

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

ASARCO LLC

and

**Cases 28-CA-255235
28-CA-263409
28-CA-267000
28-CA-275742
28-CA-275930
28-CA-278164
28-CA-278169
28-CA-283192
28-CA-283228
28-CA-283897**

**UNITED STEEL, PAPER AND FORESTRY, RUBBER,
MANUFACTURING, ENERGY, ALLIED INDUSTRIAL
AND SERVICE WORKERS INTERNATIONAL UNION,
AFL-CIO, CLC**

and

**Cases 28-CA-255412
28-CA-263590**

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL UNION NO. 104, GENERAL TEAMSTERS
(EXCLUDING MAILERS), STATE OF ARIZONA**

And

Case 28-CA-255460

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL 518**

And

Case 28-CA-255482

**INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 428**

And

Case 28-CA-255487

**THE UNITED ASSOCIATION OF JOURNEYMAN &
APPRENTICES OF THE PLUMBING, PIPEFITTING &
SPRINKLER FITTING INDUSTRY OF THE U.S. AND
CANADA, LOCAL 469**

And

Case 28-CA-255492

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL 602**

and	Case	28-CA-255862 28-CA-263369
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS		
and	Case	28-CA-256724 28-CA-265707
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, LOCAL 627		
and	Cases	28-CA-265710 28-CA-271017
JEFF PUHARA, an Individual		
and		
MARCOS ECHERIVEL, an Individual	Case	28-CA-270515

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DECISION AND ORDER¹

Statement of the Case

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On August 19, 2022, the hearing in this matter opened via Zoom video platform, with agreement of the parties. It resumed in person on Monday August 22, 2022, in Phoenix, Arizona and continued on various dates through July 28, 2023, for a total of 65 days.

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Counsel for the General Counsel (General Counsel or GC) contends that Respondent ASARCO LLC (Respondent) violated the National Labor Relations Act Section 8(a)(1), (3), and (5) in numerous ways.² The allegations range from removing union literature from break rooms and other 8(a)(1) statements to bad faith bargaining in various iterations on the part of ASARCO, which allegedly led to an unfair labor practice strike with over 700 discriminatees beginning in October 2019. The lead union for the negotiations was the United Steelworkers, although other unions participated in the negotiation committee.

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During the strike, about November 2019, Respondent hired a third-party security company, whose guards allegedly surveilled the strikers at some of the facilities. On December 2, 2019, ASARCO implemented its last, best and final offer, which is alleged as another unfair labor practice and, if the strike was not an unfair labor practice strike before, making it one.

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On July 5, 2020, during the COVID pandemic, the Union made an unconditional offer to return to work. Upon the end of the strike, ASARCO allegedly refused to return all strikers immediately to their previous positions and unilaterally implemented return to work procedures when no impasse existed. ASARCO allegedly eliminated certain positions and reassigned duties to other positions and allowed supervisors to perform bargaining unit work. In the post-strike period, ASARCO allegedly suspended and terminated employees due to their union activities. It also allegedly failed to bargain over several issues including: changes to the return to work and refusal to accept a position when offered; implementation of a fatigue monitoring system in certain types of trucks without bargaining to impasse; and implemented a COVID-19 policy and unilaterally implemented a new payroll date at one facility.

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For the negotiations for the successor bargaining agreement, I find Respondent did not engage in bad-faith bargaining and the parties were at a lawful impasse. Respondent further lawfully implemented its last, best, and final offer (LBFO) on December 2, 2019. About the time the Union intended to strike in mid-October 2019, Respondent did not make unlawful statements about striking or obtaining replacement workers. I find that, during the strike, Respondent engaged in unlawful surveillance, or gave the impression of surveillance, of the strikers through its agent AFIMAC at two facilities.

¹ 29 U.S.C. §160(c) states:

In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

² During the hearing I granted General Counsel's motion to amend out Complaint ¶15(g), which alleged Respondent denied an employee's request for union representation during an investigatory interview.

However, the record does not support finding that the economic strike was converted into an unfair labor practice strike. Post-strike, I find Respondent committed several violations of Section 8(a)(5) and Section 8(a)(3).

I find that Respondent continued to offer employment to replacement workers post-strike, in violation of *Laidlaw*. However, the number of strikers who were affected is not clear in the record and I recommend that issue be resolved through compliance.

I find Respondent violated Section 8(a)(3) by terminating employees Lucero and Laracuenta. I recommend dismissing that Respondent unlawfully terminated employees Puhara and McCray in violation of Section 8(a)(1), among other allegations related to them.

I recommend dismissing the allegation that Respondent unilaterally changed the COVID policy in 2021. I find that Respondent violated 8(a)(5) when it unilaterally changed pay dates. I also find that Respondent violated Section 8(a)(5) when it unilaterally implemented fatigue monitoring systems in haul trucks.

Regarding combined 8(a)(5) and (3) allegations concerning changes in Amarillo and the Hayden facility, I recommend finding violations.

After carefully considering the testimony, transcripts, voluminous exhibits, and making a careful review of the transcripts, exhibits and all parties' briefs,³ I make the following

FINDINGS OF FACT⁴ AND CONCLUSIONS OF LAW

I. JURISDICTION

ASARCO is owned by Americas Mining Corporation, which in turn is owned by Grupo Mexico. (Tr. 86.) Grupo Mexico has a number of divisions, including copper mining. Respondent admits that it is a limited liability company with offices and places of business in Hayden, Arizona (Hayden), Kearny, Arizona (Ray Complex), Sahuarita, Arizona (Mission Complex), Amarillo, Texas (Amarillo Copper Refinery), and Marana, Arizona (Silver Bell Mine), and has been engaged in the business of mining, smelting, and refining copper. The Silver Bell Mine, located in Marana, Arizona, is owned and operated by Silver Bell Mining LLC, which is fully owned by AR Silver Bell Inc., which in turn is wholly owned by Respondent ASARCO.⁵ The

³ On December 4, 2023, the parties submitted a Joint Motion to Correct and Amend the Record, which included a lengthy attachment of corrections. The record also should be corrected to reflect that R. Exh. 47 was offered and received. (Tr. 63:9431, 9502.) I hereby grant the parties' motion but decline to append it as it is about 66 pages.

⁴ Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather upon my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony, evidence presented, and logical inferences. The credibility analysis may rely upon a variety of factors, including, but not limited to, the context of the witness testimony, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 303–305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enf.d. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings regarding any witness are not likely to be an all-or-nothing determination and I may believe that a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622.

⁵ Per the parties' stipulation regarding Silver Bell Mine, Silver Bell Mining has arrangement with Respondent ASARCO for the procurement of administrative services.

company further admits that it annually purchases and receives at its Arizona facilities goods valued in excess of \$50,000 directly from points outside the State of Arizona. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. Accordingly, this dispute affects commerce and the Board has jurisdiction pursuant to Section 10(a) of the Act.

In 2018, various unions represented employees at the five ASARCO facilities. At the time, the total number of employees was approximately 2300, of which 1700 were represented by various unions. (Tr. 2:66.) The employee mix is about 33–40 percent skilled, with the remaining unskilled. At the time the hearing began, ASARCO employed 1400 employees. Its corporate office is now in Sahuarita, Arizona, at the Mission Complex but previously maintained its corporate offices in Tucson, Arizona.

Respondent also admits, and I find, that the Steelworkers and the following unions are labor organizations within the meaning of Section 2(5) of the Act: Steelworkers Local 886-2; Steelworkers Local 915; Steelworkers Local 937; Steelworkers Local 5252; Steelworkers Local 5613; International Brotherhood of Electrical Workers (IBEW) Local 518; IBEW Local 570; IBEW Local 602; International Association of Machinists and Aerospace Workers, Local 519; International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmith, Forgers and Helpers, Local 627; International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Local 104; International Union of Operating Engineers, Local 428; United Brotherhood of Carpenters and Joiners of America, Millwrights Local 1607; and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 469. At all material times, the above labor organizations were signatories to an agreement authorizing the Steelworkers to act as the chief spokesperson on their behalf in collective bargaining with Respondent. The term “Union” or “Unions” herein refers to the Steelworkers and the rest of the labor organizations listed.

General Counsel also alleges some of Respondent’s outside counsel act as its agents (Tr. 13–15): Paul Burmeister, counsel; Richard Russo, counsel; Jorge Lazalde—related to bargaining and implementation.⁶ See generally *Hyatt Regency New Orleans*, 281 NLRB 279, 282 (1986) (attorney served as spokesman at the bargaining table and no apparent notice given to Union of any limited authority to bind employer). Respondent denies that its attorneys are agents.

II. PROCEDURAL HISTORY

A. Charges

The charges were filed and served upon Respondent. Respondent admits all charges, save one, were properly served.⁷ The following chart reflects the charges:

⁶ Nothing reflects that Lazalde spoke at the bargaining table on behalf of Respondent. General Counsel provides no basis for Lazalde to be a supervisor and/or agent other than his presence. I therefore decline to find he was a 2(11) supervisor or a 2(13) agent.

⁷ The Employer’s Answer contests that one charge was not served upon it. Copies of charges and affidavits of service are attached to GC Exh.1 and the Employer has not contested the authenticity of these documents. See, e.g., *Blue School*, 372 NLRB No. 18, slip op. at 1 fn. 2 (2022). Otherwise, Respondent admits that all charges were timely served upon Respondent. Respondent makes no 10(b) arguments in its brief.

¶	Case No.	Charging Party	Version	Date Filed	Date Served
(a)	28-CA-255235	USW	Original	1/27/20	1/28/20
(b)	28-CA-255235	USW	First Amended	3/4/20	3/4/20
(c)	28-CA-255412	International Brotherhood of Teamsters, Local Union No. 104, General Teamsters (Excluding Mailers), State of Arizona (IBT, Local 104)	Original	1/29/20	1/30/20
(d)	28-CA-255460	International Brotherhood of Electrical Workers, Local 518 (IBEW, Local 518)	Original	1/28/20	1/31/20
(e)	28-CA-255460	IBEW, Local 518	First Amended	3/5/20	3/6/20
(f)	28-CA-255482	International Union of Operating Engineers, Local 428 (IUOE, Local 428)	Original	1/28/20	1/31/20
(g)	28-CA-255482	IUOE, Local 428	First Amended	3/5/20	3/6/20
(h)	28-CA-255487	The United Association of Journeyman & Apprentices of the Plumbing, Pipefitting & Sprinkler	Original	1/28/20	1/31/20

		Fitting Industry of the U.S. and Canada, Local 469 (UA, Local 469)			
(i)	28-CA-255487	UA, Local 469	First Amended	3/5/20	3/6/20
(j)	28-CA-255492	International Brotherhood of Electrical Workers, Local 602 (IBEW, Local 602)	Original	1/30/20	1/31/20
(k)	28-CA-255862	International Association of Machinists and Aerospace Workers (IAM)	Original	2/5/20	2/6/20
(l)	28-CA-256724	International Brotherhood of Boilermakers, Local 627 (IBB, Local 627)	Original	2/19/20	2/21/20
(m)	28-CA-256724	IBB, Local 627	First Amended	5/19/20	5/19/20
(n)	28-CA-263369	IAM	Original	7/22/20	7/22/20
(o)	28-CA-263409	USW	Original	7/21/20	7/23/20
(p)	28-CA-263409	USW	First Amended	9/2/20	9/2/20
(q)	28-CA-263409	USW	Second Amended	9/15/20	9/15/20
(r)	28-CA-263409	USW	Third Amended	9/24/20	9/29/20
(s)	28-CA-263590	IBT, Local 104	Original	7/27/20	7/27/20
(t)	28-CA-265707	IBB, Local 627	Original	9/3/20	9/4/20
(u)	28-CA-265707	IBB, Local 627	First Amended	9/24/20	9/29/20
(v)	28-CA-267000	USW	Original	10/1/20	10/2/20
(w)	28-CA-267000	USW	First Amended	12/22/20	12/22/20

(x)	28-CA-265710	Puhara	Original	9/4/20	9/4/20
(y)	28-CA-271017	Jeff Puhara, an Individual (Puhara)	Original	1/5/21	1/6/21
(z)	28-CA-270515	Marcos Echerivel, an Individual (Echerivel)	Original	12/21/20	12/21/20
(aa)	28-CA-275742	USW	Original	4/16/2021	4/16/21
(ab)	28-CA-275742	USW	First Amended	8/2/2021	8/4/21
(ac)	28-CA-275930	USW	Original	4/20/21	4/22/21
(ad)	28-CA-275930	USW	First Amended	7/28/21	7/30/21
(ae)	28-CA-278164	USW	Original	6/3/21	6/7/21
(af)	28-CA-278164	USW	First Amended	7/30/21	8/2/21
(ag)	28-CA-278169	USW	Original	6/3/21	6/7/21
(ah)	28-CA-283192	USW	Original	9/10/21	9/21/21
(ai)	28-CA-283228	USW	Original	9/16/21	9/21/21
(aj)	28-CA-283897	USW	Original	10/1/21	10/4/21

B. Complaints

The first consolidated complaint issued on June 15, 2020. Eight cases were consolidated. No hearing date was set, presumably due to the COVID pandemic. Case facts began in 2018 regarding bargaining for a successor collective-bargaining agreement. At this time, the employees were engaged in what they believed to be an unfair labor practice strike. While the employees were striking, Respondent implemented its last, best and final offer. This complaint alleged that Respondent maintained a rule that prohibited employees from putting union literature in the break room and that it solicited revocation of dues checkoff authorizations and solicited employees to resign their union memberships. It also alleged that Respondent's third-party security forces surveilled picket line activities. Regarding the bargaining situation, the complaint alleged Respondent: implemented a discriminatory absenteeism policy applied to the copper price bonus; unreasonably delayed in providing information regarding health and welfare insurance proposals; bargained without an intent of reaching an agreement, failed to provide its representatives with sufficient bargaining authority; failed to meet and reasonable times; prematurely declared impasse, made unilateral changes to mandatory subjects of bargaining; and implemented its last, best and final offer with reaching a valid impasse. After the first consolidated complaint issued, the Union made an unconditional offer to return on July 5, 2020.

On September 30, 2020, General Counsel issued a second consolidated complaint that additionally alleged, several hundred unfair labor practice strikers were denied their jobs in addition to previous 8(a)(5) allegations of bad-faith bargaining and failure to provide information. The second consolidated complaint included charges 28-CA-265707, 28-CA-263369, and 28-

CA-263590. The hearing was scheduled for January 20, 2021 by means and method to be determined.

The third consolidated complaint added charge 28-CA-263409, which was filed on July 21, 2020, and subsequently amended three times, and charge 28-CA-267000, which was filed October 1, 2020. The third consolidated complaint eventually added that Respondent: threatened employees with decreased staffing levels for protected concerted and union activities; reduced the number of shifts for employees assigned to the rod line department in Amarillo; gave bargaining unit work to supervisors in Amarillo; eliminated four positions on the rod line in Amarillo; laid off six employees; gave one position additional duties to operate cranes and assigned crane operators to some bander work in Amarillo; assigned second shift banders to perform work during the first shift on Amarillo's rod line; and recalled four employees on the rod line in Amarillo. The hearing was set for July 29, 2021. However, the hearing was postponed once again.

General Counsel issued the fourth consolidated complaint on April 22, 2021, with a scheduled hearing date of August 24, 2021. The fourth consolidated complaint added charges 28-CA-265710, 28-CA-27017, and 28-CA-270515. The additional allegations included charges filed by two individual employees, additional threats, four suspensions, warnings, discharges and two Weingarten violations. It also alleged that Respondent implemented a new policy requiring employees to walk one mile from the parking lot to the working facility and changes to rod line work at the Amarillo facility. The hearing was postponed again for new charges.

A fifth consolidated complaint issued on March 15, 2022, which added the following charges: 28-CA-275742, filed April 16, 2021, and amended August 2, 2021; 28-CA-275930, filed April 20, 2021, and amended July 28, 2021; 28-CA-278164, filed June 7, 2021, and amended July 30, 2021; 28-CA-278169, filed June 3, 2021; 28-CA-283192, filed September 10, 2021; 28-CA-283228, filed September 16, 2021; and 28-CA-283897, filed October 1, 2021. The new allegations included: suspensions and discharge for two employees and termination of employment and removal from the recall list for laid off employees at Hayden and Amarillo facilities; unilateral implementation of COVID policies, payroll date changes, revised return to work procedures; and unilateral implementation of fatigue monitoring systems at Silver Bell and Ray facilities. The case was set for hearing on July 26, 2022.

General Counsel issued an amendment to the Fifth Consolidated Complaint on March 17, 2022. The allegation clarified that, besides the over 700 unfair labor practice strikers, the allegation also included those names presently unknown to General Counsel.

The hearing was postponed again, this time about 1 month, for a change in Counsel for General Counsel. The hearing opened by videoconference about August 19, 2022. The remainder of the hearing was conducted in person in Phoenix, Arizona.

III. ALLEGATIONS

The Fifth Consolidated Complaint, as amended,⁸ alleges the following violations of Section 8(a)(1):

⁸ On day 54 of the hearing, General Counsel withdrew pars. 5(g)(1)-(3) without objections from the other parties. Those allegations were remanded to the Regional Director for further processing. (Tr. 54:8084-8085.)

¶5(a): About September 25, 2019, Respondent, by Tracy Morris, at the Amarillo facility, removed Union literature from the employee breakroom.

¶5(b): About September 25, 2019, Respondent, by Joshua Brown, at the Amarillo facility, promulgated and maintained a rule prohibiting employees from placing Union literature in the employee breakroom.

¶5(c): On a date in or around mid-October 2019, Respondent, by Stacy Sinele, by letters to employees solicited revocations of employees' dues checkoff authorizations and solicited resignation of employees' membership in the Unions.

¶5(d): From a date in or around early or mid-November 2019 through about July 5, 2020, Respondent, by unnamed agents of a third-party security company retained by Respondent, video recorded its employees engaged in a strike outside the entrances to Respondent's facilities set forth below: the Ray, Mission, Silver Bell and Hayden facilities.

Regarding events leading to the strike, and claims of the unfair labor practice strike and additional events that occurred during the strike, the following allegations are:

¶6(a): Since about October 19, 2019, certain employees of Respondent represented by the Union and employed at Respondent's facilities ceased work concertedly and engaged in a strike.⁹

¶6(b): The strike described above in ¶6(a) was caused by Respondent's unfair labor practices described above in ¶¶5(a) and (6) and below in ¶7(f) and was prolonged by the unfair labor practices of Respondent described above in ¶¶5(c) and (d) and below in ¶¶6(c) and ¶7(h-i).

¶6(c): About December 2, 2019, Respondent implemented a Copper Price Bonus Proposal that penalizes employees by reducing their potential compensation when they spend time on union activities.

¶5(f)(1): Since December 2, 2019, Respondent had maintained and enforced the terms of a last, best and final offer made to the Unions in negotiations and other terms and conditions of employment

Regarding returning strikers after the Union's unconditional offer to return, the Complaint alleges:¹⁰

¶6(d): About July 5, 2020, by email and letter, the Union, on behalf of the listed employees who engaged in the strike described above in ¶¶6(a)) and 6(b) and other employees who engaged in the strike described above in ¶¶6(a-b) whose names are presently unknown to General Counsel but are particularly within the knowledge of Respondent, made an

⁹ I do not insert the names of all alleged unfair labor practice strikers, which numbers well over 700, if I counted correctly.

¹⁰ General Counsel moved to amend the Fifth Consolidated Complaint on November 1, 2022 to reflect General Counsel's position to overrule *Hot Shoppes*, 146 NLRB 802 (1964). On September 23, 2025, General Counsel moved to remove this allegation and the briefed arguments. The Boilermakers filed a short Opposition to the withdrawal, stating the matter was already heard and briefed. Because General Counsel controls the complaint allegation, I grant its motion to Withdraw Certain Arguments and Portions of the Brief in Support Thereof.

unconditional offer for the employees to return to their former positions of employment, on or about July 6, 2020.

¶6(e)(1): Since about October 13, 2019, Respondent has hired and retained permanent replacement employees to replace the employees named above in paragraph 6(d);

(2): Since about July 6, 2020, Respondent, by email and letter, has failed and refused to reinstate the employees named above in paragraph 6(d) to their former positions of employment.¹¹

Regarding post-strike events at the Amarillo Copper Refinery:

¶5(k): About October 21, 2020, Respondent, by Mitchell Farley, at the Amarillo facility, threatened employees with reduced staffing levels if employees engaged in union and protected concerted activities including participating in a strike.

¶5(l): About November 16, 2020, Respondent, by Brenda Alward, at the Amarillo facility, threatened employees with reduced staffing levels if employees engaged in union and protected concerted activities, including participating in a strike.

¶6(f): About September 14, 2020, Respondent reduced the number of shifts for employees assigned to the rodline department at Respondent's Amarillo Copper Refinery from three to two.

¶6(g): Since about September 14, 2020, Respondent has assigned supervisors to perform work ordinarily performed by employees in the Units in Respondent Amarillo Copper Refinery.¹²

¶6(h): About September 14, 2020, Respondent eliminated bander, mobile equipment operator, mechanic and general mechanic positions on the rodline at Respondent's Amarillo Copper Refinery.

¶6(i): About September 25, 2020, Respondent laid off its employees: Jon Mares; Pat Montano, Clay Spangler; Jared Bliss; Juan Carreon; and Jorden Decorte.

¶6(j): About September 30, 2020, Respondent eliminated bander, mobile equipment operator, and mechanic positions on the rodline at Respondent's Amarillo Copper Refinery.

¶6(k): About September 30, 2020, Respondent began assigning the acid pickling¹³ operator on the rodline at Respondent's Amarillo Copper Refinery to train to operate cranes.

¶6(l): About September 30, 2020, Respondent began assigning crane operators on the rodline at Respondent's Amarillo Copper Refinery to cut bands.

¹¹ General Counsel amended per GC Exh. 215(d).

¹² General Counsel attempted to adduce evidence regarding supervisors performing bargaining unit work during the strike, which was not alleged, and General Counsel maintained it wanted to present the evidence under a theory not currently Board law. I sustained Respondent's objection to such presentation and General Counsel filed a special appeal. The Board denied the special appeal but stated it would permit General Counsel to raise the issue on exception. I therefore make no findings regarding any work the supervisors made during the strike.

¹³ The complaint states "active pickling." Given the context, GC meant "acid pickling."

¶6(m): About September 15, 2020, Respondent began assigning second shift banders on the rodline at Respondent's Amarillo Copper Refinery to perform work during the first shift.

Regarding shutdowns at Respondent's Amarillo and Hayden facilities, the Complaint alleges:

¶6(n): About September 15, 2021, Respondent terminated the employment of, and removed from any recall list, certain employees at Respondent's Hayden Operations and Amarillo Copper Refinery.

Regarding two employees, Puhara and McCray, the Complaint lists the following allegations occurring during the strike and shortly thereafter:

¶5(e): About June 20, 2020, Respondent, by Esther Romero (Romero), at the Ray facility, told employees they were unfit for duty because they could hardly walk from the parking lot to the mill shop in response to their union and protected concerted activities, threatened employees with unspecified reprisals for engaging in union and protected concerted activities.

¶5(f)(2) About June 2020, employees Puhara and Paul McCray claimed that Respondent's new policy requiring employees to walk from the parking lot to the mill shop was unsafe for employees; (3) The claim of employees Puhara and McCray described related to the LBF offer; (4) About June 2020, Puhara and McCray engaged in concerted activities with each other and other employees for the purposes of mutual aid and protection by raising concerns about the safety of Respondent's new policy requiring employees to talk from the parking lot to the maintenance mill shop and the motivation behind it; (5) About August 2020, Puhara and McCray concertedly complained to Respondent regarding wages, hours and terms and conditions of employment of McCray at McCray's suspension hearing; (6) About August 2020, McCray engaged in concerted activities with other employees for the purposes of mutual aid and protection by raising concerns to Respondent about the arbitrary conduct of Esther Romero towards employees; (7) About June 18, 2020, Respondent suspended Puhara and McCray from work and required them to submit for a fitness for duty exam as a condition of continued employment; (8) About August 21, 2020, Respondent suspended McCray; (9) About August 25, 2020, Respondent suspended Puhara from work; (10) About August 28, 2020, Respondent issued two disciplinary warnings to Puhara; (11) About August 28, 2020 Respondent discharged McCray; (12) About September 4, 2020, Respondent discharged Puhara; (13, 14 and 15) Respondent suspended and discharged Puhara and McCray because they engaged in protected concerted and/or union activities and to discourage employees from engaged in such activities.

¶5(h): About mid- to late August 2020, Respondent, by Kenny Hatfield, denied Puhara union representation from Steelworkers Local 915 during an investigatory interview.

Regarding discipline of two employees at the Mission facility, the complaint alleges the following post-strike conduct in violation of Section 8(a)(3):

¶5(m): About February 3, 2021, Respondent suspended employee Ben Lucero.

¶5(n): About February 16, 2021, Respondent discharged its employee Lucero.

¶5(p): About March 3, 2021, Respondent discharged its employee Eli Laracuate.

And additional §8(a)(1) allegations post-strike:

¶5(i): About August 18, 2020, Respondent, by Dean Alonzo, at the Ray facility, accused employees of falsifying documents in response to their union and protected concerted activities and threatened employees with unspecified reprisals.

5 ¶5(j): About August 28, 2020, Respondent by Dean Alonzo, at the Ray facility, accused employees of falsifying documents in response to their union and protected concerted activities and threatened employees with unspecified reprisals.

10 ¶5(q): About August 25, 2021, Respondent, by Kim Decker, through letters sent to employees at the Hayden Operations, threatened employees with discharge because they engaged in union and protected concerted activities, including participating in a strike.

15 ¶5(r): About August 31, 2021, Respondent, by Brenda Alward, through letters sent to employees at Respondent's Amarillo Copper Refinery, threatened employees with discharge because employees engaged in union and protected concerted activities, including participating in a strike.

IV. ASARCO'S ORGANIZATION

20 Respondent ASARCO performs mining, smelting and refining for copper. It operates three open-pit mines, which are the Ray Complex, the Mission Complex and the Silver Bell Mine. The Ray Complex includes Ray Mine and the Hayden Concentrator. The Hayden Smelter maintains its own supplemental agreement. Silver Bell mines, smelts and refines copper. Respondent also maintains a smelter and concentrator at the Hayden Operations and the Amarillo facility. The Amarillo facility refines copper and produces copper cake and coil, 25 which then is marketed.

A. Respondent's Managers

30 The parties stipulated, and I find, that the following persons are supervisors within the meaning of Section 2(11) of the Act and agents within the meaning of 2(13) of the Act:

Manuel Ramos, President, through August 31, 2018;
 Agustin Trevino, Director of HR, beginning Feb. 4, 2013 through October 18, 2019;
 Tracy Morris, Operations Manager, beginning 1978 through July 31, 2020;
 35 Mike Hamill, General Supervisor Maintenance, North Mill, through September 15, 2020;
 Ann Videna Senior HRIS Analyst, Since 2011 to present;
 Daniel Howard, maintenance manager, Mission Mine, August 31, 2020 through March 18, 2022;
 Michelle Lammers, Ray General Manager, July 2019 through November 2022; late 2019
 40 added Hayden Concentrator general supervisor; April or May 2020 Copper Basin Railway added to Hayden Concentrator General Manager; November 2022-hearing, operations manager for all mines;
 Brad Stonehouse, general manager Silver Bell Mine.

45 Other supervisors are noted throughout this decision. Throughout these events, Stacy Sinele has been the corporate labor and employee relations manager and a human resources manager. (Tr. 2:55, 64:9605.) During part of the negotiations, she reported to Augustin Trevino. Sinele reports to Leonardo Contreras, Respondent's president. (Tr. 56, 87.) Contreras reports to Grupo Mexico, Respondent's parent organization. At Amarillo, Brenda Alward, the plant
 50 controller, reported to Scott Cole; while performing HR duties, she also reported to Stacy Sinele and Debbie McMorrow. (Tr. 45:6733.)

Sinele is responsible for all aspects of human resources, including hiring, labor relations, benefits, safety training and strategic planning. Part of her labor relations duties involve collective-bargaining negotiations. (Tr. 2:56–57.) Jorge Lazalde and Paulina Orozco Duck (Duck), attorneys with Americas Mining Corporation, attended a few negotiation sessions. (Tr. 2:91–92, 96.) Other participants in negotiations included Mike Kotraba,¹⁴ manager at the Ray Mine, and Krista Cazeaux, who reported to Sinele and took the bargaining notes.

At the time of hearing, Sinele directly supervises three human resources managers, Juan Mora, Debbie McMorrow, and Kim Decker, and the benefits manager, Kim Guillot. (Tr. 2:57–58.) Each of the human resources managers engages in local collective-bargaining negotiations for their respective facilities. Mora is located at the Mission Mine. McMorrow is located at the Silver Bell Mine. Decker is responsible for the Ray Mine, Hayden Smelter and Hayden Concentrator. Sinele is responsible for human resources at the Amarillo facility. (Tr. 59.)

B. Descriptions of Facilities and Their Products

Five facilities are at issue: Ray, Hayden, Mission, Silver Bell and Amarillo. The Ray facility mines copper and has a concentrator.¹⁵ The Ray Mine, at the time of hearing, had 500 employees, of which 360 are union-represented; in 2018 it employed 600 employees, with 500 union-represented. The employees working in the concentrator area are represented by Steelworkers Local 915. (Tr. 70–71.) IAM Local 519 represented employees at the Ray facility who are machinists. (Tr. 2:71–72.) IBB Local 6527 represents employees related to the boiler. Plumbers Local 469 represented some classifications as journeymen plumbing. Carpenters Local 1912 represented carpenters only at the Ray Mine and were not involved in any of these cases.

The Hayden operations contain a smelter and the concentrator. The smelter heats and processes copper. In 2018, approximately 500 employees worked at Hayden, of which 400 were represented; by hearing the number of employees working there was 75-80. IBEW Local 518 represents the electricians, including apprentices. Steelworkers Local 886 and 886-2 also represented employees at Hayden. Local 886-2 only represented employees in the concentrator. (Tr. 2:76–78.)

The Mission Complex is a mining and milling facility. Ore is mined in the pit and carried to the top of the mine with haul trucks, which move at 5 to 7 miles per hour. (Tr. 59:5924.) The haul truck delivers the ore load to the crusher at the North Mill. The South Mill operates a concentrator. Mission's end product is copper concentrate. (Tr. 59:8900.) At the time of hearing, 500 employees worked at the Mission complex; in 2018, 600 employees were there, with 475-480 represented by the unions. Operating Engineers Local 428, IBEW Local 570, Steelworkers 937, and Teamsters Local 104 represent those employees. The unions at the Mission Complex have a group pact in which the employees may move between the unions. (Tr. 2:78–81.)

The Silver Bell Mine is engaged in mining, smelting and refining copper and is the smallest of the ASARCO properties, with mining activities confined to a section of the property. (Tr. 55:8315.) It has the "SX-EX" process for leaching, without any concentrating operations. Approximately 175 employees worked in the Silver Bell Mine in 2022; in 2018, the number was 200, with 150 represented by Steelworkers Local 937. (Tr. 2:81–82.)

¹⁴ Trevino apparently removed Kotraba.

¹⁵ A concentrator crushes rocks and processes them.

The Amarillo Refinery, located in Amarillo, Texas, refines copper into final products for sale, which are copper rod, cake and coil. In 2022, approximately 65 employees work at the Amarillo refinery; in 2018 275–300 employees worked at the facility, with approximately 200 bargaining unit employees. IBEW and Steelworkers Local 5613 represent the bargaining unit employees. (Tr. 2: 83-84.) The Steelworkers produce the copper rod line. Mechanics are also involved in the operations. Only copper rod was produced in 2022. (Tr. 2:86.)

V. BARGAINING FOR A NEW BASIC LABOR AGREEMENT

The initial issues in this case involve whether Respondent ASARCO negotiated in bad faith in 2018-2019 while the parties worked on a successor collective-bargaining agreement. The issue then becomes whether, as a result, Respondent unlawfully declared impasse and implemented its last, best, and final offer. The determination of whether Respondent engaged in these unlawful acts will be part of the basis of whether the employees engaged in an unfair labor practice strike, starting in October 2019. In examining the following facts, the employer's entire course of conduct is considered in evaluating whether it unlawfully bargained in bad faith with the Union. The entire course of conduct is not limited to the 6-month statute of limitations because the true nature of Respondent's conduct may not be clear from only that period. *Altura Communications Solutions, LLC*, 369 NLRB No. 85, slip op. at 3, 6, 35 fn. 22, and 37 (2020), enf'd. mem. 848 Fed. Appx. 334 (9th Cir. 2021); *Regency Service Carts*, 345 NLRB 671, 672 n.3 (2005). See also *Machinists Local Lodge 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411, 416 (1960).

A. Representatives for the Parties During Negotiations

Sinele¹⁶ was the chief negotiator for the Basic Labor Agreement (sometimes called “big table” discussions) and assisted in negotiations for the local agreements. (Tr. 2:101–102.) The local agreements supplemented the Basic Labor Agreement (BLA) for site-specific issues. (Tr. 2:116.)

Sinele again was the lead spokesperson for the negotiations that began in 2018 to replace the expiring agreement. (Tr. 2:103–104.) She had direct knowledge of the proposals, including drafting, proposing, accepting and rejecting proposals. (Tr. 2:104.) She met with Respondent's negotiating team regarding the proposals. She was also responsible for responding to the Union's information requests. (Tr. 2:105.) She also scheduled meetings on behalf of the company, including times and places of when to meet. (Tr. 2: 106.)

Others on ASARCO's negotiating team were: Scott Cole; Augustin Trevino, director of Human Resources at the time; Crista Cazeaux, a human resources representative who took Respondent's bargaining notes; Mike Kotraba, the general manager of Ray Mine operations. Pauline Duck (Duck), who works for Americas Mining Corporation, also attended some bargaining sessions and provided legal advice. (Tr. 2:113.) Duck never commented during negotiations. Attorney Jorge Lazalde also provided legal advice but never commented at the bargaining table.¹⁷ (Tr. 3:216-217, 28:4293.) Manuel Ramos attended one bargaining session as company president. Also in attendance from time to time were attorneys Richard Russo and

¹⁶ Sinele required review of documents during her testimony and the documents frequently are the best evidence of the sequence of events. However, the documents reflect that she said ASARCO was bargaining in good faith or was there to bargain in good faith. Similarly throughout negotiations the Union accused that Respondent of bargaining in bad faith. Such statements carry no weight as those are legal conclusions to be addressed herein.

¹⁷ Armenta testified that Lazalde worked for America's Mining and had worked with him in other negotiations. (Tr. 28:4290.)

Paul Burmeister, who also represented Respondent at hearing and spoke at times during negotiations. (Tr. 2:111.)

A Respondent subcommittee consisting of Sinele, Cole, and Trevino initially worked on the economic package. (Tr. 6:679.)¹⁸ Economic proposals included wages, copper price bonus, 401(k) and pensions, and insurance. The subcommittee decided on proposals by group consensus. The subcommittee had no recorded minutes. Cole was responsible for analysis, review and recommendations for economic proposals. (Tr. 6:681–685.)

The Steelworkers were the lead union representing the unions during the negotiations. (Tr. 2:106–107.) Bob LaVenture, director for Steelworkers' District 12, was the lead negotiator until his death. However, at the main negotiations, Manny Armenta, Sr. (Armenta) did most of the talking for the Union at the bargaining table. He was lead negotiator for the Union after LaVenture's death in late 2019.

The Union negotiating team consisted of approximately 20–40 persons representing the various unions. (Tr. 22:3490.) Because of the number of people in the Union's committee, the Union kept the main meeting room for its caucuses and breakouts; Respondent would leave for its smaller breakout room for their caucuses.

Because the Union negotiating team was comprised of representatives from the different locals, many drove to the negotiation locations, which may have taken 2 hours driving in each direction.¹⁹ Armenta told the negotiating team to arrive 45–60 minutes before the scheduled start time to receive updates and discuss rumors, comments, and sometimes bargaining. (Tr. 28:4323–4324.) The Union negotiation team also discussed proposals during breaks. After Respondent would leave, on most days the Union committee would stay 30 minutes to discuss everything. (Tr. 22:3517–3518.)

Among the Union's bargaining committee were several people²⁰ that took notes and/or testified:

Name	Union position	Job held, including dates, location(s)
Manuel Armenta, Sr.	Subdistrict director for Subdistricts 2 and District 12 (did not take notes)	
Gaylan Prescott	District 12 Director (after LaVenture's death) (did not take notes)	
Fernando Terrazas	Sub-District Director for Sub-District 2, which covers Arizona, New Mexico, Colorado, Utah, and Nevada	
Greg Romero ²¹	President, Steelworkers Local 886	Hayden Smelter, heavy equipment operator (mostly manning street sweeper), hired 2001, terminated 9/2021 post-strike

¹⁸ Sinele could not recall whether Lazalde, Duck or Kotraba participated in the subcommittee. (Tr. 6:687–688.) The record does not reflect that Lazalde or Duck spoke in subcommittees.

¹⁹ If bargaining members drove from Amarillo, Texas, the length of time was significant.

²⁰ The list is not comprehensive.

²¹ Most of Romero's answers regarding negotiations were to leading questions. General Counsel did not

Ruben Gonzalez	Local USW vice president	Contract coordinator pre-strike ²²
Eduardo Placencio	Local USW 937 president since March 2020, chief shop steward at Mission previously recording secretary and shop steward	Mission Mine float man
Anthony Jose	Chief steward, Operating Engineers, at Mission	Pre-strike, truck instructor at Mission; post-strike, motor grader operator
Gregory Dean Schuett	USW Local 937, financial secretary	On preferential hire list at time of hearing, lab sampler at Silver Bell
Will Jondreau	USW Local 5613 recording secretary	Amarillo, general mechanic; pre-strike contract coordinator and resigned June 2020 for better job
Robert Sandoval	Local 886 vice-president during strike	Retired and disabled, 2020; was filter operator at Hyden Concentrator
John Saavedra Sr.	USW Local 5613 president, since middle 2019; previously vice president	Amarillo, until shutdown on October 28, 2022
Lyle Murphy	USW Local 5252 president	Ray, Mobile Equipment Operator
Rick Sosa	Safety Chair, Local 5252	Ray, Mobile Equipment Operator

Romero initially used his computer to take notes but switched to handwritten notes in January 2019. Gonzalez reported that he brought to each session his laptop computer, upon which he received emails, his cellular telephone, and a three-ring binder in which he took notes. He noted that all members of the union negotiating team had their cell phones and many brought their laptops.

B. Background for Negotiations

In a previous case, another administrative law judge (ALJ) described in detail the previous bargaining history between these unions. No party excepted to his decision and the decision was entered as a joint exhibit. I summarize bargaining history provided there:

In 2005, ASARCO filed for Chapter 11 bankruptcy. While Respondent was in bankruptcy, it engaged with the Union to negotiate a new collective-bargaining agreement. The parties reached a Basic Labor Agreement (BLA), which the Bankruptcy Court approved and extended from January 1, 2007, through June 30, 2010. The parties agreed to one-year extensions in 2010 and in 2011, to run through June 2013. In June 2013 the parties extended the BLA indefinitely. However, Respondent proposed significant changes to the BLA. The parties reached tentative agreements (TAs) on its noneconomic issues by January 2015 and then moved onto economic issues. Respondent made a final offer, which the Union rejected;

establish that he was adverse witness. Like Sinele, he referred to contemporaneous bargaining notes to determine what happened but also had independent recollections of certain events. Therefore, for the areas where General Counsel had to lead Romero, his bargaining notes are the best evidence. (Tr. 22:3496 et seq., 23:3648 reminder; GC Exh. 20.). His notes also do not reflect that the Union ever protested when Respondent said it was leaving negotiations for the day or for a break or why Respondent's representatives were sometimes "late" in entering the large negotiating room. See, e.g., Tr. 22:3502.

²²Resigned in October 2020 and became Business Agent for Operating Engineers (Tr. 26:4133–4135.)

Respondent apparently implemented its final offer. General Counsel issued a complaint alleging numerous 8(a)(1), (3), (4), and (5) violations, which the administrative law judge heard in March through June 2016. The decision, issued on June 28, 2017, found several violations of 8(a)(1) and one violation of 8(a)(3). The 8(a)(5) violations found Respondent failed to provide information, made unilateral changes, and directly dealt with employees. However, the unfair labor practices found “did not detrimentally affect negotiations for a new collective-bargaining agreement or contribute to the deadlock between the parties.” That 8(a)(5) was dismissed. JD(SF)–30–17 (2017), 2017 WL 2806211 (2017).

After the ALJ’s decision issued, the Unions and Respondent ASARCO entered into a Basic Labor Agreement, which was effective from September 21, 2017, through November 30, 2018. (GC Exh. 2.) Each location also had its own supplemental agreement. (Tr. 2:101; GC Exhs. 3–7.) The parties began negotiations for a new BLA in August 2018. The parties did not establish any ground rules for the negotiations. For a while, the parties met in certain subcommittees. The subcommittees dealt with local agreements and certain portions of the contract provisions. Otherwise, negotiations took place for the successor agreement to the Basic Labor Agreement (BLA) at the “big table.”

While the parties reached tentative agreements on a number of noneconomic issues, the parties did not reach agreement on several economic issues. Among the economic issues that concerned the Union was that Respondent proposed pay increases only for skilled workers, leaving out the unskilled workers. In early September 2019, Respondent presented its last, best and final offer to the Union. In late November 2019, after further unfruitful negotiations, Respondent announced it would declare impasse if the Union did not accept the LBFO. declared impasse. It implemented its last, best and final offer on December 2, 2019.

C. Negotiations Begin in 2018 for a Successor Agreement to the Expiring Basic Labor Agreement

Before negotiations began for the successor agreement, Sinele, Trevino, LaVenture, and Armenta Sr. met to discuss who would attend negotiations, the order of presentations, and other issues. (Tr. 2:131–132.) The parties did not establish any ground rules for the negotiations.

On August 20 and 21, 2018, the parties opened bargaining with Sound Off Meetings, which lasted 1 to 2 hours. (Jt. Exh. 3; Tr. 22:3494–3495.) Trevino asked what the Union was looking for in the negotiations. Armenta listed wage increases, improvements in the defined benefits and pension, gains in the 401(k) plan, maintaining insurance and benefits. LaVenture pointed out for ASARCO gave a presentation that addressed safety and commitment to the environment. It also addressed the volatility of copper prices per pound, copper production at the various facilities, and ASARCO’s goals. Respondent’s stated goals were improving safety, remaining profitable during variable copper prices, operational flexibility, and long-term job security for everyone. (GC Exh. 9.) Sinele gave a presentation about health care benefit costs and claims, with a goal of moving more towards preventive screenings, and 401(k) updates. (GC Exh. 10.) The parties did not exchange proposals. (Tr. 2:146.)

In August 2018, the parties began negotiations with the local agreements despite the Union’s reluctance at first to do so. (See, e.g., Tr. 64:9607; R. Exh. 50.) The parties generally discussed the local agreements and moved into separate meetings for the sites. Armenta did not attend the meetings for the local agreements but reviewed and signed off on the agreements. The parties eventually reached tentative agreements on all local supplements.

On *September 28*, Armenta Sr. sent Sinele an information request. Armenta stated the Union wanted to negotiate a new agreement and was willing to meet at times and places that would be mutually agreeable. (Tr. 2:147–148; GC Exh. 11.) The information request asked for an employee census, benefits booklets or a schedule of benefits, and claims experiences under life/accidental death and dismemberment and short-term disability policies. (GC Exh. 11.) On *October 4*, Sinele acknowledged that she received the request on October 2 and agreed to provide a response. (GC Exh. 12.)

D. October and November 2018: The Parties Start with Local Supplemental Agreements, Then Proceed to the “Big Table”

On *October 11, 2018*, after two telephone conversations with Armenta, Sinele, in writing, offered dates to negotiate the Ray supplemental agreement and the Union economic proposals during the week of October 29 through November 2, 2018, at a location in Tucson. Otherwise, Respondent also was in process of negotiating a supplemental agreement with IBEW Local 602 in Amarillo. Respondent agreed to maintain the status quo after the BLA expired. (GC Exh. 13.) The following day, Armenta, per email, agreed to negotiations the week of October 29, but stated that Sinele also offered November 10 during the phone calls; he also asked for an even exchange of economic proposals for the week of October 29 because Respondent offered no economic proposal during the previous negotiations. (GC Exh. 14.) At that time, the Union had not presented an economic proposal either.

On *November 1, 2018*, Respondent presented proposals for the local supplements at Mission and Silverbell. (GC Exh. 20 at 1.) The parties reached some agreements regarding the Hayden facility. Regarding the Mission facility, Respondent presented at least 25 proposals. The bargaining began at 12 p.m. and the parties left at 12:35 p.m.; Romero did not know what time the negotiations were scheduled to begin.

On *November 2, 2018*, the parties again negotiated regarding local agreements, including the Ray concentrator job family structure. (GC Exh. 20 at 2.) On *November 5, 2018*, negotiations for the local agreements continued. Respondent brought tentative agreements for the Ray facility. Regarding Mission, the parties tentatively agreed to several items. (GC Exh. 20 at 2–3.)

On about *November 6, 2018*, the negotiations were scheduled to begin at 10 a.m. but did not begin until Respondent’s representatives arrived at 11:13 a.m. (GC Exh. 20 at 4.) The parties tentatively agreed to a local supplement for the Hayden Smelter, but it was not final. The parties also discussed the Silver Bell Mine local agreement. (Tr. 22:3512–3514; GC Exh. 20 at 5–6.) Ultimately, the parties agreed to keep the prior local agreement. (Tr. 2:168, 172, 3:186–187; GC Exhs. 15–16.) The parties reached a local supplemental agreement for the Silver Bell Mine on *November 7, 2018*. (GC Exh. 17.) Also on *November 7, 2018*, the parties began negotiating the Amarillo local agreement. The Mission facility local supplemental agreement was reached on *November 8, 2018*. (GC Exhs. 18, 18(a), 20 at 4–5.)

On *November 14, 2018*, which was approximately 2 weeks before the BLA lapsed (official last date November 30, 2018), the parties returned to the “big table” to bargain the successor to Basic Labor Agreement (BLA). (Tr. 3:192; Jt. Exh. 3.) Much of the day was spent in “sidebars” regarding the Amarillo local agreement, which Armenta said the Union would review that night and discuss further the next morning. Regarding dates for the next meetings, Sinele said she would not be available the following week but would be available on November 27. Sinele also stated that Respondent did not have its economic package for the Union. Armenta said the Union was not interested in extending the BLA and Respondent was “riding on

a fine line” not giving the Union a proposal. (Tr. 28:4319.)²³ Sinele said she was willing to accept the Union’s proposal for review, but Armenta said he would only give an “even exchange.” (GC Exh. 20 at 7.) The parties agreed to a tentative supplemental local agreement for Amarillo. (Tr. 28:4317–4321; GC Exhs. 19, 20 at 7–8.)

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On November 15, 2018, the Union signed off on the Amarillo local agreement. Armenta again offered all dates for meeting until BLA expiration. Sinele again said she was not available until November 27. Sinele asked again for the Union proposal, to which Armenta said that he would only do “an even exchange.” The meeting allegedly lasted only 4 minutes after obtaining signatures offering documents for signature. The Union formally notified the Employer that it would not extend the BLA past its expiration date.²⁴ (GC Exhs. 20 at 7, 326²⁵ at 3859.)

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November 27, 2018 bargaining session: The originally scheduled start time was 1:30, and was pushed back to 2:30 p.m. At 2:37 p.m. Sinele texted Armenta that Respondent would be present shortly. (GC Exh. 22.)

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Respondent arrived at 2:58 p.m. Sinele was present, as were others who were employed by America’s Mining (Lazalde) and Attorney Paulina Duck. Sinele suggested an even exchange of proposals, with Respondent able to provide a non-economic proposal that day. Sinele discussed Respondent’s proposal (GC Exh. 24) and its goals. Respondent’s stated goals were flexibility, efficiency, and making the company more competitive.

20

Respondent’s proposal was a redlined version. Sinele noted that competitors negotiated similar contracts. Sinele said Respondent’s proposal was in a new format, in which the articles would be in alphabetical order. (Tr. 22:3540–3541; GC Exh. 20 at 8–9.²⁶)

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²³ Armenta relied upon Romero’s notes, which he had not reviewed at the time the notes were made. I therefore rely upon Romero’s testimony and only use Armenta’s testimony where it adds to Romero’s notes and testimony.

²⁴ Local Union President Romero’s notes show the Union was already making “ULP Strike” signs. He testified the Union was making signs because the contract expiration was about 2 weeks away and wanted to be ready. (Tr 22:3533; GC Exh. 20 at 8.) Armenta thought creating the signs was in response to not having Respondent’s economic proposal and membership frustration. (Tr. 28:4326.)

²⁵ At the end of hearing, Respondent moved to admit GC Exh. 326, to which General Counsel objected. The objection was that the notetaker, Krista Cazeaux, had not testified at all, so did not testify to authenticity and the statements therein could not be relied upon for the truth of the matters asserted. Sinele testified that she reviewed the notes shortly after Cazeaux made them and the bargaining notes were kept in the normal course of business. I admitted as a business record. The testifying witness, here Sinele, is not required to have personally participated in the creation of the document. Sinele was familiar with the record-keeping system for the bargaining notes. *Midfirst Bank, SSB v. C.W. Haynes & Co.*, 893 F. Supp. 1304, 1311–1312 (D.S.C. 1994), *affd.* 87 F.3d 1308 (unpub.) (4th Cir. 1996). As the writing was made or transmitted by a person with knowledge at or near the time of the incidents recorded and the bargaining notes were kept in the normal course of business, I find that the ASARCO bargaining notes are a business record. *Sea-Land Service, Inc. v. Lozen Int’l, LLC*, 285 F.3d 808 (9th Cir. 2002).

In comparison to Respondent’s notes, the Union’s bargaining notes, which were taken by a variety of its negotiation team, did not always capture the detailed exchanges between the parties. In most cases, they hit upon the topics covered at meetings and were corroborated by witness testimony, correspondence, and the admitted proposals and counterproposals. The actual union notetaker testified to his own bargaining notes. Armenta, in contrast to Sinele, had not reviewed the admitted union bargaining notes until the day he was called to testify or in preparation for that day’s testimony and often made interpretations on the stand.

²⁶ Romero’s notes erroneously stated the date as November 17 but he testified to November 27. (Tr. 22:3536.)

Respondent left at 3:58 p.m. and returned at 6:31 p.m. During the break the Union evaluated Respondent's proposals. (Tr. 22:3542.) The Union immediately presented Respondent with an information request.

5 Shortly thereafter, the Union presented its first proposal (UP-1) to Respondent. Some of UP-1's proposed provisions, such as justice indignity, were marked as new. (Tr. 16:4051–4052.) The Union's economic proposal for wages did not list any specifics but only called for "substantial" increases. (Tr. 16:4053.)²⁷ Armenta testified that the Union wanted an even
10 exchange of proposals and had its economic proposal ready. (Tr. 28:4311–4312.) Testimony from a union bargaining team member revealed that, other than demanding a "substantial" wage increase, the Union was not prepared to make an economic proposal for some time.

15 Sinele asked some questions about UP-1, then Respondent's team left at 7:07 p.m. At 7:57, Sinele notified the Union that they needed more time with the Union's information requests and wanted to resume bargaining the following day. (GC Exh. 20 at 9.)

20 *November 27, 2018 bargaining session:* Three days before the Basic Labor Agreement expired, at 1:01 p.m. Sinele texted Armenta that Respondent's bargaining team would be available at 2:30 p.m. At 2:37 p.m., Sinele again texted, this time saying the team would be there soon. (GC Exh. 22.) Negotiations did not start until 3 p.m. (GC Exh. 326 at 3860.)

25 Sinele presented Respondent's 77-page proposal that reflected changes on a copy of the expiring Agreement after Armenta requested it. (Tr. 3:226.) It did not contain an economic package. (Tr. 3:205–206, 208–209.) Respondent proposed to eliminate the equal employment opportunity (EEO) and joint employer-union civil rights committee portions of the Agreement. (Tr. 3:207–208.) Respondent's proposal also moved provisions in a complete "rewrite" of the Agreement to alphabetical order. (Tr. 3:210, 212.)²⁸ Armenta testified that in several respects, Sinele explained that the changes were made to comply with the law but the Union did not
30 address those concerns that day. (Tr. 28:4359–4360.)

The Union hand-delivered and emailed an information request, based upon "the Union's need to understand the Company's desire in changing current language." The Union asked for the information quickly to proceed with negotiations. (Tr. 3:230–232; GC Exh. 26.)

35 Armenta then presented some proposals from "UP-1." The Union's proposal included increases for shift differentials and weekly benefits for supplemental unemployment benefits, increased vacation days, a copper price bonus and "substantial wage increases." Regarding health insurance, UP-1 required updated summary plan descriptions (SPDs) and increased vision benefits. The Union proposed a signing bonus of \$1500 and \$1000 on each anniversary
40 date of the Union's contract approval. "Pension Plan" was marked OPEN. The Alcohol and Drug Abuse Policy was also marked "open for discussion." (Tr. 3:235–236; GC Exh. 25.)

45 Sinele questioned what the Union meant by "substantial wage increases." Armenta told Respondent that once the Union had seen Respondent's proposal, the Union could put a figure on it. According to Union bargaining committee member Romano, the Union did not have a wage package prepared when it submitted this proposal.

²⁷ Armenta testified his explanation of why certain items in Respondent's proposal were objectionable. He maintained that he told Respondent that day about certain objections, but the bargaining notes (both Union and Respondent) do not support his testimony.

²⁸ Armenta testified that the Union recognized that Respondent's proposal on arbitration, requiring to arbitrate grievances within a year, was problematic. (Tr. 28:4356.) However, at no time did the Union raise this point in negotiation.

Negotiations ended at 7:07 p.m., which also contained a break at 3:58 p.m. and resumed at 6:32 p.m. (Tr. 3:238-239; GC Exh. 326.)

November 28 was a day previously scheduled for negotiations.²⁹ At 9:40 p.m., Attorney Burmeister emailed Armenta and LaVenture that Respondent needed November 28 to work on the Union's information request and then meet with a response to the Union's proposal on November 29, 10:30 a.m. (Tr. 3:240–241; GC Exh. 27 at 2.) Union attorney Padias responded at 10:23 p.m. by email, stating that the Union was disappointed that Respondent had provided only a non-economic package and the Union was ready to meet on November 28. However, Padias also said that the information was needed to evaluate Respondent's proposals. (GC Exh. 27 at 2.) During the evening of *November 28*, Sinele, emailed Respondent's responses to the Union's information requests. (Tr. 3:253; GC Exhs. 29, 29(a), 29(b).)

November 29, 2018 bargaining session: The parties began negotiations at 10:46 a.m. although scheduled for 10 a.m. When the Union requested a response to its November 27 proposal, UP-1, Sinele said she had no response at that time. Armenta stated that the Union rejected: Respondent's lack of an economic proposal; deleting FMLA and USERRA language; grievances;³⁰ protective equipment; bereavement pay, alternative work schedules or extended shifts; and contracting out. The parties took a break at 11:07 a.m. for Respondent to caucus. (Tr. 3:260–267; GC Exh. 326 at 3866–3867.)

Respondent arrived again at 2:39 p.m. and had questions on UP-1 regarding: day pay supervisors; the proposed increase for the safety shoe allowance; the civil rights committee and why the Union wanted to keep it in the contract; clothing and tool replacements; increased time for showering; grievance section on justice and dignity; absentee control policy and calling in; and apprenticeship. (GC Exh. 326 at 3868–3871.)

Respondent left at 3:32 p.m. and returned at 6:08 p.m., during which time the Union committee might have worked on proposals. (Romano Tr. 22:3548–3549.) When Respondent returned at 6:08 p.m., it presented "package proposals" as counters to UP-1. (Tr. 22:3549.) The proposals were: an increase for the safety shoe allowance; overtime lunches and making corrections; lead persons; grievances, incorporating part of the union proposal; and made some movement towards the Union's position on attendance. (Tr. 3:267-280; GC Exh. 32.) Armenta again asked for Respondent's economic proposals. Sinele said she would "give him an answer" by midnight. Armenta asked for a caucus of 15 minutes and Respondent left at 6:50 p.m. (Tr. 3:280-281; GC Exh. 326 at 3873.) Respondent returned at 7:13 p.m. Armenta and the contractor coordinators who served on the negotiating committee asked questions about Respondent's proposals. At 8:25 p.m., Sinele asked for a Respondent caucus and the parties had no further dialogue that evening. Sinele made several information requests to the Union, including a request for the total economic costs of the UP-1. (Tr. 3:287-291; GC Exh. 33.)

November 30, 2018 bargaining session: November 30 was the last day before the BLA expired. The Union responded to Respondent's information request to almost all items: The Union did not provide the total economic cost of UP-1. (Tr. 3:304; GC Exhs. 33, 37.)

²⁹ After reviewing GC Exh. 27, Sinele at first denied she knew what Burmeister was doing with the negotiation schedule and then became evasive. (Tr. 3:243–244.)

³⁰ Respondent's proposal on arbitration included a provision in which the failure to arbitrate provision only applied to the Union, and if not filed within a year was dismissed with prejudice. It additionally required both parties to agree to the date and the plain language appeared to state that if no date was reached within a year, the grievance would be dismissed.

Armenta texted to try to continue negotiations. However, on this day the parties worked was the extension of the Basic Labor Agreement. (Tr. 3:309–310.) As of 11:13 a.m., Respondent’s representatives were still considering the extension proposal. (GC Exh. 36.)³¹ Respondent’s attorneys³² were at the airport, preparing to leave. I take judicial notice that November 30, 2018, occurred on a Friday.

At 6:57 p.m. Armenta notified Sinele the Union was ready to resume negotiations. Sinele testified that Respondent did not want to go back to the table to work on other issues without the attorneys present and wanted to concentrate on the extension. (Tr. 3:313–314.) By the end of the day, the parties signed an extension of the Basic Labor Agreement (BLA). The BLA extension required a 48-hour notice to terminate. (GC Exh. 34.)

Scheduling the next round of negotiations: On Monday, *December 3, 2018*, USW attorney Padias emailed Respondent counsel Russo and Burmeister about possible dates for negotiation, offering the weeks of December 10 and 17. (GC Exh. 327 at 1.) On *December 5*, Respondent attorney Russo wrote that it was available for December 17, beginning at 2 p.m., until December 19 at 11 a.m. Russo also requested the Union’s responses to Respondent’s November 29 proposals so that the meeting could proceed quickly when they met. (GC Exh. 327 at 2.) The following day Padias emailed Respondent’s counsel that the Union was frustrated with Respondent scheduling for only 3 days out of the Union’s proposed 10 days; in addition, Respondent’s major changes to the BLA and Respondent’s failure to provide its economic package³³ increased the difficulty in reaching an agreement quickly. Padias asked that Respondent reconsider the Union’s offer of dates. (GC Exh. 327 at 4.)

On *December 6* Russo replied that the Employer could meet in the apprenticeship subcommittee and for “other operational issues” on December 11-14 and again requested that the Union provide its response to Respondent’s proposal before the December 17 “big table” meeting. (GC Exh. 327 at 6.) Padias accepted the subcommittee dates but would not provide any response to Respondent’s proposal until the parties met face to face, as the Union declined to bargain by email. (GC Exh. 327 at 9; R. Exh. 60.) Sinele testified that the reason Respondent was unable to meet after December 19 was that she was scheduled to fly out to be on the delivery team for the birth of twin granddaughters. (Tr. 64:9656.)

December 11 subcommittee meeting: Kotraba, Cazeaux, and Chuck Hansen, a maintenance manager for the Ray Mine, represented management for a subcommittee meeting on the Union’s proposal for an apprenticeship program, which trained certain skilled workers. Sinele did not attend. (Tr. 4:365, 368; GC Exhs. 20 at 10, 327.) The parties did not reach tentative agreements on apprenticeship that day. The meeting began at 2 p.m. and ended

³¹ Armenta testified that Trevino said he had to go to Mexico the following week to “get some approval on some stuff before we can continue.” Armenta asked Trevino whether he needed to talk to the president of American Mining Corp, Trevino did not say anything and nodded his head. Trevino did not mention anything in particular and Armenta testified “He [sic, Trevino] was referring to the—to the bargaining to be able to reach an agreement, that’s what I took it as.” (Tr. 28:4410–4411.) Armenta also cited that Trevino made no mention at the bargaining table of having to report to Mexico, but Trevino said he had to report to Grupo Mexico as the director of HR.” (Tr. 28:4413.) Armenta admitted that, in context of checking with Grupo, it was “not necessarily about this bargaining, except that day I mention [American Mining president].” (Tr. 28:4415.) Armenta’s inference about Trevino’s trip to Mexico is not a Respondent admission. It does not support a finding that Trevino had to receive orders from Grupo Mexico about bargaining.

³² Respondent’s attorneys reside in Peoria, Illinois, and Chicago, Illinois.

³³ The Employer contended that it provided some economic proposals, such as the vacation bonus, but agreed it had not provided wages, copper price bonus, 401(k) or health insurance. See, e.g., Tr. 4:336.

24 minutes later, resumed at 3:54 p.m. and ended at 4:04 p.m., for a total of 34 minutes of face-to-face bargaining.

December 12, 2018 bargaining meeting: Respondent's team arrived at 11:33 a.m. The parties dealt with a memorandum of understanding (MOU) on flexibility, which was in the BLA. The parties eventually reached a tentative agreement on flexibility.

The discussion shifted to the safety committee and Respondent attempting to clean up language. (Tr. 28:4423–4425; GC Exh. 42 at 2–4.) The Union wanted the safety provision to remain unchanged. The meeting ended at 12:15 p.m. Nothing was discussed about the economic proposals; Respondent did not provide any further counterproposals to UP-1. At the conclusion of the meeting, the Union did not state it had more to discuss that day. (Tr. 4:376–377; GC Exhs. 20 at 10–11, 42 at 2–4.)

December 13, 2018 bargaining meeting: At 2:30 p.m. the bargaining began over the safety and health section. (Tr. 4:380–381.) The meeting lasted 23 minutes without reaching any tentative agreements.

December 17, 2018 bargaining session: The parties met in sidebars on contracting out and safety.³⁴ The notes do not reflect how long the parties met on contracting out or what was discussed. In the safety discussions, Sinele met with Armenta and the Union team from 2:30 p.m. to 2:53 p.m. (GC Exhs. 20 at 11, 326 at 3891–3892.)

Sinele explained fitting Respondent's safety proposals in the BLA language with the Respondent proposal. After Sinele reviewed, Armenta demanded that she explain again, which Sinele did. They specifically discussed the Employee Assistance Program (EAP), which Sinele said would be part of employee benefits. Armenta stated that EAP should also be part of the drug and alcohol section. Sinele said she would look at the language. The parties also discussed HIPAA releases. (GC Exh. 326 at 3892.)

After meeting, Respondent emailed a copy of the safety proposals and offered to “come down” and discuss them after the Union reviewed it. Nothing in the record shows the Union asked to meet further that day, despite Respondent's offer. Respondent also asked for the Union's responses to its November 29 information request, including the economic cost of UP-1, and a December 10 information request.³⁵ The email also notes that the Union rejected Respondent's four-package proposals and Respondent asked whether the Union would offer counterproposals that week. In a separate email, Respondent sent the Union information on the hourly sickness and accident claims paid and hourly life claims for active and retired employees. (GC Exhs. 43–44.)

December 18, 2018 bargaining session: The bargaining sessions began at 11:40 a.m., although scheduled to begin at 10 a.m. Respondent distributed a comparison of its proposal and the BLA regarding safety. (Tr. 4:395–396.) The safety proposals included environmental and medical issues. After Sinele explained the proposal, they tentatively agreed to some health, safety and environment provision. The tentative agreement (TA) shows that Armenta signed with the knowledge that the provisions would not necessarily fit into the same sections and possibly be moved. (Tr. 4:402, 64:9650; GC Exh. 45; R. Exh. 58.)

³⁴ Local Union President Romero noted that work was done in sidebar meetings on “contracting out and safety” and that no negotiations that day took place at the “big table.” (Tr. 22:3565; GC Exh. 20 at 11.)

³⁵ General Counsel re-emphasized that the Employer did not provide any counterproposals to UP-1's economic proposals. However, Sinele's subsequent email identifies that Respondent was waiting for the Union's responses to its information requests. (GC Exh. 43.)

After Respondent explained the contracting out proposal, the parties also signed the tentative agreement for the contracting out provision that day. (Tr. 4:397–400; GC Exh. 42 at 5.) Armenta rejected Respondent’s November 29 proposals. Armenta recommended that the parties concentrate next on the grievance procedure and lead persons. Respondent left the bargaining room at 12:13 p.m. (GC Exh. 20 at 12.)³⁶

It appears that the parties continue to meet in subcommittee/sidebars on grievances and lead persons. (GC Exh. 47.) After the parties separated, Sinele emailed the Union that Respondent intended to break for the evening and asked to meet at 8:30 a.m. the next morning. She also offered to review any documents that the Union wished to email that evening. (Tr. 4:404; GC Exh.46.)

December 19, 2018 bargaining session: Although the meeting was scheduled to begin at 8:30 a.m., and supposed to end at 11 a.m., Respondent was not present at the table at 9 a.m. At 9:04 a.m., Respondent requested information regarding officers and committee members at the various locations. (Tr. 4:410; GC Exh. 49.) Sinele testified that Respondent was working on grievance process language during the previous evening and was preparing to meet in grievance subcommittee. (Tr. 4:410–413.)³⁷ At approximately 9:15 a.m., LaVenture sent Sinele and other management representatives an email that Respondent was 45 minutes late and failed to notify the union representatives it would be late. (Tr. 4:422–423; GC Exh. 49.) At 9:21 a.m., the Union sent Sinele a text message requesting a meeting at the “big table” before the subcommittee. (Tr. 4:415.) At 9:55 a.m., within an hour of Respondent’s latest information request, Local Union President Romero emailed a partial response to Respondent.³⁸ (GC Exh. 49 at 4.)

Sinele responded to Armenta that the parties had agreed to meet in subcommittee, that Respondent was preparing to do so with its information request and now wanted to know the subject of the “big table” meeting. Sinele stated Respondent was willing to meet at the big table, but just because LaVenture said so was not a sufficient answer; however, she suggested that the parties meet in a sidebar to resolve the issue. (Tr. 4:433-434; GC Exh. 49 at 2.)

At about 10:10 a.m., LaVenture led the entire union committee of 20-25 persons to Respondent’s breakout room, where LaVenture proceeded to yell at Respondent’s team.³⁹ At 10:30 a.m. the subcommittee for the grievance procedure began to meet in the large meeting room. Towards the conclusion of the meeting, Armenta remarked that that the parties had been

³⁶ Armenta testified that he demanded Respondent’s economic proposal but that is not corroborated in the bargaining notes or any other witness testimony. In contrast, Armenta testified that Sinele suggested that they concentrate on grievance procedure and lead persons, when Romero’s notes corroborate that Armenta was the one who made the suggestion. (Tr. 29:4458–4459; GC Exhs. 20 at 12, 326 at 3894.) Therefore the testimony about demanding Respondent’s economic proposal is not credited.

³⁷ Armenta denied that the parties agreed to meet in subcommittee, but notes reflect that, at the end of the December 18 meeting, Sinele recapped that Armenta was asking for grievance and lead persons in smaller subcommittees, to which Armenta agreed. (Compare Tr. 29:4478–4479 with GC Exh. 326 at 3894.)

³⁸ Romero labeled his email as a “partial response.” Sinele’s testimony relied upon Romero’s labeling that the response was only partial. (Tr. 4:419–420.) Sinele did not re-request the rest of the information until 9:02 a.m. January 28, 2019, the day on which the parties resumed negotiations. (GC Exh. 52 at 1.)

³⁹ Armenta testified that the Union’s negotiating team was upset because they traveled early to get to meetings and Respondent was not at the Big Table, hence LaVenture’s actions, and LaVenture said so to Respondent. (Tr. 29:4481–4482.) No one argues that these actions were necessary for bargaining, particularly as the parties went forward with the original plan to meet in subcommittee.

able to accomplish TAs in the side bars, which was “important to both parties for efficiencies” (Tr. 22:3572-3574; GC Exh. 326 at 3894.)

Manager Mike Kotraba said he had to leave at 11 a.m. for a cookout at the Ray Mine. (GC Exh. 49 at 3.) Respondent’s team was gone when some members of the Union negotiating team checked Respondent’s breakout room at 11:48 a.m. (Tr. 22:3577.) Armenta sent an email about Respondent’s “unprofessional actions”: He testified that he was never advised that Respondent’s team needed to leave early and General Counsel makes much of Respondent’s absence. (GC Exh. 49 at 4.) However, Respondent’s December 5 email gave the Union notice that Respondent needed an ending time of 11 a.m. for that day.

The parties held no further bargaining sessions until January 2019. (Tr. 4:439.)

E. Winter 2019 Negotiations

On *January 8, 2019*, Armenta requested, by email, that Sinele provide dates for negotiations. (GC Exh. 50 at 1.) On January 10, Sinele stated Respondent would provide dates by the end of the week and asked whether the Union had any unavailable dates. Armenta replied that the Union was available any day in January. On Friday, January 11, Sinele emailed Armenta and LaVenture that Respondent was available the week of January 28. (GC Exh. 50 at 2.)

January 28, 2019 negotiation session: The meeting was scheduled to begin at 1:30 p.m. At 12:24 p.m., Sinele texted Armenta with a request for a sidebar at 1:30 p.m. to “regroup from the last time” and some housekeeping issues. Armenta asked whether Respondent had an economic proposal that day. Armenta said Trevino was going to meeting with the Grupo [Mexico] people, which Armenta claimed the trip was about having an economic proposal ready. Sinele made clear she was the chief negotiator, not Trevino. Sinele said she thought they would work on the sidebar on grievances instead of economic issues. Sinele said she did not know a specific date and time when she would have an economic proposal ready. Armenta said it was “bullshit.” He then said he would talk to the committee and meet then the following day. Sinele asked if the Union wanted to continue to work on grievances. The Union again asked for an approximate date and time for the economic proposal and Sinele said “throughout the negotiating process.” Sinele passed out a counterproposal. (Tr. 22:3581–3590; GC Exhs. 51 at 1-2, 326 at 3896.)⁴⁰

January 29, 2019 bargaining session: The parties held a “big table” bargaining session. The session was supposed to start at 11 a.m. and the Respondent’s representatives arrived at 11:15 a.m. Armenta and Jerry Barrett, a union attorney, asked when Respondent would provide its economic proposal. Sinele wanted to continue with the grievance procedures in subcommittee unless the Union wanted to discuss other items. Armenta again said he wanted an economic proposal. Sinele tried to direct the discussion towards grievances. Barrett asked when Respondent would provide an economic proposal. Paul Burmeister, an attorney representing Respondent, answered Barrett after Sinele obtusely directed him to do so. Armenta stated that Trevino said he had to meet with parent Grupo Mexico and would provide

⁴⁰ No Respondent meeting notes were included in GC Exh. 326.

an economic proposal.⁴¹ After further back and forth, Sinele said she did not have an exact time when the economic proposal would be presented.⁴²

5 The parties broke from the “big table” at 11:29 a.m. (Tr. 5:495–496; GC Exh. 54 at 1.) It appears that during the break the parties met in sidebar about the grievance procedure, and Respondent turned down the union proposal. Also in sidebar, Kotraba apparently rejected continuing the BLA language about justice and dignity, which related to whether an employee would work while a disciplinary grievance was processed. (Tr. 23:3609.) Romero did not note how long the parties spent in the sidebar. (GC Exh. 54 at 1.)⁴³

10 Upon Respondent’s return to the big table discussions at 3:37 p.m., the parties discussed Respondent’s counterproposal on clothing and tool replacement, which the Union rejected. The parties shifted to costs of printing the completed agreements, then back to the grievance/arbitration provisions. Respondent gave a counter proposal at 5:35 p.m. (GC Exh. 15 54 at 1.) At what point the parties broke is not clear from Romero’s notes, but Armenta asked Respondent to return at 6 p.m. Respondent’s negotiating team returned at 6:22 p.m. (Tr. 23:3612; GC Exh. 54 at 2.) At that time Respondent, by Kotraba, explained that the counterproposal was a complete proposal, but not necessarily a “package” proposal. Kotraba confirmed that the one-year scheduling requirement for arbitration was scheduling only and not having the case heard. (GC Exh. 54 at 2.) As part of the discussion, Armenta asked how Respondent’s proposal to eliminate non-preemptory discharges from grievance processes and the justice and dignity provisions achieved efficiency for Respondent.⁴⁴ The meeting ended at 20 7:08 p.m. (Tr. 23:3622.)

25 Later, Sinele emailed Armenta and LaVenture that Kotraba would bring Respondent’s Grievance and Arbitration proposal and asked questions related to issues from the subcommittee. Sinele also advised that Respondent would be available for the following day’s negotiations at 1 p.m. (GC Exh. 58.)

30 LaVenture emailed⁴⁵ an information request, which had the stated purpose of projecting the Union’s costs of its own proposals in response to Respondent’s November 29, 2018 request and “to knowledgeably value and trade negotiation items.” (GC Exh. 56.) LaVenture claimed Respondent failed to completely answer its prior information request about the estimated costs of Respondent’s proposals. LaVenture also included a brief partial response to the pending Respondent information request and added more items to its own information request related to labor costs, such as overtime lunches, interplant transfers, shift premiums, holidays, vacation, bereavement/jury duty leave, copper price bonuses paid for the 3 previous years, pension data, 401(k) savings plan information, and supplemental unemployment benefits. (GC Exh. 57.) In response Sinele withdrew Respondent’s November 27, 2018 information request for the total economic costs of UP-1, which the Union never answered. 40 (GC Exh. 61.)

⁴¹ Neither Sinele nor Romano heard the conversation between Trevino and Armenta. At this point, the statement was not considered for the truth of the matter but only as part of the discussion on January 29. Respondent’s notes do not reflect whether Trevino was present that day, but Sinele testified that Trevino did not attend many sessions. (Tr. 5:487.)

⁴² Sinele testified that she did not recall whether the comment was part of the discussion; however, in context of the discussions, it appears that is what happened. (Tr. 5:489.)

⁴³ Respondent’s notes do not show the sidebar discussions. (GC Exh. 326 at 3896.)

⁴⁴ The Union also discussed scheduling grievances, which was a problem; sometimes 3 years would go by, and the case still had not gone to arbitration. (Tr. 23:3619.)

⁴⁵ Throughout these discussions, LaVenture, Armenta, Romero and others directed a union staff member to attach their letters to the Employer in emails. For ease of reading, I will refer to the Union official from whom the letter was sent, rather than the staff member who attached the email.

5 *January 30, 2019 bargaining session:* The meeting was scheduled for 1 p.m. in Tucson. Sinele texted Armenta that Respondent would not be available at 1 p.m. but apparently received no acknowledgement. Sinele texted that Respondent was working on proposals. She subsequently sent an email to Armenta that Respondent would be prepared at 2 p.m. She also advised that Kotraba had some issues to discuss with the grievance/arbitration subcommittee before meeting at the “big table.” Respondent was almost prepared to present the grievance/arbitration language based upon the previous day’s discussions. (GC Exh. 62 at 1.)⁴⁶

10 Respondent’s team of Sinele, Kotraba, Attorney Burmeister and Cazeaux attended this meeting, which started at 3:06 p.m. (Tr. 5:535, 23:2623, 25:4077.⁴⁷) Armenta stated the Union would no longer meet in subcommittees. (Tr. 5:535–536, 23:3625–3626; GC Exh. 326 at 3900.)⁴⁸ Regarding the grievance/arbitration provisions, the parties specifically discussed how benefits would be grieved as well as the provisions in the benefit plans’ summary plan descriptions (SPDs). (Tr. 537–538.) After meeting for 24 minutes, the parties took a break at 3:30 p.m. (Tr. 541.)

20 The parties also discussed the health plan summary plan description (SPD) and the pension. Armenta argued that the health care coverage was spelled out in the BLA: Health care coverage and pension were grievable. (Tr. 23:3633.) The Union also rejected Respondent’s non-peremptory discharge language. (Tr. 23:3634; GC Exh. 59 at 2.) Respondent returned to its breakout room at 3:31 p.m. (Tr. 23:3636.) At 4:09 p.m., Respondent sent the Union a counterproposal.

25 The parties resumed the “big table” meeting at 5:39 p.m. with a discussion of the grievance/arbitration provisions. (Tr. 5:541–542.) Armenta rejected Respondent’s proposal about step two of the grievance procedure because of the time taken to process the grievance while an employee could be suspended without pay for a period of time. (Tr. 23:3537–3639.) Armenta demanded to know whether Respondent was presenting an economic proposal that day or the next, but Respondent intended to continue negotiating non-economic issues first as it was making progress on those and then get the economic proposal. (Tr. 5:542, 23:3642.) Respondent left at 6 p.m. (GC Exh. 59 at 3.)⁴⁹

35 After that day’s meeting, Sinele emailed Armenta and LaVenture Respondent’s grievance/arbitration language, which Sinele maintained addressed the Union’s concerns.

⁴⁶ At 12:40 p.m., Armenta Jr. talked by phone with Kotraba, who said Respondent was still at the corporate office. Gonzalez testified that he overheard this conversation. (Tr. 26:4077–4078; GC Exh. 60(a).) Armenta Jr. was not called to testify about this conversation; Gonzalez’ notes do not reflect that he overheard the conversation but merely states Armenta Jr. called Kotraba. Gonzalez did not identify where this company office was. Given that the discussion was before the appointed meeting time and other events intervened about notifying the Union about when Respondent would be ready, this alleged conversation is uncorroborated and gives little to support that Respondent delayed starting the meeting.

⁴⁷ On this date Ruben Gonzalez started taking notes for the Union after Armenta appointed him. Gonzalez was a contract coordinator at Respondent. He was vice president of the executive board for Steelworkers Local 937 and involved with negotiating local supplemental negotiations and some “Big Table” negotiations. (Tr. 26:4073–4074.)

⁴⁸ General Counsel asked Sinele whether Kotraba told the subcommittee “it was the Employer’s way or the highway.” Sinele did not recall such a statement. (Tr. 5:536; GC Exh. 59 at 2.)

⁴⁹ For the end of the negotiation session, Gonzalez’ notes reflect Armenta asked if Respondent was going to have any other proposals “today or tomorrow,” with Sinele replying she sent an email if the Union had questions and “I’m walking away.” Gonzalez does not reflect an end time and it is not corroborated by Romero’s notes. See GC Exh. 60 at 2.

Included were changes to the peremptory discharge phase, which was moved to Step 2 of the grievance process and briefing. Respondent also agreed to maintain the current BLA language instead of its proposal, which Respondent based upon the Union's representations of two strikeouts for "remedies for benefit disputes." (Tr. 5:546–548; GC Exh. 62 at 2.) Respondent included its proposal for moving for arbitration:

(4) Failure by the party moving for arbitration to schedule the Arbitration of a grievance within one (1) year after the Step 3 decision shall result in dismissal of the grievance.

(GC Exh. 62 at 7.) The arbitration provision also required that the parties schedule arbitration to a mutually convenient date. The definitions limited grievances to those filed by the Union. (Tr. 5:551–552.)

Sinele also emailed Armenta and LaVenture that Respondent was unavailable for the next day's (January 31) negotiations because Respondent's team continued to work on the grievance proposal, and only was available on Friday, February 1 from 9 a.m. to 2 p.m. (Tr. 29:4537-4538; GC Exh. 63.) Armenta responded that Respondent previously promised January 31 and requested that Respondent meet as scheduled and offered to meet "any other day moving forward." (GC Exh. 63 at 1–2.) On the morning of January 31, Sinele emailed the Union again that Respondent was not available that day, this time adding that Kotraba was not available. (GC Exh. 63 at 3). Sinele testified that Kotraba was necessary to discuss the grievance/arbitration proposals as he was in that subcommittee and Respondent's committee was not prepared to discuss anything else. (Tr. 5:565–567.) Nothing indicates that the Union asked to negotiate anything else instead for that day.

February 1, 2019 bargaining session: Although Respondent scheduled negotiations to begin at 9 a.m., negotiations did not begin until 10:20 a.m. At 9:22 a.m., Sinele sent the Union an email proposal withdrawing a grievance proposal and clarified another part of the proposal in response to a union question. Armenta demanded Respondent come to the meeting room and explain its proposal. (GC Exhs. 59 at 3, 65.)

Sinele, Kotraba, Burmeister, and Cazeaux were present for Respondent. Respondent distributed some documents and the parties resumed discussions on the grievance/arbitration provisions. Respondent's proposal also changed the procedure for contacting and scheduling with the arbitrator, with the Union responsible for scheduling. Sinele testified that scheduling was not an administrative duty of Respondent to schedule arbitration for the Union and it was the Union's responsibility to move arbitration forward. (Tr. 5:579–583, 23:3650–3652.)

An additional issue was the list of people who served on the Board of Arbitrators. The Union had one person to fill an empty slot, which the Union submitted later that day. (Tr. 5:584–587; GC Exh. 66.) About 10:33 a.m., Armenta said the Union would review and get back with Respondent. (Tr. 5:585; GC Exh. 59 at 4, 64 at 1.) The parties reach agreement and signed the tentative agreement regarding grievance-arbitration as of February 1, 2019. (R. Exh. 61.)

Armenta testified that he reviewed Respondent's proposal during the break. (Tr. 29:4521.) The parties reconvened at 11:32 a.m. After further discussion on the grievance process, Respondent said it would consider the Union position and left at 11:37 a.m. (Tr. 5:588, 23:3656; GC Exhs. 59 at 4, 64 at 2.) Sinele returned at 12:39 p.m. and gave Armenta another version of Respondent's proposal. Armenta asked what would happen if "we mutually agree to extend." Sinele's response is not noted but Sinele left at 12:50 p.m. (GC Exh. 64 at 2.) The

parties reconvened at 1 p.m., at which time Respondent submitted a proposal on civil rights language. (Tr. 5:588–589.)

Respondent previously proposed to eliminate the Civil Rights Committee, which served as an internal committee of human resources and bargaining unit employees to investigate and reach a decision about civil rights complaints. Now Respondent proposed changes based upon the Union's input. Respondent also said the Union would provide training. Armenta asked whether the training would be paid for by Respondent, which Sinele stated was not part of the proposal. Respondent attorney Burmeister interjected that the parties should train their own representatives separately. Armenta stated that training was provided jointly in the past. Burmeister said the point could be discussed. (Tr. 5:589–591.)

Armenta asked if there was anything else and Sinele said nothing else. Armenta asked for dates for upcoming negotiations, offering any day in February. Sinele said Respondent was not available the next week but would follow up with date during the week of February 11. Armenta also offered to meet in Phoenix if scheduling in Tucson would be a problem and that they were available on weekends. Although the meeting adjourned at 1:24 p.m., Kotraba returned at 1:31 p.m. with confidentiality paperwork that day. At 1:48 p.m., Respondent notified the Union that it would not be available for further meetings that day (note that Respondent previously stated it would not be available past 2 p.m.) and Sinele would be available in the lobby to talk. (GC Exh. 59 at 5; GC Exh. 68.) Armenta testified that Sinele did not explain why Respondent was not available past 2 p.m. and speculated the reason was Attorneys Russo and Burmeister had to catch flights; however, nothing in the record indicates that Armenta asked why or insisted on staying past that time. (Tr. 29:4537–4538.)

That evening, Sinele sent to Armenta dates for Respondent availability for negotiations of February 12, 13, 26, 27, 28, 29.⁵⁰ (GC Exh. 67.) On February 5, Armenta agreed to the dates. (R. Exh. 62.)

February 8, 2019 letter from LaVenture to Sinele: LaVenture emailed Sinele a letter regarding Respondent's failure to provide its economic proposal. He stated the Union did not agree to bargain noneconomic issues before discussing the economic portion. He asked that Respondent provide its economic proposal by noon on February 11 (3 days from the date of the letter and the day before the parties were scheduled to meet again). LaVenture stated, since November 27, 2018, the Union repeatedly requested Respondent's economic proposal, but Respondent instead provided shifting reasons why it did not present it. Those reasons included authorization from multiple layers of upper management,⁵¹ or still working on it. At no time has Respondent said when it would provide a proposal, LaVenture wrote, but the Union needed Respondent's economic proposal to be able to bargain intelligently over open items and make comparisons. (GC Exh. 69.)

On *February 11, 2019* Sinele responded to LaVenture that the letter was self-serving and inaccurate, but Respondent never conditioned bargaining over economic issues before resolving the non-economic issues. Respondent would attend the negotiations the following day but without any of the Union's unlawful conditions on bargaining. (GC Exh. 72.)

February 12, 2019 bargaining session: Setting up for negotiations, Sinele and Armenta texted and emailed about starting times. Respondent offered to start in the morning and Armenta proposed starting at noon. Sinele wrote that they would start at 1:30 p.m. instead of

⁵⁰ 2019 was not a leap year, so the 29th was an error, unless Groundhog's Day caused a repeat like the movie. See <https://www.imdb.com/title/tt0107048/>, last visited February 19, 2026.

⁵¹ Nothing in the record supports LaVenture's conclusory statements.

noon if the Union was not available for the morning. Sinele later told Armenta that Respondent would be available at 12:30 p.m. and would send Respondent's response regarding the Civil Rights Committee proposal. (GC Exh. 70.)

5 At 12:46 p.m. on February 12, the negotiations began with Armenta asking if
Respondent had an economic proposal. Sinele stated that some issues, such as contract
coordinators and pro-rated vacations, were economic and that Respondent provided the civil
rights language. Armenta demanded an economic proposal immediately and Respondent
representatives who could make decisions. He said that Respondent represented the people
10 who made the decisions were in Mexico.⁵² Sinele said they were working on some economics
and would have more later. (GC Exh. 73 at 1.)⁵³ Armenta also said he would not negotiate
through email⁵⁴ and demanded Respondent attend on time. Turning to the Civil Rights⁵⁵
proposal, Armenta said only one section was crossed out, which did not incorporate all changes
that the Union previously wanted.

15 The discussion turned to Respondent's revised proposal for Civil Rights provisions,
which included more provisions.⁵⁶ Armenta raised the policy would not cover retaliation.
Armenta said that he wanted a full explanation and that the proposals were not piecemealed.

20 Sinele then said she wanted to address Armenta's statement that she did not have
authority to make decisions. Armenta said that Sinele and Trevino said certain things were not
within their authority and up to "Mexico City." Sinele said, "It didn't happen at this table."
Armenta said it did not matter if it was there or in caucus. (Tr. 6:672; GC Exh. 374 at 3.)⁵⁷
Sinele also said that Respondent was present to bargain in good faith and talk about issues;
25 she also said that the negotiations were moving along, with Respondent looking for efficiencies
and listening to the Union. (Tr. 6:673.) Before the 1 p.m. break, Sinele stated Respondent
needed a caucus to get some information on a proposal. (GC Exh. 73 at 2–3.)

⁵² Sinele testified that she did not recall Trevino making that statement on which Armenta relied. Again this is a conclusory statement without evidence.

⁵³ For this exhibit, General Counsel frequently would read Romero's notes and asked what someone "meant by that." Much of Romero's testimony was his interpretation or speculation on what was said but was not in the vein of "what else was said." This testimony is not given any weight as it does not provide any basis for his understanding, e.g., Tr. 23:3670–3671, General Counsel asks what Sinele meant by that; Romero responds, "Likely we talked before that some of it was economic, too" and General Counsel's next question, after reading Romero's notes is "Do you know what Mr. Armenta was referring to when he said that?" Romero stated what Armenta was referring to, and I asked how he knew what it was about. (GC Exh. 73.) For these types of exchanges, little credence is given to the testimony as leading the witness and giving answers without a basis unless clarified in the record. *H.C. Thomson*, 230 NLRB 808, 809 fn 2 (1977) (answers to leading questions during direct examination given little weight).

⁵⁴ Sinele admitted that she continued to send proposals to the Union via email and sometimes the Union would ask for a proposal emailed. (Tr. 654–655.) Despite the Union's averment that it would not negotiate by email, at times the Union responded and/or submitted proposals through email.

⁵⁵ The Civil Rights Committees, stationed at each location, attempted to resolve civil rights issues in special cases. Local Union President Romero testified that they are used rarely and he could not recall any use at Hayden. (Tr. 23: 3672.)

⁵⁶ General Counsel attempted to adduce evidence that showed any elimination of civil rights provisions, which originally included a provision against discrimination for union activity, pointed to animus against union activity. Sinele explained, in different points, that protections for any civil rights were provided by law and that Respondent intended to maintain protections for all employees. (See, e.g., Tr. 664–666.)

⁵⁷ Gonzalez testified that he "could not recall" any Respondent representative say they had to have approval from Mexico. (Tr. 26:4091.)

Armenta contacted Sinele, asking when Respondent would return to the bargaining table. (Tr. 6:695; GC Exh. 71.) Sinele testified that they likely were making changes regarding the Civil Rights proposal and training for employees by the Union. (Tr. 6:695–696.)

Respondent returned at 3:56 p.m. with Respondent providing a revised proposal on Civil Rights and continued discussions of the Civil Rights proposals. (Tr. 6:698; GC Exh. 326 at 3911–3912.) Armenta expressed displeasure that Respondent did not include a section on harassment. He demanded a complete proposal on all civil rights sections, including EEO. Sinele testified that the parties were bargaining, and the Union wanted all parts together, which Sinele said were separate sections. (Tr. 6:703–704.) During this exchange, Sinele suggested that the Union should make a proposal if it wanted all the sections together. (GC Exh. 356 at 3912.) Armenta asked how Respondent's proposals on civil rights made the company more efficient, which Sinele explained. Armenta then made a verbal counter proposal that the language from BLA Art. 4, subsection a, b, and (civil rights and EEO) c stay. (Tr. 6:709; GC Exh. 356 at 3912–13.)

Armenta then demanded Respondent's economic proposal, as some portions of the non-economic proposals affected money, such as the Union paying for training. Sinele would not agree that the Union could demand or require a due date for the economic portion and cited the progress so far, with 80 tentative agreements to date. (Tr. 6:712–713; GC Exh. 326 at 3913.) Sinele asked if the Union had any proposals for them. Armenta admitted he did not. (GC Exh. 73 at 7.)

Sinele presented and explained Respondent's proposal for BLA Exhibit A, the Drug and Alcohol policy. The parties discussed Respondent's perspective of taking HR "out of the equation" on seeing the company physician yet still requiring HR to make the appointment with the company physician. Also discussed was an employee self-reporting certain drugs, for which Sinele gave the example of Sudafed, whether prescribed or over-the counter. The main goal, Sinele said, was to avoid HR seeing the prescription. (GC Exh. 326 at 3913–3916.) Union Attorney Barrett and Respondent Attorney Russo participated in the discussion. Sinele testified that Russo was authorized to speak for the negotiating committee. (Tr. 6:719.) At the time Respondent did not have a vendor selected for testing, which the Union wanted to discuss.

Regarding the actual procedures, Respondent proposed alcohol screening by breathalyzer and drug testing through saliva testing. Armenta asked for an explanation about the saliva testing, which Sinele provided. Sinele pointed out the oral testing was less invasive and took less time, but unknown regarding the costs. Armenta requested the cost information. (Tr. 6: 723–725; GC Exh. 326 at 3917–3918.) The parties then broke.

Respondent returned about 3:55 p.m. Armenta accused Respondent of stalling, because it shouldn't take 2.5 hours to come back. Armenta asked for a response to his counter proposal on civil rights and asked when to expect the information. Sinele agreed to have the information that day. Union Attorney Barrett asked if Respondent had any other proposals and Sinele said it did not. Respondent Attorney Russo asked if the Union had any proposals, and nothing in the records reflects the Union having any other proposals that day. (Tr. 29:4569; GC Exh. 73 at 13.) Respondent left at 5:13 p.m. and notified Armenta at 6:32 p.m. that it was done for that day and wanted to start the following day at 10:30 a.m. (GC Exh. 73 at 13.) After Respondent left, the union bargaining committee stayed and discussed Respondent's drug and alcohol proposal. (GC Exh. 74 at 12.)

Later that evening Union Local President Romero emailed Sinele with the Union's counterproposal regarding civil rights, which was to keep the language stated in the BLA. (Tr.

6:727–728; GC Exh. 75.) Sinele emailed to Armenta a synopsis of what Respondent understood were the Union’s counterproposals on the drug and alcohol policy and that Respondent would attempt to have the cost information on drug testing in the morning. Sinele also proposed starting the negotiation session for February 13 at 10:30 a.m. (Tr. 731; GC Exh. 76.)

February 13, 2019 bargaining session: The bargaining session began at 10:30 a.m. as scheduled. Respondent was represented by Sinele, Cazeau, Mike Kotraba, and Attorney Russo. The contents of most of the bargaining is contained in the table below. (GC Exhs. 77 at 1, 178 at 1.)⁵⁸ The parties broke at 11:04 a.m., after meeting for approximately 33 minutes. At approximately 11:55 a.m., Respondent emailed the Union and proposed to meet at 2:00 p.m. as it was speaking with the drug/alcohol testing vendor at noon. (Tr. 6:743–745; GC Exh. 79.) During the call with the vendor, Sinele requested the information the Union sought. By email at approximately 1:28 p.m., Respondent later requested to meet at 2:30 p.m., then later asked for 4 p.m. in order to update its proposal. (Tr. 6:746–749.)⁵⁹

During the 4 p.m. session, Sinele began discussing drug testing and that Respondent spent time talking to vendors and finding the answer to other union concerns about testing. (GC Exh. 326 at 3921–3922.) Armenta accused Respondent of being unprofessional for failing to have all the details of a proposal, which he called piecemealing, and then said Respondent still did not have an economic package. Armenta then went back to drug testing. He gave a verbal counter proposal, which Sinele clarified. Sinele asked if the Union had anything else. (GC Exh. 326 at 3922–3923.)

Armenta asked when Respondent would provide its economic proposal. Sinele said Respondent was willing to discuss any union proposal, whether non-economic or economic. Armenta reiterated the Union’s proposal, that it wanted a “substantial wage increase.” Sinele asked whether the Union had any specifics on the wage proposal and tried to get parameters for the Union’s proposed “substantial wage increase.”⁶⁰ Armenta maintained that the “substantial wage increase” spoke clearly as the Union’s proposal. Armenta then said the specifics desired from Respondent were wages, health care, 401(k), pension and vacations. Sinele said she was working on drug and alcohol proposals. Armenta again asked if Respondent was presenting its economic package that day. Sinele said it would not. Armenta asked whether it would receive a proposal on February 26; Sinele said Respondent would present when it was ready. Sinele testified that she was not bargaining on those issues that day. Armenta told Sinele she needed to improve her lying. Respondent attorney Russo asked why the Union was asking questions when the company was leaving. The Union’s attorney asked when Respondent would expect an answer and Russo said they would get back to them. The meeting adjourned at 4:20 p.m.⁶¹ The parties did not reach any tentative agreement that day. (Tr. 6:759–768; GC Exh. 326 at 3923–3924.)

⁵⁸ General Counsel’s questioning here, like its questioning for February 12, follows the same pattern of reading the notes and asking whether he know what it means, or says what it refers to, leading, etc., so most of this questioning deserves little credit and the notes themselves are the best evidence except where the transcript is cited.

⁵⁹ Armenta did not tell the 20 or so other members of the Union’s bargaining group why Respondent was not returning to the table between 2 and 4 p.m. (Tr. 48:7154.)

⁶⁰ Respondent withdrew its information request because it did not want to slow down bargaining. It considered this conversation as a new information request for “substantial individual wages.”

⁶¹ One set of Union notes the company was already standing and getting ready to leave when the Union was asking questions; it also reflects that the company left at 4:17 p.m. and “called it a day” at 5:10 p.m. (GC Exh. 178 at 5.)

Issue	Respondent proposal	Union response /counter:	Respondent counter/information provided
Drug and Alcohol Testing	10:30 session: Sinele distributed the Employer's revised proposal for the drug and alcohol policy based upon the previous day's discussions. (R. Exh. 63.) She also provided the cost differences per test. Armenta requested that the information be provided in an email. Sinele also distributed random testing procedures.	10:30 session: Armenta asked for an explanation regarding split sampling and saliva testing. Sinele said in a call scheduled for that afternoon with the vendor, she would find out and report back. (Tr. 6:739-740; GC Exh. 326 at 3919-3020.)	4:00 p.m. session: Sinele presented more information about what the vendor said regarding saliva testing. Sinele said that the testing levels would change from urine to oral sampling and said a new chart would reflect these guidelines. She mentioned that the company had talked with various personnel with the vendor but wanted to get verbal answers down to the Union as soon as possible. Armenta then upbraided Respondent for making a proposal without having all the details, which he said was piece-mealing and a delay tactic, and again had not presented its economic proposal. Sinele said she would review and the guidelines were in the proposal. When Armenta said "how the hell do you know what they are going to be," Sinele said she understood as a rejection or could get more information. Armenta said the Union was rejecting, should leave as in the BLA. Regarding random testing, Armenta proposed going into effect after 6 months. (Tr. 6:752-

Issue	Respondent proposal	Union response /counter:	Respondent counter/information provided
			GC Exh. 326 at 3921-3922.)
Civil Rights	10:30 session: The parties discussed the Union's counter proposal regarding the civil rights provision, which Respondent eventually rejected and subsequently sent via email.		

At about 5 p.m., Sinele emailed Armenta with a “formal” information request for the Union’s explanation of “substantial wage increase,” stating Respondent could not evaluate the Union’s demand without dollar figures attached. Sinele cited that Respondent made certain economic proposals already, such as contract coordinator, committees and vacation. Sinele advised that Respondent would continue to evaluate the drug and alcohol policy proposals and give the Union a counter proposal when the parties met on February 26. Regarding the civil rights committee, Respondent rejected the Union’s counter proposal and adhered to its proposal of February 21. Sinele testified that she intended to continue with the drug and alcohol policy that week. (Tr. 6:769–775, 23:3728–2730; GC Exh. 79.)

On Thursday *February 14, 2019*, Union District Director LaVenture sent Respondent an email about the Union’s information request, dated January 29, 2019. The Union’s original information request demanded certain financial information, including: hours worked or labor cost per unit for year 2016, 2017, and 2018; total copper production, operating cost and net cost per pound of copper produced; certain mine production data for the 3 years previously mentioned; copper ore reserves as of December 31, 2018; capital expenditures planned for each facility and estimated impact on employment level; and other data. The Union’s original information request demanded Respondent’s response within a week. (GC Exhs. 57, 80.) LaVenture again demanded that Respondent immediately send the information. (GC Exh. 80.)⁶²

On *February 20, 2019*, Sinele responded to LaVenture and Armenta that Respondent verbally withdrew its own information request to the Union, which made the Union’s January 29 request moot. As to the resubmission of the Union’s information request, Sinele objected regarding relevance because the information did not relate to wages, hours or terms and conditions of employment and no proposal was tied to Respondent’s production or the financial information the Union was seeking; even if the Union could prove relevance, the information was confidential and related to trade secrets; if so the parties would need to confer about reaching an agreement to ensure confidentiality. (Tr. 7:806–814; GC Exh. 80.)

⁶² General Counsel asked Sinele whether she understood that the information requested by the Union was necessary for the Union to complete its explanation of a substantial wage increase. Sinele testified she did not and later stated she did not know what the Union would use to calculate the desired wage increase. Sinele also testified the information would not be relevant to determining the copper price bonus and unknown whether Respondent’s copper production was relevant to the London Metals Exchange prices. (Tr. 7:794–801.) Notably when the information request issued, LaVenture made no mention that the information was necessary to develop its economic proposals further.

On *February 22, 2019*, Sinele advised the Union that Respondent secured meeting space, including space for a breakout room, for the meetings for February 26 through March 1, with a proposed starting time of 1:30 p.m. (Tr. 7:824–825; GC Exh. 81.)

The Union issued another information request. This time the Union made specific requests for: hourly employment costs; data on the workforce and seniority; labor costs and production; copper price bonus calculations; occupational safety and health data; pension data, which included specific needed from actuaries; the 401(k) savings plan; health insurance and life insurance costs, with information from third party providers; and flexible spending accounts. Sinele testified that the information was normally provided to the Union, with some accessible only from third-party vendors. (Tr. 7:833–839; GC Exh. 83.)⁶³

On *February 25, 2019*, Sinele emailed Armenta that Respondent could not meet on February 26, but the Union could expect an economic proposal on February 27. On February 26, Armenta suggested a start time of 10 a.m., to which Sinele proposed 2 p.m. (GC Exh. 82.)

February 27, 2019 bargaining session:

Although the parties were scheduled to meet at 2 p.m., at 1:16 p.m. Sinele told the Union that Respondent would not be available until 3:30 p.m. At 2:10 p.m., Armenta asked whether Respondent would have a response to his request that day. Sinele responded that Respondent was working on his request. (GC Exh. 87.) Armenta did not advise the bargaining team about the specific contents of Sinele's emails, only that Respondent would not be coming until later. (Tr. 48:7160–7161.)

Respondent's team arrived at the bargaining session about 3:49 p.m. Armenta said that Respondent was very unprofessional as was the late cancellation of the scheduled February 26 meeting and the late start that day. Sinele said Respondent was trying to prepare presentations and had documents ready for the Union. The document distributed was Respondent's economic proposal with a three-year contract term.

Sinele gave a review of the economic proposal as part of a "package deal." See the table below for a summary of the proposal. (Tr. 7:849–853; GC Exhs. 84 at 1, 86, 326 at 3925–3926.) Sinele reviewed the proposal before the Union asked questions. (Tr. 25:3749.) Respondent's proposal included all tentative agreements but required the Union to drop all its remaining demands. (Tr. 7:975–876; GC Exh. 86.) LaVenture thanked Respondent and started asking questions about different provisions, starting with sickness and accident provisions.

After Respondent presented its proposal, Armenta said he would have more questions and "based on [the] piece of shit you just gave us, [you] didn't need 2 days." Sinele offered to entertain the Union's counterproposals and questions. As offered by LaVenture, the parties agreed to meet again the following day at 10 a.m. (GC Exh. 84 at 3.) The parties adjourned at 4:27 p.m., or approximately after meeting for 40 minutes. (Tr. 7:920; GC Exh. 326 at 3926–3927.)

The table below summarizes Respondent's economic proposal, with Union commentaries and counter proposals:

⁶³ On March 13, 2019, Respondent provided the Union with requested information regarding workforce, seniority and layoff. (R. Exh. 64.)

Issue	Employer Proposal	Union Response/Counter	Employer Response/Counter
Wages	No change from BLA, e.g., no wage increase for any job classification (Tr.7:854-867; GC Exhs. 84 at 1, 86.) ⁶⁴		
Copper Price Bonus	To be determined (TBD)		
Pension	Would not apply to anyone hired after July 1, 2011 and accruals were frozen. (Tr. 7:866-870.)		
401(k)	No change from BLA		
Disability benefits/ Sickness & Accident (S&A)	Instead of S&A starting after 15 days, Respondent proposes to increase to 30 days. (Tr. 25:3754; GC Exh. 84.)	Armenta: Need clarification of language on S&A. (GC Exh. 84 at 2-3.)	Sinele willing to take a look at clarifying S&A language. (GC Exh. 84 at 3.)
Welfare/health insurance	Premium increases and deductible increases for individual and family plans. Emergency room copay would be \$200. (GC Exh. 84 at 2.) The family plan premium proposal was double the BLA's premium. The plan also would be self-insured, including medical, prescriptions, vision, dental S&A, and group life. (Tr. 7:877-779, 885-886, 888.) New hires would be eligible for benefits on the first day of the month following hire. (GC Exh. 84 at 2.) No changes to retiree health care list currently in BLA. (GC Exh. 84 at 2.)	LaVenture also asked about Respondent's proposal for one rate for all welfare benefits and putting everything into one plan, with one premium. Sinele explained that Respondent could file a "wrap document" for tax purposes that would include all plans, rather than separate documents for each welfare benefit. Armenta disputed that notion that Respondent's benefits experts said this plan would be more efficient. (Tr. 7:917-919; GC Exhs. 84 at 3, 326 at 3926.).	

⁶⁴ General Counsel asked Sinele a number of questions about who decided not to propose a wage increase and how the decision was made. Respondent eventually objected. At the time I noted that General Counsel was getting into *Berbiglia* privileges. *Berbiglia, Inc.*, 233 NLRB 1476, 1495 (1977). To justify questioning, General Counsel cited *Taylor Lumber & Treating*, 326 NLRB 1298 (1998), which dismissed all allegations of an employer's alleged bad faith bargaining and an alleged unfair labor practice strike. But at JD slip op. fn. 2, the administrative law judge found that the privilege applied to a chief negotiator who was an attorney and the management control team. Respondent provided bargaining notes for this hearing. What General Counsel sought was beyond the bargaining notes and provided no authority that its line of questioning was relevant. Compare *Stericycle, Inc.*, 370 NLRB No. 89 fn. 6 (2021).

Issue	Employer Proposal	Union Response/Counter	Employer Response/Counter
	For the flexible spending accounts, the language was updated to reflect the IRS guidelines for contributions. (Tr. 7:907-908.) Benefits stop while employee on strike (effective date unclear) (Tr. 25:3755.) Change the format and rely upon what was in the summary plan descriptions, instead of repeating the information in the new collective-bargaining agreement. (Tr. 7:879-885.)⁶⁵	Armenta testified that Sinele did not present the SPDs with the proposal.	
Term of Agreement	3 years		

February 28, 2019 bargaining session:

Respondent's team arrived at 10:01 a.m., one minute after the scheduled 10 a.m. start time. (GC Exh. 88 at 1.) The discussion began with Armenta asking questions about the proposed welfare plan. Armenta clarified that Respondent rejected most of the Union's November 27, 2018 proposal on welfare. Armenta also stated he was having problems reviewing Respondent's proposal because the rejected items were not included in Respondent's proposal. Sinele explained that, as before, Respondent's proposal was in a different format and reviewed that some headings were different. Armenta requested a version with strikeouts. Sinele agreed to do so. Armenta stated he did not trust Respondent and that there was a more professional way of presenting proposals. Sinele again stated Respondent would accommodate his request. (GC Exh. 326 at 3928–3929.)

Armenta requested clarification on the plan design and premium schedules. Sinele stated the proposals would have the summary plan descriptions, which the parties would agree to. Sinele also stated that the vision plan would be in the summary plan descriptions, but the Union could present a counteroffer. (GC Exh. 326 at 3929.)

Armenta moved to the copper price bonus, which in Respondent's proposal was "to be determined." Sinele said Respondent did not have a proposal on the copper price bonus at the moment. (Tr. 7:932; GC Exhs. 88 at 4, 326 at 3929.) Respondent Attorney Burmeister stated that Respondent was waiting for a union counteroffer, because it did not think the Union was likely to agree to Respondent's offer and Respondent did not have everything fleshed out, but

⁶⁵ Respondent had summary plan descriptions for healthcare/vision, life insurance, short-term disability, sickness and accident benefits, and the flexible spending account. (Tr. 7:910–911.)

“we could” if the parties could reach agreement. Armenta accused Respondent of failing to bargain in good faith to reach an agreement. (Tr. 7:933; GC Exh. 326 at 3930.)⁶⁶

Armenta then demanded that Respondent put its proposal to freeze the defined benefit plan⁶⁷ in writing. Sinele agreed to do so. (Tr. 25:3763–3764; GC Exh. 88 at 5.)

Regarding wages, Armenta argued that Respondent said it intended to be efficient and competitive, but could not keep employees, particularly in the skilled trades and still did not propose a wage increase for 3 years. Sinele pointed out that the parties agreed to an apprenticeship program, that this was their initial proposal and wanted to know what the Union’s “substantial [wage] increase” was so that they could bargain. Armenta asked if it was subject to change, to which Sinele replied that any proposal was subject to change, as they were there to bargain. (GC Exhs. 88 at 5, 326 at 3930.)

LaVenture stated that some bargaining would deal with the information requested earlier that week (on Monday) and asked for the information by March 11. Sinele said the goal was to have the information to the Union in 2 weeks and the information would be sent as it was received. Armenta said he had no further questions and might have more later. Sinele said she would be happy to answer questions by email, to which Armenta said he would prefer to do so across the table. (GC Exh. 89 at 5.) The meeting adjourned at 10:31 a.m. The Union did not ask to bargain over any other subject at the end of the day. (Tr. 25:3766–3667; GC Exh. 326 at 3930–3931.)

At about 4 p.m., Sinele emailed Armenta and LaVenture regarding the requests the Union made about a redlined copy of Respondent’s economic proposals and the recent information request. Sinele stated it was taking longer than expected to complete the redline copy for the Union and could not provide it that day. Regarding the information request that the Union said it needed to make an “intelligent proposal” on wages, Respondent expected to provide that by March 11. Respondent expected the Union to “provide a full economic proposal, in writing, responsive to the Company’s proposal we presented on February 27.” (GC Exh. 90.)

On Feb. 28, 2019 the Union requested to meet during the week of March 11. (GC Exh. 90.) On *March 6*, Respondent proposed meeting on March 13 and 14, beginning at 10 a.m. The Union accepted these dates. (GC Exh. 92.)

Late on March 11, Respondent provided a voluminous partial response to the Union February 25 economic information request. (GC Exhs. 93, 93(a)-(e).)

⁶⁶ I asked Armenta how Respondent’s “to be determined” (TBD) on the Copper Price Bonus was different than the Union’s proposal of “significant wage increases,” without any defining numbers. Armenta denied that they were the same because the Union didn’t proposal a package proposal and Respondent did. Then General Counsel asked whether, in the Union’s proposal, the parties could have bargaining separately about all the economic issues and reach agreement on those individually, to which Armenta simply answered yes. Respondent objected as leading, which I sustained. (Tr. 30:4609–4610.) General Counsel was questioning to make a point about Respondent making unacceptable proposals. However, Respondent’s conduct during negotiations included answering questions and altering a number of proposals; Respondent also did not make a “take it or leave it” statement. Therefore these answers are not credited.

⁶⁷ GC Exh. 88 and Romero testimony initially failed to include that the defined benefit plan was not eliminated, but frozen. Further testimony from Romero clarified that the plan was frozen. (GC 88 at 5, Tr. 25:3763–3764.)

March 13, 2019 negotiation session:

At 8:47 a.m. on March 13, Sinele requested that LaVenture sign a confidentiality agreement for more of the information, which the Union usually signed in the past. (GC Exh. 96.) Respondent provided workforce seniority, layoff and 401(k) savings plan information. At 9:12 a.m. Respondent provided the redline version of the proposal that the Union requested. (GC Exh. 98.) The meeting was scheduled to begin at 10 a.m. with Respondent's team arriving at 10:03 a.m. Armenta commented with expletives that he had little time to review the information sent 2 days before. (GC Exh. 95 at 1.)⁶⁸

Respondent provided the Union with an updated proposal on benefits, which Sinele said was the "clean-up." Armenta accused her of going beyond clean-up, and Sinele replied the intent was only clean-up. Armenta said he suspected Respondent made changes because he did not trust them. (Tr. 30:4631; GC Exh. 94 at 1.) The discussion on the proposal continued, with Sinele having to remind Armenta that crossouts were for language already in the SPDs, so it would not be repeated in that portion of the health/welfare proposal.⁶⁹ (GC Exh. 94 at 2.) Armenta made other obtuse attacks; Sinele responded that was Respondent's proposal and the Union could counter.

Armenta said he needed 45 minutes to review the information as he asked for it 2 weeks before.⁷⁰ Sinele reminded Armenta that he said he did not want to negotiate by email. Armenta said, "Get the fuck out of here." Respondent's team left the Union at 10:24 a.m. (Tr. 27:4260; GC Exh. 95.)

At 4:16 p.m. by email, Union canceled the meeting for the remainder of that day because they were evaluating the information Respondent provided that day. (Tr. 25:3772; GC Exh. 94.) Armenta proposed meeting at 10 a.m., Sinele answered that Respondent would be available at 10:30 a.m. General Counsel questioned Romero about whether Respondent's representatives returned to bargaining that day, which they did not. Nothing indicates when the Union was finished reviewing the information and ready to resume negotiations until the Union, at 4:16 p.m., notified Respondent it was continuing to review the information. (GC Exh. 100; Tr. 8:1128.)⁷¹ Armenta admitted that the parties could have bargained about a topic other than economics, but the Union was focused on economics. (Tr. 30:4646–4647.)

On March 14, 2019. no negotiations took place. Respondent, at about 6:58 a.m. and continuing through the morning, provided additional information, including different summary plan descriptions (SPDs), to the Union. (Tr. 8:1119–1124; GC Exh. 101, 101(a)-(f).) At 10:17 a.m. Armenta emailed Respondent that it would not be ready at 10:30 a.m. because the Union was still evaluating information. (GC Exh. 103.) At 12:41 p.m. Respondent sent the Union more information related to the economic proposals. (GC Exh. 101 at 12.) At 2 p.m., Armenta notified Respondent that it was still reviewing the information and could not negotiate that day. Sinele

⁶⁸ Armenta testified that the information came in after 9 a.m. on March 13, shortly before the next negotiation session began, and that he did not have time to review it. However, this statement is not accurate as some of the information was available to him from late on March 11, which gave him a day to review.

⁶⁹ Armenta testified that the SPDs had been negotiated in the previous agreement and the Union saw no need to renegotiate the features.

⁷⁰ As with much of the information for health and welfare, Respondent had to obtain information from third-party providers and actuaries. For some of the information, the Union was required to sign confidentiality agreements each time new information was provided.

⁷¹ Any implication that the failure to continue bargaining after 10:24 a.m. should be placed on Respondent instead of the Union, is misleading.

notified Armenta that union signature on the confidentiality agreements were needed to release more information. Once received, Respondent then released actuarial data on pensions to the Union. (GC Exh. 103 at 1.)

5 The information the Union received was “intensive and long.” Some of the information was sent to the Steelworkers’ offices in Pittsburgh, where technicians evaluated the information over a period of days. (Tr. 30:4649–4651.)

10 On March 20, 2019, Sinele confirmed that the Union was still evaluating data on March 14 and asked for the Union’s availability for negotiation dates. On March 21, Armenta notified Respondent that it was available March 27 and 28. (R. Exh. 65.)

March 27, 2019 bargaining session:

15 The negotiations were scheduled to begin at 1 p.m. and Respondent arrived at 1:04 p.m. (GC Exh. 326 at 3934.) The Union presented its second comprehensive proposal, UP-2 (GC Exh. 109), to which Respondent had no counter that day.⁷² Armenta did not explain how the Union reached its calculations, nor had it performed any costing of UP-2. (Tr. 30:4656–4657.)
20 The table below presents the union proposal, without including areas of TA:

Issue	Union Proposal (UP-2)
Term of Agreement	Ending April 1, 2022
Leadman Differential	Modified from \$2.00 to \$1.50
Overtime	Overtime lunches: keep as in BLA
Grievance	Adjustment of grievances is TA (no mention of any additional issues)
Absentee Control Program	Change to clean slate as of day of ratification
Supplemental Employment Benefits	Proposing specific amounts
Wages	Substantial increase is, for all employees: \$8/hour, retroactive to December 1, 2018 \$5/hour across the board on April 1, 2020 and \$5/hour across the board April 1, 2021
Shift Premium	Change to \$0.50/hour
Drug and Alcohol	For random testing, not clear who is going to perform but apparently Union agrees to Respondent vendor; rest of proposal, keep as in BLA
Pension	“not interested” based upon Union’s calculations as taking away money from unit employees

25 Sinele said she had no questions at that time but Respondent needed time to review the proposal. Respondent left at 1:15 p.m. (GC Exhs. 107, 326 at 3934.). At 2:44 p.m., Sinele notified the Union that Respondent needed the rest of the day to review UP-2 and resume the following day. (GC Exh. 107, 108, 326 at 3934.)

⁷² Romero testified that the union committee spent March 26 preparing UP-2. (Tr. 25:3774.)

March 28, 2019 negotiation session:

The bargaining session started at 1:02 p.m.⁷³ Sinele advised the Union that Respondent was still examining UP-2. (Tr. 9:1267; GC Exhs. 110 at 1,⁷⁴ 326 at 3935–3936, GC Exh. 112.)

- 5 Respondent presented additional proposals, linking the copper price bonus to attendance. Sinele discussed Respondent's copper price bonus structure. After reviewing the copper price proposal, Sinele then distributed Respondent's revised attendance policy. (Tr. 9:1269–1270.)

Issue	Respondent Proposal	Union comments/counter	Respondent response/counter
Copper Price Bonus and Attendance (GC Exh. 112 at 5-7.)	As before, the amount of the bonus is partially based upon the price of copper on the London Metals Exchange (LME). Eligibility tied to bonus, which was not any part of the BLA. Eligibility: Off probation by the first day of the quarter; cannot be in layoff status (previously allowed if an employee had recall rights, but Respondent's proposal eliminates that). (Tr. 25:3781.) Attendance criteria: No absences 100%; if 2 or more absences in quarter, no bonus. (GC Exh. 326 at 3935.) Attendance criteria did not excuse union business (e.g., time off for negotiations, union audits,	Union did not discuss the union business related to attendance on copper price bonus. (Tr. 30:4671, 4679.)	

⁷³ Romero testified that the session was supposed to begin at 10 a.m. and for unknown reasons, switched to 1 p.m. (Tr. 25:3780.) Gonzales testified that the session was supposed to begin at 11 a.m. and did not recall whether Respondent gave any explanation for the change. (Tr. 26:4115–4116.) Armenta testified that the negotiations were to start at 11 a.m. and Respondent did not explain why it needed to change to 1 p.m. Nothing in the record indicates the Union asked why Respondent needed additional time. (Tr. 30:4660.)

⁷⁴ Armenta testified that Respondent had not reviewed UP-2 at all yet seems to admit Respondent was still going through it; Armenta's statements are implicitly contradictory. Union bargaining notes show Respondent was still reviewing. (Tr. 30:4660; GC Exh. 110 at 1.)

Issue	Respondent Proposal	Union comments/counter	Respondent response/counter
	conferences, etc.) (Tr. 40:4463-4464.)		
Attendance (GC Exh. 112 at 1-4.)	7 is maximum allowed absences and 8 is termination; cleanup of other language (GC Exhs. 110 at 1, 326 at 3935.)	Armenta wanted to leave in language to be able to grieve attendance.	

Although union witnesses testified that, under Respondent's copper price bonus proposal that union business leave excluded certain employees from receiving the copper price bonus, no one raised this issue during this negotiation session. (Tr. 25:3795-3798.) Armenta said he would examine Respondent's proposals and get back to them. Sinele proposed reconvening at 3 p.m. Respondent left at 1:20 p.m. The Union caucused during the break. However, the parties did not reconvene that day. Armenta did not explain to the Union negotiating team why they did not reconvene. (Tr. 9:1272-1273, 26:4118.)

In an email from Sinele to Armenta, at 6:06 p.m., Sinele advised that Respondent needed clarification on the UP-2's wage proposal and those included in the supplemental agreements. Respondent made an information request, due by April 1, about the integrated pay grades. (Tr. 9:1274 et seq; GC Exh. 113.) Much of Sinele's request was related to the Union's broad request for "substantial pay raises." Later the Union starts with \$8 per hour retroactive to December 1, 2019, and then more increases later. Sinele maintained Respondent needed the Union to clarify its position to get a complete and full wage proposal. Sinele also requested the Union's counterproposals for the drug and alcohol policy in writing, as the Union rejected Respondent's proposal and had given a verbal counter the day before. Lastly Sinele advised that Respondent could not continue negotiations that day and asked for additional dates.

F. Spring 2019 Scheduling, Information Requests and Negotiations

On April 11, 2019 Armenta proposed dates starting April 30—May 3, 2019. Sinele offered week of May 20, starting May 21. Sinele could not recall why Respondent was not available earlier. Armenta accepted these dates and Sinele notified him which hotel would host the negotiations. (Tr. 9:1340-1346; GC Exhs. 116, 116(a).)

During April 2019, the Union and Respondent exchanged information. Some of the information Respondent provided to the Union related to health insurance and how it was used over the years, such 36 months of dental claims, which were listed month by month for coverage and enrollment. (See e.g., Tr. 9:1335-1338; GC Exhs. 117-118.) On May 14, 2019, Sinele provided the Union with information for a number of the Union's pension and retirement income plan and COBRA questions that were provided from the third-party administrator, which Sinele pointed out that it was previously provided to the Union to its February 25, 2019 request. (GC Exhs. 119-119(e).)

May 21, 2019 negotiation session:

At 9:12 a.m., before the scheduled 10 a.m. meeting, Sinele sent the Union additional information from Respondent's third-party administrator for the years 2015-2018 sickness and

accident policies and anticipated cost savings for Respondent's proposal to freeze the pension; dental vision and medical rates. (Tr. 9:1365–1370; GC Exhs. 124, 124(a).)

The meeting started at 11:04 a.m. for the scheduled 11 a.m. meeting. (GC Exh. 120 at 1.) Armenta⁷⁵ requested that they wait for LaVenture, who arrived at 11:07 a.m. Armenta introduced two Steelworkers specialists in health and welfare, Katie Horrigan and Diane Pickle.

Armenta verbally rejected Respondent's copper price and attendance proposals. (GC Exhs. 120 at 1, 326 at 3937.) As the meeting opened, Sinele also provided red-lined copies of Respondent's proposal for the company's welfare plan proposal. (GC Exhs. 122 at 1–7, 125), and an offer to meet in subcommittee for the summary plan description. The deductibles and premiums were unchanged from Respondent's original position. It also included an additional provision under layoff, which benefited an employee on sickness and accident leave, and that dental and vision provisions would be included in the summary plan description. Sinele also stated Respondent would have a complete response to the proposal. (Tr. 9:1371–1375, 9:1424–1425; GC Exh. 326 at 3937.)

In the first session of the day, Armenta asked for the Respondent's complete response to UP-2 and Sinele offered to present it at 4 p.m. as Respondent had counter proposals. Armenta said he was disappointed that Respondent did not have it sooner and called them "unprofessional" and that Respondent was "too busy getting rid of people." (Tr. 9:1411, 1413; GC Exh. 326 at 3938.) Sinele said Respondent was busy with daily business and information requests.⁷⁶ Sinele said the entire summary plan description, except those controlled by law, was open for negotiation. (Tr. 9:1379.)

The parties broke at 11:19 a.m. and returned at 4:01 p.m. (scheduled for 4 p.m.)⁷⁷ Respondent rejected UP-2 but provided counter proposals for: bereavement leave; day pay supervisors; EEO; job opportunities (which included plant seniority issues); leadpersons (with the employer proposal to withdraw previous changes and return to original language); performance of work testing; PAC and SOAR⁷⁸ checkoff (return to original language except for the EEO section); political leave; probationary period; agreement on alternative work hours; workforce training; and, corporate governance. (GC Exhs. 120 at 3–5, 122 at 8–22.) Sinele testified that Respondent withdrew some of its prior proposals and kept the same language as the BLA as part of the give-and-take of bargaining. For example, Respondent withdrew its previous proposals on lead persons and PAC/SOAR and kept the language from the BLA, which was what the Union wanted. (Tr. 9:1433–1434, 1437–1438; GC Exh. 122 at 13–14.) Some of Respondent's withdrawals were without the Union requesting them but did so because of the "give and take" of bargaining.⁷⁹ Armenta made a comment that Grupo Mexico should be

⁷⁵ As with all bargaining sessions, Armenta reviewed notes taken by members of the Union bargaining committee (here, Romero and Gonzalez) before testifying to the events. (e.g., Tr. 30:4686, reviewing GC Exhs. 120–121.)

⁷⁶ Sinele testified this response was not about reviewing UP-2 but was about Armenta's comment that Respondent was busy getting rid of people. (Tr. 9:1415.)

⁷⁷ Supposedly Paulina Duck was in the negotiation session but nothing reflects that she spoke at the negotiating table. Union bargaining committee member Jondreau testified that a lady attorney from Grupo showed up for the negotiations, apparently in the late afternoon session. His notes do not reflect that she made any comments during the negotiations or what her role was. (Tr. 48:7179–7180; GC Exh. 179(d).)

⁷⁸ SOAR is the Steelworker Organization of Active Retirees. (Tr. 25:3806.)

⁷⁹ General Counsel questioned Sinele long and hard about why Respondent was willing to return to the contract language contained in the BLA. At hearing GC contended that without the Union making any proposals on these items but Respondent returning to the BLA was not reasonable give and take and was regressive. (Tr. 9:1445.) General Counsel also questioned Armenta whether Respondent explained

concerned about part of the EEO proposal, but Sinele did not know what he meant. (Tr. 9:1455.) Armenta said the Union would examine the proposals and get back to Respondent. The parties broke at 4:38 p.m., after bargaining at the table for 37 minutes. (Tr. 9:1462; GC Exh. 326 at 3937–3940.)

The parties returned at 5:55 p.m. The parties spent another 14 minutes at the bargaining table. Armenta, talking about the EEO language, required that veterans be included. The Union accepted most of Respondent's counterproposals and made a counteroffer on the probationary period. The parties also agreed to continue a 2011 memorandum of understanding (MOU) regarding Corporate Governance. Armenta stated that there had been some movement and hoped that they could continue so they could reach an agreement. Before the parties adjourned at 6:09 p.m., Sinele proposed to meet the following day at 1:30 p.m. Armenta proposed 10 a.m. but admitted he would have nothing ready for 10 a.m. Sinele stated Respondent would have something at 1:30 p.m., to which Armenta replied that they were prepared to work late. (Tr. 9:1469; GC Exhs. 120 at 6–8, 121 at 8, 326 at 3941.)⁸⁰ The meeting ended about 6:06 p.m.

May 22, 2019 bargaining session:

Negotiations started at 1:31 p.m.⁸¹ Sinele presented eight TAs from the previous day, which she said were signed and “cleaned up.” Armenta said he would review and then sign. He told Sinele to put each item's article number on the TA to compare to the BLA. Sinele said she would include the reference to the article number, but the formatting would be prepared later. (GC Exh. 326 at 3942.)

Sinele also presented some counterproposals, explaining what changed from Respondent's previous proposals. They did not indicate what the Union's proposals were. (Tr. 10:1497–1498.) The first Respondent counters were hours of work, reporting and call out pay,⁸² with withdrawals of Respondent's previous proposals and returning to the BLA language, which was the same as what the Union proposed in UP-2. (GC Exh. 128 at pp. 1–2.) Sinele considered this counterproposal as a “giveback” to the Union. (Tr. 10:1487.) The next Respondent counter proposal was Political Leave, which Respondent now agreed to leave as the BLA language in accordance with the Union's demand. (Id.; GC Exhs. 128 at 3, 326 at 3943.)

At about 1:50 p.m. Sinele presented Respondent's counterproposal on overtime, which largely kept the BLA language except for paying overtime for lunch; it also provided that an employee called out to work would be provided a lunch every 4 hours by the employer, instead of requiring the employee to provide his own lunch. (GC Exh. 128 at 4–5.) Respondent provided a proposal on probationary period that would be 13 weeks of actual work, instead of the first 480

these proposals, which it did not. The record and bargaining notes do not show that the Union ever asked for explanations either.

⁸⁰ Romero testified that Sinele provided no reason for wanting to meet at 1:30 p.m. instead of 10 a.m., which conflicts with his bargaining notes; I therefore credit the bargaining notes instead of his testimony. His testimony also did not show that the Union would have nothing to present at 10 a.m. (Tr. 25:3811; GC Exhs. 120 at 8–9, 132 at 1.)

⁸¹ Romero's notes reflect at start time of 2:22 p.m. but conflicts with Gonzalez, who testified to 1:30 p.m. (Tr. 26:4123; GC Exh. 127.) Respondent's notes show a start time of 1:31 p.m. (GC Exh. 326 at 3942.)

⁸² For reporting to work and call out pay, GC asked Armenta how much time was spent on that area, to which Armenta said, he did not know for that day and did not “have a timeframe of how long it took”, then appeared to guess that total time spent was “probably no more than 2 hours.” (Tr. 30:4728–2730.) Armenta testified similarly for other items Respondent presented that day about TAs. (See Tr. 31:4759: “They all took about the same time.”) I do not give credence to the estimate of total time because Armenta admittedly could not say how long it took.

hours actual work, which was the counter to the Union's proposal of 520 hours. (GC Exh. 128 at 6.) Respondent's vacation proposal eliminated the vacation bonus (no change from Respondent's previous proposal) and prorated vacation provisions and apparently reincluded the grievance provision. Respondent also made a proposal on the Workplace Problem Solving Committee. (GC Exh. 128 at 11–12.)

On Orientation, Respondent presented changes to limit the Union's presentation time to 20 minutes, eliminate the distribution (but not discussion) of the BLA and added other company policies and deleted that the costs would be borne by the company. Respondent would no longer give employees authorization cards to new employees, instead of what was included in the BLA. Sinele testified that Respondent not passing out authorization cards was cleanup because the company did not hold authorization cards. Armenta testified that Sinele did not give an explanation of why the union presentation time would be limited to 20 minutes, but the notes also do not show that Armenta or anyone from the Union requested any explanation either. (Tr. 10:1507-1510, 30:3736–3737; GC Exh. 128 at 13.) Armenta testified that he told Respondent that he would look at the proposals before saying no. (Tr. 30:4741.)

Armenta took 18 minutes away from the table to review the proposals. The parties reconvened at 2:30 p.m. Armenta was prepared to sign off on the TAs, plus political leave. (GC Exh. 126 at 4.) Armenta commented that he rejected for a third time, the previous day, Respondent's health care proposal to be included with the SPDs.

The Union then offered a health care proposal that also had vision and dental provisions. Diane Pickle, the USW benefits specialist in Strategic Campaigns, presented the Union's health care proposal. The proposal went through the Steelworkers' policies.

The Union said its plan gave Respondent \$1.3 million in savings, compared to Respondent's proposal with higher premiums and less favorable coverage for employees, who had no wage increase in years. Sinele said she certainly wanted to examine it. (GC Exh. 126 at 4-5.) Armenta said it would be hard to explain why the savings would be turned away. Sinele thanked them for the presentation and said Respondent would examine their proposal. Sinele asked whether the plan could be used for future non-Medicare enrollees. Pickle stated that the Union would need census data to calculate a response. Sinele asked further questions about the covered retirees. (Tr. 10:1514–1524; GC Exhs. 129, 326 at 3945–3946.) Respondent left the meeting room at 2:48 p.m. (GC Exh. 127 at 7; Tr. 26:4125.)

In early evening Sinele texted Armenta and proposed to start at 11 a.m. the following day, in order to spend time reviewing the Union's benefits proposal. The text does not reflect Armenta's response. (Tr. 10:1525; GC Exh. 131.)⁸³

May 23, 2019 bargaining session:

At about 10:13 a.m. Armenta advised the Union team that Respondent needed more time and wanted to meet at 11:30 a.m. because it likely would make a wage proposal that day. (GC Exh. 133 at 1.) The Union apparently accepted Respondent's proposal to start at 11 a.m. But at about 10:45 a.m., 15 minutes before the scheduled start time, Sinele texted and emailed Armenta that Respondent was working on their wage proposal but it would not be ready until

⁸³ Sinele could not recall Respondent's team for that day except for Cazeaux, Burmeister and herself. (Tr. 10:1482.) Armenta's testimony for this day relied upon Romero's notes and separately had little recall of any of this day's negotiations. Romero testified that negotiations were supposed to start at 10 a.m., then 1:30 p.m.; however, the previous day's notes reflect why negotiations were scheduled for 1:30 p.m. (Tr. 25:3821; GC Exh. 132 at 1.) Compare Tr. 25:3811; GC Exhs. 120 at 8–9.

that afternoon. (GC Exh. 135; R. Exh. 67.) Additionally, Respondent gave Pickle an information request, to which Pickle responded at 3:24 p.m., about the comparisons between the USW Health and Welfare Fund to the ASARCO Benefit Plan. (Tr. 10:1528–1531; GC Exh. 136.) Armenta stated that some union negotiators needed to leave at 5:30 p.m. (R. Exh. 67.)

The parties began negotiations at 2:23 p.m. after planning a 1:30 p.m. start time. Instead of Director LaVenture attending, Gaylan Prescott, an assistant to the director, attended for the Union. (Tr. 3822; GC Exh. 132 at 1.) Armenta provided the signed TAs for political leave, bereavement leave, EEO, interplant job opportunities, leadpersons, PAC and SOAR checkoff, payment for company mandated training, performance of work testing, and the workforce training program. (Tr. 10:1534–1537; GC Exh. 132 at 1.) Regarding the counterproposals that Respondent presented the previous day, the Union rejected vacations and overtime lunches and stayed with its proposal on probation at 520 hours. (Tr. 25:3823; GC Exh. 132 at 1–2.)

Respondent⁸⁴ then presented its wage proposal for skilled trade employees at all facilities, with increases for most of these positions. (Tr. 10:1538–1553; GC Exh. 134.) Sinele explained that, as they had stated throughout negotiations, the company had a hard time hiring and keeping skilled trade employees. Armenta asked if that was all Respondent had, and Sinele said “right now.” (Tr. 10: 1555; GC Exh. 326 at 3947.) Armenta, after venting, said that Respondent was trying to divide the workforce, which was not going to happen. He said the Union would look at it but was not excited. The parties broke at 2:36 p.m. The Union went into a caucus. (Tr. 26:4130, 31:4774–4776.)

Upon resumption at 3:12 p.m., Armenta called Respondent’s wage proposal “disgusting” and rejected it. He said that he wanted the company to seriously consider an increase for all employees and bargain in good faith, and that he could “get a fifth grader to do a better job in five minutes.” (GC Exh. 326 at 3948.)

Sinele asked whether the Union had a counterproposal, to which Armenta replied that the Union maintained its current proposal. Sinele asked whether the Union would have anything for the following day’s negotiations, and Armenta said they might. They agreed to a 10 a.m. start time. They broke at 3:15 p.m. Nothing indicates the Union wanted the Respondent team to stay longer to bargain. (Tr. 25:3826; GC Exhs. 132 at 2–3, 326 at 3948.) The union team stayed and discussed the wage proposal.

Friday, May 24 scheduled bargaining session (cancelled)

At about 10:37 a.m., Armenta texted Sinele that the Union would need more time. Sinele asked when Armenta thought the Union would be ready. He did not know. Sinele said that some of the team might have flight changes and asked whether the Union would have anything for that day. At 11:46 a.m. Armenta still did not know when the Union would be done, but he told Sinele to let “the legal people” go and provide dates for further negotiations. (GC Exh. 138.) Sinele later emailed Armenta that she would contact him the next week for dates. (GC Exh. 137.)

G. Negotiations Summer 2019

Scheduling the next sessions: On May 30, Armenta emailed Sinele about scheduling the next dates. Sinele offered full days on June 18 and 19, which Armenta accepted. (GC Exh. 139.) On May 31, Sinele sent the Union an information request about the Union’s May 22 healthcare

⁸⁴ Sinele testified that she and Trevino developed this wage proposal without Scott Cole; no one from Americans Mining Co. (e.g., Duck, Lazalde) was involved. (Tr. 10:1544–1545.)

proposal, which was necessary for Respondent to understand the workings of the multi-employer plan. (Tr. 10:1567–1568; GC Exh. 140.)

*June 18, 2019 bargaining session:*⁸⁵

Respondent arrived at 10:03 a.m. for the scheduled 10 a.m. meeting. Present with Sinele were attorneys Russo and Burmeister. The Union's chief spokespersons were Armenta and Attorney Jerry Barrett.

Sinele asked whether the Union had any proposals. Armenta said they did not: The Union already rejected Respondent's proposal. Armenta said that only a minimal number of proposals were TA'd and still had many items left; the parties spent a lot of time on items where the company went back to the BLA language. The parties briefly discussed contract coordinators with no agreement. Sinele commented that she was hoping the Union would have something for them that day. Respondent's team left at 10:19 a.m. and returned at 10:25 a.m. only to say they would be back after lunch. (GC Exh. 143 at 2.) At 12:45 p.m., the Union caucused on contracting out.

The Union (Pickle) sent Sinele the rest of requested information about the Union's healthcare proposal from May 22. (GC Exh. 144.) At 2:33 p.m., Sinele emailed Armenta that Respondent was working on proposals but needed the afternoon to continue to work on the proposals. At 2:40 p.m., Sinele suggested that they reconvene the following morning at 10 a.m. because Respondent was reviewing the information the Union sent on the Union's health insurance proposal. Armenta agreed. (GC Exhs. 143 at 3, 145, 178(e).)

June 19, 2019 bargaining session:

Although the parties were scheduled to begin at 10 a.m., Sinele's email asked to meet at 11 a.m. so that Respondent could finalize proposals. At 11:02 a.m., Sinele emailed to Armenta a comprehensive "responsive" proposal," which was 77 pages long. Sinele said it might be a while to get the hard copies and she suggested meeting at 1:30 p.m. (GC Exhs. 148, 149; R. Exh. 70.) Armenta suggested Respondent provide a couple of hard copies, which Respondent did. Armenta reviewed Respondent's proposal with the Union negotiating team and then excused them for lunch, telling the team to return by 1 p.m. (GC Exh. 147.)

At 1:37 p.m., Sinele notified Armenta that she had more printed copies for the union team. (R. Exh. 69.) Respondent's team arrived about 2:45 p.m.⁸⁶ Present with Respondent's team was attorney Duck. The Union was represented by LaVenture, Armenta, Attorney Barrett and Diane Pickle.

Sinele reviewed the proposal and answered Armenta's questions in less than an hour. Respondent presented this proposal as a package due to time constraints. If the Union rejected one provision, then it was a rejection of the entire proposal. (Tr. 10:1598, 1601–1602.) The healthcare proposal was provided the day before, so Respondent did not include the SPDs cited in Respondent's proposal. The Copper Price Bonus language included was unchanged from Respondent's proposal of March 28. The Pension Plan proposal was unchanged from

⁸⁵ GC Exh. 326 does not contain any notes for June 18 or 19.

⁸⁶ Gonzalez' notes show Respondent provided copies of its proposal at 2:45 p.m. and the team arrived at 2:55 p.m. (GC Exh. 147 at 1-2.) Jondreau's notes only show that Respondent showed up at 2:55 p.m., but do not reflect that exchanges between Respondent and the Union that delayed the face-to-face negotiations. (GC Exh. 178(f).)

Respondent February 27 proposal. The 401(k) language was unchanged from the BLA. The wage proposal was unchanged from Respondent's last proposal.

Regarding the civil rights committee. Armenta said that the proposal might violate the law.⁸⁷ They also discussed day pay supervisors, holidays, jury duty and witness service (Respondent accepted the union proposal), vacation, and printing contracts. While Respondent accepted the Union's counterproposal for the probationary period, the Union questioned specifically about Respondent's proposal to decrease seniority and a break in service after 12 months, instead of the BLA's 36 months. (GC Exh. 147 at 6–7.) They briefly discussed drug and alcohol testing methods.

Sinele asked whether the Union would have anything in response. Armenta said the Union rejected Respondent's proposal and said the Union would have a counterproposal. Respondent's team left at 4:01 p.m. The union team stayed to discuss the proposal. Nothing indicates the Union wanted to discuss anything further with Respondent.⁸⁸

Scheduling the next meetings: On June 19, 2019, after that day's meeting, Sinele emailed dates to Armenta and LaVenture for July 8 and the morning of July 9 in Tucson. Sinele wrote that Respondent would welcome proposals from the Union and that if the proposal was completed before the next meeting, to email it to her. Regarding the Union's request about the cost of printing the future agreement, Sinele referred the Union to information previously provided on November 28 and December 10, 2018. She also responded to Armenta's verbal request for the contractual source of its proposal on company rights from the Pinto Valley agreement. Armenta agreed to those dates. (Tr. 10:1616–1619; GC Exh. 150.)

On June 27, 2019, Armenta emailed Respondent an information request about worker's compensation, vacation bonus and prorated vacation, with a request to have the information provided before the July 8 meeting. On July 7, Sinele responded with specifics or noting when the information was previously provided; it included attachments on the vacation bonuses paid in year 2018 and 2019 to date and another was broken down by facility and month. (Tr. 10:1620–1626; GC Exhs. 151, 152, 152(a).)

July 8, 2019 bargaining session:

Respondent was represented by Sinele, Attorney Russo and Caseux. The Union was represented by LaVenture, Armenta, and Attorney Barrett. (Tr. 48:7195.) Respondent arrived at 10:07 a.m. instead of the scheduled 10 a.m. Armenta presented UP-3 (GC Exh. 155) and reviewed the proposal with Respondent. Much of the proposal cites "no change(s)." UP-3 followed the BLA format and included all tentatively agreed provisions. Armenta maintains that the entire proposal, not including the copper price bonus, would save Respondent \$15 million. The Union's proposal included some of these open items:

⁸⁷ General Counsel asked Armenta when Respondent provided the civil rights policies. Although Respondent had not provided them, Armenta also could not recall asking for them. (Tr. 31:48–5–4806.)

⁸⁸ Romero testified that his notes had no indication that Respondent intended to return. (Tr. 25:3839.)

Subject	Union presentation	Employer response	Counter?
Management Rights	No change		See language in next company proposal
Supplemental Unemployment Benefit	No change		
Wages	\$5/hour increase across-the-board		
Copper Price Bonus	Remove the bottom threshold and not tied to any absenteeism		
Health and Welfare	Incorporate the USW healthcare plan, as presented by Diane Pickle, with those lower than what Respondent proposed on 6/19/19		
401(k)	Left open		
MOU for Signing Bonus	Signing bonus to employees once agreement ratified and signed by International President; signing bonus on each anniversary date of signing		
Drug and Alcohol policy-random testing	Union agrees to Respondent's proposal	Accept at 3:17 p.m.	
Pension	No changes from BLA		
Day pay supervisor		Propose to TA Union proposal 3:17 p.m.	
Probationary employees	Keep at 520 hours	Propose to TA Union proposal at 3:17 p.m.	
Jury/witness duty		Propose to TA Union proposal at 3:17 p.m.	
Shift premiums		Propose to TA Union proposal (after above proposed TAs).	

(GC Exh. 326 at 3950–3951.)

- Sinele thanked Armenta for the proposal and said they needed time to review.
- 5 Respondent team left at 10:24 a.m. At 11:30 a.m., Armenta emailed Sinele about whether Respondent would return before noon or have a time to reconvene. Sinele replied that they were reviewing UP-3 and asked questions about jury duty/witness service proposals, including the reason for the proposed change in the language. Sinele advised Respondent was planning to work through lunch and would get back with them. At 3:17 p.m., Sinele also included 4
- 10 proposed TAs based upon UP-3 (above). She offered to meet with a response by 8 p.m. or start meeting in the morning at 8 a.m. Sinele later submitted another proposed TA (above). Armenta agreed to meet at 8 p.m. that night. (Tr. 10:1652–1662; GC Exh. 157.)

That night, Sinele sent Armenta an electronic copy of Respondent's comprehensive proposal in response to UP-3. As with Respondent's previous comprehensive proposal, it included all previously agreed-to TAs; any current BLA provision not included indicated that the BLA provision would remain unchanged. This time, however, Respondent did not state that rejection of any one proposal was a rejection of the entire package. (Tr. 10:1671; GC Exh. 156 at 2.) Sinele also stated that six copies were available at the hotel's front desk.

After Sinele emailed Respondent's latest proposal, at 8:03 p.m. Sinele and attorney Burmeister returned to the bargaining room where the Union negotiating team waited. They presented Armenta with 8 copies of Respondent's latest proposal. Respondent ran out of paper and apparently did not want to keep the Union waiting for more copies. Armenta did not forward the electronic copy of the company's proposal to the Union's bargaining committee. About 20 union bargaining committee members were present. Respondent previously brought enough copies for the entire committee.⁸⁹ Armenta told Respondent to "go buy some fuckin' paper."

Sinele later emailed Armenta and LaVenture that the company made another 25 copies, which were available at the front desk. Sinele stated, "We are very disappointed that you refused to discuss the Company's proposal at 8:00 tonight even though you had been provided with 6 hard copies and an electronic copy had been sent to you earlier" Sinele pointed out that each copy was 65 pages and the batch took over an hour to print. Respondent would be prepared to negotiate at 8 a.m. and someone from the Union could pick up copies at the front desk. In the future, Sinele stated, it would only provide the electronic copy and a few hard copies unless the Union could provide a "justifiable reason." Sinele also summarized a number of the changes in the company's proposal. (GC Exhs. 154, 158.)⁹⁰

Armenta emailed back to Sinele that the Union objected to the position on providing copies in the future and said, "You can bring your proposal at 8:00 a.m. tomorrow and go through it with whole committee it's your proposal." (GC Exhs. 154, 158.)⁹¹

July 9, 2019 bargaining session:

The parties began at 8:10 a.m. after a scheduled 8 a.m. start time without any pleasantries between the parties. Armenta screamed at Respondent about not bringing hard copies of Respondent's proposal for the entire union bargaining committee and that they were not negotiating electronically. Sinele said they had copies and were not playing a game. The Union's local attorney asked why Respondent did not have copies. Armenta told Sinele to go get the copies from the front desk and "It's your fuckin' proposal, you should have brought it in."⁹² (GC Exhs. 160 at 2, 326 at 3952.)

Respondent returned with copies at 8:24 a.m. Once the copies were retrieved for the Union, LaVenture said that the issues were really economics; the Union would work to get an

⁸⁹ Gonzalez testified that all union bargaining committee members carried cell phones. (Tr. 27:4261.)

⁹⁰ General Counsel questioned Sinele about not meeting that night after Respondent sent its latest proposal and then made additional copies. That email was sent at 9:18 p.m. when the remainder of the copies were made, plus Armenta had told Respondent to get out of the meeting room. Sinele testified it was to ease animosity. In addition, Armenta's response did not demand to continue bargaining that night. (Tr. 11:1713; GC Exh. 158.) Given that the copies were left for the Union and Sinele gave the Union an opportunity to review the proposal overnight, the explanation is reasonable.

⁹¹ Romero testified that the union committee left at 9:18 p.m. because it was waiting for Respondent, but upon further questioning he admitted he did not have a definite recollection. (Tr. 25:3849.)

⁹² A number of the Union's bargaining committee members had laptops and email access.

agreement, but “you have a horrible boss in Grupo” that thinks it “can instill their way of doing business. . . .” (GC Exh. 326 at 3952.)

5 Respondent’s latest proposal included some changes that showed movement towards the Union’s positions and others where Respondent stood pat. (GC Exhs. 156, 158.) Armenta told Sinele to review the changes made since June 19, the most significant listed below (GC Exh. 326 at 3952.) The proposal was presented as comprehensive, but not a package. (Tr. 32:4907.)

10 After Sinele reviewed, at 8:57 a.m., Armenta instructed the Respondent team to leave to give the Union time to review the proposal Respondent returned at 9:55 a.m., at which time the Union reviewed. Some of the discussions are listed in the table below. (Tr.48:7205; GC Exhs. 159 at 4, 178(h).)

Subject	Employer Proposal	Union Response	Counter?
Civil Rights Committee	Most of language as in BLA, except open on training and continue to propose 180-day complaint times	Said not giving counter but change back to BLA language.	
Leave of Absence for USERRA provision and (separate) FLMA provision	Add language clarifying that any violation also grievable	Change on USERRA does not cover Union concerns and the company policy did not talk about training, returning to work, or disability. Wants reconsideration on language for both.	
New Employee Orientation (GC Exh. 156 at 19); also see Dues Deduction	No change from BLA except addition of the Union “time to advise employees regarding execution of authorization cards”. Give new employee an electronic copy of BLA and supplemental instead of hard copy.	TA	
Overtime	Removed strike out of language giving employees time to eat if waive lunch	Reject	
Wages (GC Exh. 156 at 37 et seq.)	Unchanged from company’s previous proposal (no change in response to UP-3).	Union position is that Respondent cannot hire enough personnel throughout the plant. Company’s position is that hard to hire mechanics, electricians, etc. Union rejects.	
Health, Prescription Drug and Vision	No change from company’s previous proposal (no change in response to UP-	No mention of the USW plan with savings of \$1 million? Pickle is willing	Sinele says currently rejected but

Benefits (GC Exh. 156 at 46 et seq.)	3) Respondent is seeking cost saving, and flexibility in future. (GC Exh. 326 at 3953.)	to answer questions and employee have claim service dissatisfaction.	continuing to review information.
Management Rights (GC Exh. 156 at 3)	Paragraph that includes "all matters related to Company and its operations are exclusively within the jurisdiction and control of the Company, except those matters relating to wage rates, hours and other employment conditions that are specifically set forth elsewhere in this Agreement." Next paragraph defines company rights and management functions, including previous items from BLA, but deletes provision of "first providing advance notice to the Union and bargaining either to agreement or impasse." Still includes language from BLA that Company not permitted to act inconsistently with this agreement	No discussion	
Copper Price Bonus (with attendance criteria attached) (GC Exh. 156 at 47-48)	Attendance requirement excludes a number of absences but not specific to union business. ⁹³ Attendance Factors changed to be more favorable to employees--- e.g., for average copper price at \$3.10, with 1.5 to 2 absences in a quarter-- in previous proposal employee would receive \$350, but in new proposal \$420.	Reject as part of whole; no discussion	
Sickness and Accident Plan (S&A)	Per GC Exh. 158, remove S&A from wrap document; insert language for		

⁹³ Sinele testified that some union business might disqualify for the bonus, depending on how coded but this was her testimony and was not raised in negotiations.

	separate plan; revert to specifying 15 days		
401(k) (GC Exh. 156 at 50)	Company's proposal unchanged- no change in response to UP-3		
Union Security		TA	
Printing Contracts	Split cost 50/50	Union "leery" of language	No counter
Manning of new facilities	Removal of certain language		

Except for the two above marked "TA," the Union rejected the remainder of Respondent's proposal but would continue to review.

- 5 Other proposals were signed for TA: Joint Efforts; Day Pay Supervisors; Jury Duty/Witness Service; Probation Period; Shift Premium; and Alcohol and Drug Abuse Policy (including testing protocols). (GC Exhs. 161, 162.)

- 10 Regarding the next meeting dates, Armenta suggested that they meet for 4 or 5 days straight, because they "don't want to sit on our asses." Respondent left the meeting room at 10:11 a.m. (GC Exhs. 149 at 5, 326 at 3954–3955.) At 10:46 a.m., Armenta emailed Sinele that Union had nothing further that day and asked again for a block of bargaining dates. (GC Exh. 163.)

- 15 *On July 10*, Sinele emailed the next available dates as August 6–8 all day and possibly the morning of August 9. (GC Exh. 163.)

- 20 *On July 12*, the Union made 16 information requests in the following areas: workers' compensation; prorated vacation (with some re-requests for updated information); leave of absences for uniformed services; compensation for improper layoff or recall; copper price bonuses, including for each of the four previous quarters the number of individuals who would have been affected by Respondent's absenteeism proposal; and supplemental unemployment benefits. (Tr. 11:1763–1766; GC Exh. 164.)

- 25 *August 6 and 7, 2019 bargaining sessions:*

- 30 *On August 6*, negotiations began at 10:05 a.m. in Phoenix. The Union presented a new package proposal (UP-3), which added Veteran's Day on holidays if Respondent withdrew their proposal on Civil Rights, FMLA, Leave of Absence and Contract Coordinators. (GC Exh. 168.) At 10:11 a.m. Respondent withdrew from the meeting room to consider the Union proposal. The union team reviewed proposals until Armenta allowed the team to break, and told them to return at 1:45 p.m. (Tr. 26:4149; GC Exh. 166.)

- 35 Respondent requested a sidebar meeting. At about 12:50 p.m., in the hotel lobby, the attorneys for both parties, with lead negotiators present, had discussions about contract coordinators, which Respondent wanted to eliminate. (Tr. 11:1780—1783.) About 5:20 p.m. Respondent rejected UP-3 and provided the Union with a new comprehensive proposal, which countered some of the Union's proposals.⁹⁴ The preface to the proposal stated that any Union proposal to change the BLA that was not included in the proposal would be considered a

⁹⁴ This time Sinele, by email, asked Armenta for the number of copies Union wanted printed. (GC Exh. 169.)

rejection. It included all TAs but not possible “non-material revisions” that might arise from formatting or structural changes. (GC Exh. 167 at 1.)

Respondent’s comprehensive proposal included:

5

Subject	Respondent Proposal	Union Response⁹⁵	Respondent Counter on 8/7/24
Management Rights	Unchanged from previous Respondent proposal (GC Exh. 167 at 2.)		
Civil Rights Committee	Change language from “may” instead of would; leave additional language about 180 days. ⁹⁶ Took strike-through off of “if true” (leaving in “if true” was acceptance of union language) (GC Exh. 167 at 9.)	Union rejected on 8/7, wants wording from BLA to stay in.	Back to original language
Holidays (GC Exh. 167 at 11.)	Language in 2b—go back to BLA language. Sinele explains that employee who calls in before or after holiday for good reason (e.g., family illness or personal illness) with documentation will be paid for the holiday; otherwise would not be paid, shown as strikethrough of previously underlined language. (Tr. 11:1802-1805.)	Reject, maintain Union proposal on 8/7.	
Leave of Absence for Employment with Union (GC Exh. 167 at 13.)	Maintained language from prior proposal probationary period; withdrew other changes back to BLA language	Even with corrections, Union rejects on 8/7.	

⁹⁵ The Union’s response took place on August 7, 2019, at the beginning of that negotiation session. (GC Exh. 326 at 3959–3960.)

⁹⁶ Sinele testified that the 180 days was the requirement for filing with the Arizona Human Rights Commission. (Tr. 11:1767.)

Subject	Respondent Proposal	Union Response⁹⁵	Respondent Counter on 8/7/24
Paid Time Off – Vacations (GC Exh. 167 at 19, 22.)	On 22, maintained deletion of pro-rated vacation. On 21, added vacation for employees retired, discharged or die (Tr. 11:1807-1808.)	Reject Respondent proposal and maintain BLA language on 8/7; does not cover vacation bonus.	
Workplace Harassment, Awareness and Prevention (GC Exh. 167 at 29.)	Struck out portion of “in accordance with standard local plant understandings” in Item 3 about: All employees shall be compensated for time spent in training, deleting variance between local plants. (Tr. 11:1808-1810.)	Different local sites have different training for different operations, leave as is, as of 8/7.	Respondent will consider.
Wages (GC Exh. 167 at 34.)	No changes from Respondent’s previous proposal after considering UP-3 (Tr. 11:1810-1811.)		
Benefits (GC Exh. 167 at 40 et seq.)	Employee Assistance (EAP) Benefits refers to Welfare Plan “set forth in applicable SPD agreed to by the Company and Union.” (GC Exh. 167 at 44.) Respondent intends for it to be covered in the ASARCO LLC Union Benefit Plan (one ERISA plan). Accidental Death and Dismemberment: Sinele thinks it was previously agreed to additional life insurance benefit of \$4500 for 30 years seniority or 10 years with permanent and total disability with receipt of Social Security disability benefits. Prescription, drug and vision	Union response on 8/7: Received Respondent’s SPD on EAP (GC Exh. 174) that morning, which Pickle explained to the Union bargaining committee. Still no answer from Respondent on why it rejects the UAW plan presented by Pickle. Armenta turned the presentation over to Pickle: Pickle points out that total maximum for 2019 and 2020 out-of-pocket expenses were not compliant with the Affordable Care Act (ACA), so the Union could not consider this proposal. An open	On 8/7, Based upon Pickle pointing out noncompliance with ACA, Respondent made correction and handed out corrected table to Union. Respondent changed the maximum in-network out-of-pocket for individual at \$3000, (for family \$400 in Romano’s notes, GC Exh. 171 at 3.; but Respondent’s notes is \$1000 for out-of-network GC Exh. 326 at 3960.) In early afternoon, Respondent provided the Union with the requested SPD for EAP. (GC Exh. 174.)

Subject	Respondent Proposal	Union Response⁹⁵	Respondent Counter on 8/7/24
	benefits unchanged. (Tr. 11:1812-1816.) Respondent rejected the Union's proposal on benefits. (Tr. 322:4873, citing GC Exh. 160 at 4.)	enrollment would be best to see response.	
Copper Price Bonus	London Metal Market Price in first row decreased from \$3.10 to \$3.00 (increased the first range for receiving the bonus---the lower price on the Metal Market means that Respondent decreased the point when employees could have the bonus) but still dependent on the absenteeism	As of 8/7, the Union rejects because company proposal still has attendance requirement attached. (Tr. 32:4932.) ⁹⁷ Sinele does not recall any discussion of approved absences and union business. (Tr. 11:1871.) No specific objection to attendance noted in GC Exh. 171 (Romero).	
ASARCO LLC 401(k) and Pension Plan Proposal (GC Exh. 167 at 47.)	Corrected error from previous proposal; otherwise unchanged.	As of 8/7, Union rejects but will have a counterproposal.	
Manning of New Facilities (GC Exh. 156 at 58.)	Deleted references to BLA sections. Delete provisions about plant service. Delete section about local parties meeting to seek agreement on standards to be used to determine qualifications for jobs and subsequent related section.		
Contract Coordinator	Still deleted		
Successorship	Still deleted		

⁹⁷ GC adduced testimony from Armenta that the Union objected to the attendance criteria, partially because union business was not excluded and therefore would cause penalization for those employees out for union business. Armenta first testified generally that people who took time off would get penalized and then added that people on the bargaining committee would be penalized. Armenta later admitted that he did not bring up union business that day and that the Union never asked for a reason why union business would not be an excused absence for the copper price bonus. (Tr. 32:4931–4938.) Later Armenta testified that those discussions were “very brief.” (Tr. 32: 4961.) Considering that none of the bargaining notes corroborate this testimony, I discredit that the Union specifically raised Union Business in the absenteeism section or in response to the Copper Price Bonus proposals.

Subject	Respondent Proposal	Union Response ⁹⁵	Respondent Counter on 8/7/24
Neutrality	Still deleted		
Supplemental Unemployment Benefits	Still deleted		
Signing Bonus	Still deleted		

After Sinele finished her presentation of Respondent's latest proposal, Armenta met with the union committee for about 12 minutes. The Union then offered Respondent that it would drop its proposal on supplemental unemployment benefits if Respondent dropped theirs. Pickle also reminded that the Union had not been provided the SPD for the EAP proposal. Sinele also clarified Respondent's proposal of hours of work. The parties also scheduled to meet the next morning at 11 a.m. and left at 5:54 p.m. The Union did not offer any other proposals or request to bargain longer. (Tr. 11:1835–1838; GC Exh. 326 at 3957–3958.)

For the August 7 session the parties again met in Phoenix. Although supposed to be present at 9 a.m., Respondent's team arrived at 11:15 a.m. Armenta provided three signed TAs, which reverted to BLA language: hours of work; hiring consideration; and indefinite shutdowns. (Tr. 11:1851–1852; GC Exhs. 172, 173, 326 at 3959.) The Union responded to Respondent's most recent proposal, as shown in the above table. Pickle had raised an issue about Respondent's health insurance plan that might not be compliant with the Affordable Care Act; Sinele notified Armenta at 12:41 p.m. that they were looking into the issue and suggested the parties break for lunch. Respondent confirmed that the Union was correct and adjusted the proposal to ensure compliance (Tr. 64:9684–9686; R. Exh. 71–72.) Before the break, Sinele stated Respondent rejected UP-3. (GC Exh. 326 at 3960.)

At about 4:15 p.m., Respondent brought back the revisions to the area of the health and welfare proposal (Tr. 65:9755; R. Exh. 72) and a possible TA on Civil Rights. The Union then gave another package proposal, which was one page and Armenta said was self-explanatory: The Union proposed to withdraw its demands on a signing bonus (MOU) if Respondent withdrew the elimination of the contractor coordinator positions, overtime, vacation and seniority provisions.

Armenta then said they would get together in the morning. Armenta said, "It's very unprofessional to say you'll meet and haven't even met for an hour," sit on your ass all day and come back with unsubstantial proposals; you're not here." Sinele refuted, said Respondent was there, and the Union had 3 hours in the morning and did not want to start that. Union attorney Barrett said, "We were here; you're supposed to have authority; and you don't make decisions." Respondent attorney Burmeister said, "I think part of the issue is we try to give comprehensive proposals; you give one sheet; and you haven't answered anything." The arguments about the amount of time spent meeting continued until the parties adjourned at 4:35 p.m. (GC Exh. 326 at 3951–3962.) Respondent left the meeting room at 4:36 p.m. and no further negotiations occurred on August 7, with an agreement to meet the following day at 9:30 a.m. (GC Exh. 171 at 5.)

August 8, 2019 bargaining session:

The bargaining session began at 9:38 a.m., although scheduled start time was 9:30 a.m. Sinele asked whether Armenta received some possible TAs. Armenta said he reviewed them but had not signed them yet. Sinele said Respondent rejected the Union's package proposal. (GC Exh. 326 at 3963.)

Respondent also responded to the Union's "generalization" the day before about amount of meeting. Sinele said they were frustrated with lack of union proposals; they were there to talk "today" about anything the Union wanted to propose or talk about other than the TAs. Armenta asked if Respondent had any further proposals. Sinele did not. Armenta asked for more from Respondent. Sinele said they were waiting to hear about the TAs. Armenta asked if there was anything for later that day. Sinele said they were there to bargain, if the Union wanted a dialogue. Armenta said the ball was in Respondent's court because the Union rejected Respondent's proposal.⁹⁸ Armenta demanded to know whether Respondent would have anything later that day. Attorney Burmeister said there was nothing further for that day. Armenta said, "It's pretty fucking unprofessional, meeting for 5 minutes, bring us here and have nothing else, that's bullshit." (GC Exh. 326 at 3963.)

Burmeister replied, "Oh we are pretty close to where we are going to be," followed by Sinele saying "We are here all day to meet." Armenta asked if Respondent had anything else that day. Burmeister said, "Not our plan, we'll look at this, but we have met approximately 40 times." Armenta demanded that Respondent go back and text in 30 minutes whether it had anything else that day. Respondent's team left at 9:46 a.m. At 10:45 a.m., Respondent notified the Union that it would have a last, best and final offer (LBFO) for negotiations on September 5. (Tr. 12:1903 et seq.; GC Exhs.176 at 2, 326 at 3963–3964.)

Armenta said Respondent's announcement of an upcoming LBFO was an unexpected development. According to Armenta, the Union still had plenty to discuss about the economic package and items that Respondent crossed out of the contract proposals, and only short periods of time were spent on discussing the economic subjects. (Tr. 32:4960–4967.) Yet, up to this point, nothing in the record reflects that the Union requested more time to discuss the proposals, or asked specific questions without Respondent answering, or that Respondent foreclosed any discussions.⁹⁹

The Union Immediately Makes More Information Requests; the Parties Plan for More Meetings

After negotiations concluded for August 8, Union Director LaVenture sent an information request on six items on health care to "evaluate Company's Update to Health and Welfare Proposal, dated August 7, 2019" The items were:

1. Updated claims for calendar year 2018 and year-to-date 2019 with corresponding enrollment for medical/prescription drug, dental and vision coverage.
2. A report of high dollar medical/prescription drug claims (claims above \$25,000) for calendar year 2018 and year-to-date 2019.
3. A report of the 2020 COBRA rates/premiums equivalents for medical/prescription, dental and vision coverage.
4. A copy of the 2020 renewal calculation used to develop COBRA rates/premium equivalents that include a detailed description of the components included in the renewal calculation for medical/prescription, dental and vision coverage.
5. A comprehensive report of the cost savings expected from the medical plan changes proposal in the Company Update to Health and Welfare Proposal, dated August 7, 2019. Please provide a separate cost savings estimate for each proposed plan design change (i.e., deductible, coinsurance, out-of-pocket maximum, copayment),

⁹⁸ This statement was not correct as the meeting began with Respondent rejecting the Union's proposal.

⁹⁹ In instances when the Union berated Respondent's proposals, Sinele usually responded, "That's our proposal."

including separate estimates for the proposed in-network and out-of-network changes where applicable.

6. A copy of any materials prepared for the upcoming 2020 open enrollment period.

5 (Tr. 12:1935–1937; GC Exh.179.)

Also on *August 8*, the Union made another information request, labeled “third request,” regarding prorated vacation, and “second request” leaves for uniformed services, compensation for improper layoff or recall, copper price bonus, and supplemental employment benefits. (Tr. 10 12:1938–1942; GC Exh. 180.)¹⁰⁰ On August 12, Sinele sent to LaVenture and Armenta’s the response to this request. (GC Exh. 182.)

At 11:19 a.m., (date uncertain but before 9/5/19) Sinele texted Armenta to schedule a meeting on *September 5* to present Respondent’s last, best and final offer (LBFO).
15 Respondent’s negotiating¹⁰¹ team approved the LBFO. Sinele testified that Respondent was giving the LBFO when the big issues, such as wages, copper price bonus, pension and healthcare, were open and she had completed her review of the Union’s healthcare proposal. Sinele further testified that the Respondent rejected the Union’s healthcare proposal because it was not flexible and the savings were not clearly defined when there was no guarantee that the
20 premiums would remain the same. (GC Exh. 181; Tr. 1925–1931.)

On *September 3*, Sinele offered Respondent’s availability to bargain at 1:30 p.m. on September 5. (GC Exh. 183.) On *September 4*, Respondent provided SPDs for the health and vision plan, the pension plan and retirement income plan, and 401(k) plan with its SPD. The
25 SPDs conformed with Respondent’s LBFO and had red-lined versions for the Union’s review. (Tr. 13:1971–1977; GC Exhs. 184, 185.)

H. September—October 2019 Negotiations

30 *September 5, 2019 bargaining session: Respondent presents its Last, Best and Final Offer*

Although scheduled to begin at 1:30 p.m., at 1:20 p.m. Armenta texted Sinele that the Union would not be ready for Respondent until 1:45 p.m. Respondent arrived at 1:32 p.m., at which time Respondent found that the Union needed 15 more minutes. (GC Exh. 188 at 1; R.
35 Exh. 73.)¹⁰² Respondent arrived at 1:57 p.m. and promptly passed out its Last, Best, and Final Offer (LBFO) to all union bargaining committee members. (Tr.13:1985; GC Exhs. 188 at 1, 326 at 3965.) The LBFO itself was 55 pages, including red lines and underlines. (GC Exh. 190.) Respondent presented the LBFO with a four-page summary explaining the LBFO’s contents, why Respondent moved to presenting the LBFO, some definitions and descriptions and
40 summarizing.

Respondent first reviewed the bargaining history: They met for over a year, and over 40 times in the “big table” and subcommittee sessions; they reached tentative agreements on a number of proposals; the company made compromises and concessions to try to reach a

¹⁰⁰ This request is not pled in the Complaint. (Tr. 12:1938.)

¹⁰¹ The team consisted of Sinele, Trevino, Cole, and Cazeaux. Sinele and Trevino made the final approval. (Tr. 12:1931–1932.)

¹⁰² Armenta testified that Respondent was late and gave no explanation why it arrived at 1:57 (Tr. 32:4984). Union bargaining notes state otherwise, so the bargaining notes are credited over Armenta’s testimony.

successor BLA; Respondent has in good faith exhausted the process;¹⁰³ the LBFO contains everything the company was willing to make; the TAs are not incorporated in the LBFO but are part of the proposal, including those verbally TA'd in August (Civil Rights Committee and Workplace Harassment Training); any BLA provisions not addressed in the LBFO are
 5 “substantively” unchanged and any Union proposal not specifically incorporated is a rejection of such proposal. Before getting to the Open Items, Respondent made clear:

While we are willing to answer questions about our LBFO proposal, we are
 10 unwilling to move any further. We ask the Union to give careful and favorable consideration to this offer.

(Tr. 25:3885–3887; GC Exhs. 187 at 1, 189.)

Sinele testified that Respondent would review any further proposal from the Union,
 15 answer questions, consider what was being presented and determine whether to reject the Union's proposal. (Tr. 13:2003–2004.)

The handout listed the open items, which are listed in the table below with Respondent's explanations. After Sinele gave her review of the open items, Director LaVenture and Assistant
 20 Director Armenta used aggressive tones towards Sinele, who remained in her normal tone of voice. (Tr. 26:4164–4165.) LaVenture made some accusations and said Sinele was full of shit. Sinele said, “I guess we are done.” Armenta said they were not done. Sinele said, “We're here to answer questions, not here to be told I'm full of shit.” Armenta said they were not done, Respondent still owed answers on an information request and the Union needed time to
 25 examine the “so called” best and final and “maybe” make a counterproposal. The parties broke at 2:20 p.m. after Armenta said the Union needed an hour. (GC Exhs. 188 at 3, 326 at 3966.)¹⁰⁴

At 3:28 p.m., Armenta advised Sinele that the Union was ready for Respondent's return.
 30 R. Exh. 73.) The parties reconvened at 3:40 p.m. The Union said it was not agreeing to the LBFO but needed clarifications. (GC Exh. 326 at 3967.) The Union's comments and questions are listed in the table below. Armenta told Respondent that that was all the clarification he needed for now and the Union was still working on its review; the Union would get back with them later that day. Respondent's team left at 3:49 p.m. (GC Exh. 188 at 5.) At 3:54 p.m., Sinele emailed a response to the Union's August 8 information request, answering questions
 35 about cost savings from the company's updates on Respondent's August 7 health and welfare proposals (item 5), and that other information would be “forthcoming.” (Tr. 13:2088–2089; GC Exh. 191.)

At 5:20 p.m., Armenta notified Respondent that it needed more time to review the LBFO
 40 proposal. (GC Exh. 188 at 6.) Respondent returned to the meeting room at 6:16 p.m. after notification from the Union. (GC Exh. 188 at 6; R. Exh. 73.) Upon return, the Union's specialist, Katie Horrigan, had further questions, which are reflected in the table below. At the conclusion of the discussion the Union reserved the right to ask more questions or ask for further clarification. Armenta said the Union was not ready to give a counterproposal yet and he was
 45 not available Monday through Thursday of the following week. Sinele said she would get back to

¹⁰³ Armenta testified that he did not ask Sinele what she meant when she said they exhausted the bargaining process, but instead told her he did not think they had exhausted the bargaining process. (Tr. 32:4987.)

¹⁰⁴ Romero's notes do not reflect all of La Venture's accusations towards Sinele or that LaVenture said she was full of shit but did include Sinele's remark about being done. See GC Exh. 187 at 1–2. I credit the more detailed version in GC Exh. 326, which gives the more logical explanation of why Sinele had such a reaction.

Armenta with more dates. The parties broke at 6:29 p.m. with plans to discuss future bargaining dates by email. The Union did not ask for more bargaining that day. (GC Exhs. 188 at 7, 326 at 3969.)

Subject	Respondent Proposal	Union Response and Respondent Answers
Management Rights	Withdrawing proposal to delete language about prior notice and opportunity to bargain to impasse regarding safety, work rules and other rules	
Absentee control	Employee gets clean slate on effective date of agreement Instead of 11 maximum total absences in 12-month period to warrant termination, is >7. Employee with 6 absences gets counseling. Employee gets notification of pending absences for termination and provide U with copy. A single tardy is ½ day absence; instead of BLA of 2 tardies is 1 absence; leave early (with certain exceptions) is ½ day absence. If >7 absences in rolling 12 months, still has hearing before termination to review record. (no change from previous proposal)	
Alternative Work Schedules	No pay in lieu of lunch Otherwise no substantive changes in languages except cleanup (same as previous proposal)	Union asks whether Respondent intends to remove 2 ½ times on wages for a holiday and asks if it removes premium pay; Sinele says not intent. Union asks about FMLA vacation coordination—Sinele says company not intending to require employee to use vacation time first in FMLA and no intent to change their practice. (GC Exh. 326 at 3968.) ¹⁰⁵

¹⁰⁵ Armenta's testimony here about problems required referral to the proposal at GC Exh. 190, then said the Union's problem was "I think about eliminating double time or something like that." He next testified that she said, "There's no intent" and did not explain her answer. (Tr. 32:5014–5015.) The bargaining notes do not reflect that Armenta asked for any explanation and because Armenta was not specific about the issue, I do not credit this testimony.

Subject	Respondent Proposal	Union Response and Respondent Answers
Leaves of Absences for Employment with Union	No benefits while serving probationary period with Union. Continue to provide for leave of absence, including accumulation of seniority. (no change from previous proposal)	
Leave of Absence for Service with Uniformed Services	Provide leave of absence in accordance with applicable law and/or company policy (no change from previous proposal) Clarify this provision is grievable	
FMLA	Provide leave of absence in accordance with applicable law and/or company policy (no change from previous proposal) Sinele testified it was subject to the grievance procedure (Tr. 13:2096.)	Union asked about correlation between vacation and FMLA.
Overtime	Eliminate \$10 payment for waiving overtime lunch (no change from previous proposal) Provide lunch every 4 hours to employees called out for work (no change from previous proposal) Rest of proposal same as BLA	Union asks how many people would be affected when employees select lunch rather than pay; Sinele says that information has been provided and can double check. (GC Exh. 326 at 2968.)
Vacation	Eliminate vacation bonus Eliminate prorated vacation for death/retirement, but instead employees receive same vacation pay as employees who have resigned or discharged Rest of language same as BLA (No change from previous proposal)	
Printing Contracts	Print hard copies, but costs shared equally by Union and Company. Eliminate requirement to distribute hard copies within 3 months and requirement to	

Subject	Respondent Proposal	Union Response and Respondent Answers
	obtain bid from Union printer. Continue to provide Union with electronic copies of BLA. (No change from previous proposal)	
Seniority	Seniority broken for employees who have not worked for more than 12 months. (BLA language was 3 years) Maintain 7-day period for reductions in force without regard to seniority. Remainder of language same as BLA.	Union asks “what is informing this”: Sinele says if person is out on leave, the first 12 months the employee receives a wage supplement through S&A (sickness and accident); The BLA allows someone to continue to accrue seniority through 36 months but the cost of benefits etc. is not efficient to continue, so the proposal is to break benefits and separate employment after 12 months. (GC Exh. 326 at 3969.)
Workplace Problem-Solving Committee	Consolidate both sections of committee. Specify that each location may have workplace problem-solving committee (BLA language mandated each site have committee, but no change from Company’s most recent proposal)	Union wants to understand deletion. Sinele said there was overlap in committees, and what might work at one site would be different than another. Response from Union “work will be performed by employees and want to emphasize.”. (GC Exh. 326 at 3969.)
Term of Agreement	4 years, beginning effective date of agreement	
Wages	Skilled trade employees receive increases based upon job titles per table for each facility. Other employees continue with wages as in BLA. Changes were bolded (instead of underlined), plus new classifications e.g., welders second class, added and in bold as well. The only decreases from the previous proposal were at Hayden Smelter, for mason and mechanics in years two and three, and now “adjusted.” (Tr. 13:2034-2035; GC Exh. 190 at 31.) Other remaining changes were increases. Those marked with “RC” were “red circled,” meaning those already in positions	Armenta demands some clarifications. Re plant repairman first class red circled-current rate is 22.59, effective date is 23.10 but first class is 22.75. Union asks: Some locations listing wages for positions that do not exist? Sinele says the jobs are in the system; Armenta says should be working based on local supplement. Armenta sees decrease for mason and mechanic positions; Sinele explains it was an adjustment; Armenta calls it regressive bargaining and accuses Sinele of not explaining that; Sinele says she is explaining now, but Armenta again calls regressive. (GC Exh. 326 at 3967.)

Subject	Respondent Proposal	Union Response and Respondent Answers
	were grandfathered to their current rates and new employees to that classification would see lower wages to start. ¹⁰⁶	
Welfare Benefits	Maintain separate welfare plans; no single consolidated plan; see SPDs for specifics Premiums and monthly rates: Employee only \$83.76 Employee plus spouse \$217.77 Employee and child \$167.51 Employee plus family \$376.91 Maintain “covered retirees” to age 65, as in 9/21/17 MOU.	
Copper Price Bonus	Previous proposal had floor price of copper at \$3.00; now decreased to \$2.90 but no rounding up from \$2.899 (more favorable to the employees than Respondent’s previous proposal) Still tied to absences, receive: 100% for 0 absences 66.67% for 0.5 to 1 absence 33.33% for 1.5 to 2 absences >2 absences, no bonus	
401(k)	Clarify all employees are automatically enrolled with 3% default after completion of 1 month service ¹⁰⁷	
Pension Plan	Hard freeze and eliminate local parties’ requirements on qualifications (as per previous proposals)	
Manning of New Facilities	Remove reference to plant service	

¹⁰⁶ For an explanation of use of red circling employees’ pay, see Tr. 13:2031–2033.

¹⁰⁷ Respondent never proposed any change to its matching contributions. (Tr. 13. 2049.)

Subject	Respondent Proposal	Union Response and Respondent Answers
	Elimination of local parties' requirements on qualification	
Contract Coordinators	Eliminate provision (no change from previous proposals). This eliminated 3 positions.	
Successorship	Eliminate provision (no change from previous proposals)	
Neutrality	Eliminate provision (no change from previous proposals)	
Supplemental Unemployment Benefits	Eliminate provision (no change from previous proposals)	
Signing/Ratification Bonus	No signing or ratification bonus	
Holidays	No changes from BLA	
MOU on paid sick time	No changes from BLA	
MOU on child care, elder care and dependent care	Do not include MOU in agreement	

(GC Exh. 189–190, 326 at 3965–3966.)¹⁰⁸

5 On *September 9*, Director LaVenture sent to Sinele another information request¹⁰⁹ that maintains items were only partially answered from Respondent and/or provided for additional information based upon the LBFO, with a deadline of September 16, 1 week from the date of the request. The new requests related to attendance and tardiness records for each location for the previous three years plus year-to-date; the company policy on USERRA leave and the FMLA; for the seniority proposal, identifying who would lose seniority and how many years of seniority would be lost and the number of employees with a break in service that would cause a loss of seniority. It also requested certain information about insurance, maintaining that Respondent's answers were insufficiently detailed so that it could "independently verify the accuracy of the . . . calculations." It also withdrew its requests about urgent care copayment but apparently left others intact, even after Sinele presented information on May 21, 2019, and now asked for further information.¹¹⁰ (GC Exh. 193.)

The Union reviewed the LBFO and thought Respondent did not want to reach an agreement and the Union would likely have to strike. (Tr. 32:5027–5028.) On *September 10*, Respondent proposed to meet at the Phoenix Sheraton regarding the LBFO. Sinele noted to

¹⁰⁸ The grievance/arbitration procedure is not included in the list.

¹⁰⁹ This information request was not alleged as an unfair labor practice.

¹¹⁰ The Union's request does not explain why it took almost four months for it to determine Respondent's answers were incomplete on this topic.

Armenta that Respondent would consider in good faith any proposal the Union had to offer; but, if the Union's offer was not the LBFO, it likely would be rejected. (GC Exh. 194.)

On *September 19*, regarding the information requests, Sinele notified Armenta that Respondent was gathering the September 9 requested information and characterized it as voluminous. Respondent advised it was gathering information from the third-party provider and required the release for the pension information. Armenta and LaVenture returned the Third-Party Release Agreement for its information regarding Respondent's health and welfare proposals, with some changes. However, in order to have the information to the Union for the next negotiation, Respondent offered October 2 instead of September 24 for their next meeting. Sinele said they were working as hard as possible to respond quickly to the voluminous information requests. (GC Exh. 195.)

On *September 24*, Sinele notified Armenta of the location for the October 2 negotiations and said that if necessary Respondent also would be available to meet the following day. (GC Exh. 196.) On *September 26*, Sinele emailed most of the information to LaVenture and Armenta in response to its "voluminous" September 9 request. Sinele's attached 15-page cover letter reminded the union officials that Respondent was not in possession of some of the information and had to obtain it from third-party sources; some of the information sought from third-parties was not yet available, but otherwise the information request was fulfilled within the 11 tabbed sections. (Tr. 14:2131; GC Exh. 193, 197.)¹¹¹

On *September 30*, Director LaVenture emailed to Sinele a letter containing a re-request of information related to the copper price bonus,¹¹² originally requested in January 29 with Respondent's response on February 20 that the Union request was no longer relevant; but now, over 7 months later, LaVenture determined the information was relevant and that Respondent should update the information as circumstances change. (Tr. 14:2183 et seq.; GC Exh. 198 at 3-4.)

October 2, 2019 bargaining session:

The parties met at 10:10 a.m., originally scheduled for 10 a.m. The union negotiators that day included Ruben Garza, the director for District 13 (Texas, Oklahoma, and Arkansas), Bruce Fickman, a Steelworkers attorney from Pittsburgh, and local union counsel Jerry Barrett. Paulina Duck allegedly attended. La Venture was unable to attend.

Armenta stated the Union rejected Respondent's LBFO. The Union distributed to Respondent a four-page proposal, UP-4. The table below shows the contents of UP-4. (GC Exh. 201.) Armenta described as significant movement in response to the LBFO. (GC Exh. 200 at 1.) After Armenta discussed the contents of UP-4, he stated he signed TAs for which Respondent already gave verbal agreement. The Union proposed that any other open items would be covered as the language in the BLA and Respondent would withdraw any open items and revert to the language in the BLA. Sinele said Respondent was there to bargain in good faith and wanted to take a break; however, the Union had not moved to the LBFO, so it would be rejected. The parties broke at 10:22 a.m.

¹¹¹ Testimony regarding GC Exh. 197 is contained in Tr.14:2131-2182.

¹¹² The information requested was copper cost, production, productivity and comparative labor cost data, which LaVenture said was necessary and relevant to the company's proposals to change the copper price bonus. (GC Exh. 198 at 3.)

Subject	Union Proposal (UP-4)
Term of the Agreement	Change effective date from July 1, 2019 through June 30, 2022 . (GC Exh. 201 at 1.)
Economic Opportunity/Wages	Across the board wage increases: All job classifications, by pay rate, receive a minimum of 5% increase to maximum of 15% in the first year; continue with pay raises for each year of the contract (GC Exh. 201 at 2.)
Overtime	Revert to language in BLA
Management Rights	Revert to language in BLA
Absentee Control Policy	Revert to language in BLA
Clothing and Tool Replacement	Revert to language in BLA
Alternative Work Schedules	Revert to language in BLA
Supplemental Unemployment Benefits	Revert to language in BLA
Holidays	Revert to language in BLA
Benefits (health plan and premiums)	Revert to language in BLA
401(k)	Revert to language in BLA
MOU Signing Bonus	Union withdraws
SPDs	All SPDs to be updated as to any changes negotiated and the dates
Company Rights	Revert to language in BLA
FMLA	Revert to current language
USERRA leave	Revert to language in BLA
Vacations	Revert to language in BLA
Printing of contracts	Revert to language in BLA
Copper price bonus	Revert to language in BLA
Pension plan	Revert to language in BLA
Manning of new facility	Revert to language in BLA
Contract Coordinators	Revert to language in BLA
Successorship	Revert to language in BLA
Neutrality	Revert to language in BLA
MOU on paid sick time	Return to language in BLA
MOU on childcare, elder care, and dependent care	Union withdraws

Respondent emailed Armenta that it would be available to meet at 1:30 p.m. (GC Exh. 202.) Respondent returned at 1:40 p.m. and stood pat on the LBFO. Sinele said the Union's movement was far from the LBFO. (Tr. 32:5040.) Sinele asked Armenta if the Union had anything further to discuss. (GC Exh. 326 at 3970.)

Respondent left the room at 1:42 p.m. after Armenta said the Union needed a 5 to 10 minutes to meet. Respondent returned at 2:47 p.m. When the meeting continued, Armenta upbraided Respondent for rejecting UP-4, then gave letters providing information about "potential" picketing and local counsel for the different unions. Sinele asked that he to let her

know if anything else. Armenta said, “You’ll be hearing from us.” (GC Exhs. 207, 326 at 3970–3971.)

I. Union Votes to Strike After Respondent Gives LBFO

At the October 2 bargaining session conclusion, the Union hand delivered to Sinele a notice that employees would be picketing in all facilities where bargaining unit employees worked. The Union provided Respondent with a “Notice of Picketing Activity” for everyone “entering or exiting the . . . facilities.” (GC Exh. 218 at 3.)

During the week of *October 7, 2019*, the Unions held meetings at the various locations for members of all the unions to determine whether to strike. Even before the vote, strike preparations were underway. (Tr. 41:6088.) Armenta led the meetings and read from his notes. He told members that Respondent should not have rejected UP-4, which the Union contended made significant moves towards the Respondent’s position, and Respondent committed a number of unfair labor practices. The alleged unfair labor practices in Armenta’s script were Respondent: bargained in bad faith; failed to provide needed information; about 2 weeks before the meeting, removed union literature about strike preparation from Amarillo’s break room; and the proposal “for the Copper Price Bonus has an attendance requirement that discriminates against employees because of their union activities.” (GC Exh. 209.)

Union notes from the October 7, 2019 show that Armenta said 67 percent of the bargaining unit would not receive a raise and everyone had increased out of pocket costs for insurance. For the copper price bonus, the notes specifically state:

Copper Price Bonus raise[s] the root and tie to absences. It is downright dirty, so we are doing a strike vote today.

(GC Exh. 206.) Gonzales did not specify that the attendance criteria for the copper price bonus discriminated against union business. (Tr. 26:4186.)

Another employee testified that the attendance criteria was tied to the copper price bonus and belatedly added union business to the attendance criteria that was not acceptable. In separate conversations with other employees, this employee raised concerns about why it took so long to get a contract. Because the union business criteria addition to the copper price bonus seemed like a coached addition to somewhat leading questions and that the conversation with other employees indicated the main concern was the length of time the parties were taking to reach a contract, I discredit this statement. (Tr. 40:5937, 5941.) *H.C. Thomson*, 230 NLRB 808, 809 fn. 2 (1977) (answers to leading questions on direct accorded minimal weight).¹¹³

Mission Chief Steward Jose testified that they were told Respondent was not bargaining in good faith and as for the rest of the meeting, Jose relied solely on the bad faith bargaining as the reason for a ULP strike. (Tr. 41:6089–6091.) “Just getting ready for the strike. That’s about it. . . .” Jose was sincere and direct in his testimony, without the need for coaching or leading, and therefore is credited.

Armenta apprised the members of the differences between an unfair labor practice strike and an economic strike, including that in an economic strike employees could be permanently

¹¹³ See, e.g., *NLRB v. Consolidated Biscuit Co.*, (unpub.) 301 Fed. Appx. 411, 435–436 (6th Cir. 2008), enf.g. 346 NLRB 1175 (2006) (leading questions on direct examination, with yes or no answers, gave all reason to discredit witness testimony).

replaced and put on the list for recall. (GC Exh. 209.)^{114, 115} Another employee testified that he spoke with a fellow employee about the need to go on strike, and the reasons included better wages and better working conditions. Based upon Armenta's notes, which conflict with coached testimony and testimony I credit, Armenta only raised the copper price and attendance criteria generally, and not specific to union business concerns were related to attendance in general, and not to the union business portion of the attendance criteria.

At the end of each meeting, members voted whether to strike on a ballot that gave employees two choices to check: Accept the LBFO or "I reject the company's current contract proposals and vote to go on strike against the company in protest against the company's current contract proposals and in protest against the company's serious unfair labor practices." (GC Exh. 207.)

Gonzalez, who was on the negotiating team and employed as a contract coordinator, testified that he voted to go on strike because,

"[T]he employees deserved better. . . . [P]rotection in articles that were crossed out The different committees that were eliminated in the last, best and final. It was the Union's engagement to get involved with company decisions and without that involvement, I felt the employees didn't have certain protections [T]here was always the economic parts. I didn't like not receiving a raise in eight years and my healthcare going up." (Tr. 26:4188–4189.)

Gonzales also cited that his job of contractor coordinator was eliminated. However, he knew that ULPs were filed but could not recall what they were. (Tr. 26:4195.)¹¹⁶

¹¹⁴ Local 937 financial secretary Schuett required review of the meeting topics before he could testify about what was discussed. While he credibly discussed what effect the proposed attendance criteria potentially would have on his bonus, he admittedly was unsure about what was brought up at the meeting he attended. For example, he recalled that he received a copper price bonus for every quarter over 6 years. He had been employed for many more years than that. I do not rely upon his testimony to establish the facts of what bargaining unit employees were told in the meeting about why they needed to strike. (Tr. 36:5402–5411.)

¹¹⁵ Robert Sandoval, who retired on disability after the conclusion of the strike in July 2020, testified that Armenta told employees the following: Respondent was hardly meeting with the Union and was bargaining in bad faith, and Respondent failed to provide information. He also testified that Armenta said the copper bonus "was distributed against the Union officers." (Tr. 38:5639.) Sandoval's testimony here was slightly hesitant at the beginning, as if he was searching for the words and was coached. He then testified, a little more definitively, that he went on strike because the company bargained in bad faith, would not give a raise to production workers like himself, raised the insurance and discriminated against union officers like himself on the copper price bonus. (Tr. 38:5650.) Yet another employee also required prompting about what Armenta said, including specifics on bargaining and the copper price bonus. Regarding copper price bonus, he recalled strictly on the number of absences nothing about union business. For reasons he went on strike, the employee said the increase in premiums for benefits, freezing the pension and "picking and choosing who they were going to give a raise to." He then was again prompted to recall "anything else" that affected his decision to go on strike, and added copper price bonus with the attendance policy, but again, nothing about union business. (Tr. 50:7442–7443, 7447; accord 50:7514–7515.)

¹¹⁶ Placencio, who was a local union recording secretary at the time, testified he went on strike because FMLA language was change, the Union was discriminated against in the copper price bonus proposal, and the increase in health insurance premiums, and the lack of pay raises for most of the bargaining unit. (Tr. 35:5299–5300.) Placencio's testimony sounded rehearsed, particularly regarding the copper price bonus. Mission employee Pacheco had to have his recollection refreshed with the Union's flyers about the reasons for the strike; I cannot credit these reasons because the flyers tell the witness the reasons the Union said it was going on strike, not those that he could recall.

Saavedra, the Amarillo local union president, was a late addition to the bargaining team. Armenta presented reasons for striking. Saavedra first recalled only that Armenta said that Respondent bargained in bad faith as the unfair labor practice. After having his recollection refreshed with Armenta's script (GC Exh. 209), Saavedra testified that the ULPs were removing union literature from the breakroom, the copper price bonus discriminatorily tied to attendance, and the bad faith bargaining. (Tr. 49:7338–7340.) Saavedra testified he voted to go on strike because he thought there was no other alternative: Respondent was not making progress in negotiations because it was dragging its feet. He said Respondent had excuses, such as not having copies of something for everyone, coming back late for lunch, needing to discuss things among themselves. In short, Respondent used stall tactics during bargaining. (Tr. 49:7334–7335.)

Jondreau testified that he voted to reject the LBFO because "it was garbage" and he did not think it was fair, including tying the copper price bonus to attendance. He also testified that Respondent did not want a good contract, "[I]t didn't seem like there was much negotiation. It's kind of like, we hand them something; they'd hand us something." And then they'd take a long break, and then it really wouldn't be any movement on anything." (Tr. 48:7235–7236.)¹¹⁷ Jondreau's notes, although not capturing the entire meeting, do not reflect any discussion of removal of union literature at Amarillo. (GC Exh. 210.)¹¹⁸

On Friday, October 11 the ballots were counted: The bargaining unit members voted to strike.

J. The Union Notifies Respondent About the Upcoming Strike and The Parties Schedule Another Meeting; More on the Union's Information Requests

On October 10, 2019, Sinele emailed Armenta about meeting again on October 30 to answer the Union's questions or to discuss the LBFO. Sinele testified that Respondent was willing to meet to discuss any topic but if the Union had any questions that could help with the Union considering the LBFO and its acceptance, Respondent wanted to move in that direction. (Tr. 14:2255–2256; GC Exh. 208.)

On October 11, 2019, LaVenture sent Sinele two separate emails. In the first, the Union gave notice to terminate the BLA and its extension as of Sunday, October 13, 2019, at 8 p.m. Arizona time and 10 p.m. Texas time. The Union also notified Respondent that it intended to begin striking (except for the Carpenters) shortly thereafter. The Union offered to meet and bargain for a "safe and orderly" shutdown "if the Company is going to continue operations at the struck facilities." (GC Exh. 211.) In the second, LaVenture emailed Sinele that the Union withdrew all proposals for permissive subjects, which were neutrality, contract coordinators, Board of Directors, Investment Commitment, upstreaming and the right to bid, and any additional permissive subjects. (GC Exh. 212.)

¹¹⁷ It was at this point in his testimony that Jondreau linked specifically the union business issue in attendance as tied to the copper price bonus. Jondreau also testified that he believed the parties did not sign any tentative agreements (TAs), but the record is replete with numerous examples of TAs. (Tr. 48:7268–7269, showing TA on Amarillo local agreement as an example). His testimony about bargaining is only relied upon where corroborated.

¹¹⁸ Jondreau testified that he did not witness anyone removing union literature concerning strike preparations in the break room. He heard about it from the local union president, John Saavedra. (Tr. 48:7227–7228.)

On the same day, Sinele emailed LaVenture and Armenta about the Union's September 30 information request, which she answered that the Union's statements were self-serving and /or inaccurate, particularly related to the Union's contention that Respondent made statements about economic concessions necessary for Respondent's competitiveness. Sinele pointed out that Respondent never claimed an inability to pay and was not obliged to provide economic information that the Union could use to verify Respondent's alleged claims. She offered, without waiving Respondent's objections, certain information subject to a confidentiality agreement. Sinele provided certain information, most of which was previously produced, and answered the rest. (GC Exh. 213.)¹¹⁹ About the time the strike started, Respondent HR Director Trevino resigned. (Tr. 14:2235.)

K. Respondent Closes Two Facilities and Offering Work to Workers Wishing to Work During the Strike¹²⁰

On October 12, 2019, Sinele emailed a letter to LaVenture and the Unions about what Respondent intended to do during a strike and enclosed a sample letter of what Respondent intended to send to the employees. Sinele's letter to LaVenture, which was not addressed to employees, stated that Respondent intended to: continue operations and invite employees to continue working; "may" hire temporary or permanent replacement workers and if permanents are hired, retain those after the strike; once the strike was over, return the strikers' reinstatement based upon needed skills and abilities when vacancies occur after any unconditional offer to return to work; may use workers from agencies or contractors to perform bargaining unit work during the strike; and, assign nonbargaining unit employees to perform bargaining unit work during a strike. For those striking, employees receive no pay and their health insurance would cease as of midnight on the 14th day after the strike began, per the BLA and offer COBRA coverage. (GC Exh. 215.) Also enclosed was a sample letter to employees, dated October 13, 2019, and stated, in relevant part:

Although a strike has begun, the Company intends to remain open and in operation. Any employees who wish to continue working are welcome to do so.

Employees who choose to continue working during a strike may have concerns about possible Union charges, trials or fines. One way to protect yourself against Union charges, trials and fines is to resign your full Union membership and become a "financial core" member. As a "financial core member" you may not be fined, penalized or punished by the Union as long as you continue to pay the portion of the Union dues that directly relates to the Union's costs of negotiating and administering the contract. If you become a "financial core" member, you may not be allowed to attend Union meetings or vote in Union elections. But the Union is legally required to represent you the same as anyone else in the bargaining unit. The Union cannot retaliate against you because you choose to be a "financial core" member.

¹¹⁹ Sinele testified that the LBFO was based upon efficiencies and flexibilities needed to operate the business. Competitiveness seemed to be considered as challenges to hire skilled trades. But she credibly denied that she ever claimed an inability to pay. GC pointed out that in the sound-off meeting Sinele said profitability was a goal. Sinele answered that any business wanted to remain profitable. (Tr. 14:2273–2275.)

¹²⁰ Complaint ¶¶6(a) and 5(c): 5(c) alleges about mid-October 2019, Sinele by letter to employees, solicited revocation of dues checkoff authorization and solicited resignation of employees' membership in the Union. 6(a) alleges since October 13, 20219, certain employees of Respondent represented by the Unions and employed at Respondent's facilities ceased work concertedly and engaged in a strike.

Employees who want to become “financial core” members may do so by filling out the enclosed letter and sending it to your Union representative. The choice is entirely yours and the Company is not urging you to make a decision one way or the other. If you have any questions about becoming a “financial core” member, you can call the information officer at the Phoenix office of the National Labor Relations Board . . . or the Fort Worth, TX office of the National [Labor] Relations Board You should also check the Unions constitution and By-laws for any particular procedure which may apply.

10 (GC Exh. 215 at 6.)¹²¹

Sinele testified that HR personnel were fielding a number of questions about working during the strike and possibly being exposed to charges, which Sinele put into a letter, dated October 18, 2019, to bargaining unit employees. (Tr. 15:2342–2344; GC Exh. 275.)¹²² This letter told employees that anyone wishing to continue work should report to Ray or Mission and then addressed the concerns:

One way to potentially protect yourself against Unions charges, trials and fines is to resign your Union membership if allowed under your Check-Off Authorization Form. If you resign membership, you will likely not be allowed to attend Union meetings or vote in Union elections. But the Union is legally required to represent you the same as anyone else in the bargaining unit.

The letter also told employees to review their Check-Off Authorization forms and used the Steelworkers as an example. The letter reminded that the “choice is entirely yours and the Company is not urging you to make a decision one way or the other.” The letter then provided the information for the NLRB offices in Phoenix, Arizona and Fort Worth, Texas. (GC Exh. 275.)¹²³ Sinele testified that Respondent received more than ten rescissions of dues checkoff. (Tr. 15:2350.) Gonzalez, a local union vice-president and negotiating team member, testified that a “small handful” of members changed their status but did not know if they did so because of the letter. (Tr. 27:4207–4208)

On October 22, 2019, Sinele, by email, notified Armenta that employees from Amarillo and Hayden who might wish to work at Mission or Ray during the temporary shutdown of those facilities, could “consistent with past practice” for company travel provide them with travel, lodging and meal reimbursement during the strike. Should the Union wish to discuss, Sinele suggested Armenta contact her. (GC Exh. 221 at 2.)

On the same day, Armenta, by email, responded with a denial that the payments Sinele said Respondent would offer was not consistent with past practice and “the Union does not agree to this unilateral change.” As a result, Armenta demanded Respondent provide evidence of the past practice. (GC Exh. 221 at 3.)

On October 30, 2019, Respondent notified Armenta that Respondent instead of transferring employees to Ray or Mission, it now would offer work for employees in care and maintenance at Amarillo during Amarillo’s shutdown. Respondent also withdrew its offer for

¹²¹ Romero testified that he had not received this letter. (Tr. 25:3920.)

¹²² GC questioned whether Sinele spoke to anyone in the Union and whether she bargained with the Union about the letter. The transcript notes that the complaint did not allege these statements as 8(a)(5) violations, but only as 8(a)(1). (Tr. 15:2343–2344; GC Exh. 275.)

¹²³ Romero testified that he received the letter and spoke with other employees who also received the letter. He knew of 5–7 resignations at his local union. (Tr. 25:2923–3928.)

travel, lodging and meal reimbursement and stated the Union's related information request was moot. (GC Exh. 227 at 2.)

During the strike, Respondent compiled a list of striking employees, but the list did not include when or how long each employee was on strike. (GC Exh. 215(a).) It also compiled a running list of replacement workers, which was provided to Union requests throughout the strike. (Tr. 15:2356; GC Exh. 215(b).)¹²⁴

Picketing started at the various locations with similar picket signs. Some signs said, "Fair Contract Now" and "Union on Strike"¹²⁵

L. Negotiations Continue; Union Requests More Information

On October 10, 2019, Respondent offered to negotiate on October 30. On October 25, via email, Armenta notified Sinele that the Union was not available on that date but would be available on November 12 at 10 a.m. to negotiate open items. (GC Exh. 222.)

On October 15 and November 17, Respondent received further information requests from the Union, this time about outside entities performing work within the facilities to cover struck work, (Tr. 15: 2375–2379; GC Exh. 217-217(a).) Respondent was not available on November 12, so Sinele offered November 14 in Phoenix, with a 10 a.m. start time, for the next negotiation. (GC Exh. 226.)

On October 18, Sinele notified LaVenture that production at the Amarillo and Hayden facilities would be shut down and employees laid off. Employees could report to Mission or Ray if they could be qualifications for jobs. (GC Exh. 219.) Sinele could not recall whether the Union requested effects bargaining but knew the BLA covered interplant transfers. (Tr. 15:2395.) On October 30, however, Sinele rescinded the offer to pay for any employee costs for the transfers and for Amarillo, communicated the manager's decision to keep some employees for care and maintenance. (Tr. 16:2440–2441; GC Exh. 227.)

On October 28, Sinele sent to LaVenture information supplementing Respondent's response to the Union's information request of September 9, which came from the third-party administrator. (GC Exh. 223.) The information covered a number of areas of health insurance, such as in and out of network emergency room costs for years 2017–2019 (year to date).

On October 29, Sinele sent to the Union that Respondent was willing to meet for questions and discussions of the LBFO on November 12. Sinele stated:

[A]s we made clear when we met at the Big Table on September 5 and October 2, the Company has made its last, best and final offer, and the Union can expect that any proposal that it makes that is less than acceptance of the last, best and final offer will be rejected by the Company.

Armenta agreed to meet at 10 a.m. on that date. (GC Exh. 226.)

On November 11, the Union sent to Sinele a letter, dated November 12, 2019. The letter recapped that, in August 2018, Respondent began negotiations with the stated goals of

¹²⁴ The Parties stipulated that Respondent sent replacement employees letters of offers. (Tr. 15:2357–2358; GC Exh. 215(c).)

¹²⁵ Sometimes the signs identified the Union local that was striking. See e.g., Tr. 25:3995–3996; GC Exh. 216.

flexibility, efficiency and making the company more competitive. Because of the goals and the concessions in the LBFO, the Union now explained that it needed information that was previously requested January 29, 2019 and September 30, 2019: hours, worked per unit of production; operating cost and net cost per pound of copper produced; copper and mine production; and, Asarco capital expenditures planned, 2020-2022 analyses of comparative production costs or labor productivity; hourly employment costs. The Union next cited the February 22, 2019 information request that provided information about employment costs for bargaining unit employees for 2017 and 2018; Now the Union requested similar information for 2019, through September 2019. The Union previously requested Respondent's estimated "roll up" or compounding costs, to which Respondent replied on March 20, that Respondent had no "Compounding Table." It also criticized the employment costs provided as too low based upon data provided and likely incorrect, and overtime figures were too high, and requested confirmation from Respondent. Regarding pension expenses, the Union asked for confirmation on certain figures that seemed incorrect. Regarding health care data provided on November 27, 2018, and was originally from Respondent's third-party administrator, the Union stated the claims worksheet provided was missing information and necessitated a need for further information.¹²⁶ (GC Exh. 231.)¹²⁷

November 14, 2019 bargaining session:

Because of the Union's most recent information request, dated November 12, Respondent advised Armenta that it was working on responding to the "voluminous" information request and would not be available to meet until 1 p.m. Armenta agreed to the changed start time. (GC Exh. 223.) Sinele testified that she and Caseaux were working on part of the information request before the meeting, and Scott Cole was elsewhere working on the request. (Tr. 16:2535-2536.)

LaVenture died recently, which caused the parties to cancel one previously scheduled bargaining session. Gaylan Prescott, the Acting Director for District 12, attended in LaVenture's place. (Tr. 33:5139.) Katie Horan also was present for the Union. Among the rest of the Union team were Armenta and Attorney Barnett. Respondent was represented by Sinele, Cazeaux and Attorneys Russo and Burmeister.¹²⁸

Respondent arrived at 1:06 p.m. in the meeting room. Armenta asked if Respondent had anything to offer. Armenta had planned questions, likely prepared by USW technicians. (Tr. 33:5156; GC Exh. 234.) He first asked about Respondent's rationale on leaving 62 percent of employees without a pay raise for 10 years and a 4-year agreement. Sinele said that as per

¹²⁶ Armenta denied that the Union ever received any of the healthcare information in response to a previous request, then confusingly stated the Union had requested more information but had not received it all. Email from Respondent to Armenta, dated October 28, 2019, shows Respondent's supplemental response to questions about health insurance. (Tr. 33:5136-5137; GC Exh. 223.)

¹²⁷ On November 1, the Union made an information request for OSHA logs and MSHA forms. (GC Exh. 229 at 2.) On November 15, Respondent notified the Union that it was still working on the information request and would respond as soon as "reasonably possible." (GC Exh. 239.) On December 6, 2019 Respondent mailed the documents in a flash drive to Prescott and provided a hard copy. (Tr. 64:9692-9694; R. Exh. 74.)

¹²⁸ The Union gave Respondent a Memorandum of Understanding in which strikers' 401(k) loan payments were suspended until they returned to work. On October 26, 2019, Armenta emailed to Sinele a proposal to delay 401(k) loan repayments for striking employees until they return to work. On October 31, Sinele notified the Union that Respondent agreed to allow strikers to suspend 401(k) loan repayment, gave specific requirements for participation, and instructions to obtain the suspension. The Union agreed to the rest of the terms on November 4. Sinele confirmed information on November 11, by email. (GC Exhs. 224, 228, 230, 232, 326 at 3972.)

previous discussions at the table, Respondent needed skilled tradespersons and had difficulty finding them to work there. Armenta cited that the Chief Financial Officer received increases and bonuses for years 2010–2014, so he again questioned the rationale. Sinele said they were there to negotiate in good faith and not to discuss senior management; Sinele said she was there to discuss the proposals Respondent gave. Armenta asked about an estimated proposal overall, itemized, which Sinele said was in the November 12 information request and was working on it, should have it that day. (GC Exh. 326 at 3972.)¹²⁹

Armenta asked questions about employees who were red circled. Sinele said she thought that information was included in was in an earlier Respondent's response to the information request. Armenta said Sinele did not answer his question and would follow up in writing.

Armenta next questioned about the rationale for copper price bonus, which he said was not only tied to attendance but raised the first level of bonus to a minimum of \$2.90 (London Metals Exchange price).¹³⁰ Sinele testified that, as explained previously, for attendance, those employees who were working contributed more. Sinele could not recall the Union raising anything about union business tied to attendance, or clarifying any points on that issue, nor do bargaining notes reflect any Union questions about it. (Tr. 16:2482–2485; GC Exhs. 236, 326 at 3973–3975.)¹³¹

Armenta said Respondent wanted to be “profitable and efficient,” without using the word competitive, across the copper price cycle. Sinele said she did not recall using the term “profitable” but did use the term efficient. Copper price affected everyone in the business and the company made a proposal that it thought would work at this time. Armenta asked how much Respondent's proposals would save the company. Sinele said the Union's November 12 information requested that information and Respondent would have that information later that day. Armenta then asked how Respondent measured competitiveness on competitors. Sinele said they were reviewing every page in detail. (GC Exh. 326 at 3975.)

The Union raised that the Union's health insurance program would have given significant savings and wanted to know why Respondent would not give it further consideration. Sinele reminded the Union that Respondent's plan was self-insured and retained flexibility, so Respondent was not interested and rejected the Union's plan. (Tr. 16:2497–2500; GC Exhs. 236 at 4, 326 at 3973–3974.) Sinele also answered questions about cost-sharing, in which the premiums to employees were increased. (Tr. 16:2503–2510.)

The pension was discussed and Sinele agreed to provide actuarial information. The parties also discussed Respondent's proposal to change how long a person would not work yet accrue seniority. Sinele explained that retirees who are covered by the pension would be grandfathered to their healthcare rates without any changes from the BLA. However, the break in seniority after 12 months, even for an accident, was unacceptable to the Union. (Tr. 16:2516 et seq.)

Towards the end of the discussion, Sinele stated that the Union rejected the LBFO multiple times and asked what Respondent needed to do for the Union to agree to the wage

¹²⁹ General Counsel asked Sinele a number of questions about what a skilled tradesperson was and who decided it. However, the bargaining notes for this session do not reflect any discussion or disagreement about what positions Respondent's proposals included as skilled trades. See Tr. 16:2471–2475.

¹³⁰ The BLA London Metal Exchange level to receive a bonus was \$2.73. (GC Exh. 326 at 3973.)

¹³¹ Romero's bargaining notes (GC Exh. 235) also do not reflect anything mentioned about Union business and attendance with the copper price bonus.

proposal. The Union, per Armenta, said that Respondent would need to consider wages for every employee, not just skilled employees and fair comprehensive health care for everyone. Sinele asked about the pension, to which the Union said it wanted a higher match on the 401(k). The Union also wanted to maintain the defined benefit plan.

Sinele asked if the Union wanted to wait for Respondent to finish the information request and “get back on the 401(k).” Armenta said if Respondent was providing by email, “we don’t need to sit here.” Sinele said she would email it and the meeting adjourned at 2:48 p.m. (GC Exh. 326 at 3976–3977.) Armenta did not say that the Union would never accept the LBFO.

This bargaining session was the last before the LBFO was implemented. Open items included (but not limited to) wages, pension, copper price bonus, healthcare, and 401(k). (Tr. 16:2544.)

M. Respondent Tells the Union It Intends to Implement LBFO

Later that day, on November 14, 2019, Sinele sent some of the information requested on November 12 to the Union. In the letter to the Union, Sinele stated that Respondent

made it crystal clear for over two months that [Respondent] presented the Union with its . . . (LBFO). The Union has already rejected the LBFO on multiple occasions and never mentioned that it was doing so because it needed the requested information, or that the requested information will result in the Union finally agreeing to the LBFO. The information being requested does not appear currently relevant to Big Table negotiations or the Union’s acceptance of the LBFO.

(GC Exh. 238 at 2.) Nonetheless, in spite of these objections, Respondent decided to provide the responsive information. *Id.* Sinele’s letter concluded that Respondent believes it fully responded to the November 12 information request and should the Union believe anything to be missing, to specify what that would be. Respondent again asked the Union to accept the LBFO. *Id.* at 9.

On *November 18, 2019*, Respondent by email to the Union, recapped the recent negotiations with 40 negotiation sessions.¹³² The recap included Respondent’s rejection of UP-4 and the November 14 session and notified the Union that the parties were deadlocked regarding critical issues of wages, health insurance, and pension.¹³³ As a result, Respondent intended to implement the LBFO on December 2. Respondent stated it would notify the Union with a copy of communications to employees for review and would provide the Union a copy of the implemented terms and conditions. (GC Exh. 241.) On *November 22, 2019*, the Union, by email to Respondent, denied that the parties were at impasse because Respondent failed to engage in good faith negotiations and the Union remained willing to bargain on all open issues. (GC Exh. 244.) In response, Respondent answered that the Union would not sign an agreement that contained the wage, health insurance and pension in the LBFO, which meant the parties were at impasse, which Armenta denied saying and the Union again denied that they were at impasse. (Tr. 33:5173; GC Exh. 246.)

¹³² The number of sessions included “Big Table” and subcommittee meetings. (Tr. 16:2560.)

¹³³ Armenta testified that Sinele’s recap of the November 14 meeting was incorrect. (Tr. 33:5160.) However, the record definitely reflects that the Union continued to reject the LBFO.

On *November 24, 2019*, Respondent provided to the union information it intended to provide to employees regarding implementation, including implemented terms and conditions, the summary of benefits and booklet for coverage for changes to health insurance. (GC Exh. 245.) The Implemented terms and conditions included a section, previously proposed, entitled "Company Rights."

November 27, 2019: The Union denied impasse and gave its latest proposal, UP-5. UP-5 included the following provisions: Wages scales for all employees would increase in varying amounts of 3 percent to 15 percent in the first year, 3 percent to 10 percent in the second year, and 3 percent to 5 percent in the third year; benefit contributions, for the 3 years, would increase \$10 for each plan for the entire 3-year period of the contract and the rest of benefits would be unchanged. In addition, all open items would remain as in the BLA, such as the copper price bonus. The Union maintained it was flexible on all bargaining issues and demanded to meet. (GC Exh. 248.)

On *December 2, 2019*, Respondent implemented the LBFO, which included all TAs and the previously agreed-to local supplements. Thus, the LBFO became the implemented Terms and Conditions.¹³⁴

The language in the attendance section of the implemented Terms and Conditions was consistent with Respondent's previous proposals. During the hearing no union witness discussed a time when he accrued any points for taking union business despite the union leave not listed as an excused absence. As before the implemented Terms and Conditions, Respondent continued to count union business as an excused absence. Therefore the copper price bonus awards were the same for those taking union business as any other person with the same attendance record without union business.

N. Post-Implementation Events

On *December 10, 2019*, Respondent advised the Union it rejected UP-5 for a number of reasons, including that UP-5 maintained a 3-tier structure on the health plan and status quo on a number of benefits. Respondent pointed out a number of areas where the Union refused to accept the LBFO, including: the Union would not agree to the LBFO because the LBFO's pay increase excluded the non-skilled workers and the Union would only accept a contract with pay increases for all bargaining unit members; the disagreement on health insurance; the Union's requirement of the pension plan continuation, instead of a freeze as proposed in the LBFO.¹³⁵ Respondent further stated that if the Union agreed the wage increases to only skilled employees, increases in health insurance premiums as in the LBFO and freezing of the pension plan, then Respondent would meet on January 22, 2020, for further discussions. (GC Exh. 252.)¹³⁶

Via *December 19, 2019* letter, after Respondent implemented the LBFO, the Union again denied these positions and called UP-5 "substantial bargaining movement." It also cited that the Union sent a further information request on December 16, which should be provided within 30 days and then would notify Respondent about bargaining dates. In the letter, Armenta

¹³⁴ The implemented Terms and Conditions has the term "Agreement" as its title and sprinkled throughout. For whatever reason, it did not change from the LBFO.

¹³⁵ Armenta testified the Union never told Respondent that it would not accept a proposal that did not provide wage increases for the entire bargaining unit, which does not match Armenta's previous testimony. Additionally, the Union continued to reject Respondent's health care plan and insist upon the pension, without freezing it.

¹³⁶ Respondent was not available for the remainder of December 2019.

stated that the December 16 request for further information was due within 30 days and after reviewing the Respondent's responses the Union would seek further bargaining dates. (GC Exh. 255.) However, the Union never requested additional bargaining dates, nor did it respond to Respondent's offer to meet on January 22, 2020. The Union also did not provide another proposal after receiving all the requested information. (e.g., Tr. 64:9713–9714.). Respondent provided the December 16, 2019 requested information on January 18, 2020. (GC Exh. 256.) This information request is discussed in more detail below.

In *February 2020*, the Union held more informational meetings for members to vote allegedly whether to continue to strike. Armenta again read off a script and made clear that the Union was not ending the strike. (Tr. 48:7253.) The meetings were not as heavily attended as the pre-strike meetings. The Union presented to the employees the “new unfair labor practices”: continuing to bargain in bad faith over mandatory subjects; failure to timely provide information; implementing the LBFO and its provisions; threatening to hire permanent replacements and then doing so; soliciting employees to resign their full union membership; and surveillance of picketing activities. (GC Exh. 261.) The ballot given to union members stated: “I continue to strike for a fair and equitable contract and in protest against the company’s serious unfair labor practices” with places for “yes” or “no.” (Tr. 16:4024–4032, 33:5191 et seq., 48:7260; GC Exh. 262.)

One employee had problems recalling what happened at the meeting but briefly addressed the copper price bonus (nothing specific until General Counsel asked for more), the contract terminating pension and “messed” with benefits. (Tr. 40:5962–5963.) I do not credit the seemingly coached statements about the copper price bonus, plus nothing on Armenta’s script shows that topic was specifically addressed.¹³⁷ He also testified that he believed the Union was engaged in a ULP strike and because Respondent was hiring replacement workers. His discussion with other employees after the meeting was about how angry they were about the contract implementation and the hiring of permanent replacement workers, not about the alleged ULPs. (Tr. 40:5975.) Yet another employee testified that he continued to vote for the strike because the employees deserved a fair contract and Respondent should negotiate better. (Tr. 43:6435.)¹³⁸

¹³⁷ When initially asked about what the ballot said, this employee at first testified that the ballot had the same terms as the first ballot. His recollection appears confused with the earlier meeting (compare GC Exh. 262.)

¹³⁸ Another employee wrote notes that Respondent wrote letters of “scare tactics,” which he tentatively stated it was “like, the letters that they were getting, like the members were getting.” GC asked him which letters and he generally replied that those the employees received from Sinele. The questioning continued:

GC: Do you recall what those letters said or were about?

W: I don’t remember the exact one, but I think that’s what they were talking about, the scare tactics.

GC: Can you . . . take a look at GC Exhibit 275 . . .”

[witness reviews GC Exh. 275]

GC: Was that the letter that you were referring to?

W: I believe so.

GC: Okay. And do you recall anything else that was discussed about the scare tactics?

W: No. Not really.

Picketing continued at the facilities until COVID made it difficult to continue. Picketing continued only at Ray only. (Tr. 33:5189.) Eventually the Union made an unconditional offer for the strikers to return.

In July 2022, shortly before this hearing opened, the Union made another bargaining offer, UP-6. The Union waited because Respondent was sticking with its LBFO. (Tr. 16:4054–4055.) A union negotiating team member testified that the Union makes no further proposals until July 2022 because Respondent stated it would not change from LBFO.

VI. DID RESPONDENT BARGAIN IN BAD FAITH VERSUS WERE THE PARTIES AT IMPASSE?

General Counsel alleged, with several items in the complaint, that Respondent bargained in bad faith and unlawfully removed union literature from a breakroom. The Complaint also alleges, that as a result of Respondent's conduct, the Unions engaged in an unfair labor practice strike, which was prolonged by Respondent's failure to provide information, implementation of the LBFO, picket line surveillance, and threatening employees with hiring replacement workers. (Complaint ¶¶ 5 a-d), 5(f)(1), 6(a), 6(b), 6(c), 7(f) 7(g), 7(h), 7(i)).

A. Analytical Framework

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Collective bargaining is defined in Section 8(d) as "the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). The Supreme Court explained that good-faith bargaining "presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract" and though "the parties need not contract on any specific terms . . . they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground." *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 485–486 (1960). Accord *NLRB v. Katz*, 369 U.S. 736, 747 (1962).

The Board has long held that General Counsel has the burden of proof to show Respondent bargained in bad faith. *American Ship Building Co.*, 240 NLRB 1, 19 (1979); *Silver Fleet, Inc. d/b/a Silver Fleet Motor Express*, 174 NLRB 873, 890 (1969). In analyzing whether Respondent violated its bargaining obligations (and to avoid repetitive discussions), I examine whether the Respondent acted in bad faith during negotiations as part of the impasse discussion. A large part of the analysis is whether Respondent bargained in good faith and the many pieces that make that determination. The impasse analysis and good faith bargaining analysis have overlapping areas, so to streamline the process, the matter will be covered through a discussion of impasse.

Impasse is considered a "legitimate 'bargaining tactic.'" *Troy Grove v. NLRB*, 140 F.4th 506, 511 (D.C. Cir. 2025), quoting *Brown v. Pro Football, Inc.*, 418 US. 231, 239 (1996). The employer is not required to bargain during the impasse but must be prepared to resume negotiations because impasse is temporary. *Troy Grove*, 140 F.4th at 512, citing *Brown*, 418 U.S. at 245.

To evaluate whether impasse exists, the following factors are discussed:

- (1) bargaining history;
- (2) whether the parties have negotiated in good faith;
- (3) the length of negotiations;
- (4) the importance of the issue(s) over which there is disagreement; and

- (5) the contemporaneous understanding of the parties regarding the status of negotiations.

Dish Network Corps., 366 NLRB No. 119, slip op. at 3 (2018), citing *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enf.d.sub nom. *Television Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). Under such an analysis, “One or two factors . . . may be sufficient to demonstrate the absence of impasse.” *Altura Communs. Sols., LLC*, 369 NLRB No. 83, slip op. at 2, fn. 4 (2020) (explaining how *Taft Broad. Co.*’s “five non-exhaustive factors” should be applied to determine if a good-faith impasse existed) (quoting *American Security Programs, Inc.*, 368 NLRB No. 151, slip op. at 13 (2019), enf.d. 842 Fed. 648 (D.C. Cir. 2021)), enf.d. 848 Fed. 344 (9th Cir. 2021).

“An impasse finding is warranted where there is ‘no realistic possibility that continuation of discussions . . . would have been fruitful.’” *Phillips 66*, 369 NLRB No. 13, slip op. at 7 (2020) (quoting *TruServ Corp. v. NLRB*, 254 F.3d 1105, 1114 (D.C. Cir. 2001) (internal quotations and citation omitted)). The party asserting impasse as a defense, here Respondent, bears the burden of proof. *Mike-Sell’s Potato Chip Co.*, 360 NLRB 131, 139 (2014), enf.d. in part 807 F.3d 318 (D.C. Cir. 2015). When parties negotiate in good faith, over months of negotiations, and make “modest progress in narrow respects where possible” but “each side [stands] firm on its proposals regarding critical issues,” “[t]he Board and courts have consistently found valid impasse.” *Phillips 66*, above, slip op. at 4, 8 (finding a valid impasse where parties engaged in good faith, because the parties’ respective positions were well-known and firmly adhered to, such that the “parties’ protracted lack of progress . . . supports a finding of impasse,” despite each side making “several limited concessions during negotiations”).

[P]arties bargaining for a collective-bargaining agreement do not have to continue meeting indefinitely where there is no prospect of agreement. *Richmond Electrical Services*, 348 NLRB 1001, 1002 (2006) (finding that by the time the employer had declared impasse, it was reasonable to find that further bargaining would be fruitless); accord *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952) (“[T]he Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position.”).

Richfield Hosp., Inc., 368 NLRB No. 44 (2019).

The issue of impasse does not rest upon a stated contemporaneous, “mutual agreement” regarding the statue of the negotiations; “each party must independently, and in good faith, believe that ‘it is at the end of [its] rope.’” *TruServ Corp. v. NLRB*, 254 F.3d 1105, 1116-1117 (D.C. Cir. 2001), quoting in part *PRC Recording Co.*, 280 NLRB 615, 635 1986).

Because the history of these negotiations is provided above, we go directly to the second factor in the *Taft* list for determining impasse. During this discussion, I analyze whether Respondent bargained in good faith and whether the alleged unfair labor practices preclude finding impasse.

*B. Impasse Factor Two: Have the Parties Bargained in Good Faith*¹³⁹

In describing the scope of a refusal to bargain in good faith, the Supreme Court has held that parties must refrain from conduct which “reflects a cast of mind against reaching

¹³⁹ I keep in mind the gravity of this analysis, as summarized in *N.L.R.B. v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960):

agreement,” and “is in effect a refusal to negotiate,” as well as conduct which “directly obstructs or inhibits the actual process” of collective-bargaining negotiations. *Katz*, 369 U.S. at 747. The Supreme Court in *Katz* also explained that “a refusal to negotiate in fact as to any subject which is within § 8(d), and about which the union seeks to negotiate, violates § 8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end.” *Katz*, supra at 742–743,

Good-faith bargaining is evaluated through consideration “of the totality of a party’s conduct.” *Philips 66*, 369 NLRB No. 13, slip op. at 6 (2020). That evaluation includes conduct “both at and away from the bargaining table.” *Hilton Anchorage*, 370 NLRB No. 83, slip op. at 2 (2021). Conduct that the Board has found to be indicative of bad-faith bargaining includes “delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meeting.” *Atlanta Hilton and Tower*, 271 NLRB 1600, 1603 (1984).

In contrast, a party’s steadfast insistence on a position is “not of itself a refusal to bargain in good faith.” Rather, a party may “stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree.” *Id.* While the Board is “prohibited from sitting in judgment on a party’s substantive bargaining proposals,” a specific bargaining proposal’s content “may become relevant in determining whether a party was making a sincere effort to reach an agreement or whether it was intent on frustrating the very possibility of reaching an agreement.” *Phillips 66*, 269 NLRB No. 13, slip op. at 4 fn. 9 (2020).

In examining the situation with this Respondent, per *Atlanta Hilton*, supra, General Counsel does not maintain that Respondent withdrew any agreed-upon proposals, bypassed the Union, or made any unilateral changes before implementation of the LBFO. Therefore, the examination is regarding delaying tactics, unreasonable bargaining demands, failure to designate an agent with sufficient bargaining power, and arbitrary scheduling of meetings (which General Counsel contends is failure to meet at reasonable times). I also examine Respondent’s conduct at the bargaining table. Ultimately, I recommend finding that Respondent did not act in bad faith during negotiations.

1. Bargaining Authority

General Counsel contends that Respondent delayed significantly in providing its economic proposals. In part, General Counsel blames these delays on what it claims is a failure to imbue Respondent’s agents with sufficient bargaining authority.

General Counsel maintains that Sinele did not have such authority and that the parent organizations were calling the shots. General Counsel maintains that Respondent insisted on discussing only noneconomic proposals while it waited to receive authority from parent Grupo

Probably in few other instances is the task of judging so difficult. Of this we have remarked before that ‘there is a duty on both sides, though difficult of legal enforcement, to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement * * *.’ *Globe Cotton Mills v. N.L.R.B.*, 5 Cir., 1959, 103 F.2d 91, 94. Perhaps it would have been more accurate to say ‘difficult of legal determination’ for once the decision is made, the sanctions of the Act are undoubtedly potent, swift, and adequate. The truth is that objective standards are generally either unavailable or unavailing. And conduct done at one time judicially ascertained to manifest good faith, may, under other circumstances, be a mere pretense.

Mexico. (GC Br. at 79, citing *Troutbrook Co., LLC d/b/a Brooklyn 181 Hospitality, LLC*, 372 NLRB No. 26, slip op. at 5–6 (2022), *enfd.* 107 F.4th 994 (D.C. Cir. 2024).) General Counsel adopts the Union's supposition that Respondent required approval from Grupo Mexico for its economic proposals. It primarily relies on two prongs: Trevino's travels to Mexico to deal with the parent company and the occasional presence of two attorneys from the parent at negotiations. Looking at these arguments requires analysis of Trevino and his travels to Mexico and the presence of the parents' attorneys at negotiations.

The Board has long examined bargaining authority within the facts of each case. For example, a representative who can only transmit proposals to and from an employer does not have sufficient authority. *Pioneer Astro Metallica, Inc.*, 156 NLRB 468, 473–474 (1965); *Lloyd A. Fry Roofing Co.*, 106 NLRB 200, 200–201 (1953). However, the agent has apparent authority to enter into binding agreements “in the absence of clear notice to the contrary.” *Shaun's Launch Service, Inc.*, 361 NLRB 836, 839 (1982), quoting *University of Bridgeport*, 229 NLRB 1074 (1977).

The facts demonstrate Sinele had apparent authority to enter into binding agreements. Sinele signed off on tentative agreements, including the local agreements, time and time again. At no time did anyone tell the Union that Sinele did not have bargaining authority. Sinele repeatedly deflected the Union's accusations that she did not have authority to bargain and enter into agreements. *Adams Iron Works, Inc.*, 221 NLRB 71, 77 (1975) (no violation when union questioned authority of employer negotiator and negotiator gave assurances of authority). Sinele was the chief spokesperson and attended each session in full. She presented Respondent's proposals, demands and concessions. *Hyatt Regency New Orleans*, 281 NLRB 279, 282 (1986) (attorney who was the chief spokesman for Respondent in negotiations, attended each session, made presentations had apparent authority and was respondent's agent with bargaining authority). General Counsel does not carry its burden to show that Sinele did not have bargaining authority. See generally *Gulf States Cannery, Inc.*, 244 NLRB 1566, 1576–1677 (1976).

General Counsel reads much into Trevino allegedly saying that he had to travel to Mexico for some stuff, supposedly related to bargaining and relies on the Union's own statements of February 2019 that suggest Respondent had to get authority from parent Grupo Mexico. (GC Br. at 69, 80.)

Armenta's insistence that Trevino had to go to Mexico to obtain authority is speculative. The particular conversation General Counsel cites occurred on November 30, 2018: Armenta testified that he and LaVenture met with Trevino and Sinele in a sidebar, in which Trevino said he had to go to Mexico to get approval on some issues, some things. But he didn't mention anything in particular. . . . He was referring to the bargaining to be able to reach an agreement, that's what I took it as.” (GC Br. at 14–15, citing Tr. 4409–4410.) I find that Armenta inferred a conclusion about Trevino's travels, which does not prove the point.

Armenta's testimony similarly made repeated accusations about Respondent's lack of authority, claiming that Grupo Mexico controlled the negotiations. Armenta insisted that Trevino had to go to Mexico to obtain authority, yet also admitted Trevino frequently traveled to Mexico even before negotiations. When Armenta accused Respondent of requiring Trevino to go to Mexico to get approval for negotiations, Sinele reminded him that she, not Trevino, was in charge of negotiations. Even if Trevino consulted with “higher ups” in Mexico, he was permitted to have consultations. Yet it does not prove that Sinele did not have the bargaining authority.

General Counsel also contends that two attorneys from Respondent's parent America's Mining Company/Grupo Mexico also were agents and controlled bargaining. Lazalde and Duck attended some of the bargaining sessions and held high level positions with the parent organization. As a result, GC claims, they had authority to make financial and operational decisions.¹⁴⁰ Based on this information General Counsel contends that "If . . . its parent organizations had no hand in formulating or dictating bargaining strategy or proposals then there would be no reason for either Duck or Lazalde to be in attendance. On the contrary, the logical conclusion from their presence was that Grupo Mexico clutched Respondent's purse strings and Sinele was unable to engage in economic bargaining at any point without Grupo Mexico's approval, just as Trevino stated on November 30, 2018." (GC Br. at 93.)

Unlike Russo and Burmeister, Lazalde and Duck had no input during negotiations at the "big table." General Counsel surmises that, because America's Mining Company directed Respondent to hire AFIMAC (a guard company that will be discussed below) during the strike that the parent also directed Respondent during bargaining. (GC Br. at 93 fn. 111.) General Counsel infers a connection with insufficient proof. Sinele's un rebutted testimony said that the attorneys only gave legal advice. As the burden is upon General, General Counsel does not sustain its burden to prove Lazalde and Duck acted as Respondent's agents during negotiations. *Tri-State Culvert Mfg.*, 280 NLRB 743 n. 1 (1986). "[C]ircumstances of the case might well prompt suspicion or evoke a suggestion of misdeeds, these sentiments are no substitute for proof, the vital element necessary for a finding of unlawful activity." *Id.*

The inference that, because Sinele did not agree to any proposals at the table without consultation with the team Respondent's principals or Grupo Mexico is unwarranted. The record shows that Sinele did not agree immediately in many cases but came back after consultations with her team, regardless of whether Duck or Lazalde were present at negotiations. Furthermore, General Counsel's claim that Respondent's bargaining team was held to noneconomic subjects while waiting from authority from Grupo Mexico also is not supported in the record.

In addition, Respondent signed off on numerous agreed-to provisions, including the local agreements. Respondent imbued Sinele with sufficient bargaining authority that did not lead to delays in negotiations. I therefore recommend dismissal of GC's allegation that Respondent's representatives did not have adequate bargaining authority.

2. Alleged delays on bargaining economic subjects

General Counsel contends that Respondent insisted on bargaining non-economic subjects before it negotiated the economic subjects. The facts do not support a finding that Respondent alone caused the delay in discussing economic subjects.

a. Applicable law

Where the parties continue to move forward on noneconomic subjects and no party has declared impasse, Respondent's failure to provide its economic proposal is not violative.

¹⁴⁰ One record example in which the Union speculated about the importance of Lazalde's role was LaVenture's February 8, 2019 letter, in which challenged Sinele's authority to negotiate economic issues. LaVenture stated his belief that Respondent's representatives did not have authority to negotiate economic issues without input from Lazalde or Duck, from Grupo/Copper Peru. LaVenture believed Lazalde was calling shots based upon his experience with Grupo that the local spokesperson did not have authority for proposal of significant value. (GC Exh. 69.) However, nothing during negotiations proves that Lazalde and Grupo Mexico were "calling the shots."

Wyman Gordon Pennsylvania, LLC, 368 NLRB No. 150, slip op. at 5 (2019),¹⁴¹ enfd. 838 Fed. 1 (D.C. Cir. 2020). The Board recently stated that an employer cannot refuse to negotiate on any mandatory subject, regardless of demonstrated good faith when bargaining for other subjects. To promote the give and take inherent in negotiations, in which movement on some subjects may be quicker than others, an employer must not refuse to negotiate economic issues before non-economic issues are complete. *Troutbrook Co., LLC, d/b/a Brooklyn 181 Hospitality, LLC*, 371 NLRB No. 26, slip op. at 3–4 (2022), enfd. 107 F.4th 994 (D.C. Cir 2024).

b. The facts show Respondent did not delay or refuse to negotiate economics

General Counsel and the Union maintain that, as in *Troutbrook*, Respondent failed to bargain in good faith over economic issues when it failed to provide its wage and copper price bonus proposals with its first proposal, particularly when the Union requested an “even exchange” of economic proposals. General Counsel contends that UP-1 showed the Union bargained in good faith and Respondent failed to present any economic proposal until 3 months after UP-1 was presented. (GC Br. at 79.)¹⁴²

This recitation of facts is misleading: First, General Counsel equates the timing of Respondent’s presentation of its economic proposals as a refusal to bargain economics. Secondly, GC infers the Union presented an economic package that was suitable for negotiation. UP-1’s wage language was for “substantial wage increase.” Union testimony admits the Union would not present its economic package until Respondent did. The Union did not provide a detailed economic proposal until after Respondent presented its economic package.

On November 27, 2018, Sinele asked what the Union meant by a “substantial increase” in wages; instead, the Union conditioned presentation of its wage package upon having Respondent’s proposal. As of February 13, 2019, when the Union demanded to negotiate economics and have Respondent’s economic package, Respondent said it was willing to discuss any union proposal it wanted to discuss. The Union’s economic proposal still consisted of “substantial” wage increases. When asked again what “substantial” wage increases meant, the Union refused to give any specifics and instead demanded Respondent provide an economic package.

On February 27, 2019 Respondent presented its first economic proposal and continued to negotiate both economic and noneconomic issues. Although Respondent did not initially present a copper price bonus, as of February 28, 2019, the Union still had not defined what “substantial” wage increases were. A negotiating team member testified that the Union did not have an economic proposal prepared either. On March 27, 2019, a month after Respondent presented its wage proposal, the Union finally defined its “substantial wage increases” as across

¹⁴¹ In *Wyman Gordon*, *supra*, the company did not demand the union agree to any of its specific proposals before proceeding to economic subjects, nor had the parties reached any “stalemate.” The Board instead found the employer violated 8(a)(5) with failure to provide information and withdrawing recognition without a show of majority support.

¹⁴² General Counsel contends that early in the negotiations, during November 2018, the Union proposed an even exchange of economic proposals, but Respondent refused. The Union then provided UP-1 “in the spirit of good faith.” As repeated several times, above, this proposal only stated for wages a “substantial increase” and the Union was not prepared to give any economic proposal and was waiting to see what Respondent’s package was. General Counsel also contends that Respondent delayed because it needed approval from parent Grupo Mexico. As will be seen, General Counsel’s position on bargaining authority is based upon supposition. (GC Br. at 80.)

the board increases of \$8 per hour retroactively, and then \$5 increases at two subsequent dates.

Troutbrook, above, is distinguishable, examining whether Respondent “cabined” its proposals to only non-economic proposals and for the length of negotiations. The key difference here is that the employer in *Troutbrook* refused to negotiate the economic subjects before the parties completed the noneconomic subjects. Unlike *Troutbrook*, Respondent did not withhold its economic proposals until the noneconomic were done.

Troutbrook also is distinguishable because the parties only had six negotiation sessions over 11 months and the parties never reached agreement on any issue. *Troutbrook*, 107 F.4th at 1002, citing 372 NLRB No. 26, slip op. at 4. Here the parties negotiated in numerous sessions and reached agreement over many non-economic issues and continued to do so after Respondent presented its economic proposals.

Although the Union frequently demanded Respondent’s economic package and disparaged Respondent’s proposal when it finally received it, Respondent offered to negotiate what the parties had in front of them at the time. Further Respondent did not “truncate” non-economics from economics as negotiations proceeded for about 6 more months before Respondent presented its LBFO and over 8 months before implementation. Because negotiations were not stymied with Respondent’s later presentation of its economic proposal, Respondent did not delay negotiations by providing an economic proposal later rather than sooner.

c. Several of General Counsel’s cases are differentiated

General Counsel contends that delay in presenting economic proposals or piecemealing the proposals is evidence of bad faith. (GC Br. at 77, citing *United Technologies Corp.*, 296 NLRB 571, 572 (1989), enf’d. sub nom. (unpub.) *NLRB v. Hamilton Standard Div.*, 788 F.2d 6 (2d Cir. 1986). The facts in *United Technologies* have some glaring differences. There, the parties met 24 times in the course of a year. After the initial 12 sessions, during which the employer asked the union why it wanted each of the union’s proposals, the employer presented only one counter proposal at each session. When the union objected to the employer’s presentation, the employer said it could present a complete proposal, but the employer’s proposal would be “take it or leave it.” Despite the union’s frequent request for the economic proposals, the employer had not presented one in the year spent bargaining. The employer stopped bargaining and withdrew recognition and made unilateral changes. *Id.* at 571. The Board examined the totality of circumstances, including that the employer had not even drafted an economic proposal, much less presented it to the union, before it withdrew recognition: “[T]he union could not have agreed to a contract prior to the withdrawal of recognition even if capitulated to the [employer]’s every demand.” *Id.* at 572.¹⁴³

General Counsel also cites a number of cases in which the employer did not provide an economic proposal until months after the union presented its economic proposal. I cannot find these cases on point because the Union’s offer here was as clear as mud on what specific raises the Union expected for the positions in bargaining unit employees. “Substantial” increases could be a dollar per hour to an infinitesimally high amount.

¹⁴³ The employer also unilaterally transfer a unit employee from its main facility to a distant facility without notice or bargaining with the Union. Once the Union discovered the transfer it demanded that the employer be transferred back. The employer complied, but without any notice or bargaining. *United Technologies*, 296 NLRB at 572.

In examining a number of cases that General Counsel cites, in each the Union presented a specific economic proposal:

- 5 • *Southside Electric Cooperative, Inc.*, 243 NLRB 390 (1979): The employer incurred a number of violations, such as bargaining in bad faith by limiting frequency and duration of negotiation sessions and refusing to provide an economic proposal for the union until seven months after the union presented its proposal. The union's presentation of wages was an estimate but stated it was slightly less than 20 percent above the highest rate in each classification, requiring employer to pay for tools and equipment, increased holidays, vacation and dues check off. After the union presentation, the union demanded the employer's economic proposal. *Id.* at 393-394. Although the employer claimed at the union's proposal would bankrupt the company and other doom-and-gloom economic scenarios for the employer for the six next meetings, it finally made an oral counterproposal on wages—4 ½ months later. *Id.* at 394. Over six months after the first negotiation session, despite the union's repeated requests, the employer gave its first written economic proposal. *Id.* at 396. The facts in *Southside* have no similarity to the events described above. In *Southside* the union actually made a numerical wage proposal. In comparison to the facts here, the Union gave no wage proposal beyond the vague "substantial increases." General Counsel's comparison to *Southside* falls flat.
- 25 • *Preterm, Inc.*, 240 NLRB 654 n.3 (1979): The parties engaged in negotiations for an initial agreement in 21 sessions over 10 months. Unlike Respondent, the employer refused to negotiate economic issues for some time despite the union's repeated requests for discussion. Unlike Respondent's presentations here, the employer never gave a comprehensive contract draft and refused to use the union's proposed contract draft. 240 NLRB 654 and n. 3. The record here reflects that Sinele did not refuse to bargain but asked the Union to explain its wage package, which the Union refused to do, and did not deny any opportunity to discuss. Instead, the Union repeatedly demanded Respondent's package and claimed the parties were supposed to provide an even exchange of offers. Therefore, General Counsel's reliance upon *Preterm* is unwarranted.
- 35 • *Eastern Maine Med. Center*, 254 NLRB 224, 244 (1980), *enfd.* 658 F.2d 1 (1st Cir. 1981): The bargaining started a few months after the union was certified. The employer insisted on bargaining non-economic proposals until the parties reached agreement on non-economic issues. *Id.* at 232.-233. The administrative law judge did not credit the employer's claim, which the employer also admitted, that the parties had not agreed to tackle only the non-economic issues first. *Id.* at 232-233. Months passed before the employer would discuss economics. In the period when bargaining was underway, the employer "discriminatorily withheld normally occurring pay increases" for the represented employees while continuing to grant the pay increases to the non-represented employees. *Id.* at 272-273. The administrative law judge found that the employer's significant delay in bargaining wage issues, particularly while giving non-bargaining unit employees raises, was conditioned on the union accepting the rest of the employer's proposed package in a short period, created issuing with flexibility. *Id.* at 245, citing *inter alia*, *NLRB v. Patent Trader, Inc.*, 415 F.2d 190, 198 (2d Cir. 1969).¹⁴⁴ In the case at hand, Respondent here did not condition its

¹⁴⁴ Withdrawn in part, 426 F.2d 791 (2d Cir. 1970).

bargaining for economics until non-economics were complete. Respondent presented its first economic package on February 27, 2019 and shortly thereafter completed the remainder of the proposal. Respondent did not make its last, best and final offer until early September 2019, or over 6 months later; Respondent declared impasse in November 2019, almost 9 months after Respondent gave its first wage package.

- *Hydrotherm, Inc.*, 302 NLRB 990 (1991): The parties had a limited number of bargaining sessions. The union initially provided a complete package before negotiations started. At the first bargaining session, the union agreed to the employer's negotiating ground rules, which included confidentiality. The employer only presented one proposal entitled "management functions," which imbued the employer with totally control over a number of subjects. The employer presented a proposal at the second meeting but had nothing about wages or benefits. Throughout negotiations the employer the employer insisted upon continuing its "existing system of annual merit [wage] increases." *Id.* at 991. The employer also demanded that temporary employees be excluded from any agreement and the company alone would determine what temporary employees would be paid. The employer there engaged in a number of other unfair labor practices during that time.

The Union's offer of UP-5 in mid-November offered an increase of \$10 per pay period on health care premiums is weighed against its proposals on wages. The Union continued to press for wage increases for all bargaining unit employees when Respondent stuck with its proposal on only granting wage increases to skilled workers. Respondent made clear that it would accept nothing less than full acceptance of the LBFO. The proposals do not show that the Union would have moved away from its opposition of the LBFO "to suggest that future bargaining might be fruitful." *Holiday Inn Downtown-New Haven*, 300 NLRB 774, 775–776 (1990), citing *Pepsi-Cola-Dr. Pepper Bottling Co.* 219 NLRB 1200 (1975).

I therefore find that Respondent did not delay in providing proposals, including the economic package, and gave its agent(s) sufficient bargaining authority.

3. Alleged Failure to Meet at Reasonable Times:

At the outset, General Counsel's recitation of facts does not include all salient bargaining sessions. General Counsel contends that Respondent was not available to bargain at the "big table," until late November, 3 days before the BLA expired. However, the parties conducted several (at least five) meaningful negotiation sessions for the local agreements, to which both parties agreed; the record does not indicate that Respondent was avoiding any bargaining obligation as the Union complicitly engaged in the local agreement discussions. By disregarding the parties' successful negotiations for the local agreements, General Counsel does not demonstrate that Respondent was not ready to negotiate until November 2018.¹⁴⁵

GC cites *Calex Corp.*, 322 NLRB 977 (1997), *enfd.* 144 F3d 904 (6th Cir. 1998). There the employer engaged in bad-faith bargaining with a significant pattern of delay. The employer repeatedly refused the union/s request to bargain more frequently and often canceled scheduled meetings. The employer also offered to meet every other week if the employees abandoned a strike.

¹⁴⁵ A number of employee/bargaining unit members testified that Respondent gave no reasons for arriving late or cancelling bargaining sessions. The record evidence shows that Respondent notified Armenta and LaVenture, who did not share the reasons to the rest of the Union team. (e.g., Tr. 49:7417.)

General Counsel also relied on *Lower Bucks Cooling & Heating*, 316 NLRB 16 (1995) for the proposition that the employer refused to set times for future meetings or delaying scheduling them. (GC Br. at 81.) There the evidence of the employer's bad faith consisted of telling the union to submit initial contract proposals and then perhaps it would meet.¹⁴⁶ The union provided a proposal, which the employer later claimed it misplaced it and had not read. Id. at 18. Even after the union provided another copy of the proposal, months later the employer still had not read it. Later the employer canceled a meeting and offered a date approximately a month later, during which time he would review the union's contract proposal. Id. 19. The employer also repeatedly insisted that the union instead bargain with another company so that it could stay nonunion. All of these factors, and a few more, demonstrate the employer was not bargaining in good faith, if at all. In comparison to both cases, the situations here were nowhere as extreme as in *Calex* or *Lower Bucks*.

GC also contends the Union was ready at the onset of bargaining to meet on all subjects, including economics. However, the above discussion on economic proposals demonstrates the Union was not prepared with its economic proposals either. The Union's proposal of "substantial wage increases" apparently was developed because the Union was not ready and instead was waiting on Respondent to make the first meaning move. In fact, Respondent was the first to provide most of a comprehensive economic package in late February 2019, and it was only after Respondent presented the copper price bonus that the Union responded with an economic package. The Union's health care package was even later.

Respondent correctly points out that on a number of occasions, the Union did not want to discuss any other matters or did not ask to discuss anything else. Sinele often asked if the Union had anything else that day and the Union representatives declined.

General Counsel and the Union contend that the amount of time spent in face-to-face negotiations, which at some points were not terribly long, demonstrates that Respondent failed to meet at these times. Not all the blame can be placed with Respondent. Looking at some examples of when the Union also limited negotiations:

- November 28, 2018: Respondent is preparing the Union's information request. Union attorney Padias admits the Union needed the information request to bargain, and at the same time the Union states it is at the bargaining table ready to bargain.
- January 29, 2019: The parties met at the big table, adjourned and met in subcommittee for an unknown period of time before reconvening at the "big table." See GC Exh. 54 at 1.
- February 12, 2019: Setting up for negotiations, Sinele and Armenta texted and emailed about starting times. Respondent offered to start in the morning and Armenta proposed starting at noon. Sinele wrote that the Employer would start at 1:30 p.m. instead of noon if the Union was not available for the morning. Sinele later advised Armenta that the Employer would be available at 12:30 p.m. and would send the Employer's response regarding the Civil Rights Committee proposal. (GC Exh. 70.)

¹⁴⁶ Even more the election, the employer aid it had no intention of getting a contract.

- March 28, 2019: Met for 18 minutes on the attendance policies and copper price bonus, then adjourned. Supposed to reconvene at 3 p.m. but Sinele did not recall why they did not.

- May 21, 2019: Sinele offered to meet in early afternoon on May 22. Armenta was insisting on 10 a.m. when Sinele asked if the Union would have anything to present. He had nothing to present, but when Armenta turned the question on Sinele, Sinele said Respondent would have something at 1:30 p.m. This refusal to negotiate unprepared cannot be deemed as a delay in negotiations when the Union had nothing to discuss.

- July 8, 2019: At 8 p.m. Respondent provided a new comprehensive proposal, which was emailed to the Union and 6 hard copies were also provided. The Union refused to negotiate without more hard copies. Over an hour later, Respondent put an additional 25 hard copies at the hotel front desk for the Union and informed the Union to pick it up as they would begin negotiations at 8 a.m. Armenta refused to have anyone from the Union to pick up those hard copies and demanded that Respondent present the hard copies to the Union in the negotiation room. After Respondent notified the Union that the hard copies were available, at about 9:18 p.m., Armenta did not demand to continue bargaining that night either. (GC Exh. 158.)

- The following day, July 9, 2019: The parties met ostensibly from 8 a.m. to 10:11 a.m., then broke. At 10:46 Armenta emailed Sinele that the Union had nothing else for that day. (GC Exh. 163.)

- August 8, 2019: The parties met and discussed some possible TAs. Neither party had a different proposal, yet Armenta accused Respondent of refusing to negotiate.

- September 5, 2019: Armenta claimed Respondent was 27 minutes late; however, the bargaining notes reflect that the Union requested more time to meet before starting negotiations.

- November 14, 2019: Respondent told the Union that it was working on its November 12 information request and asked to change the negotiation start time from 10 a.m. to 1 p.m., to which the Union agreed. General Counsel at hearing attempted to adduce evidence that Sinele was available at 10 a.m. However, the credited testimony and exhibits show Respondent's representatives were working on responding to the Union's information request. At the end of the session, the Union was waiting for the information and made an additional information request about the 401(k) plan. The Union elected not to wait for the information and left.

Respondent's delays were caused primarily by the Respondent team caucusing and preparing proposals. The record reflects Respondent then presented additional proposals (or changed previous proposals) based upon the negotiations or continuing to prepare the next day, and due to review information. Another reason was that Respondent worked on providing the Union with information it requested and admittedly needed for negotiation. None of these delays are unreasonable.

Respondent also offered to meet with the Union in January 2020, after implementation. The Union never responded. I therefore recommend dismissing the allegation that Respondent failed to meet at reasonable times.

4. Whether Respondent maintained unreasonable bargaining demands and insincere positions

General Counsel maintains that several of Respondent's proposals, such as the copper price bonus, health insurance, and wages, showed Respondent maintained a closed mind. (GC Br. at 97.)¹⁴⁷ Respondent points out that the parties reached 26 tentative agreements plus the local agreements, which demonstrates Respondent was working towards the successor agreement. (R. Br. 65-70.)

a. Parties' positions

According to General Counsel, Respondent allegedly insisted on proposals that are predictably unacceptable to the Union. GC maintains that the proposals for copper price bonuses, wages, health care benefits, and retirement were "predictably unacceptable" to the Union. GC cites *Kitsap Tenant Support Services*, 366 NLRB No. 98 (2018), enf'd. (unpub.) 2019 WL 12276113 (D.C. Cir. 2019) (bad faith where employer's proposals left union with almost no ability to bargain over wages and benefits).¹⁴⁸

Respondent contends that any one of three issues, wages, health insurance, or pension, was sufficient to show impasse. (R. Br. at 90, citing *Richmond Electrical Services, Inc.*, 348 NLRB 1001, 1002-1003 (wages) and *CalMat Co.*, 331 NLRB 1084, 1098-1099 (2000) (pension)). Respondent points out that it was not required to continue the same terms as the BLA and may choose to change (or not) its proposals during negotiations.¹⁴⁹

¹⁴⁷ GC maintains that Respondent allegedly never showed economic necessity to justify its actions. However, the bargaining history reflects that Respondent answered numerous information requests. GC does not discuss why Respondent is responsible for demonstrating financial necessity when Respondent's stated goal was profitability, not financial distress.

¹⁴⁸ GC raises that the management rights clause provides unilateral control of all terms and conditions of employment except those "specifically set forth elsewhere in this Agreement." (GC Br. at 101 fn. 114, citing GC Exh.190 at 1 and *Altura Communication Solutions, LLC*, 369 NLRB No. 85 (2020)). General Counsel further contends a number of noneconomic proposals also robbed the bargaining unit employees of various rights under the Family Medical Leave Act (FMLA), workplace problem solving committees, vacation bonuses, printed copies of the BLA, contract coordinator positions for the Union, successorship protections, neutrality assurances, signing bonuses and supplemental unemployment benefits. General Counsel contends Respondent never explained why the changes. But using contract coordinator as an example, Respondent expressed a concern that it was paying for union activities and could be found legally unlawful. Regarding unformed services, Respondent stated the terms were based upon the law and found no further language necessary. GC also implies that Respondent initially made change after change to certain proposals and eventually reverted to the BLA language, which show Respondent engaged in an "unexplained regression." (GC Br. at 101-102.) First, an employer is entitled to change its position from its earlier positions when "sincerely held." *Atlas Metal Part Co. Inc. v. NLRB*, 660 F.2d 304, 308 (7th Cir. 1981), citing *NLRB v. Pacific Grinding Wheel Co.*, 572 F.2d 1343, 1348 (9th Cir. 1978). Second, Respondent accepted the prior language from the BLA, which often was the Union's position.

¹⁴⁹ Citing *Challenge-Cook Bros.*, 288 NLRB 387, 388-389 (1988).

b. Applicable law

Section 8(d) of the NLRA, as amended by the Taft-Hartley provisions in 1947, provides that “the obligation to bargain collectively does not compel either party to agree to a proposal or require the making of a concession.” *NLRB v. American Nat. Ins. Co.*, 343 U.S. 395, 404 (1952); *H.K. Porter Co. v. NLRB*, 343 U.S. 99, 106 (1952) (Board cannot directly or indirectly compel concessions or “sit in judgment” for substantive CBA terms). As a result, the Board does not “directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.” *American Nat. Ins. Co.*, 343 U.S. at 404. The Board will not decide whether an employer’s proposals were acceptable or unacceptable, but instead objectively examines whether a demand is clearly designed to frustrate an agreement on a contract. *Altura Communications Solutions, LLC*, 369 NLRB No. 85, slip op. at 1 (2020), enfd. mem. 842 Fed. 344 (9th Cir. 2021), and cases cited therein; *Taylor Lumber & Treating, Inc.*, 326 NLRB 1298, 1308 (1998). Yet some of the content of the specific proposals could be relevant to determine whether a party’s efforts to obtain an agreement were sincere. *Altura*, 369 NLRB No. 85, slip op. at 4 fn. 9.

In making this determination, I assess whether the proposals were intended to create a stalemate and insurmountable barrier to achieving the agreement. See, e.g., *Hospitality Motor Inn, Inc.*, 249 NLRB 1036, 1040 (1970), enfd. 667 F.2d 562 (6th Cir. 1982), cert. denied 459 U.S. 959 (1982). Board law has various interpretations here. An inference of an intent to frustrate reached an agreement requires that “the entire spectrum of proposals put forward by a party is so consistently and predictably unpalatable to the other party that the proposer should know agreement is impossible.” *Reichhold Chemicals*, 288 NLRB 69, 70 (1988),¹⁵⁰ enfd. in rel. part sub nom. *Teamsters Local 515 v. NLRB*, 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991). “Ridged adherence to proposals which are predictably unacceptable to the Union may indicate a predetermination not to reach agreement, or a desire to produce a statement, in order to frustrate bargaining and undermine the statutory representative.” *Kuna Meat Co.* 204 NLRB 1005, 1013 (1991), quoting *Tomco Communications*, 220 NLRB 636 (1975). The proposals can be viewed as whether they “were of such a nature as to warrant the conclusion that the Company was insisting on . . . which it knew no self-respecting union could accept.” *O’Malley Lumber Co.*, 234 NLRB 1171, 1180 (1978). Similarly, “if a party is so adamant concerning its own initial positions on a number of significant mandatory subject, we may properly find bad faith evinced by its ‘take-it-or-leave it’ approach to bargaining. *88 Transit Lines*, 300 NLRB 177, 178 (1990),¹⁵¹ citing *NLRB v. General Electric Co.*, 418 NLRB F.2d 736, 756–757 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970).

Kitsap, 366 NLRB No. 98, slip. op. at 8, explains:

. . . An inference of bad-faith bargaining is appropriate when the employer’s proposals, taken as a whole, would leave the union and the employees it represents with substantially fewer rights and less protection than provided by law without a contract. *Public Service Co. of Oklahoma (PSO)*, 334 NLRB at 487-488. Put somewhat differently, an inference of bad-faith bargaining is warranted when an employer’s proposals “would strip the [u]nion of any effective method of representing its members . . . further excluding it from any participation in decisions affecting important conditions of employment . . . thus exposing the company’s bad faith.” *A-1 King Size Sandwiches, Inc.*, 265 NLRB 850, 859 (1982) (internal quotations omitted), enfd. 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984).

¹⁵⁰ Quoting *NLRB v. Mar-Len Cabinets*, 649 F.2d 995 (9th Cir. 1981).

¹⁵¹ Enfd. 837 F.2d 598 (3d Cir. 1991).

c. Copper price bonus¹⁵²

5 Tying the absenteeism policy to the copper price bonus and omitting union business from Respondent's proposed absenteeism policy is one of the main issues in GC's complaint and a repeated theme throughout the hearing. General Counsel and the Union contend that the copper price bonus link with absenteeism, and specifically penalizing those on leave for union business, violated both 8(a)(5) and (3).

10 Regarding the 8(a)(5) allegation, Respondent increased the amount of the copper price bonus and lowered the rate of absenteeism from its initial proposal over the course of negotiations. However, the specific part of the policy that Union found objectionable, failing to include union business in the absenteeism policy, is problematic because the Union neglected to raise it during negotiations.¹⁵³ The hearing notes from the Union and Respondent
 15 demonstrate that the Union generally objected to tying absenteeism to the copper price bonus during negotiations. The Union's counter proposal to the absenteeism policy was tied to the copper price bonus, which the Union did not discuss, like so many of the union proposals, only said to keep the language as in the BLA.

20 Some witnesses contend that the Union raised the union business and the copper price bonus to the membership during the strike vote. However, the Union's failure to object specifically to Respondent about the Union business undercuts the significance of the proposal during the events as they unfolded.¹⁵⁴ Most of the credited evidence also shows Armenta did not raise the copper price bonus with the union attendance issue specifically at the pre-strike
 25 membership meetings conducted in October 2019, despite the Union's flyers including it. The statements were general, that absenteeism was tied to the copper price bonus. A few employees, who did not appear coached, did not cite the copper price bonus and the attendance issue of union business as part of the attendance criteria, as a reason for the strike.

30 The other issue is whether Respondent rigidly adhered with its proposals on the copper price bonus. It did not. Respondent changed the attendance requirements and the London Metals Exchange (LME). For example, at first Respondent said it would offer a bonus when the LME price was at \$3.10; it later decreased the price to \$2.90, a 20-cent drop, which worked in favor of employees. Therefore General Counsel did not demonstrate that Respondent was
 35 inflexible with the copper price bonus. Sticking with the proposal after making a change does not show bad faith but does demonstrate hard bargaining.

Regarding the 8(a)(3) allegation, General Counsel contends the copper price bonus proposal was inherently destructive of employees' rights to engage in union activity and was

¹⁵² *Complaint ¶6(c)*: About December 2, 2019, Respondent implemented a Copper Price Bonus proposal that penalizes employees by reducing their potential compensation when they spend time on union activities. Respondent states it made LBFO on September 5, 2019 and implemented on December 2, 2019. Respondent unilaterally implemented the LBFO, which contained the copper price bonus.
Complaint ¶7(i): About December 2, 2019, Respondent implemented LBFO, including, but not limited to, the Copper Price Bonus.

¹⁵³ Respondent notes that, during direct examination, Armenta testified to leading questions that this matter was raised at the table. I agree that this testimony should be discredited, not only because it was obtained in response to leading questions, but the documentary evidence does not support such a conclusion.

¹⁵⁴ The record shows Respondent never penalized any employee who took union business in their attendance and thereby it did not affect a copper price bonus. Therefore, no employee suffered any consequences because of the omission. However, that information does not necessarily indicate what Respondent would have done without the pending charge and subsequent complaint.

motivated by antiunion animus and its plan to bargain in bad faith. To show Respondent's conduct violated Section 8(a)(3), General Counsel cites *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967). Respondent denies that the "union business" component of the absenteeism policy ever penalized anyone for "union business." The Union also failed to ask or raise the matter during negotiations, and Sinele would have "disavowed the Union of its mistaken understanding" (R. Br. at 71.)

The Union is precluded from raising the alleged discriminatory impact of the absenteeism proposal due to laches. The defense of laches has two criteria: an unreasonable delay in asserting one's rights, and (2) a resulting prejudice to the defending party. 3750 *Orange Place Ltd. Partnership d/b/a Beachwood Holiday Inn v. NLRB*, 333 F.3d 646, 665 (6th Cir. 2003). In *Beachwood Holiday Inn*, the court found the employer's claim of laches was inapplicable because the union had been diligent in pursuing bargaining. *Id.* That is not the case here. The Union knew full and well that Respondent's proposal included terms that potentially inhibited union activity. It even included the issue on its flyers to employees for the pre-strike meetings. Yet during negotiations the Union only objected generally to the absenteeism policy and never raised the potential discriminatory issue with Respondent. The Union(s) waited until after Respondent implemented the LBFO to file charges including a paragraph about the discriminatory impact of the absenteeism policy. The Union cannot play "gotcha" by failing to raise what it considered a significant issue and then expect Respondent to change course. *Marine Officers Assn., Teamsters Local 54 (Riverway Co.)*, 260 NLRB 1360 (1982).

I therefore recommend dismissal of the allegations related to the copper price bonus and attendance.

d. Wages, benefits, and pension

General Counsel contends that Respondent's proposals in these areas were predictably unacceptable, thereby showing Respondent bargained in bad faith and had no intention of reaching an agreement. Respondent contends that any of these issues alone could have created impasse. In assessing whether a single issue causes impasse, Respondent is required to show three factors: "[F]irst, a good-faith bargaining impasse actually existed; second, the single issue involved was critical; and third, 'the impasse on this critical issue led to a breakdown in the overall negotiations.'" *Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17, 21 (D.C. Cir. 2012), citing *CalMat Co.*, 331 NLRB 1084, 1097 (2000).

"It is well settled that when a party to negotiations advances and maintains a position in good faith . . . , a refusal to retreat from that position cannot be equated with a refusal to bargain, [fn omitted] nor is a mere repetition of the proposals made in good-faith evidence of bad faith in the absence of other evidence of bad faith, [fn omitted]" *Sonat Marine, Inc.*, 281 NLRB, 93 (1986). Failure to make economic concessions "of any kind" raises whether an employer is negotiating in good faith. *International Telephone & Telegraph Corp.*, 166 NLRB 592, 598 (1967), *enfd. sub nom NLRB v. ITT Henze Valve Service Controls and Instrument Div., Intern. Tel & Tel. Corp.*, 435 F.2d 1308 (5th Cir. 1971).¹⁵⁵

Respondent did not stick with its initial proposals on wages. Upon the Union's rejection of Respondent's first wage proposal, in which Respondent proposed no wage increases,

¹⁵⁵ GC implies that Respondent raises financial reasons for its actions. When an employer maintains it wants to promote competitiveness, it is not making an admission of financial distress. See generally *North Star Steel Co.*, 347 NLRB 1364, 1369–1370 (2006) (differentiating when a union is entitled to financial information, which is the difference between "inability to pay" versus "competitive disadvantage").

Attorney Burmeister stated that Respondent did not think the Union “would go for it.” However, the statement reflects Respondent’s prediction. Even if one considers the initial position insincere, Respondent did not stick with that position for long. Respondent increased its wage offers for skilled workers on two occasions.

On November 14, 2019, after Respondent presented its LBFO, Sinele specifically asked what Respondent needed to do for the Union to agree to the wage proposal. The Union, per Armenta, said that Respondent would need to consider wages for every employee, not just skilled employees and fair comprehensive health care for everyone. Sinele asked about the pension, to which the Union said it wanted a higher match on the 401(k). The Union also wanted to maintain its defined benefit plan proposal.

GC contends that denying wage increases to unskilled workers was predictably unpalatable to the Union and therefore created a violation. The Union contends that Respondent not moving on wages after June 19, 2019 and the Union making three more proposals after Respondent’s offer, which shows the Union was not intransigent. However, that is not the standard for judging Respondent’s conduct for its wage proposals. In *SCA Services of Georgia*, 274 NLRB 830, 834 (1985), the employer’s allegedly rigid wage proposal offered increases, but less than union proposal. The Board found that the employer’s “rigid” wage proposal was not a violation because the Act did not require the employer to concede when its position “is fairly maintained.” *Id.*

As with SCA, the record does not support finding Respondent acted in bad faith. Although Respondent was firm that it would not give wage increases to the unskilled workers, it moved on the skilled workers, offering wage increases and again increasing that offer. Respondent explained its position for rejecting the Union’s demands that all workers, not just the skilled ones, receive wage increases: Respondent could easily find unskilled workers, but needed to recruit skilled workers. This explanation is “plausible and this would not warrant an inference of bad-faith bargaining.” *Halliburton Services, a Division of Halliburton Co.*, 227 NLRB 1908, 1912 (1977), and cases cited therein; *SCA*, supra.

The record must include “substantial evidence” of changed circumstances sufficient to show more bargaining would be fruitful. *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 233 (D.C. Cir. 1996). This record does not show that more bargaining on the issue of wages alone would be productive. The Union, despite decreasing its demands on wages, was firm that it would not accept any proposal that did not grant wage increases for only skilled workers.

In short, the Union repeatedly rejected Respondent’s proposal because over 60 percent of the bargaining unit would not receive pay increases. Thus, the second *CalMat* factor is demonstrated. For factors one and three, Respondent demonstrated that it was not required to make further wage concessions. The issue of wages alone demonstrates that the parties were at loggerheads. *Id.*¹⁵⁶ As a result, Respondent demonstrates that the parties were at impasse over the issue of wages. *SCA*, supra; *Richmond Electrical Services, Inc.*, 348 NLRB at 1002-1003.

Moving on to health care, General Counsel contends that Respondent “flatly refused to entertain” the Union’s health care plan. (GC Br. at 99–100.) In assessing this claim, one considers what a flat refusal looks like. An example of an employer’s intransigence in considering a union’s insurance proposal is found in *J.G. Kern Enterprises, Inc. v. NLRB*, 94 F.4th 18, 27 (D.C. Cir. 2024), enfg. 371 NLRB No. 91 (2022), There the employer, during the

¹⁵⁶ The Union maintained that giving wage increases only to skilled workers was divisive, per Armenta’s statements at the May 23rd negotiation session.

certification year, refused to provide information to the union about employer costs so that the union could provide its own union benefit plan proposal. The employer refused to provide the information because it insisted that it would provide its own plan. The court, in short, stated “the Company impermissibly foreclosed bargaining over a mandatory subject.” 94 F.4th at 27.

The facts here show GC’s hyperbole is unwarranted, especially when compared with the facts in *J.G. Kern*, supra. When the Union made its presentation about its health care proposal, Sinele was engaged and asked questions. General Counsel admits that after the Union made its presentation about its healthcare plan, Respondent left the room to consider the plan. Sinele also asked to meet at 11 a.m. to assess the plan. (GC Br. at 35.) Respondent made an information request about the Union’s health care proposal on May 31, 2019, which was duly provided to Respondent on June 18, 2019. “Respondent caucused to review the information and did not return to bargain for the rest of the [June 18] . . .” (GC Br. at 70 and 37 fn. 65.) Failure to accept the Union’s proposal does not mean that Respondent did not refuse to consider the Union’s health care proposal.¹⁵⁷

Respondent is not required to accept what the Union believes is the best insurance plan. Respondent repeatedly explained that it wanted to keep its self-insured plan to maintain flexibility. This issue too demonstrates that the parties were not close to an agreement.

General Counsel contends that Respondent’s proposal of the freeze on pension benefits and no changes to the 401(k) were evidence of Respondent’s problematic conduct. According to the General Counsel, Respondent’s retirement proposal was a reduction and unacceptable to the Union without a corresponding raise. (GC Br. at 100–101.) According to GC, Respondent’s first proposal Armenta asked who the Unions could even consider these proposals (especially without the copper price bonus). GC also points out that Respondent never moved on these issues.

In *Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 757–759 (6th Cir. 2003),¹⁵⁸ the court discussed that the employer did not change its position on holiday buy-back and pension. The employer was engaged in hard bargaining and was not required to change its position, according to the court. *Id.* at 758. I therefore find that Respondent did not engage in bad faith bargaining regarding health insurance or pension.

e. Conclusion regarding bargaining proposals

General Counsel cited *Kitsap Tenant Services*, 366 NLRB No. 98. The facts in *Kitsap* were extreme compared to the above issues. Before reaching the issue of bad faith bargaining and the employer’s proposals, the Board already found the employer in *Kitsap* failed to provide, and delayed in providing, information and failed and refused to meet at reasonable times. In *Kitsap* the employer proposed, inter alia, that it retain all rights to discipline, layoff, suspend and discharge employees and none of it was subject to grievance arbitration. The employer also retained total control for all work rules and policies, again not subject to a grievance procedure. The Board concluded that these proposals would strip the union of its representational duties. These requirements demonstrate that the employer engaged in bad faith bargaining. *Kitsap*, 366 NLRB No. 98, slip op. at 8–10.

¹⁵⁷ The Union cites the significant percentage increases in premiums, deductibles and out-of-pocket maximums as evidence of bad faith. But the case the Union cites is *Oxarc*, 2022 WL 16742402 (Nov. 4, 2022), which is an administrative law judge case without precedential value.

¹⁵⁸ Reversing in rel. part 335 NLRB 961 (2001).

None of the above proposals strip the Union of its representational duties. The parties bargained over dues checkoff and grievance-arbitration, without requiring the Union to cede its representational authority. Although the economic proposals were quite unsatisfactory to the Union, the negotiations yielded agreement on a number of noneconomic issues.

Bad faith is not shown when the parties fail to reach agreement because each “had a serious objective that it would not relinquish.” *Telescope Casual Furniture, Inc.*, 326 NLRB 588, 602 (1998). Respondent’s proposals do not show an intent to avoid agreement. *Reichhold*, supra. Both parties had serious objectives that never met up in the middle. Respondent did not stick with its original proposals for the copper price bonus or wages. *88 Transit Lines*, 300 NLRB at 178. I therefore recommend dismissing the allegation that Respondent engaged in bad faith bargaining with these proposals. *Halliburton Services*, 227 NLRB at 1913.

5. Other evidence of Respondent’s conduct at the bargaining table¹⁵⁹

General Counsel also contends that Respondent’s actions throughout bargaining demonstrates that Respondent’s positions were not sincerely held. GC cites that Attorney Burmeister, on August 8, 2019, stated Respondent was “right where we needed to be”. GC maintains that the statement reflects Respondent’s “take it or leave it” approach to negotiations. GC cites *Burrows Paper Corp.*, 332 NLRB 82, 82 (2000), which GC identifies as “statements by CEO during negotiations about the union considered in finding bad faith.” (GC Br. at 102.)

Remarks at the bargaining table do not show that Respondent intended to frustrate the bargaining process. In *Preterm, Inc.*, 240 NLRB 654, 655 (1979), the Board found no fault with the employer’s chief negotiator’s “bellicose and argumentative behavior,” which was insufficiently extreme or disruptive to constitute evidence of a refusal to bargain in good faith. Isolated outbursts are insufficient to thwart the bargaining process.

General Counsel contends that the August 8, 2019 statement that Respondent was “right where we want to be” (or something close) implied the impending implementation of the LBFO. (GC Br. at 102.) General Counsel’s interpretation foreshadows events almost 4 months in the future and does not consider the intervening events. Burmeister’s statement is an “innocuous statement of bargaining position and permissible under 8(c) of the Act.” *SCA Services of Georgia*, 275 NLRB at 835 (employer statement to employees that it would sign only the contract it wanted to sign was privileged per §8(c) of the Act).

Burrows, which GC cites, also has a number of factual differences. The Board there found the employer engaged in surface bargaining, including requiring wages would remain at its sole discretion without any union involvement and could not be grieved. The employer refused to agree to a grievance-arbitration process except leaving management in charge of all grievances, with a broad management rights clause. In addition to these facts, the CEO stated that he wanted to run the company “as he saw fit, as he had before the advent of the Union” The CEO also told the union representative that he “personally” did not recognize the union as the employees’ bargaining agent (among other statements). 332 NLRB at 82. The statement was supported with the employer refusing to accept a recognition clause. *Id.* at 93–94. These statements are significantly different than Burmeister saying that Respondent is about where it wanted to be.

¹⁵⁹ General Counsel alleges 8(a)(1)s away from the table. Those are covered with the additional ULPs of the Impasse Section. Further, the Board hesitates to find bad-faith bargaining when the only evidence is based upon misconduct away from the table. *St. George Warehouse, Inc.*, 342 NLRB 904, 907 (2004)

I therefore find that this statement does not demonstrate that Respondent had a “take it or leave it” attitude throughout the bargaining process and instead was permissible. After all, Burmeister said Respondent was “close,” not “locked in.” It does not demonstrate Respondent was bargaining in bad faith.

(4) Failed and refused to meet with the Union at reasonable times for purposes of negotiating a successor agreement to the BLA¹⁶⁰

On November 14, 2019, after Respondent presented its LBFO, Sinele specifically asked what Respondent needed to do for the Union to agree to the wage proposal. The Union, per Armenta, said that Respondent would need to consider wages for every employee, not just skilled employees and fair comprehensive health care for everyone. Sinele asked about the pension, to which the Union said it wanted a higher match on the 401(k). The Union also wanted to maintain its defined benefit plan proposal.

Section 8(a)(5) of the National Labor Relations Act makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees....” 29 U.S.C. § 158(a)(5). Section 8(d) of the Act defines the duty to bargain collectively as the mutual obligation of the employer and Union “to meet at reasonable times to confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement....” 29 U.S.C. § 158(d) Dilatory and delaying tactics that undermine the process of collective bargaining are indicative of bad faith bargaining. See *Kobell v. Paperworkers*, 965 F.2d 1401, 1408 (6th Cir.1992); see also *Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376, 1382 (8th Cir.1993); *A.H. Belo Corp. v. NLRB*, 411 F.2d 959, 968 (5th Cir.1969).

The Board also declined to find a violation for an employer’s lead negotiator showing up late in *Houston County Elec. Co-op.*, 285 NLRB 1213, 1215 (1987). The parties negotiated 55 sessions and the lead negotiator was often tardy about 10 to 20 minutes. The Board found that the delay did not significantly disrupt bargaining. *Id.*

However, in *Beverly*, 310 NLRB at 239, the union negotiating team waiting over 4 hours for the employer representatives, who were supposed to provide certain information and failed to do that as well. The employer could have informed the union of problems that the chief negotiator had with travel but failed to do so. Given the other bad-faith actions of the employer, the administrative law judge found the employer violated the Act by being late and deliberately not notifying the union.

Richfield Hospitality, Inc., 368 NLRB No. 44 (2019).

A pattern of purposeful delay would indicate bad faith. Unlike the discussion in *Richfield*, Respondent notified the Union when it would be late and reasons why (e.g., working on proposals, information requests). In *Garden Ridge Management*, 347 NLRB 131,132 (2006), reaff’d. 349 NLRB 1108, 1109 (2007), the Board determined that the employer failed to meet with reasonable frequency when it only met 20 times in over 11 months despite the union frequently begging to meet more frequently and string dates together. The employer refused to meet at all after The employer gave no reason for why it could not meet more frequently other than its attorney-negotiator saying he wanted time to absorb the negotiations. Respondent here continued to meet and offered to meet again after it implemented the LBFO.

¹⁶⁰ General Counsel does not claim that scheduling was “arbitrary.” See *Anaheim Plastics*, 299 NLRB 79, 99 (1990).

The facts in *Calex* are more extreme than presented here: The employer began negotiations saying it would only meet once a month and continued this conduct for over a year. *Calex Corp. v. NLRB*, 144 F.3d 904, 909 (6th Cir. 1998), *enfg. Calex Corp.*, 322 NLRB 977 (1997). The pattern of delay included canceling meetings and was significantly less than the number of meetings here.

Respondent's December 10, 2019 letter to the Union specifies the points of impasse and where the Union was adamant about not accepting the LBFO. The specific economic terms were the Union's demand that all bargaining unit members receive pay increases, despite Respondent's LBFO providing pay raises only for skilled labor; Respondent's health insurance plan; and freezing the pension. (GC Exh. 252.)

C. Impasse Factor Three: Length of Negotiations

Above we discussed whether Respondent spent enough time at the bargaining table. Here we examine the length in time and the sheer volume of proposals.

The more meetings that occur might demonstrate a greater likelihood of impasse. *The Baytown Sun*, 255 NLRB 154, 157 (1981), citing *Fetzer Television, Inc. v. NLRB*, 317 F.2d 420 (6th Cir. 1963). The Board notably looks to whether negotiations were "exhaustive." *Betlem Service Corp.*, 268 NLRB 354 (1983).

The parties did not have to meet indefinitely. In *United Brotherhood of Carpenters & Joiners, Local 1780*, 244 NLRB 277, 278–280 (1979), after the employer agreed to recognize the union, the parties met four times before the employer issued its final offer that the union could "take it or leave it." The employees then went on strike, with the employer's agents thereafter making coercive statements about proposals only going to get worse and threatening employees with job loss. *Id.* After the employer gave its "take it or leave it" ultimatum the employees were on strike, the negotiations continued with the employer offering proposals with less favorable terms and conditions, the employer had an approach that "undermined the basic concepts of meaningful collective bargaining." *Id.* at 281. None of this happened in these facts.

In shortened form, the history of comprehensive proposals from the parties can be summarized in a table:

DATE	Respondent	Union
11/27/18	Comprehensive proposal except economics	UP-1 in that time frame, wages "substantial increase"
2/27/19	Comprehensive package with economics plan, except Copper Price Bonus	
3/27/19		UP-2 package
3/28/19	Copper Price Bonus proposal	
5/22/18		Union's health and welfare proposal
6/19/19	Comprehensive proposal	
7/8/19		UP-3
7/9/19	Comprehensive proposal in response to UP-3	
8/6/19	Comprehensive proposal	
8/8/19	Comprehensive proposal	
9/5/19	LBFO	

DATE	Respondent	Union
10/2/19		UP-4; striking shortly thereafter
11/14/19	Tells Union that they appear deadlocked over wages, health care and pension; deadlines Union to accept LBFO by December 2	
11/27/19		UP-5
12/2/19	LBFO Implementation	

General Counsel contends that Respondent spent too much time in caucus revising proposals. The record reflects that Respondent was the party revising and resubmitting written proposals. The result of those caucuses showed that, after the parties reached the local agreements, Respondent sent a 77-page package proposal about November 27, 2018. Respondent and the Union spent time on grievances, including grieving benefits, the summary plan description. By January 30, 2019, Respondent sent a counterproposal. On February 1, 2019, the Union rejected Respondent's counter and the parties continued negotiations. On February 8, 2019, the parties were working on a civil right provision and Sinele stated Respondent was preparing civil rights revisions. Also on February 8, Respondent presented a drug and alcohol policy and needed to obtain information. Later in the evening, the Union sent a counter on civil rights.

About February 27, 2019, Respondent presented a comprehensive proposal, including all tentatively agreed-to points and an economic package (excluding the copper price bonus). The health and welfare package reflected an increase in premiums but no change to retiree health benefits. No wage increase was offered.

The followday day, February 28, the Union rejected the proposal but demanded a redline copy. Attorney Burmeister said, after stating he believed the Union would reject the proposal, he was waiting for the Union's counterproposal. Sinele, in response to Armenta's questioning, said that any proposal was subject to change. Respondent was unable to make it back to the bargaining table that day because it took longer than expected to complete the redline copy that the Union demanded.

On March 13, 2019, the Union cancelled the meeting. Armenta stated the Union was concentrating on economics. He admitted the Union could have bargained a different topic.

On March 27, 2019, the Union presented UP-2, giving wage increases across the board starting at \$8/hour, retroactively to December 1, 2018, and \$5/hour increases on two consecutive years. It also rejected Respondent's pension proposal.

On March 28, 2019, Respondent presented the Copper Price Bonus proposal, tying the proposal to attendance. Respondent also sent the drug and alcohol proposal to the Union.

On April 20, 2019, the parties exchanged information. On May 14, Respondent provided actuarial information on the pension and retirement.

On May 21, 2019, the Union verbally rejected Respondent's Copper Price Bonus proposal. Respondent provided redline copies on welfare. Respondent also rejected UP-2 but provided a number of written counterproposals. The Union accepted a few of the counterproposals.

On May 22, 2019, the parties tentatively agreed to several proposals. Respondent countered on hours of work, reporting, call out pay, and overtime. Respondent made additional proposals on workplace problem-solving committee and orientation. The Union also addressed several minor corrections and clarifications to prior proposals during this period. These adjustments were accepted by both parties without significant dispute, allowing negotiations to move forward more smoothly. This mutual acceptance of corrections contributed to a more collaborative bargaining atmosphere. The Union again rejected Respondent's health care proposal, offering its own plan through the Steelworkers.

On May 23, 2019, Respondent stated it was reviewing the Union's health care proposal and gave a related information request. Respondent also presented a new wage proposal in which only the skilled workforce received raises. The Union immediately rejected Respondent's wage proposal.

On June 18, 2019, Respondent received the information it requested on the Union health proposal. Respondent needed more time to review the Union's proposal in light of the information.

On June 19, 2019, Respondent sent a comprehensive proposal, but it could only be accepted as a package. Its positions on the Copper Price Bonus and pension were unchanged. Respondent agreed to the Union's counterproposal on the probationary period.

On July 8, 2019, the Union presented UP-3, which included all tentative agreements, and its health care proposal. It also decreased the wage demands to \$5/hour for all bargaining unit employees. The parties also had additional tentative agreements for jury/witness duty, and shift premiums.

On July 9, 2019, Respondent sent a comprehensive proposal in response to UP-3. Although wages and health and welfare were unchanged, Respondent made the Copper Price Bonus more favorable to the employees, yet it remained tied to employee's absences. It also proposed to split costs of printing the contract evenly. The Union rejected the entire proposal.

On August 6, 2019, Respondent again provides a comprehensive proposal. The Union rejected several sections but added a holiday. Respondent's wage proposal did not change at this point. By August 7, 2019, the Union tentatively agreed to hours of work, hiring consideration, and the indefinite shutdown language. Respondent presented a revised health and welfare proposal. The Union then presented a single page "package proposal" in which the Union agreed to withdraw the signing bonus if Respondent would drop its demands to eliminate the contract coordinator position, overtime (lunch), vacation and seniority.

On August 8, 2019, Respondent rejected the Union's proposal but said it would present its last, best and final offer (LBFO) at the September 5 meeting. The Union issued an information request on health care

On September 5, 2019, as expected, Respondent presented the LBFO, which was another package proposal. A number of provisions were changed. The proposal was for a term of 4 years. It increased wages for the skilled employees from its previous proposals (except for 2 positions at the Hayden Smelter). It appears that, compared to previous proposals, Respondent decreased the employees' premiums. Regarding the Copper Price Bonus, Respondent decreased the London Metals Exchange (LME) from \$3 to \$2.90, which meant that if the LME reached the lower number, employees would be eligible for a bonus; however,

Respondent retained the requirement tying the CPB to absenteeism. Pension stayed the same and Respondent still eliminated the contract coordinator position (3 positions).

In response, on October 2, 2019, the Union gave Respondent UP-4, in which the Union proposed to revert a number of proposals to the BLA. The Union notably rejected Respondent's wage proposal, still requiring all bargaining unit employees receive wage increases, and rejected the Copper Price Bonus and Respondent's Health and Welfare plan. The Union began its strike later that month.

On November 14, 2019, Respondent was still providing information (discussed above, and the parties still had discussions. However, the Union's questions were predominantly covered in response to the Union's November 12, 2019 information request. Not too long thereafter Respondent notified the Union that they were in deadlock on wages, health insurance and pension and unless the Union agreed to the LBFO, it would implement it on December 2, 2019.

Respondent made numerous offers, which included movement. Even with limited face to face time (and notably GC omits specific amounts of time spent in sidebars and subcommittees in its averages), the parties continued to exchange proposals. The Union did not present its health and welfare package until the parties were in negotiations for about 6 months, and almost 3 months after Respondent provided its economic package (excluding the copper price bonus). In *USW Local 14534 v. NLRB*, 983 F.2d 240, 246 (D.C. Cir. 1993), the court found no error in the Board's finding that the parties were at impasse regarding wages and benefits, despite a truncated bargaining schedule. Here, the parties did not have a truncated bargaining schedule and were at impasse over wages and benefits. This factor does not point to bad faith bargaining but points to impasse.

D. Impasse Factor Four: Importance of Issues Over Which There was Disagreement

As discussed above, towards the end of negotiations, the major areas of disagreement were wages, benefits (including health insurance and pension/401(k)) and the copper price bonus. The areas were important to both sides. This factor points to impasse.

E. Impasse Factor Five: Contemporaneous Understanding of the Status of Negotiations

A party's insistence that the negotiations are not at impasse is insufficient unless supported by conduct showing it will seriously compromise further. *TruServ Corp. v. NLRB*, 254 F.3d 1105, 1117 (D.C. Cir. 2001). Once an employer declares impasse, the union is responsible to demonstrate "changed circumstances of the union." *Laurel Bay Health & Rehabilitation Center v. NLRB*, 666 F.3d 1365, 1375 (D.C. Cir. 2012), enf. denied in rel. part 356 NLRB 3 (2010). Indeed, "[a] union official's denial that an impasse exists, combined with a new negotiating proposal that does not meet the employer's position, does not rebut an impasse." *Troy Grove*, 140 F.4th at 514, quoting *Mike-Sell's Potato Chip Co. v. NLRB*, 809 F.3d 318, 324 (D.C. Cir. 2015). When an employer maintains that "acceptance of its position on particular issues is essential to agreement, a union's last minute movement, short of agreement" does not break the impasse. *Mike-Sell's*, 809 F.3d at 323. Also see *Holiday Inn Downtown - New Haven*, 300 NLRB, 776 (1990) (no violation when nothing showed union was willing to break deadlock on issue causing impasse).

Respondent gave the Union the LBFO, which included areas where the parties reached tentative agreements. The biggest areas of dispute were economic items, which appropriately were named "the big ticket items": wages; health insurance; and the pension. Respondent was

clear that it was at the end of its offers on these items. The table above shows Respondent offers several comprehensive proposals.

The Union continued to insist on wage increases for all employees, not just skilled workers. The Union continued to insist the pension could not be frozen, despite Respondent's requirement that pensions be frozen, and would not accept Respondent's 401(k) proposal. Lastly, the Union continued to reject Respondent's health insurance proposal, which included a cheaper plan but required more employee contributions to premiums. The issues were important to both parties.

Although Respondent had implemented its LBFO on December 2, 2019, its December 10 letter to the Union made clear that, should the Union accept Respondent's terms on these three portions of the LBFO, Respondent was open to continuing a meaningful dialogue about the agreement. Instead, the Union again rejected these proposals and other than proposing to keep non-economic items the same as in the BLA, did not agree to accept the economic terms of the LBFO that limited pay increases only to the skilled workers.

The Union and General Counsel rely on Respondent's delay in providing health care information to show impasse could not have existed. However, even when the information was provided, the Union did not sufficiently change its proposals to break impasse. The Union also made clear throughout negotiations and its wage proposals that it would not accept Respondent's proposals that only gave pay raises to the skilled workers and none to the remaining workforce.

General Counsel maintains that the Union never said it would not accept Respondent's economic package. However, when Respondent was at the end of its rope and told the Union it was not moving from its economic package, the Union's conduct shows rejection of Respondent's proposal. On November 14, 2019, 2 months after Respondent presented its LBFO, Sinele specifically asked what Respondent needed to do for the Union to agree to the wage proposal. Armenta said that Respondent would need to consider wages for every employee, not just skilled employees and fair comprehensive health care for everyone. By this time, the Union already was on strike with the economic package at the cornerstone of reasons to strike. Although the Union modified its economic demands, it continued to demand wage increases for all employees, not just the skilled/mechanics. The Union did not demonstrate it was willing to move from its demands of wage increases for all, thus proving the parties were at impasse.

For example, in one case, despite 6 months of negotiations, the parties remained apart on the issue of contributions to the pension fund. The employer stuck to its guns on what it expected for the contribution. Examining the entire course of bargaining, the court determined the Union's unchanging position set up the perfect storm for impasse. *Laurel Bay Health & Rehabilitation Center v. NLRB*, 666 F.3d 1365, 1375 (D.C. Cir. 2012).¹⁶¹

The parties remained far apart on economic issues, particularly with the Union insisting that everyone, not just skilled workers, receive pay increases. *Saunders House v. NLRB*, 719 F.2d 683, 688-689 (3d Cir. 1983), cert. denied 466 U.S. 956 (1984) (Change from an off-the-record position to an on the record position on wages did not show the union made any true movement). Although the Union changed the amounts of the pay increases, it repeatedly insisted that it would not concede wage increases for the majority of the bargaining unit, the unskilled workers. The Union's unrelenting insistence on these positions did not preclude that

¹⁶¹ The Court noted that the union representative's last minute "protestations and posturing did nothing to negate the culmination in impasse of 6 months' fruitless bargaining." *Laurel Bay Health*, 666 F.3d at 1375.

the parties were at impasse. *Troy Grove*, supra. Like *Laurel Bay*, I too find that the Union's position was to delay the inevitable imposition of the LBFO and the parties were at impasse. *TruServ v. NLRB*, 265 F.3d at 1118 ("bargaining positions of the parties, as expressed by their experienced negotiators, indicate that the parties were at impasse."); *Mike Sells*, supra.

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F. Additional Factor: Do the Alleged ULPs Preclude a Finding of Impasse

General Counsel alleges a number of additional unfair labor practices occurring before Respondent implemented the LBFO. These include removing information from a break room in Amarillo, an information request and surveillance on the picket line.

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1. Removing union literature from the break room in Amarillo (Complaint ¶5(a)) and promulgating and maintaining a rule prohibiting employees from placing Union literature in the breakroom (Complaint ¶5(b))

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a. Facts

The anode casting section, located on the south side of the Amarillo facility, produced copper cathodes. The Amarillo anode casting section was staffed with about seven to eight employees on one 6 a.m. to 2 p.m. shift (except for John Saavedra, which is explained below) and one supervisor, John Brown. Tracy Morris was in charge of the south side of the plant. At the time of hearing, neither Brown nor Morris were employed by Respondent.

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The bargaining unit employees typically arrived pre-shift, about 5:25–5:30 a.m., for coffee and talking in the break room. The employees took their meals and breaks in a break room because while in the working areas they were required to wear respirators. The Union maintained a bulletin locked board in the Amarillo anode casting break room.

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Seven employees worked in anode casting. Their break room had two means of access: one was from the production floor; the second was from a metal staircase outside the building. Supervisors usually used the staircase to enter the breakroom, particularly if they needed to don a respirator before going to the production area. Brown typically ate lunch in his own office. The breakroom was also used for the weekly Friday safety meetings, which Brown also attended.

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In September 2019, local Union President John Saavedra, Sr. (Saavedra) was working as a setup man/furnace operator in anode casting. He frequently started work alone at 1 or 2 a.m. to heat up the furnace that melted copper. (Tr. 48:7291–7294.) At that time, the Steelworkers Union provided Saavedra with about six different Union documents to hand out to union members in case of strike. Saavedra was supposed to hand out the documents one at a time.

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At about 5:25 a.m. to 5:30 a.m. while the furnace apparently was down, Saavedra started distributing the literature to employees coming in for their shift. Contrary to the Union's instructions, Saavedra placed documents at the table where the anode casting employees normally sat. Saavedra did not have any additional employees in that department to receive the document. Saavedra testified that no one in management spoke with him about this document, nor the second document he distributed. (Tr. 48:7298–7300, 7305.)

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The next day, which was on a Wednesday, using the same method as before, Saavedra distributed the document about the strike defense fund (GC Exh. 434(b)) in the breakroom. Saavedra was having problems trying to light the furnace for 3 days, which meant production

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was shut down during that time. (Tr. 48:7307.) Brown, the mechanics and mechanic supervisors, electricians and the south side plant manager Morris were working on the furnace.

5 On that Wednesday, at approximately 9:30 a.m., Supervisor Brown and Saavedra talked in the control room while they waited for clearance to attempt to reignite the furnace. Brown told Saavedra that Supervisor Morris removed the union literature from the breakroom, but Brown did not know what Morris did with the documents. Brown further related that Morris asked him why he allowed the documents to be handed out. Saavedra could not recall anything further about the conversation, which lasted only minutes. Saavedra checked the table and trash in the
10 break room but did not find the documents at either place. Saavedra did not question Brown further about Morris' actions. Later in the day, the bargaining unit employees asked Saavedra about what happened to the documents and Saavedra shared with them what Brown said. Saavedra made more copies, which he handed out to the employees. He also instructed employees not to leave out the documents and keep it with their personal belongings. Saavedra
15 denied that Brown told him what to do with any future union handouts. (Tr. 48:7310–7315.)

Will Jondreau testified that he did not witness anyone removing union literature concerning strike preparations in the break room. He only heard about it from Saavedra. He also testified that Armenta "basically" raised removal of union literature in the strike meeting. (Tr.
20 48:7227–7228.)

b. Analysis

25 The question is whether Supervisor Brown's statement to Saavedra is hearsay, which would be excluded, or an admission against interest. Effective December 1, 2024, Fed. R. Evid. 801(d)(2) identifies an opposing party's statement as non-hearsay if the statement is offered again an opposing party and:

- 30 (A) Was made by the party in an individual or representative capacity;
- (B) Is one the party manifested that it adopted or believed to be true;
- (C) Was made by a person whom the party authorized to make a statement on the subject;
- (D) Was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
- 35 (E) Was made by the party's coconspirator during and in furtherance of the conspiracy.

40 The statement must be considered by does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

45 If a party's claim, defense or potential liability is directly derived from a declarant or declarant's principal, a statement that would be admissible against the declarant or the principal under this rule is also admissible against the party.

Therefore, per Fed. R. Evid. 801(d)(2)(A) through (D), the alleged statements are not hearsay but an admission against interest. This finding is consistent with years of Board precedent. See, e.g., *Teamsters (Ind.) Local 560 (Pennsylvania R.R. Co.)*, 127 NLRB 1327, 1243 (1960) (agent's statement removed from hearsay because admission against interest).
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The statement admits removal of union literature from a break room, which based upon facts presented, is not a working area. An employer is not permitted to remove union literature

left for employees in nonworking areas in nonworking time. *Intertape Polymer Corp. v. NLRB*, 801 F.3d 224, 232 (4th Cir. 2015), *enfg. in rel. part* 360 NLRB 957 (2014). Respondent does not show any “special circumstances,” to “maintain production or discipline.” *Shamrock Foods Co.*, 366 NLRB No. 117 at p. 2, 23 (2018). Respondent’s admission shows that it interfered with distribution of Union literature, and stating so to Saavedra also is a separate violation of 8(a)(1).

However, I do not find Respondent created a rule against distribution. First, the purported rule was not shared with anyone except Saavedra. Secondly, Brown only related that Morris asked why he allowed the distribution of the union documents, not that Brown or Morris said it would no longer be allowed. I therefore find the Respondent violated Section 8(a)(1) of the Act by interfering with the distribution of union documents that day and telling Saavedra that Respondent removed the union flyers from the break room. I recommend dismissal for establishing a rule against distribution.

2. Sinele’s October 13, 2019 letter

General Counsel alleges: About or around mid-October 2019, Respondent, by Stacy Sinele, by letters to employees at Respondent’s facilities (1) solicited revocation of employees’ dues checkoff authorizations; and (2) solicited resignation of employees’ membership in the Unions. Respondent admits that Sinele provided letters to employees around mid-October 2019 and affirmatively states that the Union was provided with copies of the letters in advance and did not object to the transmittal of the letters to employees.

a. Facts

Sinele’s letter, dated October 13, 2019, stated:

Employees who choose to continue working during a strike may have concerns about possible Union charges, trials or fines. One way to protect yourself against Union charges, trials and fines is to resign your full Union membership and become a “financial core” member. As a “financial core member” you may not be fined, penalized or punished by the Union as long as you continue to pay the portion of the Union dues that directly relates to the Union’s costs of negotiating and administering the contract. If you become a “financial core” member, you may not be allowed to attend Union meetings or vote in Union elections. But the Union is legally required to represent you the same as anyone else in the bargaining unit. The Union cannot retaliate against you because you choose to be a “financial core” member.

Employees who want to become “financial core” members may do so by filling out the enclosed letter and sending it to your Union representative. The choice is entirely yours and the Company is not urging you to make a decision one way or the other. If you have any questions about becoming a “financial core” member, you can call the information officer at the Phoenix office of the National Labor Relations Board . . . or the Fort Worth, TX office of the National [Labor] Relations Board You should also check the Unions constitution and By-laws for any particular procedure which may apply.

The letter told employees to review their Check-Off Authorization forms and used the Steelworkers as an example. The letter reminded that the “choice is entirely yours and the Company is not urging you to make a decision one way or the other.” (GC Exh. 215 at 6.)

b. Analysis

Employers “walk a fine line when engaging with employees on matters concerning union representation.” *New Concepts for Living, Inc. v. NLRB*, 94 F.4th 272, 282 (3d Cir. 2024), denying enf. 371 NLRB No. 157 (2022). Employees have a Section 7 right to cease their union membership so long as the employer has not acted with coercion, intimidation or animus. 371 NLRB No. 157, quoting *Peoples Gas System, Inc.*, 275 NLRB 505, 508 (1985).

When faced with these allegations, “the basic question to be resolved is whether the employees’ free will has been impaired in the matter of resignation from the Union.” *Morco, Inc., d/ba Towne Plaza Hotel*, 258 NLRB 69, 79 (1981), citing *Nordstrom, Inc.*, 229 NLRB 602, 605 (1977). A violation occurs when an employer interjects itself “by taking command of the situation” or the employer threatens or promises benefits based upon an employee’s action or refraining thereof. *Morco*, 258 NLRB at 69. Section 8(a)(1) is violated when the employer requires the employee to resign as a condition for returning to work, or the employer furnishes more than the resignation language and procedures. The employer may not attempt to discover whether employees will resign, and the employer may not offer assistance. *North Hills Office Servs.*, 346 NLRB 1099, 1103 (2006); *Morco*, 258 NLRB at 69. In *Morco*, the employees had “adequate resources” to verify the letter’s language, so no violation was found. *Id.* at 79–80.

In *Chicago Beef*, 298 NLRB 1040 (1990), enfd. 944 F.2d 905 (6th Cir. 1991), the Board found that “the mere distribution of forms, regardless of the date or dates of distribution,” was not a violation of the Act. Like *Morco* and *Chicago Beef*, Respondent’s letter provides information without any attendant threats or promises related to the employee’s status with Respondent. It also provided contact information for the NLRB offices where the employees could independently verify Respondent’s statements.¹⁶² General Counsel and the Union cite a number of cases that are factually distinct from the situation here.

For example, in *Space Needle, LLC*, 362 NLRB 35 (2015), the employer first reversed its union agreement to restate payroll deduction. It then issued various forms of letters, depending on whether the employees already had dues deduction and encouraging revocation of dues authorizations. In addition, the managers, who hand delivered the letters to the employees, were supposed to tell employees that “the Respondent did not want to resume dues deduction but would do so unless the employee directed it otherwise.” *Id.* The employer also gave sample resignation letters to employees but also had managers instruct employees to get the letters from the HR department, which kept a spreadsheet of those requesting resignation letters. *Id.* at 36. *Space Needle* is differentiated because the employees had no direct contact with managers providing instruction that Respondent wanted the employees to stop their dues deduction and Respondent would have no way to monitor what actions an employee took. Despite GC’s accusations about bad-faith bargaining here, no other instances of broad unfair labor practices occurred during the time.¹⁶³

General Counsel and the Union also cite *Chelsea Homes*, 298 NLRB 813, 834 (1990). However, most of the case deals with withdrawal from union authorization with the threat that signing the cards “can have serious damage.” The sample form also had preaddressed envelopes to assist the employees with the context of “unlawfully discharging and threatening

¹⁶² The cases General Counsel cites some cases that are not on point factually. See, e.g., *AdvancePierre Foods, Inc.*, 366 NLRB No. 133 (2018), in which the employer unlawfully searched and confiscated cards and disciplined employees for distributing cards during a unionization campaign, among other severe unfair labor practices.

¹⁶³ The Third Circuit finds that *Space Needle* is distinguishable from the facts in *New Concepts for Living* but did not serve as departure from Board precedent. 94 F.4th at 283–284.

employees.” The administrative law judge found the employer went beyond ministerial or passive aid.” Id. Here, Respondent did not engage in this severity of activity, such as threats or termination. Respondent gave no assistance beyond advising of their rights and providing information to discuss their individual situations with two regional Board offices.

GC and the Union also cite *Schenk Packing Co.*, 301 NLRB 487, 489 (1991). That case is factually inapposite. The employer’s letter about an upcoming lockout threatened that no union members would be hired as replacements, which the Board found was incorrect under the law, misleading and served as a “specific, unlawful solicitation to resign from the Union. Id at 489. The lockout also became unlawful with the attendant threats. Id. at 490.

Therefore, I recommend dismissal for the allegation regarding Respondent’s October 13, 2019 letter. It plays no role in determining whether the strike was an unfair labor practice strike.

3. The August 8, and November 12, 2019 Information Requests

General Counsel alleges Respondent unreasonably delayed in providing information. See Complaint ¶7(d).

a. Additional facts:

General Counsel alleges that on August 8, 2019, and November 12, 2019, the Union requested the following information:

(1) Updated claims data for calendar year 2018 and year to date data for 2019 with corresponding enrollment for medical, prescription drug, dental and vision coverage

(2) A report of high-dollar medical/prescription drugs claims (claims > \$25,000) for calendar year 2019 and year to date 2019;

(3) A report of the 2020 COBRA rates/premium equivalent for medical/prescription, dental and vision coverage.

(4) A copy of the 2020 renewal calculation used to develop COBRA rates/premium equivalents that includes a detailed description of the components included in the renewal calculation for medical/prescription, dental and vision coverage.

(5) A comprehensive report of the cost savings expected from the medical plan changed proposed in the Company Update to Health and Welfare Proposal, dated August 7, 2019. Please provide a separate cost savings estimate for each proposed plan design change (e.g., deductible, coinsurance, out-of-pocket maximum, copayment), including separate estimates for the proposed in network and out of network changes where applicable.

(6) A copy of any material prepared for the upcoming 2020 open enrollment period.

The Union claimed, by letter December 16, 2019, that Respondent failed to provide information in a number of areas (yet the complaint only maintains one delay in providing information). It also maintained it was flexible and declaration of impasse and implementation of the LBFO only made matters worse. (GC Exh .253.)

These information requests cannot be viewed in a vacuum but must be viewed within the complexity of events that began on August 8, 2019. During the August 8, 2019 bargaining session, Respondent said it was “close to where it wanted to be,” seemingly hinting that it was

about to present its last, best and final offer. Later that day, the Union made the above information request. (GC Exh. 179.)

As with all of the information requests on health insurance that required detailed analysis, Respondent relied upon its third-party administrator to provide it with statistical information. (Tr. 64:9717–9718.) The entire record shows the Union was required to sign confidentiality agreements for the actuarial data from the third-party carrier.¹⁶⁴ Cory Burnell, a senior technician in the USW collective bargaining research and benefits department, did not author the August 8 request.¹⁶⁵ He opined the request was updating information the Union already received about years 2018 and 2019 to date. The six items related to health care costs for Respondent, potential COBRA expenses to employees who might depart in 2020, and Respondent's potential cost savings from its proposal. (Tr. 51:7562 et seq.)

On September 5, 2019, Respondent presented its last, best and final offer (LBFO). Respondent also sent the Union a short response on Item 5 and reported more information would follow. (GC Exh. 191.) On September 5, 2019, Respondent emailed the summary plan descriptions for all aspects of its proposal. (GC Exh. 192.) Four days later, on September 9, 2019, the Union sent a large information request about health insurance and added a number of old information requests with it.

In its September 9, 2019 information request, the Union expanded what it wanted. The Union cited Respondent's emails from May 21, 2019, in which Sinele gave much information and now demanded updates on that information and specified how Respondent should update and wanted figures for years 2015 through 2018 in some cases. It also added information requests on life insurance, sickness and accident insurance from 2015 through 2018. It also raised its information requests from March 28, 2019 and two from late 2018. The Union requested information, such as supplemental employment benefits, although the LBFO did not propose anything new in that issue. The Union additionally requested attendance and tardiness records for three years at each location, the leave of absence policy for service members and the FMLA policy, and questions about the seniority proposal. (GC Exh. 193.)

On September 19, 2019, Sinele sent Armenta an email stating Respondent was working diligently to locate and provide information, much of which Respondent requested from its third-party provider. (GC Exh. 197; R. Exh. 68.) On September 23, 2019, LaVenture signed a third-party release agreement, which required the Union to maintain confidentiality of the information and required the information be used only for collective-bargaining purposes. (GC Exh. 197 at 18.)

On September 26, 2019, Sinele emailed a response to the Union's "voluminous" September 9, 2019 information request. (GC Exh. 197; R. Exh. 68.) Sinele noted that some of the information requested was redundant. Some information was still pending with the third-party provider processing and would be supplied as quickly as that provider could give it to Respondent. The response was over 290 pages. Sinele also stated:

Moreover, many of the requests sought information regarding Company proposals made to the Union months earlier, which proposals the Union has

¹⁶⁴ During October through December 2018, Respondent provided much of the similarly requested information, some of which came from the third-party administrator. These responses are not part of General Counsel's case. (See, e.g., R. Exhs. 52–55.)

¹⁶⁵ Burnell testified that, about August to October 2019, he reviewed the parties' proposals, counterproposals, and considered the amount of information requests and responses. He concentrated on the economic issues. (Tr. 51:7559.)

already rejected (e.g., benefits proposals). The timing of the Union's voluminous information request following receipt and rejection of ASARCO's September 5, 2019 last, best and final offer, certainly appears dubious.

5 At some point the Union sent Respondent's September 26 email to Cory Burnell at USW.¹⁶⁶ Burnell testified to his breakdown of his review, starting with "requested item I D entitled Reiterated Information request from March 26, 2019. . . Insurance, Accounting of cost savings to be generated to Asarco resulting from (1) Plan Design and (2) Premium cost-shifting proposals. Please include all calculations and inputs such that the Union can verify the accuracy of Asarco's work." It continues to:

- subpart a. The number of employees enrolled in the "Individual" coverage tier who:
- (i) Met the \$200 deductible but had out of pocket expenses between \$200 and \$750. Include the amount of these expenses.
 - 15 (ii) Incurred between \$2000 and \$4000 out of pocket expenses and the amount of those expenses per capita accounted by individual.

20 The request was for years 2015–2018. Respondent reported that it requested the third-party carrier to provide the information on subpart ii and Respondent would provide to the Union as soon as it received it from the administrator. The same was true for subpart b, ii, which requested: The number of employees in a "family" coverage tier who (i) met the \$400 deductible but had out of pocket expenses between \$400 and \$1000. Include the amounts of these expenses," and (ii) Incurred between \$2000 and \$5000 out of pocket expenses and the amount of those expenses per capita accounted by individual. The requests again were for the years 25 2015–2018.

Respondent's reply to I D was contained in tabs two and three. The information was provided on May 19, 2019, to a previous request. Burrell testified that Respondent's "Tab 4," containing information for I D, was "largely unresponsive." He said that the third-party administrator's letter, which discussed methodology of the calculations, was partially responsive.

30 On October 2, 2019, the Union presented Respondent with UP-4, which proposed reverting the health insurance to the language in the BLA and updated SPDs. (GC Exh. 201.) The Union made its proposal although Respondent advised the Union it was awaiting more information from its third-party carrier.

40 On October 28, 2019, Respondent supplemented its September 26, 2019 response to the Union's September 9 information request, with 198 pages, including the cover letter explaining what was provided. (GC Exh. 223.) It identified its response to I D, specifically: plan design and premium cost shifting proposal for plan years 2015–2018, subparts a and b regarding individual coverage and family coverage supplemented (GC Exh. 223 tab 1). Respondent also provided information for II, coverage and termination of coverage that supplemented its earlier response. Sinele concluded that if the Union believed Respondent had not fully responded, "you should consider this a formal request that the Union provide the Company, with sufficient specificity, exactly how any response is incomplete." (GC Exh. 223 at 4.)

¹⁶⁶ Burnell testified that he received a copy from Union staff "shortly after it was provided in September 2019" and later testifying to fall 2019. (Tr. 51:7570, 7572.) Burnell did not testify to when he received it or what "shortly" meant.

On November 12, 2019, a little more than 2 months after Respondent gave the LBFO, the Union sent Sinele a letter, drafted by Burnell, about health care data. The Union's request related to a November 27, 2018 information request response regarding health care utilization and/or expense reports and said it was requested for an update from October 2018 through September 2019. Also relating to the report ending September 2018, the Union asked for more information:

We note that the October 2017 through September 2018 medical and drug claim data was prepared by [third-party carrier] and appears to have been excerpted from a larger report. If available, please also provide copies of health care utilization and/or expense reports that may be regularly prepared by the company's insurance carriers, third-party administrators, or vendors (i.e. pharmacy benefit manager or short-term disability benefits manager).

Unfortunately, the claims worksheet includes no explanation or footnotes. We assume that these figures are paid claims, after all discounts. Please note whether the claims data is adjusted to deduct employee copayments, coinsurance and deductible amounts. Please also note whether the medical and drug claims are adjusted to deduct coordination of benefit offsets, subrogation recoveries, prescription drug rebates, and employee premium payments. If not, please provide the relevant figures.

(GC Exh. 231 at 7.)

The Union then requested new information on Respondent's September 5 LBFO: the total and item-by-item cost on an aggregate or hourly basis, for each of the items in its September 5, 2019 proposal over the term of the proposed agreement and "if possible . . . a description [of, sic] the underlying assumptions or methodology." It further asked for attrition rates in the units for each year and annual costs of apprenticeship and training programs, all for the previous 10 years and broken down by year. (Id.; GC Exh. 231 at 10.)

The November 12, 2019 union information request continued to a page and a half of requests entitled "Summary of USW Information Request November 12, 2019" and subtitled "Union Information Request of January 29, 2019, and September 30, 2019." Burnell testified that these pages encapsulated what the union requested, without the explanations previously provided. (Tr; 51:7583; GC Exh. 231 at 9–10.) One item among the list of 20 summarized "Active employee medical claim data . . . for the period October 2018 through September 2019." (GC Exh. 231 at 10.)

On November 14, after a bargaining session, Respondent emailed some of the November 12 information request: total employment health cost does include premium contributions for active and/or retired employees; pension plan cash contributions for 2019 was \$0 to date; and the January 1, 2019 actuarial valuation for Retirement Income Plan for Hourly-Rated employees would be provided when received from the third-party provider. Respondent stated the information was previously provided for hours worked for years 2015–2018 and for year to date 9/20/19 by the facilities, not the ten units requested, and provided the information as requested. The COBRA rate information had been provided previously. (Tr. 64:9723; GC Exh. 238.)

Respondent's cover letter, by Sinele, provided information in spite of its objections to the request. Sinele identified a significant objection:

Moreover, the timing of the request—made just days before we were scheduled to meet again at the Big Table—and the content of the request are dubious and appear designed solely for delay. For example, nearly six months after receipt of the information, you are just now asking for an explanation of pension expenses shown on the Company's March 20, 2019 breakdown of employment costs.

We have made it crystal clear for over two months that ASARCO has presented the Union with its last, best and final offer ("LBFO"). The Union has already rejected the LBFO on multiple occasions and never mentioned that it was doing so because it needed the requested information, or that the requested information will result in the Union finally agreeing to the LBFO. The information being requested does not appear currently relevant to Big Table negotiations or the Union's acceptance of the LBFO.

(GC Exh. 238 at 2.)

The Union forwarded Respondent's November 14 response to USW expert Burnell for review. Burnell testified that for active employee medical and drug claim data, Respondent did not provide a complete response for calendar year 2018, by month.¹⁶⁷ Burnell also testified that Respondent's claims data did not reflect when it was adjusted for the employees' premium payments. (Tr. 51:7584–7586; GC Exh. 238 at 6–7 and 25–27.) For the Union request of explaining whether claims data is adjusted to deduct employee copayments, coinsurance and deductible amounts etc., Respondent provided a narrative explaining the sum is the paid claim, already reflecting certain amounts deducted. (GC Exh. 238 at 7.) Burnell also found that this response to Item 2, large dollar claim reports was incomplete because it did not list every individual claim and a description of each. (Tr. 51:7689.) However, that information was not specifically requested on August 8, 2019. Burnell testified that Respondent did not supply the breakdown of 2020 COBRA rates, as requested for Item 5, and did not include any information as requested for Item 6, the healthcare enrollment information for 2020 to be given to employees. (Tr. 51:7591–7592.)¹⁶⁸

On November 21, 2019, Sinele sent to the Union the open enrollment information given to employees. (Tr. 64:9730–9731; R. Exh. 77.) On November 27, 2019, the Union proposed UP-5. (Tr. 7605.) The Union's benefit offer was an increase in premium of \$10 per pay period. Armenta separately told Respondent to provide, by December 6, the local supplements and SPDs to be implemented. (GC Exh. 249.)

On December 2, 2019, Respondent implemented its LBFO. On December 6, 2019, Respondent provided a response to Armenta's November 27 request for information on the Summary Plan Descriptions. (Tr. 64:9695–9708; GC Exh. 229; R. Exhs. 75, 75(a)-(k)).¹⁶⁹ Sinele testified that the SPDs were provided throughout negotiations. (Tr. 65:9799.)

On December 16, 2019, the Union emailed Sinele two letters about alleged missing information. (GC Exhs. 253, 254.) The first letter claimed Respondent's responses were

¹⁶⁷ Burnell also testified that it had some information on claims offsets, but not all the Union requested. (Tr. 51:7585.)

¹⁶⁸ On November 19, 2019, Respondent responded to the Union's request for information about subcontracting. Respondent objected to all requested items based upon relevance for certain subparts and provided the remainder of the information. (GC Exh. 242.)

¹⁶⁹ Also on December 6, 2019, Respondent provided the local supplements that the Union requested on November 27, 2019. (R. Exh. 76, 76(a)-(e).)

incomplete, ambiguous or inconsistent. (GC Exh. 253.) For health care data, the letter explained that certain information provided on November 14, 2019, on monthly breakdown of health care claims data were helpful, but the figures did not include certain offsets. The Union asked for breakdowns for months from January 2016 to December 2017 and October to December 2018, for employer cost savings for employee copayments, coinsurance and deductible amounts; coordination of benefit offsets; or individual claim stop-loss recoveries." (GC Exh. 253.)

The second letter was a summary based upon the previous letter, which listed almost 30 information items the Union maintained was missing. For missing health care data, the only relevant item was "Union health care information request of August 8, 2019." (GC Exh. 254 at 3.) The second letter listed the following areas of missing and/or incomplete information (summarized here):

Union Information Requests of Jan. 29, September 30 and November 12, 2019, B. Operating Cost and Net Cost Per Pound of Copper Produced; C. and D. Copper and Mine Production; F. Asarco Capital Expenditures Planned 2020-2022; G. Analyses of Comparative Production costs or Labor Productivity;

ASARCO Hourly Employment Costs, 2019 Year-to-Date Employment Costs; Estimated Roll-Up or Compounding Costs; Total and Overtime Hours Worked;

Pension Expenses; Saving Due to Proposed Pension Freeze; and Health Care Data.

The Union's December 16 letter additionally asked for additional information on health care costs, pension, retiree health care costs and life insurance expenses, based upon a March 20, 2019 breakdown. (GC Exh. 253.) Now the Union added "more complete claims data for years 2017 and 2018 in the same manner as the November 14, 2019 response for those years" (GC Br. at 108, citing GC Exh.253 at 10.)

In addition to the health care information, the Union expected a response within the next 30 days for: the operating cost and net cost per pound of copper produced (with five subparts), copper and mine production; Respondent's planned capital expenditures for 2020–2022; analysis of comparative production costs on labor productivity; and hourly employment costs (defined in 12 subparts). (GC Exh. 254.)

Burnell testified that Respondent had failed to provide complete information to the August 8, 2019 request. (Tr. 51:7594; GC Exh. 253.)¹⁷⁰

(1) Updated claims data for calendar year 2018 and year to date data for 2019 with corresponding enrollment for medical, prescription drug, dental and vision coverage

(2) A report of high-dollar medical/prescription drugs claims (claims > \$25,000) for calendar year 2019 and year to date 2019;---Burnell says lack of detail and list of large claims but only for claims above \$450,000, so only partially responsive (Tr. 51:7599-7600.)

¹⁷⁰ Burnell also opined that the allegedly missing information meant health care was still an open item for negotiation. I do not credit this legal conclusion.

(3) A report of the 2020 COBRA rates/premium equivalent for medical/prescription, dental and vision coverage. Burnell testified that Respondent provided the COBRA rates. (Tr. 51:7600.)

(4) A copy of the 2020 renewal calculation used to develop COBRA rates/premium equivalents that includes a detailed description of the components included in the renewal calculation for medical/prescription, dental and vision coverage. Burnell testified that the company's January 18, 2020 response did not include supporting calculations but "their consultant had "some data elements that might have been included" but not actual calculations showing how COBRA rates provided or calculated (Tr. 51:7600-7601.)

(5) A comprehensive report of the cost savings expected from the medical plan changed proposed in the Company Update to Health and Welfare Proposal, dated August 7, 2019. Please provide a separate cost savings estimate for each proposed plan design change (e.g., deductible, coinsurance, out-of-pocket maximum, copayment), including separate estimates for the proposed in network and out of network changes where applicable. Burnell testified that information was "arguably responsive for savings given on September 5, 2019" but no detailed calculations. (Tr. 51:7601.)

(6) A copy of any material prepared for the upcoming 2020 open enrollment period. Burnell testified Respondent provided in January 2020, and open enrollment was over December 6, 2019." Burnell testified confusingly about the effect of discovering this information after January 1, 2020 and its effects on bargaining. (Tr. 51:7602-7604.)

The Union did not only request health insurance information during this time. On November 1, 2019, it requested information for OSHA, MSHA, accident reports and citations. On December 6, 2019, Sinele sent the information to Director Prescott and notified Armenta that this information request was fulfilled. (R. Exh. 74.)

b. Analysis of the information requests

An employer's obligation to bargain in good faith under Section 8(a)(5) and (1) of the Act includes the obligation to furnish the employees' bargaining representative, upon request, with relevant information that the union needs to perform its statutory duty as the employees' bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967). An employer is required to provide information in a timely fashion or adequately explain why it could not. *Regency Service Carts, Inc.*, 345 NLRB 671, 673 (2005), citing inter alia *Quality Engineers Products*, 267 NLRB 593, 598 (1983). *J.G. Kern Enterprises, Inc.*, 371 NLRB No. 91 (2022).

Union requests for information regarding bargaining unit employees' terms and conditions of employment are "presumptively relevant" and such information must be provided upon request. *Richfield Hospitality, Inc.*, 368 NLRB No. 44, slip op. at 2 fn. 4 and 26 (2019); *Disneyland Park*, 350 NLRB 1256, 1257 (2007). The Board has long held that health insurance information is presumptively relevant. See, e.g., *Nestle Co.*, 238 NLRB 92, 94 (1978).¹⁷¹

A close examination of the facts reveals that Respondent completed answering the Union's August 8, 2019 request, including actuarial data, on November 27, 2019. The last information was Respondent's communication to employees about the open season.

¹⁷¹ Respondent's answer denies that the information is necessary and relevant. However, its brief provides nothing on this contention. (R. Br. at 106–107.)

One example is that Burnell originally testified that the August 8, 2019 request was an update to previously provided information. Yet, when Respondent completed a request on November 14 for active employee medical and drug claim data, Burnell testified Respondent failed to provide the information for the entire calendar year of 2018. (Tr. 51:7584–7585; GC Exh. 238 at 25–27.)

As of November 14, 2019, Burnell also found that the response to Item 2, large dollar claim reports was incomplete because it did not list each individual claim and a description of each as Respondent had done in the past. (Tr. 51:7689.) However, the original request of August 8 only asked for a report and did not request those details.

The additional evidence presented here shows that the Union was bombarding Respondent with information requests. Even assuming that Respondent did not supply the voluminous and technically difficult information as it had, Sinele raised the delay in Respondent's requests for information, which was not limited to the health insurance information.

The Union's requests could also be viewed as a tactical method to avoid a valid declaration of impasse. Information may be provided in a different form as long as it is

reasonably clear and understandable Furthermore, actual and specific requests for data must be made of the employer which are relevant to the bargaining discourse, and which are timed to the urgency of the situation.

Id. at 92 (1976) (footnotes omitted). But a union's delay in requesting information until the parties were at impasse is a last-minute movement to claim the parties were not at impasse. *Troy Grove*, 140 F.4th at 514. Cf. *Western Elec. Co.*, 223 NLRB 86, 92 (1976) (the union information request "presupposes that it seeks such information as a good-faith act in the discharge of its duty as the exclusive representative of the unit employees, rather than as an harassing tactic and not in a *bona fide* effort to obtain pertinent bargaining data. [fn omitted].")

The Union made the August 8, 2019 request on health insurance on the heels of Respondent stating it was pretty close to where it needed to be. It then added to what it wanted. On September 9, 2019, the Union maintained that Respondent had not sufficiently supplied information for two requests in 2018 and from almost 6 months before, in March 2019 and then added significantly more detailed requests on its health and welfare provisions, elaborating on the August 8, 2019 request. The Union's timing of its requests shows they were tactical and "submitted solely for the purposes of delay after months of extensive bargaining , after the contract's expiration. . . after the Union's rejection of the Respondent's final offer, and after the Respondent declared that it had nothing left to offer" economically. *ACF Industries, LLC*, 347 NLRB 1040, 1043 (2006).

Raising these requests is reminiscent of *Alkahn Silk Label Co.*, 193 NLRB 167, 172 (1971). There the administrative law judge stated: "The problem here does not appear to have been reticence on the part of the Respondent to supply information but ineptness of the Union representatives in describing what was wanted and their leisurely pace in getting around to it." Here I would not characterize the union representatives as inept by a long stretch of the imagination. However, the Union suddenly went from a simple 6-item list to describing in excruciating detail the underlying information it wanted for almost every item beyond what Respondent provided and said its third-party carrier was in process of gathering. Of concern, too, is that Burnell admitted he did not review the additional information.

Respondent provided simple answers to the August 8 information request by September 5 and later that month provided the rest of the information from its third-party administrator. The Union's later request of November 12 expanded upon the August 8 request. Respondent therefore provided information in a timely manner.

Even if the Union did not receive all the information, the Union bombarded Respondent with information requests from August 8, 2019, forward. In accordance with *ACF*, the Union's information requests were submitted for the purpose of delay. Therefore, the strike did not turn into an unfair labor practice strike without that information. *In re CalMat Co.*, 331 NLRB 1084, 1100 (2000).

4. During the strike, Respondent allegedly surveilled picket line activity

Complaint ¶5(d) alleges:

From a date in or around early or mid-November 2019 through July 5, 2020, Respondent, by unnamed agents of a third-party security company retained by Respondent, by video recording its employees engaged in a strike outside the entrances to Respondent's facilities, engaged in surveillance of employees' union and concerted activities:

- (1) Ray Complex
- (2) Mission Complex
- (3) Silver Bell Mine
- (4) Hayden Operations.

Respondent admits it retained third party security at these facilities during the strike but otherwise denies the allegations.

a. Facts:

Picketing took place at all facilities. Surveillance is alleged at four of the five facilities, with no incidents alleged at the Amarillo location. On October 21, Sinele, by letter, notified LaVenture that an employee who engaged in strike misconduct of a serious nature or other laws are not protected by the Act and could receive serious discipline, including discharge. (GC Exh. 220.) Some picketers carried signs stating "ULP strike." Respondent usually had security guards stationed at various locations, usually away from the roads.

The complaint allegations start in November 2019, which coincides with Respondent deploying guards contracted from a security guard company, AFIMAC. The guards were unarmed. (Tr. 62:9320.) AFIMAC guards wore khaki pants and green polo shirts. The AFMIAC team drove large SUVs in various colors. Once hired, AFIMAC obtained its Arizona security license and the guards took training, such as MSHA, to be able to work at Respondent's facilities. (Tr. 62:9326.) It appears that AFIMAC sent site managers or a site commander to each location (Tr. 62:9308, 62:9363, e.g. Lasicki at Silver Bell, Boston at Mission). The AFIMAC site manager, or sometimes site commander, performed administrative work, such as taking care of car and hotel receipts and payroll, and, depending upon the size of the site, may also acted as the evidence coordinator. (Tr. 62:9308–9309.)

The new security guards wore uniforms with different company insignia. Respondent did not provide AFIMAC personnel with cell phones.

1) *Ray Complex*

The entrance and exit from the Ray Complex is like a half cloverleaf. One road goes to Mesa and the other direction is Tucson. The picketers set up a location approximately 20 yards from the Ray Complex border, at the front entrance. The picketers also had Porta-Johns. The picketers were not on the company property.

About October 13, 2019, Sinele spoke with Tony McCauley, the Ray Mine human resources manager, about possible picketing at that facility and what to do if any problems occurred. They discussed security's presence there, allowing peaceful picketing according with employees' rights, what not to do at the picket line, and if someone crossed, finding work for that person. An outside vendor, Octavian, normally provided the security officers, who had a supervisor. Respondent's Security Department oversaw the security function. At Ray, the Safety Manager was Rose Alonzo, who reported to the mine's general manager. (Tr. 14:2223–2231.)¹⁷²

Ray General Manager Michelle Lammers had concerns about safety about activities on the picket line and requested additional security after the first 2 days when several incidents occurred on the picket line. (Tr. 14:2236–2237, 54:8185–8186.) According to the reports Lammers received, picketers directed spotlights at or towards vehicles attempting to enter the Ray site and threw rocks at vehicles. One supervisor received medical treatment for a spotlight shown into his eyes. One vehicular accident involved at least one picketer being T-boned. (Tr. 54:8158, 55:8251–8253; R. Exh. 3.)¹⁷³ During this time, Respondent's usual security company, Octavian, also had a subcontract with the Pinal County Sheriff's Department to provide an off-duty deputy on the picket line. (Tr. 54:8191–8193, 55:825–8257.)

Others entering the facility from that road reported picketers standing on an island in the middle of the road and shining LED flashlights into their vehicles, temporarily blinding them. (See, e.g., Tr. 57:8647–8648, 60:9016–9019, 9052–9053; R. Exh. 25.) These concerns were reported to the various managers, the safety office and Rose Alonzo.¹⁷⁴ (Tr. 8572 et seq., 8614 60:9018–9019; R. Exhs. 22–23.) One employee reported that he and a coworker were driving into the when a striker on a bullhorn threatened to kill the coworker; he reported this incident to the Sheriff's department. (Tr. 57:8602–8603.) Respondent received a report that a truck was blocked trying to make a delivery. (Tr. 57:8615; R. Exh. 24.) The picketers had camcorders, cell phones and used drones.

In late October or early November 2019, the Pinal County Sheriff's Department contacted Rose Alonzo to set up a meeting with Respondent and the Union about the picket line. This meeting also included the Gila County Sheriff's Department and Town of Hayden Sheriff's Department. Respondent was represented by Lammers, Alonzo, Sinele and a safety manager Nick Ferreira; the Union was represented by Armenta Sr., Manny Armenta Jr., Greg

¹⁷² On October 17, Armenta notified Sinele that employee and bargaining unit member Mark Scarfone drove his vehicle in a way that reasonably could have hurt picketers and their families. The picketers reported Scarfone to the county deputy. Armenta also wrote that Scarfone made threats towards the strikers and might carry guns in his vehicle. (GC Exh. 218.) The record reflects an understanding that Respondent terminated Scarfone for these actions.

¹⁷³ Rose Alonzo was directed to keep the log at the beginning of the strike. R. Exh. 3 was admitted over GC's and Union's objections as a business record and showing Lammers' state of mind, not for the truth of the matter asserted. Not all conduct reported in R. Exh. 3 occurred at the picket line and I only consider that which occurred at the picket line as reflecting Lammers' state of mind as the record makes no mention of attempts at security beyond the picket line area

¹⁷⁴ Alonzo also was known as Rose DiBona.

Romero and additional representatives from the International Union. The Pinal County Sheriff's Department ran the meeting, stating the purpose was to deescalate the situation on the Ray strike line. The sheriff's main issue was the speeds used on the road where the picketers were, plus the spotlights and rocks thrown in front of the Sheriff's personnel. The parties discussed the speeding. Alonzo suggested the picketers move the porta potties to the other side of the road so that they would not have to run across it. Armenta Jr. became angry, apparently threw some epithets at Respondent, including not to tell the Union "where to put my fucking port-a-johns. You're not here to tell me what to do out there on that line." After Armenta Jr.'s statements, the Union walked out of the meeting, which lasted no more than 10 minutes. (Tr. 55:8177–8180.)¹⁷⁵

Respondent contracted with AFIMAC. The AFIMAC officers had to go through Arizona licensing and MSHA training before they were allowed to start work near the picket line.

In the second week of November 2019 AFIMAC actively began providing security services at Ray. Lammers met with AFIMAC to set parameters for their operations, including maintaining logs and documentation of incidents. An off-duty Pinal County Sheriff deputy also was stationed around the clock for a few more months. (Tr. 54:8185–8193.)

Once AFIMAC began its duties, Lammers put Rose Alonzo in charge of the security duties. (Tr. 54:8162.) At the beginning of the AFIMAC's service, GM Lammers and Alonzo met with AFIMAC representatives and instructed them not to perform constant surveillance of peaceful picketing activities. Lammers never had a discussion with AFIMAC about providing video cameras or their video storage system. (Tr. 55:8274–8276.)

AFIMAC initially had 12 to 15 guards in its Ray complement, split between a day shift and night shift. (Tr. 63:9438.) Two to three AFIMAC guards were stationed at the "cattle guard." (Tr. 55:8280–8281, 63:9459–9460; R. Exh. 1.) The site where AFIMAC stationed its officers had a porty potty and a light stand.

AFIMAC set up a videographer and a security officer on both sides of the road,¹⁷⁶ a rover, and a shift supervisor in addition to the site commander. (Tr. 63:9445.) The videographer used a handheld camcorder. (Tr. 63:9478.) The videographer's job was to document "reportable incidents," such as mass picketing, fighting, impeding traffic, violence on the picket line, and verbal threats. The security officer ensures the safety of the videographer and possibly identifies other threats. The site commander instructed the videographers not to record peaceful picket line activity and not to record anything with cell phones. (Tr. 63:9447–9448, 9452, 9528.) Afterwards, the videographer reviews the recording and types a report. The site commander reviews the report before it is uploaded. (Tr. 63:9453.) After the site commander's review, the video was uploaded to the cloud to a system called Veritas. The video in Veritas could not be edited. (Tr. 63:9511.) The site commander also notified Alonzo by phone, text or email about any incidents in which video was uploaded. (Tr. 63:9482.)

About one to 2 weeks after AFIMAC arrived and the picketers were hurling racial epithets towards the officers, The AFIMAC Ray site commander released one officer from Ray when the officer and a picketer got into a verbal altercation involving racial epithets thrown at the officer. The site commander observed the picketer yelling and screaming at the guard, which included the racial epithet "n-word," and the officer acting as if he wanted to leave his post and get into a physical scuffle. The site commander removed the officer from his duties on the line. (Tr. 63:9442–9443, 9535–9540.) At this point, AFIMAC began videorecording verbal harassment after the site commander discussed the matter with Alonzo. (Tr. 93:9510, 9563.)

¹⁷⁵ General Counsel did not present any evidence to refute the discussion of the meeting.

¹⁷⁶ Per the partis' stipulation. (Tr. 63:9519.) General Counsel continued to object to admissibility.

From mid-November 2019 until early June 2020, the videographers uploaded numerous reports. Most of the AFIMAC personnel were African American and the picketers used racial epithets towards the AFIMAC officers. (Tr. 63:9469.) The picketers sometimes put their signs in front of people driving in or leaving Ray, especially around the blind curves. The picketers also surrounded 18-wheeler trucks entering the facility. (Tr. 63:9470.)

Most of the documented video shows numerous incidents of verbal harassment, including racially charged language towards AFIMAC's predominantly African-American officers. (See, e.g., R. Exh. 47 and corresponding videos in R. Exh. 48.) In a few cases, picketers' conduct escalated to approaching buses and trying to hit the bus. (e.g., R. Exh. 47 at 147–150.)¹⁷⁷ The AFIMAC site commander testified that racial epithets directed towards a specific officer was a verbal threat. (Tr. 63:9525.) Each relevant recording has lots of cursing.

AFIMAC used eight large SUVs at the site. (Tr. 63:9457.) Although the officers could have their own cell phones, any video taken on a personal cell phone was not sanctioned. (Tr. 63:9468.)

Upon Respondent's request, about a month after AFIMAC came to Ray, AFIMAC supplied a security escort, or chase team, for Respondent's chartered buses carrying employees. AFIMAC added eight more personnel, four for each shift and rented more vehicles. The chase teams went either to Mesa and Tucson. The chase team continued until a few weeks before AFIMAC wrapped up its stay. (Tr. 63:9439–9440, 9457, 9545.)¹⁷⁸

The videographers also recorded vehicles entering and exiting the Ray facility upon Alonzo's instructions. However, these videos were not kept. (Tr. 63:9564–9565.)

Employee Murphy testified that when he and other picketers saw guards with the videocameras, the picketers asked why the guards with the camcorders; the guards responded that it was "none of your business" and not to worry about it. Other guards were using cellphones. The guards appeared to pan the picketers for 10–15 minutes. (Tr. 60:7454–7455.)

On average five picketers were present during the day and two to three during the night shift. On about January 22, 2020, Placencio went to Ray with Gregory Schuett, and Lance Senteky, other officers in USW Local 937. When they arrived, about 10 a.m., some strikers were walking the line with signs and others were preparing food. The two security personnel had vehicles at the site. Placencio observed the security personnel had camcorders, which they held up towards the picket line as if they were recording. This report coincides when AFIMAC was stationed at the property.

Another employee testified that between four and six additional security guards showed up on the day shift shortly after the strike began; on the night shift, the number varied between three and five. As the strike progressed, the number of security guards decreased. The security guards were in white or black SUVs, like Suburbans. They wore black or dark blue shirts, with jackets that said "Security." These guards pointed cameras at the picketers, appearing to be recording them. (Tr. 40:5950–5953.)

¹⁷⁷ About February 2020, AFIMAC received a report about nails at the entranceway to the mine. The videographer filmed sweeping for nails, which lasted 3 to 4 weeks. (Tr. 63:9473.) None of those videos were in Veritas. (Tr. 63:9519.)

¹⁷⁸ Alonzo told the Ray AFIMAC site commander the reasons the chase vehicles were needed were: the buses had been threatened and drivers in front of the buses braked; and items were thrown at the bus. (Tr. 63:9439.)

2) Mission

Picketing at Mission stopped approximately March 29, 2020. The picket line was approximately 20 yards away from Respondent's property. Picketers were located on Pima Mine Road, near the I-9 freeway. Pima Mine Road is a two-lane road without a shoulder. (Tr. 63:9576–9577.) One of the picketing locations was on native American reservation land.

Placencio picketed at Mission approximately 20 times per month, beginning when the picketing started, usually 4 hours at a time. Placencio observed security personnel in vehicles or sometimes outside their vehicles with a cell phone, or at time with a camcorder pointed at the strike line, looking as if they had intent to record. At times when the security personnel looked like they were recording, the strikers were walking the picket line with their signs. At other times, the picketers had gatherings for meals that security also appeared to record.

The Pima County Sheriff's Department was called to the picket line a number of times. On October 29, 2019, Deputy Timothy Senne was called to the picket line due to the traffic hazard of nails found on the road. Senne approached the picketers, who became defensive and accused a safety crew of planting the nails. (R. Exh. 49.)¹⁷⁹ The sheriff's department also had reports of picketers standing in the roadway and putting "stuff," including nails, in the roadway. (Tr. 63:9583.) In one instance, the nails caused a Respondent truck to have three flat tires.

About mid-November 2019 security personnel were consistently at 2 locations: one near a guard shack, near the Pima Mine Road entrance; the other was located at the south end of the Mission Mine complex, called the South Mill entrance. At the North Mill entrance, usually three or four guards were posted.¹⁸⁰ The guards were unarmed. The guard shack at the North Mill entrance was 3 miles from the road.

The Mission GM at the time, Tom Phillips, determined a need for additional security and AFIMAC was hired. The security guards were stationed on Respondent's property, with AFIMAC guards stationed at Mineral Hill Road, six miles from the South Mills gate; it was separate from the usual checkpoint but closer to the picketers, about 20 to 50 yards away. At the North Mill gate, security was stationed 3 miles from the main gate. AFIMAC guards reported to Respondent's safety compliance officer. (Tr. 39:5702.)¹⁸¹

AFIMAC assigned seven agents, including the site supervisor and videographer, to its Mission team. Three AFIMAC guards worked each 12-hour shift. No rover was assigned from AFIMAC; those duties were left to the "in-house" security team.

The videographer recorded video of picket line infractions. The videographer worked with a "tactical security officer" who wrote the documentation. The videographer was equipped with a handheld digital camcorder. The videographer reported to the AFIMAC shift supervisor and made no reports to Respondent. At shift change, the off-going videographer would log off before the oncoming videographer would log in; the tactical security officer also turned in written documentation from his shift. (Tr. 62:9364–9367, 9371, 9378.) The night shift videographer testified that the other AFIMAC guards did not use their cell phones to record any picket line activity, nor did they point their cell phones towards the picket line. (Tr. 62:9372.)

¹⁷⁹ Senne believed the department had additional reports but "it was just taking too long." (Tr. 63:9591.)

¹⁸⁰ Mora testified that the pre-strike security guards were not Respondent employees but were from contractor Octavian. (Tr. 39:5687.)

¹⁸¹ Mora testified that if AFIMAC filed any reports, the reports would have been sent to Respondent's safety officer. (Tr. 39:5704.)

The AFIMAC team was posted across the street from the picketers, about 30-40 feet. (Tr. 62:9368.) The AFIMAC team had four large SUVs at Mission, two for each shift. (Tr. 62:9369.) all wore reflective neon vests. (Tr. 62:9411.) Light trees were set up at the AFIMAC site, pointing towards the picket line, so that the guards could see in the dark and the videographer could document if needed. (Tr. 62:9370–9371, 9407.)

The AFIMAC night videographer would only record for strike line violations, such as blocking tracking, vandalizing vehicles as they entered or exited the property, or trespassed. He never had to record an incident. (Tr. 62:9381.) If the videographer recorded an incident he would write a statement about the incident. (Tr. 62:9394.) The tactical security officer kept a shift log.

AFIMAC submitted weekly reports to Respondent, with dates beginning Monday November 25, 2019. The daily report, as part of the weekly submission, listed the maximum number of picketers. (GC Exh. 402.)

HR Manager Mora testified that, early in the strike, the picketers were 3 miles away from the North Mill gate and 20 picketers (or more) were stationed there; however, that number decreased until the COVID pandemic shut down the picketing.

3) *Silver Bell*

The picket line was seven miles from the front gate of the mine, Avra Valley Road and Pump Station Road, about the north side of a cattle guard. (Tr. 36:5413–5414, 5421.) Strikers held up picket signs with “ULP strike” designations, and chanted “fair contract now,” and “scab” among “other things.” (Tr. 36:5416.)¹⁸²

Silver Bell GM Stonehouse testified that the safety manager was in charge of security during the strike and had no contact with security personnel. The additional security reported to Safety Manager DeVar Cluff. Stonehouse did not recall any problems at the picket line except someone may have reported that the picketers were getting close to cars and no action was taken. (Tr. 40:6001, 55:8354.) HR Manager McMorrow recalled a report that nails were found in the road, but she did not recall the results of an investigation. Another employee reported to McMorrow that he was concerned that picketers jumped in the road in front of them; another reported children at the picket line playing and had a concern that the children would get in the road. McMorrow reported these concerns to Stonehouse and Cluff. (Tr. 42:6374–6375.)

Before the strike, a third-party security contractor, Octavian, posted at entrance one unarmed guard, plus a rover that patrolled the perimeter of the property would stop there from time to time. These security guards had uniforms, but those were not provided by Respondent. The security guards sent to Cluff reports on their patrols, particularly if any issues such as trespassing with ATVs or reporting illegal aliens to Border Patrol. After the strike began, Stonehouse testified he made the decision to increase security personnel at Silver Bell and asked Cluff to get additional guards. (Tr. 40:5979–5980, 42:6366–6367.)

AFIMAC security arrived to work at Silver Bell on November 11, 2019. (Tr. 62:9310, 9315.) The AFIMAC site manager reported to Safety Manager Cluff. (Tr. 62:9314.) However, at the beginning of AFIMAC’s duties, GM Stonehouse advised the site manager that he did not

¹⁸² Local 937 financial secretary Greg Schuett was a picket line captain who attended the strike line at Silver Bell almost every day until the picketing stopped about March 2020. He spent 4–6 hours at the site each day

want the AFIMAC guards near the picket line. Cluff appears to have emphasized this order too. (Tr. 62:9333.) The AFIMAC security team stayed seven miles away from the picketers until the AFIMAC guards were advised of any incident on the picket line. When AFIMAC was advised of a picket line incident, those guards would attempt to obtain video. (Tr. 62:9314.)

AFIMAC guards at Silver Bell had video equipment but, according to the AFIMAC site manager, did not use it. (Tr. 62:9315.) The AFIMAC guards had their own cell phones to use during shifts. (Tr. 62:9336.)¹⁸³

AFIMAC maintained two shifts, with 3 employees assigned to each shift. (Tr. 62:9311.) Two were stationed at the guard shack to check identification of people entering the property. Truck drivers checked in at a different shack that AFIMAC did not staff. A seventh employee reviewed any tape or evidence. The AFIMAC supervisor occasionally rode a roving patrol, checking on the AFIMAC guards and checking different sites on the Silver Bell property.¹⁸⁴ The AFIMAC site supervisor testified that no incident reports were written. (Tr. 62:9316.) The first AFIMAC supervisor testified that no incidents occurred. (Tr. 62:9351.)

By February 2020, GM Stonehouse evaluated that the strike activity was winding down and need not need to spend extra money on security. The security company was also having problems with staffing. (Tr. 40:4993–4994; GC Exh. 418.)

4) Hayden

General Counsel contends that, during shift changes, “Respondent would send its security guards from their stationed spot a mile down the road to monitor the employees.” (GC Br. at 57, citing Tr. 4006–4009, 5119.) Local 886 vice president Sandoval picketed with signs saying “unfair labor strike.” (Tr 38:5655.) Notably nothing is mentioned about AFIMAC’s presence or any attempted videotaping or recording by any picketer.

No AFIMAC site supervisor testified specifically about Hayden. General Counsel’s recitation of facts for Hayden rely on testimony from other site supervisors.

b. AFIMAC and agency

The initial question is whether AFIMAC guards were agents for Respondent ASARCO. Common law principles are used to determine agency. *D&F Industries, Inc.*, 339 NLRB 618, 619 (2003). Express authority occurs when the purported agent acts within the scope authority. *Bill’s Electric, Inc.*, 350 NLRB 292 fn. 3 (2007). Apparent authority is present if a third person reasonably believes that the principal consents to the purported agents is acting on the principle’s behalf:

A party claiming apparent authority of an agent must prove (1) that the acting party subjectively believed that the agent had authority to act for the principal and (2) that the subjective belief in the agent’s authority was objectively reasonable.”

¹⁸³ General Counsel states AFIMAC guards were given video equipment and cellphones to use while on site. (GC Br. at 58, citing 62:9314, 9336, and 9340.) However, the AFIMAC site supervisor’s testimony does not indicate the guards were “given” cell phones to use.

¹⁸⁴ Roving duties included checking water valves and ensuring the munition storage was secure. It also included checking the pump house, minimally twice a day.

Poly-America, Inc. v. NLRB, 260 F.3d 465, 480 (5th Cir. 2001) (citing *Myers v. Bennett Law Offices*, 238 F.3d 1068, 1073 fn. 2 (9th Cir. 2001)), *enfg. in rel. part, Poly-America, Inc.*, 328 NLRB 677, 688 (1999).

I find that AFIMAC was Respondent's agent while working across from the picket lines. Respondent authorized and directed the AFIMAC guards and permitted them to videotape the picketing strikers. Lammers generally testified that she gave directions to AFIMAC at the beginning of its time monitoring the picket lines. At Silver Bell, GM Stonehouse and Safety Manager Cluff also directed the AFIMAC supervisor for guards' locations and duties. Respondent imbued express authority to AFIMAC. *Bill's Electric*, *supra*. Because the AFIMAC guards had directions from Respondent, they were Respondent's agents. *Poly-America, Inc.*, 328 NLRB at 688.

The AFIMAC guards also had apparent authority. The AFIMAC guards worked on Respondent's property. No striker observed Respondent's own security team members telling the AFIMAC guards to leave or police coming to remove the AFIMAC guards. AFIMAC guards also possessed apparent authority as employees would reasonably assume the AFIMAC guards were permitted to act on Respondent's property and Respondent did nothing to stop them.

I therefore find that the AFIMAC guards were Respondent's agents within the meaning of Section 2(13) of the Act.

c. Respondent's agents engaged in surveillance and/or the impression of surveillance by videorecording or acting as if they were recording

1) Applicable law

If Respondent's agents commit violations, those acts are properly imputed to Respondent. *Poly-America v. NLRB*, 260 F.3d at 481. Respondent, by and through its agents at AFIMAC, violated Section 8(a)(1) by surveilling and/or giving the impression of surveillance at Mission and Silver Bell facilities. No violation occurred at Ray or Hayden, which requires that those allegations be dismissed.

The Board assesses allegations of picket line surveillance with an objective standard. An employer may merely observe open, public union activity on or near its property, which alone does not create unlawful surveillance. However, videotaping and photographing of the activities is unlawful surveillance because it tends to create "fear among employees of future reprisals. To show such surveillance lawful, an employer must demonstrate that "it had a reasonable basis to have anticipated misconduct by the employees." *Preferred Building Services, Inc.*, 374 NLRB No. 11, slip op. at 8–9, fn. 23 (2024), quoting *National Steel & Shipbuilding Co.*, 324 NLRB 324 NLRB 499, 499 (1997), *enfd.* 156 F.3d 1268 (D.C. Cir. 1998). Also see *California Acrylic Industries, Inc. v. NLRB*, 150 F.3d 1095, 1099 (9th Cir. 1998) (videotaping employees' union activities tends to create fears of future reprisals and chill Section 7 rights), citing *F.W. Woolworth Co.*, 310 NLRB 1997 (1993).

Employers are not permitted to record on the supposition that something might happen. *Woolworth*, 310 NLRB at 1997 (quotes omitted). In *Preferred Building Services*, the employer failed to provide evidence that it had any fears of the picketers blocking access to the facilities or committing any other picket line misconduct, or that any misconduct occurred on a specific date. 374 NLRB No. 11., slip op. at 9 fn. 23.

2) Recording at the facilities

General Counsel contends that AFIMAC's mission was "security by any means." (GC Br. at 73, under section heading ". . . Respondent turns to its third-party security goons to harass and intimate the strikers.") The facts do not support General Counsel's contentions, which imply AFIMAC guards were carrying guns, clubs and other sort of accoutrement and beating on the strikers. Neither the employee picketers nor Respondent witnesses identify any time when the "new guards" from AFIMAC were told by Respondent's regular security to leave; no picketer was asked whether any police were called for the AFMIAC guards.

I agree that much of the video surveillance was not warranted. However, GC argues that the justifications for surveillance were "illogical, improper or nonexistent." The facts do not support that accusation. At Ray in particular, undisputed testimony establishes that, early on, the strikers engaged in misconduct, which warranted hiring AFIMAC and subsequently the surveillance. Compare *Meditate of New Mexico, Inc.*, 314 NLRB, 1146–1147 (brief striker misconduct insufficient to intimidate nonstriking employees from crossing the picket line). I therefore find no violations at Ray initially but find violations at Silver Bell and Mission.

I do not find that Respondent engaged in any surveillance at Hayden based upon the facts. The Complaint version, dated March 15, 2022, specifically alleges that Respondent's agents surveilled the striking employees by videorecording: It says nothing about what might be called "plain Jane surveillance," that is, changes in observation. General Counsel's brief, in discussing facts, only cites that Respondent's security moved closer to the pickets during shift changes.

General Counsel's brief does not cite AFIMAC as actually videorecording or acting like the guards are videorecording. Then GC argues

At Hayden, Respondent was determined to intimidate and pressure the picketers into abandoning the picket line, a tactic which eventually succeeded. By sending its security guards from their stationed spot a mile down the road to monitor the picketers during the picket line shift changes, Respondent's actions would reasonably coerce the employees. [cite omitted] Moreover, Respondent stationed its security guards so as to watch the picket lines from every angle. Although no witness directly observed Respondent's security guards actively recording, each of AFIMAC's site managers testified that video surveillance equipment is standard issue equipment and videographers are included at each site. (cite omitted) Based on Respondent's contemporaneous filing of the pickets at every other site, a reasonable inference can be drawn that Respondent's security agents also engaged in video surveillance at Hayden . . .

(GC Br. at 117.)

GC's arguments are speculative. GC admits that no one "directly" observed recording. GC's contention that Respondent violated the Act because it conducted video surveillance at the other sites is unfounded. If no picketer observed a guard with a camera or phone pointed at them, the evidence does not support a conclusion that the AFIMAC guards engaged in surveillance of impliedly surveilled the picketers. See generally *Restaurant Horikawa*, 260 NLRB 197, 197 (1982) (dismissing surveillance allegations when no objective evidence supported finding any violation).¹⁸⁵

¹⁸⁵ In a discharge case, the First Circuit reminded the Board: ". . . [W]hen it draws inferences from

In the accompanying footnote, General Counsel also argues for finding a violation anyway because the security guards were constantly watching the picketers and “specifically driving out to observe shift changes” General Counsel makes a contradictory statement, as in its facts and the latter part of the sentence state the Hayden picketers were observed only during the shift changes, but the initial part of the sentence says the guards were constantly watching the picketers. (GC Br. at 117 fn. 118.) Given that GC’s facts state the guards were a mile away most of the time, until shift change, it is unlikely that the guards at Hayden were “constantly watching.”

General Counsel’s footnote then argues that it can proceed on a different theory that it did not pursue earlier for several reasons, e.g., conduct was alleged, the underlying facts were undisputed, law well established, and no due process concerns implicated. The additional theory is that surveillance took place anyway. I decline to accept GC’s invitation. First the facts do not support any violation. Second, due process rights are involved. “In determining whether a respondent’s due process rights were violated, the Board has considered the scope of the complaint and any representations by the General Counsel concerning the theory of violation, as well as the differences between the theory litigated and the judge’s theory.” *Buonadonna Shoprite, LLC*, 356 NLRB 857, 858 (2011), citing *Sierra Bullets, LLC*, 342 NLRB 242, 242–243 (2003). The theory first proposed in General Counsel’s brief deprives Respondent of due process by not raising the issue in its Complaint or at hearing. See, e.g.: *Huck Mfg. Co. v. NLRB*, 693 F.2d 11176, 1182 (5th Cir. 1982); *NLRB v. Blake Construction Co., Inc.*, 663 F.2d 272, 284 (D.C. Cir. 1981); *NLRB v. Temple-Eastex, Inc.*, 579 F.2d 932, 936–937 (5th Cir. 1978).

I therefore recommend dismissing the allegations that AFIMAC engaged in surveillance or the impression of surveillance at Ray and Hayden. AFIMAC, as Respondent’s agent, engaged in surveillance and/or the impression of surveillance at Silver Bell and Mission in violation of Section 8(a)(1).

5. General Counsel’s brief includes allegations that certain provisions in the implemented LBFO were unlawful

General Counsel and the Union contend that certain terms of the implemented terms and conditions were unlawful on their face and Respondent later applied them. The noted provisions are: the no-strike clause; grievance-arbitration; management rights; and union security and dues checkoff. GC’s discussion of these issues was scant. GC mentions these provisions as an alternative to finding that if the parties were at a lawful impasse, Respondent still could not implement the LBFO because it contained provisions to which the Union did not agree. However, GC did not plead these allegations in the alternative. GC did not cite the transcript, only the provisions in the implemented terms and conditions. (GC Br. at 140 fn. 128.)

Procedural due process requires notice and opportunity to be heard. *Earthgrains Co.*, 351 NLRB 733, 735 (2007). Due process requires that “findings against a party [are based] only upon matters brought to the party’s attention in the complaint or during the administrative hearing, and that are fully litigated.” *NLRB v. Temple-Eastex, Inc.*, 579 NLRB 579 F.2d 932, 936–937 (5th Cir. 1978), citing inter alia, *NLRB v. H.E. Fletcher Co.*, 298 F.2d 594, 600 (1st Cir. 1962) (where settlement agreement violated was not fully litigated at hearing and was not in the complaint not entitled to enforcement). See generally *Metal Processors’ Union Local No. 16 v. NLRB*, 337 F.2d 114, 116 (D.C. Cir. 1964) (mere entry of documents insufficient to put employer on notice that the documents were relied upon to support a claim of discharge).

admitted facts, it must do so fairly, and with full recognition of the burden of proof.” *NLRB v. Eastern Smelting and Refining Corp.*, 598 F.2d 666, 673 (1st Cir. 1979), overruled in part by *NLRB v. Wright Line*.

The test for procedural due process is whether the employer knew what conduct was in issue and had a fair opportunity to present his defense. *Soule Glass and Glazing Co. v. NLRB*, 652 F.2d 1055, 1074 (1st Cir. 1981). For the employer to have the ability to have a fair opportunity for a defense, the question is whether an employer's conduct would have changed how it litigated its case if it had notice of the agency's allegation(s). In *re Piggly Wiggly Midwest, LLC*, 357 NLRB 2344, 2345 (2012).

An agency cannot change theories in midstream without giving a respondent a reasonable notice of the change. *Lamar Advertising of Hartford*, 343 NLRB 261, 265 (2004), citing 5 USC § 554(b). General Counsel cannot wait until the post-hearing brief to include allegations, which fails to put a respondent on notice when it needs to defend itself. *New Era Cap Co.*, 336 NLRB 526 (2001). Accordingly, the agency must timely provide "the matters of fact and law asserted." *Lamar*, 343 NLRB at 265, quoting 5 USC § 554(b).

In *J.C. Penney Co. v. NLRB*, 384 F.2d 479 (10th Cir. 1967) the complaint failed to allege that a statement violated of Section 8(a)(1). The court determined procedural due process was denied because "the employer was never put on notice that . . . [the] purported statement standing alone was in issue" further the regional counsel never amended the complaint at hearing to show an additional issue.

Based upon the transcript (and GC's lack of citations therein), the emphasis throughout the hearing was that Respondent bargained in bad faith and the implementation of the Terms and Conditions was the result of bad-faith bargaining. General Counsel made clear that the unfair labor practice strike was further at issue due to its itemized list, such as the August 8 information request, surveillance/impression of surveillance by AFIMAC, and the like. General Counsel alleged that terms such as the copper price bonus, at issue in the negotiations, burden was unlawful; it did not specifically plead these sections it now claims caused additional violations. Like *J.C. Penney*, supra, the Complaint did not contain enough information to put Respondent on notice that these sections of the implemented Terms and Conditions were at issue for additional violations. See generally *In re Sierra Bullets, LLC*, 340 NLRB 242, 242–243 (2003) (complaint insufficient with General Counsel's expressly litigating on one theory). Nor did General Counsel raise this issue with its witnesses. General Counsel waited until its brief to make these arguments. As a result Respondent was not afforded procedural due process. In *re Pepsi Bottling Group, Inc.*, 338 NLRB 1123, 1124 (2003) (administrative law judge's finding was not alleged in complaint and not fully litigated at hearing, so no basis for finding contractual violation of 8(a)(5)); *The Metallic Lathers' Union of New York*, 260 NLRB 624 (1982) (GC failed to put referral question forward until post-hearing briefs, denying respondent due process).¹⁸⁶

In addition, the Board consistently finds that, where there is no bad faith bargaining and impasse exists, the employer is allowed to implement terms and conditions consistent with the

¹⁸⁶ In a different area, GC contends that it is not required to plead evidence or the theory of the case because the facts were fully litigated at hearing, giving sufficient notice. (GC Br. at 144 fn. 131.) In support of its proposition, GC mistakenly cites *DHSC, LLC d/b/a Affinity Medical Center*, 364 NLRB 878 (2016). But that case is based upon a special appeal for GC's request to amend the complaint at hearing, which the respondent opposed and also demanded a bill of particulars. The Board, citing Sec. 102.15 of the Board's Rules and Regulations, noted that a complaint advises of the charges for due notice and requires "a plain statement of the things claimed to constitute an unfair labor practice that respondent may be put upon his defense." *DHSC*, 364 NLRB at 878, quoting *NLRB v. Piqua Munising Wood Products Co.*, 109 F.2d 552, 557 (1940). Notably, the case does not say GC is not required to make a plain statement of an allegation.

pre-existing offers. GC and the Union do not maintain that the terms were inconsistent. I therefore find implementation with the preexisting offer was permissible.

6. Did the alleged additional ULPs affect finding impasse?

Respondent maintains, *arguendo*, that if any ULPs were committed during the strike, they did not convert the strike from economic to a ULP strike. General Counsel must establish that the ULP(s) was a factor that caused a longer work stoppage. *Chicago Beef Co.*, 298 NLRB No. 156 (1990), citing *C-Line Express*, 292 NLRB 638 (1989).

An economic strike may be converted to an unfair labor practice strike if an employer commits an intervening unfair labor practice that aggravates or prolongs the strike. *Vulcan Hart Corp. (St. Louis Div.) v. NLRB*, 718 F.2d 269, 276 (8th Cir. 1983). “An unfair labor practice strike does not result merely because the strike follows the unfair labor practice. A causal connection between the two events must be established.” *Typoservice Corp.*, 203 NLRB 1180, 1180 (1973). See *NLRB v. Harding Glass Co. Inc.*, 80 F.3d 7 (1st Cir. 1996; *Stowe-Woodard, Inc.*, 123 NLRB, 287, 297–298 (1959). General Counsel must prove, by substantial evidence, that the employer committed a ULP after the strike began and caused the strike switch to a ULP strike when the employees reacted to the ULP(s), “and the settlement of the strike was thereby delayed and the strike prolonged.” *Harding Glass*, *supra*; *Ryan Iron Works Inc. v. NLRB*, 257 F.3d 1 (1st Cir. 2001). General Counsel may use objective and subjective evidence to show that the strike was prolonged by the employer’s unfair labor practices. *Chicago Beef Co.*, 298 NLRB 1039 (1990), *enfd.*, 944 F.2d 905 (6th Cir. 1991).

General Counsel does not demonstrate the causal connections for October and December 2019 and in 2020.¹⁸⁷ The findings of certain unfair labor practices here do not impact the determination that these parties were at a good faith impasse, nor do they point to a connection that the strike converted from an economic one. Not all unremedied unfair labor practices committed before or during negotiations will preclude a good faith impasse. *Dynatron/Bondo Corp.*, 333 NLRB 750, 752 (2001). Also see *Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109, 121 (D.C. Cir. 2000). The unfair labor practices must be so serious that they affect negotiations in at least two ways: first, create more friction at the bargaining table; and secondly, “by changing the status quo, a unilateral change may move the baseline for negotiations and alter the parties’ expectations about what they can achieve, making it harder for the parties to come to an agreement.” *Id.*, quoting *Alwin Mfg. Co.*, 326 NLRB 646, (1998), *enfd.* 192 F.3d 133, 139 (D.C. Cir. 1999).

General Counsel first alleges that, during the period of August 20, 2018, through November 14, 2019, Respondent engaged in a number of ULPs, including Complaint “made unilateral changes to mandatory subjects of bargaining.” (Fifth Consolidated Complaint ¶7(h)(6).)¹⁸⁸ I do not find any ULPs existed before the employees struck with the exception of the removal of union literature in one location and the statement made to Saavedra. These statements were made to one employee at one facility and are too minor to make the strike an unfair labor practice strike. Jondreau testified that Armenta raised removal of union literature from the break room “basically” at the strike meeting. This statement demonstrates that the removal of union literature was given minimal importance in causing a strike. Therefore, the

¹⁸⁷ The complaint alleges several hundred individuals as unfair labor practice strikers but presented no evidence at hearing whether this list is accurate or whether some crossed the picket line, or joined the strike at a later time. Should the Board reverse my determination, a compliance hearing would be necessary.

¹⁸⁸ The Amendment to the Fifth Consolidated Complaint does not allege a specific unilateral change during that period either.

strike was not an unfair labor practice strike at the time the union members decided to strike and started picketing. *SCA Services of Georgia*, 275 NLRB at 834–835 (8(a)(1) violative statement made away from table insufficient to support 8(a)(5) violation).¹⁸⁹

Secondly, I find that, after the strike began, Respondent committed unfair labor practices with surveillance at two locations, but those did not convert the strike from economic to unfair labor practice as they were not sufficiently severe. The record reflects that none of these unfair labor practices affected the strikers' determination to continue what the ballot termed "an unfair labor practice strike."

Third, nothing changed the relationship of the parties with bargaining prior to Respondent's implementation of the LBFO. Respondent offered to meet again and the Union never responded.

Employees generally did not cite Respondent's unlawful surveillance of the strikers on the picket lines as a reason to be on strike. Nothing shows that this reason prolonged the strike.

General Counsel must show that the failure to provide information in a timely manner stops Respondent from declaring impasse when that information relates to "*core issues separating the parties*." *E.I. du Pont de Nemours & Co. v. NLRB*, 489 F.3d 1310, 1315 (D.C. Cir. 2007), (italics in *du Pont*, quoting *Caldwell Mfg. Co.*, NLRB 346 NLRB 1159 (2006)). Even presuming that Respondent did not provide the requested information, General Counsel does not carry its burden of proof.

The information requests alleged as unfair labor practices also do not provide the necessary causal connection to change the strike into a ULP strike: On October 2019, the information request cannot be related back when the Union failed to pursue the alleged January 2019 information request until November. Even then, Respondent had given the Union much, if not all, the requested information; the Union's November 2019 request required updates, including information from third parties, which Respondent diligently sought and Respondent provided information as it received it. Even if the information is delayed, the delay was not significant in December 2019 because Respondent had to obtain some of the information from third party; the Union, having asked for similar information in the past, was well aware of Respondent's need to obtain the information from the third parties and to have the Union sign confidentiality forms. So, the information requests did not convert the strike to an unfair labor practice strike. In addition, Armenta deadlined Sinele for January 2020 for the new SPDs. Further the information did not change the Union's position on wages, sticking to the requirement that all employees, not just the skilled employees, were entitled to raises.

As for Respondent's unlawful surveillance and impression of surveillance on the picket lines, the strikers never linked the continued strike to these violations. *Typoservice*, supra. Nothing in the Union's 2020 membership meetings indicated that employees extended their strike because of the surveillance on the picket line. They stayed out primarily because of the implementation of the terms and conditions. That unilateral change allegedly is the shutdown of Hayden and Amarillo in October 2019, at the beginning of the strike, which did not follow the BLA's indefinite shutdown procedures. GC contends the Union had no opportunity to bargain over the decision or effects of the shutdowns. General Counsel concludes that the shutdown are indicative of surface bargaining. (GC Br. at 94–96.) Two points to consider—

¹⁸⁹ Sinele's letter to employees was not a violation and therefore cannot be considered as part of creating an unfair labor practice strike. *Chicago Beef Co.*, 298 NLRB 1039, 1039 (1990).

First, Respondent is permitted to shut down operations during a strike. Further, Sinele notified Armenta that Respondent was doing so. In and of itself, Respondent had no violation there.

Second, General Counsel's brief is the first time General Counsel raises this argument. Although General Counsel contends that these actions are part of Respondent's pattern of bad faith bargaining, General Counsel never alleged the October 2019 shutdowns as unilateral changes. The Fifth Consolidated Complaint fails to provide notice to Respondent that it considers this action as a cause of finding bad-faith bargaining, surface bargaining or a reason the parties could not be at impasse. These facts were either known or should have been known to General Counsel during its investigation or as it prepared for litigation. Because of this lack of due process, the shutdowns in October 2019 cannot be relied upon for a finding of bad faith or for precluding impasse. *International Longshoremen's Assn (Ceres Gulf, Inc.)*, 367 NLRB No. 128, slip op. at 1, fn.2 (2020) (theory not raised before or during hearings cannot be considered after hearings). Also see *International Brotherhood of Teamsters, Local 101 (Allied Signal Corp.)*, 308 NLRB 140, 149 (1992) (Board upholds dismissal of allegation first raised in brief to administrative law judge).

General Counsel does not demonstrate that these unfair labor practices were causally linked to the strike.

G. Conclusion Regarding Impasse and The Strike

I recommend finding that that the parties were at impasse and Respondent lawfully implemented the LBFO. "Impasse on a single critical issue can create an impasse on the entire agreement." *Erie Brush & Mfg. Co. v. NLRB*, 700 NLRB 17, 21 (D.C. Cir. 2012), citing *CalMat Co.*, 331 NLRB 1094, 1098 (2000). Here, each "critical" component that led to impasse can be wages by itself or health care by itself. The parties met 40 plus times and reached agreement on a large number of issues, including, but not limited to, grievance-arbitration, drug testing, and the local agreements. The negotiations started with the Sound Off meetings in August 2018 and continued essentially to November 2019, approximately a period of 15 months.

A lawful impasse permits an employer to implement its last, best and final offer presented in negotiations. *DuPont*, 489 F.3d at 1319. As Respondent did not engage in bad faith bargaining and the ULPs found were insufficient to overcome a finding of impasse, Respondent was entitled to implement its LBFO. As a result, at no time during the almost 10-month strike were the employees engaged in a ULP strike. Instead the employees engaged in an economic strike. None of the impasse factors discussed above favor finding a violation.

An employer may implement some or all of the terms in its last offer when the parties reach an overall impasse in bargaining. *Atlantic Queens Bus Corp.*, 362 NLRB No. 62 (2015). Because the parties reached impasse, Respondent was entitled to implement the proposed changes so long as they were previously offered to the union. *Huck Mfg. Co. v. NLRB*, 593 F.2d 1176, 1186 (5th Cir. 1982). Although General Counsel and the Union complain that certain provisions could not be implemented when impasse did not exist, all provisions were offered to the Union. Respondent did not violate the Act by implementing its entire package.

Likewise Respondent's implementation of the LBFO and hiring replacement workers are not factors to show a causal connection to cause conversion of the strike. Respondent implemented based upon a lawful impasse and therefore was entitled to hire replacement workers. Hiring replacement workers in an economic strike is not an unfair labor practice and

cannot be a basis to say the strike was prolonged. See generally *Belknap, Inc. v. Hale*, 463 U.S. 491, 500 (1983) (permanent replacements hired during a strike need not be discharged to accommodate returning strikers); *Crane Co.*, 165 NLRB 570, 575 (1967). Because Respondent declared a lawful impasse, it was entitled to implement the LBFO. *Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17, 24 (D.C. Cir. 2012).

VII. RESPONDENT RETAINS REPLACEMENT WORKERS WHEN STRIKERS RETURN

Complaint ¶6(d): About July 5, 2020, by email and letter the Union made an unconditional offer to and for the employees to return to their positions of employment on about July 6, 2020.

Complaint ¶6(e): (1) Since about October 13, 2019, Respondent has hired and retained permanent replacement employees to replace the employees named above in paragraph 6(d).

(2) Since about July 6, 2020, Respondent, by email and letter, has failed and refused to reinstate the employees named above in paragraph 6(d) to their former positions of employment.

As noted in the above allegations, the Union made an unconditional offer to return to work effective July 6, 2020. To examine the above allegations, I first discussed whether the strikers were ULP strikers and entitled to immediate reinstatement. Finding that they were not, I then discuss the applicable law for economic strikers, then delve into the facts.

A. Were the Strikers Entitled to Immediate Reinstatement

General Counsel and the Union contend that all strikers must be returned to their pre-strike positions because unfair labor practice strikers have the right to immediate reinstatement. The complaint alleges over 700 named strikers. However, I recommend finding that the strike was economic, not an unfair labor practice strike.

The Board has long held that an employer does not have to terminate replacement workers hired during an economic strike to make way for returning strikers. See, e.g., *Crane Co.*, 165 NLRB 570, 575 (1967); *Moormack Gulf Lines, Inc.*, 28 NLRB 869, 880 (1941). Nor does an employer have to immediately return all strikers to their former positions when they participate in an economic strike.

B. Applicable Law for Reinstatement of Economic Strikers

It is well settled that an employer violates Section 8(a)(3) and (1) of the Act if it fails to reinstate strikers on their unconditional offers to return to work, unless the employer can establish a “legitimate and substantial business justifications” for failing to do so. See *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). The employer bears the burden of proving such a justification. See *Id.*; *Consolidated Delivery & Logistics*, 337 NLRB 524, 526 (2002), *enfd.* 63 Fed. App’x 520 (D.C. Cir. 2003).

The employer’s duty to contact economic strikers is not supposed to be “onerous or severe.” If the employer has addresses and phone numbers, the employer should be able to give sufficient notice of an open position. *Brooks Research & Mfg.*, 202 NLRB 634, 636 (1973).

Respondent claims that it permanently replaced a number of the strikers in order to continue operations during the strike which, if true, would constitute a legitimate and substantial

business justification. See, e.g., *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345–346 (1938). Hiring replacement workers during an economic strike is considered one of an employer’s primary weapons. *Vulcan Hart Corp. v. NLRB*, 718 F.2d 269, 275 (8th Cir. 1983). An employer is not required to terminate the permanent replacements hired during the strike to make way for the economic strikers. *Belknap, Inc. v. Hale*, 463 U.S. 491, 500 (1983).

Respondent’s intent to employ the replacements permanently, by itself, is insufficient. See *Hansen Bros. Enterprises*, 279 NLRB 741, 741–742 (1986), *enfd.* 812 F.2d 1443 (D.C. Cir. 1987), *cert. denied* 484 U.S. 845 (1987). The evidence to support the employer’s claim must be specific and show that the employer and the replacements had an understanding that the jobs were permanent. *United Site Services*, 369 NLRB No. 137, *slip op.* at 3.

“Job vacancies created by striking employees are considered to be filled by permanent replacements as of the time the putative replacements accept an employer’s offers of permanent employment in the strikers’ jobs.” *Solar Turbines Inc., Subsidiary of Caterpillar Inc.*, 302 NLRB 14 (1991), *affd. sub nom. IAM Lodge No. 685 v. NLRB*, 8 F.3d 27 (9th Cir. 1993) (citing *Home Insulation Service*, 255 NLRB 311, 312 n.9 (1981), *enfd. mem.* 665 F.2d 352 (11th Cir. 1981)). If the hiring commitment to a replacement employee was made before the strike was over, then the replacement is allowed to complete the requirements of passing the physical and training after the strike was over. *Solar*, *supra*.

Once the economic strikers make an unconditional offer to return, they are placed on a preferential hire list, or “Laidlaw” list. The economic strikers are placed on a preferential hire list and are supposed to be entitled to full reinstatement when a position, or a substantially equivalent position, opens. *Laidlaw Corp.*, 171 NLRB 1366, 1369–1370 (1968) *enfd.* 414 F.2d 99 (7th Cir. 1969), *cert. denied* 397 U.S. 920 (1970), citing in *Alaska Pulp Corp.*, 326 NLRB 522 (1998), *enfd. in part sub nom. Sever v. NLRB*, 231 F.3d 1156 (9th Cir. 2000). An employer may also remove economic strikers from the list if they refuse the employer’s offer of substantially equivalent employment. *NLRB v. Oregon Steel Mills, Inc.*, 47 F.3d 1536, 1539 (9th Cir. 1995). The term “substantially equivalent” includes, but is not limited to, the type of work, pay, hours, and location of work.

The above complaint paragraphs do not specifically identify any striker by name who was deprived of reinstatement as General Counsel alleges all 700 plus strikers were deprived of reinstatement due to the alleged ULP strike.

C. The Union Ends the Strike With An Unconditional Offer to Return to Work

During the strike, Respondent hired replacement workers at several facilities. However Respondent did not hire replacements at Hayden because it was only on care and maintenance, plus the number of crossovers and supervisors staffed Hayden sufficiently.

By letter dated July 5, 2020, the Union made to Respondent an unconditional offer to return to work for all facilities, effective July 6 at 8 a.m. and still contended the strike was an unfair labor practice strike. (Tr. 34: 5222–5223; GC Exh. 276.) On July 6, Sinele notified the replacement workers that the strike was ending and that they would continue to work for Respondent because the strike was economic. (GC Exh. 278.)¹⁹⁰

¹⁹⁰ On November 1, 2022, General Counsel moved to amend Fifth Consolidated Complaint ¶¶6(c) to allege that Respondent hired and refused to reinstatement employees to their previous employment per *Hot Shoppes*, 146 NLRB 802 (1964). In September 2025 General Counsel moved to delete this amendment. The motion is granted.

On July 6, Sinele, in a letter to Armenta, wrote that Respondent wanted to put the employees back to work in an orderly fashion as economic strikers and

[T]his return was sprung on the Company on a Sunday evening of a holiday weekend in the middle of a pandemic. I believe it would be more productive if we discuss this tomorrow when I have more data and I may be in a position to discuss that data with you.

In order to start the process, if the Union has a written proposal to make regarding the return of striking workers, I encourage you to send that to me as soon as possible. Finally I expect that we will continue this process in some kind of telephonic and/or electronic format, due to the recent COVID-19 outbreak . . . I assume that you have the same understanding, but I wanted to be up front in my expectations in that regard.

(GC Exh. 277.)

Respondent and the Union continued to exchange correspondence from July 8 forward. The Union demanded that Respondent to “dismiss the replacement works and displace and/or reassign junior crossover employees, if necessary.” The Union also contended that Respondent must rely upon the expired BLA’s seniority provisions. (e.g., GC Exh 279.) Respondent maintained that the strike was economic and made proposals for strikers to be returned by the preferential hire list. (e.g., GC Exhs, 280–281 at 3.)

On July 10, Sinele sent to Armenta a list of former strikers and their respective positions to return to the Silver Bell Mine. (GC Exh. 283.)

On July 12 (which may have been emailed at 2:10 a.m. July 13 local time), Sinele’s letter to Armenta stated that the Union made its position clear: The Union was not accepting Respondent’s proposed return-to-work procedures and therefore were at impasse. Respondent stated, effective the following day July 13, it was implementing its return-to-work procedures. In the same letter, Respondent provided the names and respective positions for Mission and those who would be placed on the preferential hire list. (GC Exhs. 286, 287.) Respondent subsequently sent notifications to Armenta and the Union about which former strikers would return to work and those on the preferential hire lists for the remaining facilities. (e.g., GC Exhs. 288-Ray, 289 Hayden Smelter and Concentrator and Amarillo Refinery). Armenta could not recall whether he contacted Sinele at all to her repeated invitations to discuss return-to-work matters telephonically. (Tr. 24:5277–5281.)

Respondent distributed its Return to Work Procedures, dated July 13, 2020, to its HR staff at the various work sites. The procedures stated:

1. . . . [A]ll former strikers have been placed on a preferential hire list for reinstatement to open job positions . . . in accordance with the Return to Work Procedure and application law.
2. Beginning on July 13, 2020, [Respondent] will commence with reinstating former strikers into open job positions at their pre-strike . . . facility. For any current bargaining unit job openings, [Respondent] will return former strikers to their pre-strike positions or to substantially equivalent open positions. In the event that there are less openings available than former strikers for a certain pre-strike position and/or substantially equivalent position, ASARCO will select, from amongst such former strikers, to fill the position with the striker

whose skills and abilities are best suited for the open position. Those not selected for an open position will remain on the preferential hire list.

3. Former strikers selected to fill an open job position shall be notified of their selection by ASARCO via telephone and by electronic mail (or by U.S. Mail if no electronic mail address is on file) using the last known contact information in ASARCO's possession.
4. Former strikers shall have ten (10) days from the date of notification or written notification via certified mail, whichever is sooner, to notify the Human Resources Department at their pre-strike . . . facility of their acceptance of the open job position offered and intent to return to work. Former strikers who fail to timely accept the job position offered will be returned to the preferential hire list (unless the former striker or the Unions advise ASARCO that the former striker does not intend to return to work for ASARCO). Another former striker would then be selected and notified of the offer for the open job position.
5. To satisfy safety in the workplace, especially during the COVID-19 pandemic, former strikers who accept an offer for an open job position, will be required to take a Company directed medical examination, including a drug and/or alcohol test (in accordance with the Terms and Conditions for employees who have been off work for more than six months). Should such a former striker be deemed not medically able to return to duty and/or fail the drug screen, he/she shall be returned to the preferential hiring list. ASARCO shall follow the provisions of the Terms and Conditions with respect to medical evaluations and drug screening and comply with applicable law.
6. Additionally, if required by law, regulation, or other MSHA or OSHA mandate, former strikers may be required to have refresher MSHA or OSHA training prior to returning to work.

(GC Exh. 254(a).)¹⁹¹

D. Did Respondent Hire Permanent Replacements After July 6, 2020?

During the strike, Respondent hired replacement workers. The letters to the replacement workers contained their wage rates. The offer letters for employment to replacement workers stated the candidate would be a "regular" employee and would not "be terminated solely for the purpose of reinstating strikers whom you have replaced, unless reinstatement of those strikers is required by or agreed to as part of a settlement with [the Board] or by court order or mandated through a strike settlement" between the Union and Respondent. The letters also state that the candidate accepted the offered wage rate on a specific date, which Sinele characterized as the hire date. Once the individual accepted the wage rate, he/she would be sent for medical exam and drug testing to complete the pre-employment requirements. (Tr. 15:2369–2371; GC Exh. 215(c) at 39.)

Although the strike was over, any employment applications for permanent replacement that were already in progress, including the interview process, and those that had to finish a few items to complete the process, continued. (Tr. 15:2362–2363.) Respondent would not make the firm offer of employment until the candidate passed the physical and drug and alcohol testing. Delays could be attributed to obtaining medical exams, particularly trying to get an appointment with the physician during the COVID-19 pandemic, and other such delays for lab testing. (e.g., Tr. 15:2365–2365.)

¹⁹¹ On March 24, 2020, early in the COVID-19 pandemic Sinele sent Armenta a COVID proposal. (GC Exh. 351.) The Union did not respond to Respondent's proposal, which was then implemented.

For the purposes of hiring replacements, Sinele said the “employment date” was the date on which the candidate is offered employment as an acceptance date. After the candidate stated he was willing to proceed, the candidate was scheduled for a medical exam and drug tests, and the offer is contingent upon passing those tests (Tr. 2370.) Sinele testified that the hire date, which is used for calculating seniority, is the date the candidate becomes an employee, when first reporting to the property for training and orientation. Sinele denied that the individual continued as an applicant while the exams and testing were completed. (Tr. 15 2367–2371.) For the replacement workers’ status, the date the offer was accepted is sufficient to hold a position, even after the strike is over. *Solar*, supra. In the meantime, some non-strikers apparently were offered employment after the strike was over.

E. Returning Strikers to Mission

Mission HR Manager Mora testified that Mission employed approximately 475 employees prestrike and approximately 200–225 went on strike. (Tr. 56:8454.) During the strike, Mora sent letters to prospective employees, in which Respondent notified the applicant that he/she was a permanent replacement. Mora estimated that he sent over 200 letters or emails for replacements. (Tr. 8455–8457; e.g., R. Exh. 11.) Mora testified that once an applicant accepted Respondent’s offer of employment, the process of getting the physical and background check could take between 2 to 6 weeks. (Tr. 39:5710.)

Poststrike Mission had more strikers than available positions. (Tr. 56:8460.) The department manager or general supervisor, with Mora, would see if a vacancy existed. If more than one striker matched the position, Mine Supervisor Shelstead, Greg Gohowski, and Rachel Kuro examined attendance records, tenure, and some production records to inform their selection. (Tr. 41:6269–6271.) If no one was available from the returning striker list, HR Manager Mora would try to hire from the outside.

The record reflects that HR Manager Mora also continued to offer employment to permanent replacements after the Union made its unconditional offer.¹⁹² Three were offered positions at the Mission Mine starting on Monday July 13. However, Mora testified that the mill repairman first class and mill repair helper at the Mission South Mill were different than Mission North Mill, which was part of the standard to determine whether the position was substantially equivalent. Additionally, no striker was offered the mill repair helper position because mill helper and mill repair helper were different positions, one in maintenance and one operational. (Tr. 39:5718–5720; GC Exh. 400 at 1–3.) However, one replacement was hired to start at Mission as a tire repairman on July 27, 2020, and Mora testified no striker was available; he testified that two strikers who were previously tire men were not given the position because the striker replacement filled the position. Mora also testified that he did not consider all positions for which a striker could be qualified. For the example of a mechanic, Mora would not consider that person for a laborer, or if that person was not qualified as a welder, he could not consider a person for that position either. (Tr. 56:8502.)

In comparison, on June 18, 2020, Mora offered J.C. a mill repairman second class at Mission’s North Mill, which would expire 7 days after the date of the letter unless Respondent had a signed acceptance. However, J.C. did not submit a written acceptance until August 10, 2020, and still had no date to start. Mora testified that sometimes he took a verbal acceptance and would hold the position even without the written acceptance. Mora did not recall whether

¹⁹² Mora testified that he likely sent the last letter for a replacement about May 12, 2000, or perhaps one went out in June 2000. (Tr. 56:8458.) Given the discrepancy, I credit the documentary evidence.

any striker was displaced by hiring this replacement. (Tr. 5724–5727; GC Exh. 401.) Nothing in the record indicates whether J.C. actually began employment.

To notify a former striker of a vacancy, HR Mora started with a phone call and possibly leave a message. If he had no response by phone, he sent a notification by email, if he had the individual's email address. Failing any response within a day, Mora sent a certified letter. Once he had a response, he would follow up and schedule the return. (Tr. 56:8461.) If someone turned down a job, he asked whether the former striker wanted to terminate; if so, Mora would obtain something in writing from that person to show their desires and noted it in his spreadsheet, which he updated daily. A number of former strikers declined reinstatement or did not respond to calls and letters. Reasons for processing into physicals and training or for termination are marked in the columns in the spreadsheet. (Tr 56:8463–8470; R. Exh. 12–13.¹⁹³)

I find that Respondent continued to hire (or attempted to hire) replacements instead of looking to strikers. I therefore recommend determining that Respondent violated Section 8(a)(3) at Mission by receiving an acceptance at Mission over a month after the Union gave its unconditional offer to return. *Hansen Bros.*, supra.

F. Returning Strikers to Ray and Hayden

On July 6, the day on which the strike was officially over, Respondent's HR Manager (for Ray and Hayden) Kim Decker, offered employment to EM as a SXEW Operator D. As with all letters offering employment to replacement workers, the letter said EM would be a "regular" employee and would not "be terminated solely for the purpose of reinstating strikers whom you have replaced, unless reinstatement of those strikers is required by or agreed to as part of a settlement with [the Board] or by court order or mandated through a strike settlement between the Union and Respondent. The letters also state that the candidate accepted the offered wage rate on a specific date. Once the individual accepted the wage rate, he/she would be sent for medical exam and drug testing to complete the pre-employment requirements. About 10 other such letters issued through July 27, 2020. (Tr. 15:2369–2371; GC Exh. 215(c) at 39.)

1. Ray

Sinele directed Ray GM Michelle Lammers¹⁹⁴ to apply the return-to-work procedure and determine who could return to open positions. (Tr. 55:8206–8207.) Ray HR supervisor Lori Neumann created an Excel spreadsheet, which Lammers reviewed to ensure accuracy for employee placement based upon skills in the operations. Neumann did not recall the meanings of some of her notations on the spreadsheet, and not all calls were logged on the spreadsheet. (Tr. 56:8513, 8525, 8544; R. Exh. 19.)¹⁹⁵

The Ray hiring needs changed due to operational changes made during the strike, testified GM Lammers. Lammers explained in detail how changes were made during the strike, which increased efficiencies throughout the strike, such as changes in the assay procedures that cut the frequency of testing and improved accuracy. (See, e.g., Tr. 55:8215–8217.) The

¹⁹³ R. Exhs. 12 and 13 are color-coded and have a number of abbreviations explained in the record.

¹⁹⁴ Lammers were extremely detailed and knowledgeable throughout her testimony. I therefore credit her explanations.

¹⁹⁵ Neumann no longer worked in this role after February 2021. She did not know who took over her responsibilities other than the HR department and did not recall training anyone else to handle the role. (Tr. 46:8549.)

Hayden Smelter was shut down during the strike: Subsequently Respondent did not need to maintain the Ray concentrator and its leaching processes

The initial Laidlaw list for Ray identified 109 strikers to return. The manager over each area determined the strikers who returned first. Lammers did not question the manager's determinations. (Tr. 55:8289–8290.) On August 19, 2020, Sinele responded to the Union's information request about "work force efficiencies" at Ray and the Union's demand to bargain over the effects of the efficiencies. Sinele emphasized that the work stoppage forced Respondent to adapt and, at the same time, improve the efficiencies at Ray with a bargaining unit work force of 345; therefore 125 bargaining unit jobs would not be opened. Ray decreased the amount of tonnage mined each day by 39 percent, which yielded a decreased need for 108 positions in mine production. As part of the response to the information request, Sinele provided the reasons for the remaining reductions in work force. (R. Exh. 4.)

At the beginning of each week, the Ray GM sent Neumann a list to recall. She entered the information in a spreadsheet and started calling the desired employees for recall. If she reached them by phone, Neumann advised them that a position was open and asked when they could return. If the striker accepted the position, Neuman sent them a confirming email; she also arranged or the physical. If not, she advised the individual that he would remain on the preferential hiring list. Some strikers turned down positions because they accepted other jobs or moved outside the area. (Tr. 56:5838.)¹⁹⁶ She also sent certified letters to those strikers offered positions below their pre-strike positions and those who were accepting employment to their original positions. All letters to strikers were sent by certified mail and signed by HR Manager Kim Decker. Other than determining that a striker was returned to the prestrike position, Neumann did not have any role in selection for employees who would be qualified for a different position. Neumann continued to work on the spreadsheet and returning strikers to work until February 2021, at which time the Ray HR team took over those responsibilities. (Tr. 56:8535.)

Michelle Sanchez, who worked at Ray and Hayden during this time, assisted in calling strikers back to work at Ray and eventually took over the entire process from Neumann.¹⁹⁷ (Tr. 59:8844.) Sanchez used the same process as Neumann, which involved receiving the call back information from the GM. She attempted to reach the desired employee by phone or if not answering, leave a voice mail message. If no voice mail, she would send a certified letter. If Sanchez reached an employee who accepted employment, Sanchez scheduled them for the physical and drug test. Some stated they would get in touch with her in a few days. She entered the information in a spreadsheet. For those who did not respond, Sanchez sent out certified letters identifying the position offered, that the striker had 14 days in which to respond, COVID vaccination requirements, other medical requirements and any requirements for MSHA and/or OSHA training.

If the employee never responded, Sanchez reviewed the individual's failure to respond with her manager, Kim Decker, and perhaps the corporate office.¹⁹⁸ Decker would determine whether the employee who did not respond could be terminated. (Tr. 59:8844–8850, 8862–9966; R. Exh. 38–39.)

¹⁹⁶ Neumann initially testified that no striker told her that they would not return because they did not want to work under the Last, Best and Final Offer but the spreadsheet listed a couple of employees who said that they would not work under the implemented Terms and Conditions. Those were removed from the preferential hire list. (Tr. 56:8538–5839; R. Exh. 19.)

¹⁹⁷ Sanchez could not recall when she took over these duties. She also did not recall the return to work date of expiration.

¹⁹⁸ The undelivered certified letters were placed in the employee files and no further action was taken to reach the individual. (Tr 49:8886.)

Sanchez¹⁹⁹ admittedly had not updated the spreadsheet since some time in 2021 and the information might not be correct to the hearing date. Further, the spreadsheet was kept in a computer file accessible to all HR personnel, so Sanchez did not know whether other HR personnel changed any of the information on the spreadsheet. (Tr. 59:8858–8862.) However, if a striker was offered a different position and declined, that striker remained on a preferential hiring list. (Tr. 59:8870–8871.) Some declined to work under the implemented terms and conditions, but she did not always note the reason unless it was medical. (Tr. 59:8884–8885.) But apparently not all strikers received the certified letter if unreachable.

Respondent had the Union's unconditional offer to return early July 6, most likely. Yet at Ray before any *Laidlaw* list was available, Ray staff made an offer of employment to a replacement. Additional offers of replacements issued after the unconditional offer to return. I therefore find that at Ray, Respondent offered employment to a replacement after the strike was over.

2. Hayden Smelter and Concentrator

For Hayden Smelter and Concentrator, Lammers did not create the list. David Valdez, the acid plant manager, created the list of employees who would perform care and maintenance for the Hayden Smelter and concentrator, with Lammers' guidance. (Tr. 55:8300–8301.) As of the hearing, the smelter at Hayden had not been restarted due to amount of capital investment. (Tr. 54:8150.) Because Hayden was still in shutdown, the operational needs for leaching decreased, such as a decreased need for the fleet of trucks. (Tr. 44:8212.)

The procedure for calling back strikers for Hayden involved a department manager or Manager Michelle Lammers notifying HR Generalist Michelle Sanchez to call the strikers who were offered reinstatement. If the individual did not answer or did not return the call, Sanchez issued a certified letter. In some cases, which usually were for maintenance, Sanchez called more than once before issuing the letter. (Tr. 53:8058.)

Similar to Ray, GC does not show that generally the strikers were not called back due to replacement workers taking their jobs. I therefore recommend dismissal of any allegation that Respondent failed to reinstate the economic strikers per the *Laidlaw* list at Hayden.²⁰⁰

G. Returning Strikers to Silver Bell

Silver Bell GM Stonehouse testified that the mine retained full production and lost only a few employees. During the strike the mine operated with 145–150 employees. Only 11–13 employees struck. (Tr. 55:8351, 8382.) Many of those positions were filled with permanent replacements. Approximately 17 offers were made with some of the replacements leaving and other replacements hired. (Tr. 55:8383–5384, 8439; R. Exh. 6.)

On July 15, 2020 Sinele notified Armenta of the Silver Bell strikers to be offered the positions. (Tr. 42:6379 et seq.; GC Exh. 283, 292.) In daily staff meetings, Silver Bell GM Stonehouse was advised when a striker accepted a vacancy. (Tr. 40:6013.)

¹⁹⁹ The spreadsheet was divided into employee still on the list and those who resigned, retired or terminated. (Tr. 59:8848; R. Exh. 38.)

²⁰⁰ A number of strikers were recalled and laid off, which is addressed below.

Stonehouse testified that local HR Manager Debbie McMorrow compiled the list and a supplemental list for that mine and he did not approve it before HR recalled strikers. He believed that if a position was open, the position would be offered to the striker. He further testified that HR also created the supplemental list for Silver Bell. (Tr. 40:6008-6010; GC Exh. 283, 292.)

McMorrow testified all employees, except about 15, reported to work during the strike. At the conclusion of the strike, only 6 of 10 Silver Bell job openings existed for the former strikers to fill. The openings were for 2 heavy truck drivers, 1 Electrician first class, 2 mechanic first class, and 1 welder first class; and all positions could be filled with former strikers. The former strikers selected for the jobs specifically held those positions. For those placed on the preferential hire list, McMorrow used criteria of what department and what position the former striker held.

Poststrike, McMorrow maintained a spreadsheet for 11 former strikers. (Tr. 55:8389; R. Exh. 7.) HR Manager McMorrow would call a striker and then issue a letter to those employees on the preferential hire list. (Tr. 55:8388.) As an example, she issued a letter, dated July 13, 2020, to one striker that he could return to his pre-strike position. The certified return receipt letter required the returning employee to notify her within 10 days of notification and then continue with testing, including the MSHA or OSHA training that was required. (R. Exh. 8(a).)

The spread sheet showed: Three strikers voluntarily resigned. Several did not respond to contacts from the HR office. A few declined to work under the Implemented Terms and Conditions and were considered terminated in July 2021. One declined an offer to a lesser position but stayed on the *Laidlaw* list.

H. Analysis

The terms under which economic strikers return to work is a mandatory subject of bargaining. In re *General Teamsters Union Local 662*, 339 NLRB 893, 900 (2003). Declaring impasse over the strikers' recall rights may be a violation of Sections 8(a)(5), (3) and (1). *Gasco Pumps, Inc.*, 274 NLRB 532 fn. 2 (1985) (employer violated those sections of the Act when implementing its proposal to limit strikers' recall rights to 6 months). In *Gasco*, the employer unlawfully restricted reinstatement rights to 6 months, which is not the case here.

Armenta repeatedly relied upon the expired BLA as a basis for how strikers should be returned and gave no sign that he would change. With the implemented Terms and Conditions in effect, Armenta's reliance upon the expired BLA was misplaced. Respondent correctly found that the parties were at impasse over the return-to-work procedures.

Strikers who place additional conditions on their returns with an employer, such as refusing to work under a lawful implementation of a last, best and final offer, are not entitled to reinstatement because the offer of unconditional reinstatement is no longer valid; then the former striker has no further rights to the preferential hire list. *H & F Binch*, 188 NLRB 720, 724 (1971), *enfd. in rel. part* 456 F.2d 357 (2d Cir. 1972). Several strikers declined Respondent's offers of employment because they would not work under the implemented Terms and Conditions. Those strikers added their additional condition and therefore had no further rights for preferential hire. *Id.*

In some cases, Respondent continued the processing replacement employees who accepted employment before the Union notified Respondent of its unconditional offer to return.

These permanent replacements are lawfully permitted to start their employment as their acceptance predated the Union's unconditional offer. *Solar*, supra.

For failure to restore 125 positions at Ray, Respondent contends the positions no longer existed due to staffing efficiencies developed during the strike. (R. Br. at 169–170 fn. 54, citing *Atlantic Creosoting Co., Inc.*, 242 NLRB 192 fn. 9 (1979).) In that case, the employer contended that it did not reinstate a striker because his position had been absorbed by another employee. The administrative law judge already found that the employer lawfully replaced 62 strikers with 80 laborers. *Id.* at 193–194. In dicta, the Board stated that the failure to reinstate this particular employee was due to valid economic reasons. *Id.* at 194.

The evidence here shows that Respondent continued to attempt to hire replacements after the strike was over. Some of the letters Respondent issued to purported permanent replacements show that Respondent continued to make a few offers to replacement workers after the Union made its unconditional offer to return. These offers are not allowed. The problem, though, is General Counsel's complaint cites that Respondent failed to reinstate over 700 named strikers. These broad terms do not specifically identify who, if anyone, suffered detriment due to Respondent's continued offers for replacements. General Counsel does not show who among those on the Laidlaw list, if anyone, was prejudiced. Thus, the violation is limited to continuing to make offers, but does not extend to specific strikers.

In summary, the strikers were economic strikers. Those strikers who placed additional conditions on their reinstatement waived their right to reinstatement because their offers to return were no longer unconditional. After the Union's unconditional offer, Respondent continued to make offers for employment for replacements, which is a violation. However, the complaint fails to identify who, if anyone, suffered any harm due to these offers. This situation leaves a remedial vacuum, which is best resolved through compliance.

VIII. RESPONDENT IMPLEMENTS A REVISED RETURN TO WORK PROCEDURE IN MAY 2021

Complaint ¶7(m): About May 24, 2021, Respondent unilaterally implemented a revised Return to Work Procedure for unit employees, in violation of Section 8(a)(5). Respondent maintains it lawfully implemented after bargaining to impasse.

Complaint ¶5(q): About Aug 25, 2021, Respondent, by Kim Decker, through letters sent to employees at Respondent's Hayden Operations, threatened employees with discharge because employees engaged U& PCA, including participating in a strike. Respondent denies.

Complaint ¶5(r): About August 31, 2021, Respondent, by Brenda Alward, through letters sent to employees at Respondent's Amarillo Copper Refinery, threatened employees with discharge because employees engaged in union and protected concerted activities, including participating in a strike. Respondent denies.

A. Facts

On April 26, 2021, almost 10 months after the Union made its unconditional offer to return to work, LR Director Sinele sent Union District Director Prescott and Assistant Director Terrazas an email in which Respondent proposed to alter the Return-to-Work procedure from the preferential hire list, which included a redline version of the procedure. Sinele prefaced the proposal that despite the unconditional offer to return to work to former or substantially equivalent positions, some formers strikers declined; some had reasons that they did not want to return to work at that time; some did not want to return to work under the implemented Terms

and Conditions, and others did not respond or had not updated contact information so that Respondent could reach them. Sinele reminded that the Union unconditionally offered the return to work as of July 6, 2020, but those who refused to work within the implemented Terms and Conditions were “placing conditions on their return to work.” Accordingly, Sinele advised that as of May 5, 2021, an employee on the preferential hire list who rejected an offer to return to work to a former or substantially equivalent position, or failed to timely accept an offer, Respondent would consider that person as abandoning the job. Sinele promised to send to the Union the names of employees who were offered the positions but did not respond, the employees Respondent previously contacted but the phones were no longer in service, and the employees’ certified mail was returned as undelivered. Sinele asked the Union to provide contact information for those employees before May 5. Sinele also asked the Union for input on Respondent’s proposal by April 30, 2021. (GC Exh. 376.)

On April 26, 2021, Prescott emailed Sinele that the Union rejected Respondent’s proposed changes and demanded Respondent desist from implementing any changes until the parties could agree to changes. The Union also requested information by April 30 for the substantially equivalent positions for each job in the expired BLA and for those that Respondent attempted to contact, the dates and corresponding contact method for each, the bid position held before the strike and the position offered or attempted to offer with the contact attempt. (GC Exh. 377.)²⁰¹ Sinele agreed to meet on May 4, as proposed by Prescott. (GC Exh. 378.)

Before the meeting, the Union provided a counter proposal “made without prejudice to the allegations regarding [Respondent’s] clearly illegal conduct.” One of the Union’s proposed provisions was reinstatement based upon the expired Basic Labor Agreement (BLA) and its supplements and to resume negotiations, and to return all “bargaining unit members to their pre-strike job positions.” Other employees would be bumped to another open position or laid off as directed by the BLA. Regarding notification, the Union proposed that the former strikers had 14 days from the date of the phone call “or sending of electronic/certified mail, whichever is later,” to notify HR at the facility to accept. Those who rejected the offer or failed to respond would be placed on a preferential hire list and offered again when available. (Tr. 37:5514–5515; GC Exh. 378 at 6–7.)

On May 4, 2021 District Director Prescott, Terrazas, District 13 Director Ruben Garza, Local 937 President Placencio, and other local presidents attended a videoconference meeting with Sinele about Respondent’s plan to change the return-to-work policy. At the meeting, Sinele stated the change was needed because Respondent had open jobs that needed to be filled. Sinele said the former strikers were not responsive to Respondent’s job offers and she wanted to prioritize responses from them for job offers. Prescott asked whether Respondent was hiring employees who were not previous strikers and were brought in from the “outside.” (Tr. 35:5348–5351, 5380, 37:5512; GC Exh. 395.) Prescott recalled that Respondent rejected the Union’s counter proposal but did not recall whether Respondent gave a “drop dead” date at the meeting. (Tr. 37:5517.) Shortly after the meeting, Sinele provided the Union with the local HR contacts for sharing with the former strikers to update contact information. (GC Exh. 379.)

On May 5, Sinele advised the Union that Respondent would not implement its proposed Return-to-Work policy but would follow up with the Union as the parties continued to negotiate. (GC Exh. 380.) On May 10, Sinele notified the Union that Respondent accepted some of the Union’s terms, such as a 14-day response time for the former strikers to reach by phone and then if no response within 1–2 days, issue a certified letter. Respondent also proposed that employees who accepted the return to work but could not meet the medical requirements would be placed upon Sickness & Accident (S&A), as proposed by the Union. If the examination

²⁰¹ The Complaint does not allege Respondent failed to provide this information.

process was not completed within 14 days of the notice, beginning with the newly proposed effective date of May 14, 2021, the employee would be separated from employment. Otherwise, Respondent rejected the rest of the Union's counter proposal. Sinele offered the dates of May 13 and 14 to meet by videoconference. (GC Exh. 381.)

On May 14, 2021, the Union sent Respondent an email with its second counter proposal. The Union maintained its position that former strikers be reinstated pursuant to the expired BLA and continue through bargaining and the other terms related to maintaining bumping permanent replacements. It also adhered to the position that any striker who rejected an offer or failed to timely respond, would be returned to the preferential hire list; it also maintained the former strikers would not be recalled until the parties reached a new BLA. The Union did not include Respondent's counter proposal about S&A. (GC Exh. 382.)

On May 19, Sinele sent the Union an email rejecting the Union's second counter. Respondent reasoned that it validly implemented the last, best and final offer and would not bump the lawfully hired permanent replacements. Respondent stated the Union needed to make a good faith counter proposal or else it would implement its proposal on May 24 and further:

If a former striker were to be offered a non-substantially equivalent position the notification they will receive of course communicates they remain on the preferential hire list for their former/substantially equivalent position whether or not they accept.

I will reiterate that the Company wants to get the former strikers back to work. To that end, I again invite the Union to assist the Company in locating and contacting former strikers who wish to continue to be employed If the Union has contact information for former strikers who have not been reinstated yet, now is the time to get that information to the Company.

(GC Exh. 383.)

On May 24, 2021 Prescott sent Sinele the Union's third counterproposal, which continued to require reinstatement of the expired BLA and bumping of replacement workers. On the same day, Sinele rejected the Union's third counterproposal for the same reasons for rejecting the Union's second counterproposal, and declared impasse, with implementation proceeding on that day as Respondent previously proposed. However, Prescott clarified later that he accidentally sent the wrong proposal. (GC Exh. 384.)

Upon receiving the clarification, Sinele asked Prescott whether the Union was willing to have the remaining former strikers work under the implemented Terms and Conditions, and whether the Union would agree to not bump the permanent replacements; unless the answers were "yes" to both questions, the parties remained at impasse. On May 27, the Union declined to agree to those questions because of the alleged ULP strike and instead objected to the implementation. (GC Exh. 385.)

Respondent sent certified letters to some former strikers on the *Laidlaw* list and maintained the conditions in the second return to work requirements. (See, e.g., Tr. 56:8477-8477; R. Exh. 15.)

B. Analysis²⁰²

Economic strikers retain their status as employees and once they make an unconditional offer to return to work, they are entitled to an offer of reinstatement if they have not been permanently replaced and that right can only be defeated with “legitimate and substantial business justifications.” *Gasco Pumps*, 274 NLRB 532, 535 (1985), citing *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 381 (1967), and *Laidlaw Corp.*, 171 NLRB 1366 (1968). The striker loses the right to reinstatement by failing to respond to an offer of reinstatement. See generally *Domsey Trading Corp. v. NLRB*, 16 F.3d 517, 519 (2d Cir. 1994), citing *Mississippi Steel Corp.*, 169 NLRB 648 (1968), *enfd. sub nom. Steel Workers v. NLRB*, 405 F.2d (D.C. Cir. 1968).²⁰³

Declaring impasse over the strikers’ recall rights can be a violation of Sections 8(a)(5), (3) and (1). *Gasco Pumps, Inc.*, 274 NLRB at 532 fn. 2 (the employer violated those sections of the Act when implementing its proposal to limit strikers’ recall rights to 6 months); Samuel Estreicher, *Strikers and Replacements*, 3 LAB. LAW 897, 908 and fn. 45 (1987). General Counsel contends that the implemented policy has significant differences than the previous policies enacted for the preferential hire list: “Respondent now only has to try once to offer a returning employee a position, and, if they do not accept it (i.e., either decline the offer or do not respond within 14 days), rather than go to the bottom of the recall list, the employee will now be considered to have quit and will not receive further offers to return to work. Tr. 5526–5527.” (GC Br. at 221.) However, the facts show that a striker might have more than 14 days from Respondent’s initial attempt if a certified letter is issued to the striker. Further, those placed on S&A would not be given only one chance.

The Union cites *Food Service Co.*, 202 NLRB 790, 804–805 (1973), regarding notification and registration requirements for former strikers is a mandatory subject of bargaining. However, in that case, the employer required the economic strikers to notify it of their current applications and “renewing their applications for reinstatement every 30 days.” *Id.* at 804. The administrative law judge found that the strikers’ notifications to the employer, nor the employer’s notifications to the strikers, were a mandatory subject of bargaining. Those conditions were not present in this matter and therefore *Food Service* is inapplicable.

Although Respondent declared impasse, certain of its conditions were lawful. For example, Respondent was not required to keep open positions for strikers who failed to respond to offers. The parties agreed to place those who were ill and unable to work on Sickness & Accident.

Here Respondent gave the Union an opportunity to bargain and changed some of its proposal based upon union input. Respondent also postponed implementation to continue negotiations. However, at each turn, the Union unfortunately insisted upon reinstatement of the expired BLA and bumping out the replacement workers, which Respondent was not obligated to do after an economic strike and lawful implementation of the Terms and Conditions. The Union’s insistence upon these terms, again reinforced on May 27, demonstrates that by the Union’s third counter proposal that the parties were locked in their positions. Respondent therefore lawfully put its new requirements into place.

²⁰² The complaint does not allege any violation of Sec. 8(a)(3).

²⁰³ Respondent cannot rely upon the passage of time to end *Laidlaw* rights for economic strikers. *Brooks Research & Mfg.*, 202 NLRB 634, 637 (1973).

IX. POST-STRIKE ALLEGATIONS SPECIFIC TO HAYDEN AND AMARILLO

The complaint alleges a large number of violations at Hayden and Amarillo, beginning about September 2020, in violation of Section 8(a)(5), (3), and (1). The following allegations are made:

- Respondent unlawfully threatened employee Saavedra when Respondent supervisors Alward and Farley told him Respondent intended to operate with reduced shifts, staffing and supervisors performing unit work. (Complaint ¶¶5(k), (l).):
- About September 14, 2020, Respondent reduced the number of shifts of employees in rodline department at Amarillo Copper Refinery from three to two. (Complaint ¶6(f).)
- Since about September 14, 2020, Respondent has assigned supervisors to perform work ordinarily performed by employees in the Units at Amarillo Copper Refinery. (Complaint ¶6(g).)
- About September 14, 2020, Respondent eliminated bander, mobile equipment operator, mechanic and general mechanic positions on the rodline at the Amarillo Copper Refinery. (Complaint ¶6(h).)
- About September 25, 2020, Respondent laid off employees: Jon Mares, Pat Montano, Clay Spangler, Jared Bliss, Juan Carreon; Jordan Decorte. Respondent admits laying off Mares, Monto and Spangle about 9/25/20; Decorte laid off on October 2, 2020 and Carreon laid off October 4, 2020 and Bliss laid off prior to September 25, 2020. (Complaint ¶6(i))
- About September 30, 2020, Respondent eliminated bander, mobile equipment operator and mechanic positions on the rodline at Amarillo Copper Refinery. (Complaint ¶6(j).)
- About September 30, 2020, Respondent began assigning the acid pickling operator duties on the rodline at the Amarillo Copper Refinery to train to operate cranes. (Complaint ¶6(k).)
- About September 30, 2020, Respondent began assigning crane operators on the rodline at Amarillo Copper Refinery to cut bands. (Complaint ¶6(l).)
- About September 30, 2020, Respondent began assigning second shift banders on the rodline at Respondent's Amarillo Copper Refinery to perform work during the first shift. (Complaint ¶6(m).)
- About November 11, 2020, Respondent recalled 2 banders, 1 mobile equipment operator, and one mechanic position to work on the rodline at Amarillo Copper Refinery. (Complaint ¶7(i), 8(a)(5) only.)

A. Applicable Language from the Implemented Terms and Conditions

On August 7, 2019, the Union tentatively agreed to language about indefinite shutdowns. That language was incorporated into the LBFO, which was the implemented Terms and Conditions. The language states:

- 5 (1) Before the Company decides to indefinitely shutdown or discontinue a plant, department or operating unit (a Shutdown for the purposes of this Section) it shall give the Union advance written notice of at least sixty (60) days prior to the proposed Shutdown date if the Shutdown is within the Company's control. Along with such notice, the Company shall provide the Union with a detailed statement of the reasons for the proposed action and how and where the work which was perform at the shutdown unit will be performed.
- 10 (2) Thereafter, the Company will meet with appropriate Union representatives in order to provide them with an opportunity to discuss the Company's proposed course of action, provide the Union with any additional requested relevant and non-confidential information and bargain in good faith over any suggested alternatives.
- (3) No less than 30 days prior to the Shutdown date within the Company's control, the Company shall advise the Union of its final decision, which decision shall be the exclusive function of the Company.
- 15 (4) Any Employee affected by a Shutdown shall, after exercising any right to which s/he may be entitled, be placed on layoff in accordance with this Agreement.

(GC Exh. 173 at 2.)

20 *B. Operations at Amarillo*

Before the strike the Amarillo facility produced both anodes and cathodes. The copper ore is processed into anodes, then pure copper cathodes. The cathodes then are processed into various sizes of copper rods, cake, or coils. The anodes were processed in the furnace, then the tank house and eventually sent to the rod line for processing into the different copper products. The cathodes could also be shipped out.

30 In 2018 275–300 employees worked at the facility, with approximately 200 bargaining unit employees. IBEW and Steelworkers 5613 represent the bargaining unit employees. The Steelworkers produce the copper rod line. Mechanics are also involved in the operations. (Tr. 2:83–86.) The Amarillo rod line operated during the strike. Only copper rod was produced in 2022. (Tr. 2:86.) In 2022, approximately 65 employees worked at the Amarillo refinery.

35 The entire facility has waste stream piping, which runs to tanks, and then the waste. The facility has a lunchroom, which is located next to the material handling. The copper processing is very complex and is simplified here.

40 The mobile equipment operators move materials in material handling. These operators primarily drive forklifts and straddle carriers. The straddle carriers pick up anodes, usually in the tank house. (Tr. 68:8745.) The anodes also could be obtained from the Hayden Smelter.

45 The process begins when the furnace operator heats the furnace to the appropriate temperature. Once that temperature is reached, the furnace operator signals the charge man to place bundles of anodes and any scrap copper into a shaft to be melted. The melted copper mix is sent to the caster operator.²⁰⁴ The tank house is where the copper cathodes are produced. The anode casting house produces the anodes. Anodes are not pure copper, so they are placed in an acid mix in the tank house with an electrical current running through them. The melted copper becomes a cathode.

²⁰⁴ On Sunday night the set-up crew came in to prepare for operations on Monday. The set-up crew lights the furnace, which takes six hours to heat up. (Tr. 58:8782.)

Other elements, such as selenium and tellurium,²⁰⁵ are scrap, and fall to the bottom of the tank. Any scrap copper is reburned in the tank house to make more anodes. The cathode, which is almost pure copper, is sent to the rod line, where it is melted down for the copper rods and coils. (Tr. 48:7138–7139.) The pulpit operator takes over from the caster and the mill starts operating.

A crane lifts the cathodes and places them in a furnace after the cathodes' bands are removed by either a bander or laborer, or anyone who can help so that the process is not backed up. Even prestrike, the mobile equipment operators cut bands off the cathodes. The furnace operator melts the cathodes and the melted copper is made into the size of rod that is needed by the caster and assistant caster

The acid pickling operator also helps the banders and gives the banders their breaks. This copper is in coils but is not the final copper coil. These coils go through a series of acid washes, then rinse washes and ultimately is waxed. The wax covers the copper to prevent corrosion and oxidation. If the copper rod is not adequately covered in wax or is defective, it is reprocessed from the very beginning, at the furnace. The copper is compressed twice through rollers, banded, and placed upon pallets.

Banding is performed by the bander or the acid pickling operator, who would be stationed at the A table, where the copper is weighed. Prestrike, three banders worked the banding line, with two working the press/conveyor and one stationed at the A table or on break. During the strike and afterward, two banders and the acid pickling operator took care of the process. Once compressed, the copper is automatically lifted onto a fiberglass pallet for weighing²⁰⁶ Once the compressed copper reaches a weight of 7250 to no more than 7500 pounds, the weighing process stops, then the weighing pallet lowered to where the copper can be banded. The bander at the A table also takes a sample of the copper rod from every fourth coil; the sample is tested for oxygen. The banders cut and separate the copper stack. The copper is sent through a conveyor under the hydraulic press.

The Amarillo facility also employed maintenance and general mechanics and machinists. Maintenance mechanics work on machinery and parts. The general mechanics perform brick work and work on anything that is not metals, such as PVC lines and fiberglass lines, and only worked on the day shift. Machinists prepare parts for equipment. (Tr. 48:7142–7144.)

Pre-strike, Respondent maintained it had two shifts on the rod line with a third group working as the "set-up crew." The rod line shut down at the end of the second shift, but the set-up crew worked overnight to prepare for the next day's run. The schedule was posted weekly but subject to change. The hours within the shifts varied. (Tr. 61:9191–9192; GC Exh. 435(a)).

C. Respondent Makes Plans for the Strike at Amarillo; The Amarillo Rod Line Operates 12-Hour Shifts During and After the Strike; Recall of Some Strikers

About October 11–13, 2019, Sinele discussed operational plans for a strike with the managers for the facilities. On October 18, 2019, Sinele sent to the Union a letter, which in relevant part stated:

[I]t is not feasible to continue productions at the Amarillo and Hayden work sites. The employees who have reported to work at those sites will be placed on layoff subject to

²⁰⁵ Selenium and tellurium are precious metals.

²⁰⁶ The scale house clerk is in charge of the scale. This position is salaried and apparently is not in any bargaining unit. (Tr. 49:7353.)

the following. The Company continues to operate at Silver Bell, Mission and Ray. Those laid off employees, as well as any other employees who desire to cross the picket line and continue to work for the employees who desire to cross the picket line and continue to work for the Company, are welcome to report to Mission or Ray where they will be considered for any available openings for which they are qualified.

In the event the Company determines to resume production at the Amarillo or Hayden work sites, the Union will be notified.

Should you desire to discuss this matter, please feel free to contact me.

(GC Exh. 219 at 2.)²⁰⁷

In November 2019, Sinele discussed restarting the rod line, which would likely have involved Amarillo General Manager Steve Jones. The anode line was shut down; the cathodes used to make the rods could come not only from Amarillo, but also Ray, Silver Bell and outside sources. About January 1, 2020, forward, the tank house at Amarillo was under care and maintenance only. Supervisors and bargaining unit employees who did not strike kept the rod line operating with two 12-hour shifts, 5 days each week. Farley found the 12-hour shifts were more efficient, particularly because the rod line was not shut down every day. (Tr. 46:6671–6674, 61:9199–9203; GC Exh. 247.)

Amarillo's rod line, in the refined casting area, ran three 8-hour shifts prestrike and two 12-hour shifts post-strike, according to Local Union President Saavedra. Saavedra testified to the number of positions for pre- and post-strike were:

Position	Pre-strike (three 8-hour shifts)	Post-strike (two 12- hour shifts)
Crane operator	Two on first and second shift; one on third shift	One per shift
Crane operator	One per shift	One per shift
Furnace operator	One per shift	One per shift
Caster	One per shift	One per shift
Assistant caster	One per shift	One per shift
Pulpit operator	One per shift	Two per shift
Floorman	One per shift	One per shift
Acid Pickling operator	One per shift	One per shift
Banders	Three per shift	Two per shift
Mobile equipment operator (MEO), such as forklift drivers	Three on first shift; two on second shift; one on third shift	Two on first shift; one on second shift
Mechanics	Four or five total (confusing testimony here, Tr. 49:7347-7348.)	One per shift

(Tr. 49:7343 et seq.)²⁰⁸ However, the prestrike rod line schedules presented did not show three 8-hour shifts. Some worked 12-hour shifts, including the set-up crew. (GC Exh. 435(a)).

²⁰⁷ No one from Grupo Mexico was involved with making these plans. (Tr. 46:6899.)

²⁰⁸ Alward, who was plant comptroller in 2018, testified that pre-strike, the rod line ran two 12-hour shifts and the positions on each shift were as follows: a crane operator, a chargeman, a furnace operator, a

During the first week of September 2020, Local Union President Saavedra returned to work in the rod line as a crane operator.²⁰⁹ (Tr. 49:7342.) Saavedra could not return to his previous position in anode casting because anode casting closed during the strike and did not reopen.

D. Negotiations Regarding Amarillo and Hayden Continue

By July 2020, when the strike was over, the Amarillo management team consisted of Refining Casting Manager Mitchell Farley, Maintenance Manager Lance Keys, Rod Line Supervisor Kenneth “Kenny” Vines, Tracy Morris, and HR Manager/comptroller Alward.²¹⁰ At Amarillo, only the rod line was producing product; the tank house was in care and maintenance. Farley and Mitchell were the managers in charge respectively of the rod line and entire facility maintenance. Vines reported to Farley and worked either of the 12-hour shifts.

Alward explained that Amarillo received excess cathodes from Mexico and then manufactured the rods at a lower cost, as the facility did not operate with full overhead. (Tr. 46:6777–6778, 6781.) As of July 15, the bargaining unit employees had not returned to work. The supervisors would continue to perform bargaining unit work until the bargaining unit employees completed their medical clearances, and if necessary, MSHA retraining.

On July 15, 2020, Respondent advised the Union that it would continue operations at the Hayden Smelter and Concentrator as it did during the strike: Those facilities were on an indefinite shutdown and only kept employees for care and maintenance. Respondent paid affected Amarillo and Hayden employees according to the Workers’ Adjustment and Retraining Notification Act (WARN)²¹¹ and the Indefinite Shutdown provision and, in the meantime, asked to discuss and bargain the matters with the Union. (GC Exh. 289.) Sinele sent the Union the WARN notices and the list of employees affected at Hayden and Amarillo. (GC Exhs. 290, 291.) Some of the Amarillo rod line employees were on the WARN list. No one from local management was involved in making the list. (Tr. 46:6783.)

Manager Farley and COO Contreras²¹² discussed the production levels and requirements to meet the production level based upon materials available to produce rod. The production was based upon available materials in Arizona and excess material from Grupo Mexico’s Mexican locations. Labor costs were also reviewed. (Tr. 47:7019–7021.)

On Monday July 27, 2020, Sinele sent to the Union a proposed list of strikers to return to Amarillo. (GC Exh. 300.) Until all the strikers were returned to open positions, supervisors and crossovers continued to perform the work. Respondent maintained the shifts that it kept through the strike—two 12-hour shifts. The local managers, throughout July, created the list

caster, an assistant caster, a pulpit operator, a floor man, an acid pickling operator; mobile equipment operators (forklift drivers); banders (unknown number from Alward); and maintenance mechanics; plus general mechanics. (Tr. 46:6752–6754) However, Respondent provided no documentation to back up this claim. I therefore find that Respondent operated three shifts in Amarillo pre-strike.

²⁰⁹ Saavedra later chose to work as a bander to allow a fellow crane operator with less seniority to take the job so that that individual would not be laid off. (Tr. 49:7389.)

²¹⁰ Alward left Respondent’s employ on September 23, 2022.

²¹¹ WARN 29 U.S.C. §2102 states: An employer shall not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice of such an order

(1) To each representative of the affected employees as of the time of the notice or, if there is no such representative at that time, to each affected employee; . . .

²¹² Contreras was based in Mexico. Farley did not know whether Contreras also had a role with Grupo Mexico.

based upon former rod line employees in their specific positions, and for the laborers, seniority; the other factor considered was using less employees but enough to keep the facility running. Some of the anode and tank house employees were also placed in the rod line positions.²¹³ If a crossover had lower seniority, that employee was replaced with a returning striker with higher seniority; it appears that most of the crossovers were not on the list to keep positions post-strike. (Tr. 46:6787.)

Brenda Alward was Amarillo's plant controller. Her duties involved all the budgeting for the plant and reporting monthly on productions, costs and variances. About August 2020, Alward's duties were increased to include some logistics, traffic and human resources functions. (Tr. 58:8740.)²¹⁴

E. Strikers Return to Amarillo and Hayden

On August 14, 2020, Sinele sent a revised list to the Union: Two union officials were given positions due to higher seniority (essentially super seniority because they were union officials, in keeping with the implemented Terms and Conditions). Until the strikers were back to work, the supervisors and managers continued to work the rod line in various roles to cover the staffing shortfall. (Tr. 46:6788–6789, 47:7025–7029; GC Exh. 319.) After the strike, supervisors covered more frequently to cover call offs; pre-strike, the facility had more bargaining unit employees to cover the call offs. (Tr. 57:7033–7034.)

On August 15, 2020, Sinele notified Union District Director Prescott and Armenta again that Respondent proposed temporary and indefinite shutdowns at Hayden Concentrator, Hayden Smelter and the Amarillo facility. Sinele responded to the Union's previously suggested dates and asked for remote sessions due to the ongoing COVID pandemic. (GC Exh. 320.) The cost of restarting Hayden, at that time, would have been approximately \$50,000,000. (Tr. 55:8231.) The Hayden smelter and concentrator employees were brought back to full-time status, and then given WARN notices, which provided for 60 days' pay and then laid off the employees. (Tr. 55:8231.)

One month later, on September 15, 2020, Sinele notified Armenta that the operations of the Amarillo rod line would be decreased from two shifts to a single shift, with the concurrent layoff effective September 28, 2020 (13 days later). Over 40 employees were slated for layoff; the majority worked the rod line. However, some were mechanics, machinists, electricians, operational support and two from the scrap dock. Sinele offered to bargain the effects of the layoff. (GC Exh. 328.)²¹⁵ The layoffs were determined by seniority. Respondent did not discuss the layoffs with the Union. For some positions, the strikers had not yet returned. (Tr. 46:6801–6807; GC Exh. 329.)

At the time, the Amarillo rod line was operating 5 days per week, with 12-hour shifts; however, certain employees added the week of September 14, 2020, worked an 8-hour day shift, Monday through Friday. The schedule does not show any supervisors taking bargaining

²¹³ The tank house employees now set to work in the rod line were Robert Stein and Joe Hall. Leo Segura was either from the anode line or the tank house. Hector Becerra was likely from the leeching area. (Tr. 46:6786.)

²¹⁴ Alward's last day of employment with Respondent was September 23, 2022. Her duties as comptroller included managing costs and budgets for the plan, overseeing HR and logistics functions, including expenses and production. (Tr. 58:8739–8740.)

²¹⁵ Rudolfo Rubio, who worked for Grupo Mexico, assisted with costing at Amarillo and for a few months ran the Amarillo facility. He previously visited Amarillo numerous times, according to Alward. (Tr. 46:6794–6797.)

unit positions. The need for a set-up crew was eliminated with the 12-hour night shift. (Tr. 61:9203–9206; GC Exh. 435 at 1–3.)

On September 30, Sinele notified the Union that the planned shift changes and layoffs were rescinded.²¹⁶ Although Respondent kept two shifts, it changed duties for some positions and laid off four employees. The layoffs, as alleged in the Complaint, were: Clay Spengler was laid off effective September 27, 2020. Patrick Montano's layoff paperwork was completed on October 23, 2020. Jared Bliss, an electrician, and Jordan DeCorte, a laborer, were laid off effective September 16, 2020. Juan Carreon was also laid off, but Alward did not know the date and the email discussing him had no information. (Tr. 46:6837–6852; GC Exh. 438–441.) Of the five employees Respondent laid off, three participated in the strike and two did not. One maintenance employee was not laid off due to his position in the Union. (Tr. 46:6819.)

Sinele enclosed the employee list with the positions and change in duties. Respondent eliminated the second shift crane operator and assigned crane duties to the acid pickling operator. With the layoffs and change of duties Sinele said that Respondent stood ready to negotiate the effects during the temporary indefinite shutdown. (Tr. 49:7394–7395; GC Exhs. 328, 329.)

Amarillo supervisors identified some examples of duties added to particular positions: A mechanical equipment operator could be assigned some laborer duties, such as cutting bands; The acid pickler operator could also run the crane on the second shift, instead of having a separate crane operator, as the acid pickler operator had down time to do so. The acid pickler operator needed training on the crane. If the acid pickler operator had a critical issue, the more pressing job would be the priority.

Three types of mechanics worked before the strike; mobile mechanics maintained the mobile equipment and mechanics would maintain production equipment; general mechanics could perform brick and mortar work. (Tr. 47:7056; GC Exh. 329.) Some maintenance employees were laid off, resulting in leaving the second shift without a general mechanic. If a mechanic was needed on the second shift, the work either would not be performed, or someone, including a supervisor, would have to fill in.

On September 30, 2020, the Union responded that it objected to the layoffs and demanded to bargain over the issue. It also demanded Respondent cease and desist from enacting the layoffs until the parties reached agreement.²¹⁷ On October 6, 2020, the Union, by Prescott, accused Respondent of laying off mechanics and assigning bargaining unit work to supervisors. Alward denied that any of the bargaining unit mechanics work was reassigned to the supervisors, which only occurred when if someone was out or "for continuance of operations." Respondent maintained it reduced the number of banders, mobile equipment operators and mechanics to achieve efficiency. (Tr. 46:6856-6863; GC Exh. 329(b).)

F. Employees in Amarillo Notice Supervisors Performing Bargaining Unit Work; The Local Union Grieves The Supervisors Performing Work

On October 21, 2020, the local union filed two grievances: The first, for salaried workers doing bargaining unit work; and the second, for the layoff of two banders and one mechanical equipment operator. (Tr. 49:7371–7372; GC Exh. 330.) The BLA, UP-5 and implemented Terms

²¹⁶ The Amarillo managers determined that keeping two shifts would allow the facility to produce more and avoid stagnation

²¹⁷ Saavedra testified that he did not have a chance to bargain the effects of Respondent's decision to lay off employees and later admitted he did not contact Respondent. (Tr. 49:7395–7397, 7411.)

and Conditions, maintained identical provisions under the Union Security and Work by Supervisors:

- (1) It is understood that supervisors at a plant shall not perform work on a job normally performed by the bargaining unit except:
- a. Experimental work;
 - b. Demonstration work performed for the purpose of instructing and training Employees; and
 - c. Work required by conditions which, if not performed, might result in interference with operations, bodily injury or loss or damage to material or equipment.

(GC Exhs. 2 at 5, 245 at 28, 248.)

Local Union President Saavedra, who filed the grievances, testified that in fall 2020 COVID was “running rampant” through the facility at the time, causing employees to call in sick. Saavedra admittedly did not grieve the particular section of employees for layoffs announced on September 30, 2020. (Tr. 49:7411.)

Saavedra maintained the following supervisors performed the following bargaining unit work: Maintenance Supervisor Jamie Bowen repaired gear boxes a “handful of times”; Supervisor Rodney Briant operated the service crane and the charge crane and daily performing maintenance work when a bargaining unit mechanic was on his day off. Maintenance Supervisor Lance Keys ran the pulpit, drove the forklifts, and performed banding whenever employees called in sick and covered breaks for the MEOs; and Production Manager Mitch Farley operated the furnace and forklifts and performed maintenance work. (Tr. 49:7372–7278.)²¹⁸

Regarding decreasing the number of banders from 3 to 2 each shift, when the line ran well, the bander job was unaffected and if the line had a problem, everyone, including supervisors, had to assist.²¹⁹ Supervisors did not step in for bargaining unit work if another bargaining unit person was qualified to perform the work. Almost all employees on the rod line could work in a binder position. For certain key jobs, such as furnace operator or acid pickler, if no one else was available, a supervisor would have to fill in. Vines testified that he did not have to step in too frequently; however, after the furnace operator quit, he ran the furnace for 2 months. (Tr. 47:6950–6951.)

Supervisor Farley discussed the process for permitting a supervisor fill in. The matter would not be discussed with the Union first. He testified

A: [I]f there was a position that couldn't be filled any other way, then ---then we would fill that position with a salary worker.

Q: . . . And when you say[,] “couldn't be filled any other way,” what were --- what were some of the any other ways?

A: Any other bargaining unit employee that would have been qualified to fill in the positions, that would be able to cover that.

²¹⁸ Production Supervisor Kenny Vines admittedly trained someone on the furnace. Saavedra presented hearsay evidence for the remainder of the work Vines allegedly performed.

²¹⁹ Per Rod Line Supervisor Vines's testimony: “Well, when things are going [good,] not much. When things ran good half of them sleep in, so. If you're trying to get—we're fine, we're fine.” (Tr. 47:6936,)

Q: Okay, so you would only go to supervisors as the last resort?

A: That's correct.

Judge: . . . [W]ere you offering other people overtime, and no one else would take it?

A: Right. You could offer overtime - - - if they are filling in with somebody else

(Tr. 61:7236–9237.)

Respondent did not keep track of how often supervisors performed bargaining unit work on the rod line or how often supervisors had to fill in for call-offs. (Tr. 46:6878–6879.) Manager Mitchell testified that supervisors covered shifts usually less than five times per month, but some supervisors had to fill in one position longer than one shift, e.g., Vines covering the furnace until someone could be trained. (Tr. 47:7096–7099.) Manager Farley testified that supervisors covered call offs more frequently after the strike, at a rate of a couple of times per month.²²⁰ Respondent's testimony about covering for call offs was unrefuted after Respondent's witnesses testified.

In October 2020 Saavedra and Manager Farley held a first-step grievance meeting. The following discussion is Saavedra's account of the meeting: Saavedra raised his safety concerns about employees performing multiple jobs, comparing it distracted driving and texting. Farley said management handled the jobs this way during the strike and expected the employees to do the same. Saavedra again emphasized safety. Farley again said they operated during the strike and expected the employees to do the same. "Leonardo" had discussions with them about efficiency and his hands were tied, Farley said. Saavedra did not know who Leonardo was and did not ask. Saavedra asked why supervisors were performing bargaining unit work, such as banding work. I do not credit this testimony and its conclusions because it was adduced to leading questions. The meeting concluded without much further discussion. The Union did not pursue the grievances any further. (Tr. 49:7378–7382.)

G. The International Union and Respondent Continue Negotiations on These Issues

About October 27, 2020, Respondent and the Union held a videoconference meeting, in which. Respondent was represented by Sinele, HR Secretary Cazeaux and Amarillo HR Manager Alward.²²¹ The Union was represented by Prescott, Saavedra, Ruben Garza, and Jose Loya. Saavedra reported that eliminating the position caused safety issues. One point was that the 12-hour shifts increased the change of accidents and possibly increasing the number of injuries. Saavedra made recommendations that the facility should be staffed to pre-strike levels in production and maintenance. He specifically asked for two more banders. Saavedra also complained that supervisors performed bargaining unit work, which took away bargaining unit jobs. Sinele said she needed time to consider before giving an answer. (Tr. 46:6870–6875, 49:7382–7385, 7413.)²²² Two weeks after the meeting, Respondent notified the Union it was recalling two more banders. (Tr. 49: 7413.)

²²⁰ If a bander is not available, the acid pickling operator or salaried person could fill in. Alward did not know how frequently a salaried person would step in. (Tr.46:6863.)

²²¹ Alward maintained the parties were bargaining effects. I do not credit her legal conclusion.

²²² GC maintains that Mitchell "dismissed Saavedra's concerns about supervisors performing unit work

On November 3, 2020, Sinele requested that the Union provide information related to the safety concerns, multitasking, and the supervisors performing bargaining unit work and when it occurred. (GC Exh. 331.)

On November 11, 2020, Respondent called back two banders, one mobile equipment operator (MEO) and one mechanic per the Amarillo supplemental agreement. Although Alward could not recall any specific safety incidents, she said the point of the recalls was to avoid safety issues in the future and trying to work with the Union. Respondent did not confer about the recall or solicit input from the Union about it. (Tr. 46:6881–6888, 49:7382–7383; GC Exh. 332.)

At some point in 2021, the night shift Amarillo furnace operator, Lofland, quit. (GC Exh. 435.) Supervisor Kenny Vines operated the furnace for about 2 months, while continuing to act as a supervisor. For 2 months Vines also trained Saavedra Sr. to run the furnace. (Tr. 61:9213.)

Analysis:

A. October 21 and November 15, 2020: Threats of Reduced Staffing

The complaint alleges that on about October 21, 2020, the Amarillo facility manager Farley interfered with employees' union activity in violation of Section 8(a)(1) of the Act by threatening them with reduced staffing levels because of their protected strike activity, and that, on November 16, 2020, a second Amarillo facility manager, Alward, interfered with employees' union activity in violation of Section 8(a)(1) of the Act by threatening them with reduced staffing levels because of their protected strike activity. Complaint ¶¶ 5(k), 5(l) and 8.

Regarding the alleged threat by Farley, the record shows that, in October 2020, Saavedra (a union representative) complained to Farley about post-strike changes that the Respondent was making to how it was staffing the work at the facility and about the Union's concern that the staffing was creating safety issues for unit employees. (Tr. 7378–7382.) In response, Farley stated “that’s how they’ve done it while [the employees] were on strike . . . that’s the way it was and that’s how it’s going to be.” (Tr. 7068–7071, 7379–7381.) Regarding the alleged threat by Alward, the record shows that on about October 27, 2020, Saavedra complained to Alward and other managers about a reduction in unit employee staff, and the assignment of their work to salaried employees. Alward responded that they were having salaried employees do the unit work “because that’s how they’ve done it . . . while we were on strike.” (Tr. 6894, 7390, 7383–7394.) In its brief, Respondent stated that Alward told Saavedra that the change was attributable to “efficiencies found in the manner in which the rod line was run during the strike.” (R. Br. at 222.)

In deciding whether an employer has made a threat in violation of the Act, the Board applies an objective standard. This means that the Board considers whether the remark would reasonably tend to interfere with the free exercise of employees' rights under the Act and does not look at the motivation behind the remark or rely on the success or failure of the remark in suppressing protected activity. *Midwest Terminals of Toledo*, 365 NLRB 1645, 1664 (2017), *enfd.* 783 Fed. Appx. 1 (D.C. Cir. 2019); *Divi Carina Bay Resort*, 356 NLRB 316, 319 (2010), *enfd.* 451 Fed. Appx. 143 (3d Cir. 2011); *Joy Recovery Technology Corp.*, 320 NLRB 356, 365

with statements ‘that’s how they’ve done it while we were out on strike’ . . . ‘that’s the way it was and that’s how it’s going to be’ and that if supervisors did not perform the work then Respondent would shut down the rodline.” GC contends that Saavedra’s testimony was uncontroverted because Mitchell had no recollection of the conversation. (GC Br. at 158 and fn. 144, citing Tr. 7068–7071 and 7379–7381, Complaint ¶5(k).)

(1995), enfd. 134 F.3d 1307 (7th Cir. 1998); *Miami Systems Corp.*, 320 NLRB 71, 71 n. 4 (1995), affd. in relevant part 111 F.3d 1284 (6th Cir. 1997). When applying this standard, the Board considers the totality of the relevant circumstances. *Mediplex of Danbury*, 314 NLRB 470, 471 (1994). If the statement communicates that employees jeopardize their job security and working conditions by engaging in union activity, that statement violates Section 8(a)(1) of the Act. *Metro One Loss Prevention Services*, 356 NLRB 89, 89 (2010).

The Board has found that employer post-strike statements analogous to the Respondent's were unlawfully coercive and interfered with employees' exercise of their rights in violation of Section 8(a)(1) of the Act. For example, in *U.S. Service Industries, Inc.*, the Board held that an employer unlawfully interfered with employees' exercise of their rights under the Act when, post-strike, it, inter alia, told employees that the reason they were having "problems" was "because they had engaged in protected strike activity" 319 NLRB 231, 250 (1995), enfd. 107 F.3d 923 (D. C. Cir. 1997). Similarly, in *Trading Port, Inc.*, the Board found that an employer violated the Act when, post-strike, it threatened that there would be fewer opportunities for employees who had stayed out for the full duration of the strike. 219 NLRB 298, 300 (1975). In *Richland, Inc.*, the employer unlawfully threatened employees post-strike when it told returning strikers that, because of the strike, management was going to automate work and lay off employees. 180 NLRB 91, 96–97, and 104 (1969).

Based on the totality of the relevant circumstances, I find that Farley and Alward unlawfully threatened employees by relying on the employees' recent protected strike to explain the unwelcome post-strike reductions in bargaining unit staff. Farley's and Alward's statements would reasonably tend to interfere with employees' exercise of their right to strike by communicating that when employees sought to improve their working conditions by striking the Respondent would respond by, instead, using the strike as a basis for imposing more difficult and less safe working conditions on the employees.

I find that in October and November of 2020, the Respondent, by Farley and Alward, threatened employees in violation of Section 8(a)(1) of the Act when they made statements communicating that the unit employees would be subjected to reduced staffing in retaliation for employees exercising their right to strike.

B. Reduction in Shifts of Amarillo Rod Line Unit Workers

The complaint alleges that as of about September 14, 2020—2 months after the strikers' unconditional offer to return to work—Respondent reduced the number of shifts for Amarillo rod line employees in violation of its bargaining obligations (Sec. 8(a)(5) and (1)) and in violation of the prohibitions on discrimination based on protected concerted and union activity (Sec. 8(a)(3) and (1)). (Complaint ¶¶ 6(f), 6(o), 9, and 10.) For the reasons discussed below I find that the record shows that the Respondent committed these alleged violations when it reduced the unit

work on the rod line from three shifts to two shifts²²³ with an attendant reduction in the available positions to which the former strikers could return.²²⁴

An employer's decision to change employees' work hours or schedules is a mandatory subject of bargaining. *Meat Cutters, Local 189 v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965); *Indian River Memorial Hospital*, 340 NLRB 467, 468 (2003). In this instance, the Respondent made such a change—replacing three 8-hour shifts with two 12-hour shifts—and did so without giving the Union notice of the change or an opportunity to bargain. Although the record indicates that the change was initiated during the strike, Respondent was not free to continue that strike-time change after the strike without bargaining. During an employee strike, an employer will often find it necessary to address staffing pressures by making major adjustments to how it conducts operations, even to the point of temporarily suspending operations. Once the strike ends, an employer is not free to unilaterally continue such strike-necessitated adjustments to bargaining unit work. See, e.g., *J.W. Rex Co.*, 308 NLRB 473, 498 (1992), *enfd.* 998 F.2d 1003 (3d Cir. 1993); *Land Air Delivery, Inc.*, 286 NLRB 1131, 1131–1132 (1987), *enfd.* 862 F.2d 354 (D.C. Cir. 1988), *cert. denied* 493 U.S. 810 (1989); *Alexander Linn Hospital Association*, 244 NLRB 387, 390 (1979), *enfd.* 624 F.2d 1090 (3d Cir. 1980).

A reduction in operations during a strike is not a valid basis for declining to reinstate returning economic strikers unless that reduction in operations is the result of “substantial and bona fide reasons other than considerations relating to labor relations.” *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967); see also *Zimmerman Plumbing and Heating Co.*, 334 NLRB 586, 588 (2001). Here the change was related to labor relations—i.e., the reduction in bargaining unit employees available during the strike—not to considerations other than labor relations. Indeed, as discussed above, when the Union raised concerns with the Respondent about the reduced post-strike staffing, the Respondent expressly justified the reduction by reference to the strike.

To the extent that one may view the changes as coming within the rights the Respondent unilaterally granted to itself in the expanded management rights provision that it implemented in December 2019, those expanded rights are not valid. Under Board law an employer may not, even after impasse, unilaterally provide to itself new management rights that allow it “to make future unilateral changes in . . . key terms and conditions of employment.” *California Offset Printers, Inc.*, 349 NLRB 732, 736 (2007). The Board has held that work scheduling is not only a “key term” of employment, but one that is so central a term that employee discussions about scheduling are inherently concerted even if there is no suggestion that the discussions had the object of initiating group action. *Aroostook County Regional*

²²³ As set forth in my factual findings, the evidence shows that Respondent operated the rod line for three, 8-hour shifts, 5 days a week, prior to the strike, and operated the rod line for two, 12-hour shifts, 5 days a week, after the strike. This was established by the testimony of both union and management witnesses. See Tr. 7144 (Jondreau), 7343 (Saavedrea), 6983–6984 (Farley), 7016 (Farley). Respondent argues that prior to the strike there were not three actual shifts, but rather two shifts, and then a between-shift period when a “set up crew” worked to ready the rod line for the next shift. (R.Br. at 205 ff.) The record shows that the work shift that Respondent characterizes as a “set up crew” was eliminated when the Respondent went from 8-hour shifts to 12-hour shifts. (Tr. 9203–9206; GC Exh. 435 at 1–30.) Respondent cannot, by re-labeling one of the “shifts” as a “crew,” obscure the reality that there were three daily work periods on the rod line prior to the strike and only two daily work periods on the rod line after the strike ended. Although, in September 2020, Respondent announced that it would be reducing the rod line operation further—from two shifts to one shift—the Respondent did not follow through with that further reduction and it is not a subject of the complaint. (GC Exh. 328; Tr. 6799.)

²²⁴ Compare Tr. 7145 (approximately 70 employees on the rod line prestrike) and GC Exh. 329 (33 bargaining unit employees on the rod line poststrike).

Ophthalmology Center, 317 NLRB 218, 220 (1995), enf. denied in relevant part 81 F.3d 209 (D.C. Cir.).²²⁵

When the Union raised concerns that the post-strike staffing had been changed from the pre-strike status quo, Respondent made clear that it considered those changes to be within its sole discretion and would not bargain with the Union about them. Both Farley and Alward communicated that the Respondent had completed the work in this way during the strike and, therefore, the returning strikers would have to complete the work that way now that the strike was over. Although General Counsel did not show that the Union made a formal request to bargain regarding the change to the number of shifts, it did show that the Union objected to the staffing changes and that management responded by making clear that the Respondent considered the post-strike staffing changes to be solely within its discretion. Under such circumstances, Respondent was presenting the changes as a *fait accompli* and the Union was not required to make a formal, manifestly futile, request to bargain. *Technocap, LLC*, 372 NLRB No. 136, slip op. at 9 (2023); *Westinghouse Electric*, 313 NLRB 452, 453 (1993), enf. 46 F.3d 1126 (4th Cir. 1995), cert. denied 514 U.S. 1037 (1995).

Respondent, by declining to continue the prestrike status quo regarding shifts on the rod line, or bargain about the reduction, failed to meet its bargaining obligation and violated Section 8(a)(5) and (1) of the Act.²²⁶

I also find that Respondent discriminated in violation of Section 8(a)(3) and (1) of the Act when it reduced the number of rod line shifts, a change that was attended by a reduction in bargaining unit positions at the Amarillo facility. Where an employer makes changes that affect returning strikers' access to shifts, the employer has "the burden . . . to come forward with evidence of legitimate objectives for its conduct." *Community Motor Bus Co.*, 180 NLRB 677, 680–681 (1970), enf. denied on other grounds 439 F.2d 965 (4th Cir. 1971). Moreover, when the evidence shows that Respondent was motivated at least in part by protected strike activity, Respondent's burden goes beyond coming forward with evidence of legitimate objectives, and extends to proving that it would, in fact, have taken the same action even in the absence of the protected union activity. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1184–1185 (2011) (where the record evidence shows that the challenged action was motivated at least in part by employees' protected activity, the burden shifts to the employer to show that it would have taken the same action even in the absence of that activity).

The evidence here shows that Respondent was motivated by the employees' union activity when it made poststrike staffing changes that were detrimental to bargaining unit employees of the Amarillo facility. First, as previously found, after the strike ended the Respondent not only lawfully retained permanent replacement workers hired during the strike, but unlawfully made offers to hire replacement workers after the strike concluded. Also, as previously found, management at the Amarillo facility demonstrated hostility to the employees' union activity by unlawfully interfering with their right to distribute union literature to co-workers. In addition, the conclusion that Respondent's decision to reduce the number of rod line shifts was connected to the union strike activity is buttressed by the evidence that when the Union

²²⁵ Although I find that the actual implementation of the Terms and Conditions was not pled, Respondent still cannot rely upon this section under the circumstances described above.

²²⁶ On July 15, 2020, Respondent did give unit employees a federally required 60-day WARN Act notice regarding the shutdown of certain operations at Amarillo and Hayden, but the Amarillo rod line was not part of that shut down. (Tr. 8231; GC Exhs. 289, 290, 291.) At any rate, the implemented Terms and Conditions required the Respondent to not only provide the 60-day notice before shutting down any department, but also to provide the Union with a detailed statement of the reasons for the shutdown and an opportunity bargain in good faith over any suggested alternatives. (GC Exh. 173 at 2.)

complained to the Respondent about the post-strike staffing, managers responded, as discussed in the previous section, by linking the demand that unit employees work under the protested conditions to the fact that the employees had engaged in a strike.

Here Respondent has not met its burden of demonstrating that it would have reduced the number of shifts for legitimate reasons even if the employees had not engaged in the protected strike and other union activity. On the contrary, Respondent contends that it did not reduce the number of shifts from the pre-strike level at all. To the extent that there was testimony suggesting that the Respondent decision to reduce the shifts was motivated by concerns about efficiency or cost, that testimony is hard to square with the Respondent's claim that it did not reduce the shifts. Moreover, suggestions about economic reasons for the changes were unspecific and conclusory, and uncorroborated by documentation of economic analyses or details regarding costs and benefits. See *Laborers International, Local 91*, enfd. 825 Fed. Appx. 51 (2d Cir. 2020) ("unspecific, conclusory testimony does not suffice to sustain" a respondent's defense burden when action was shown to be motivated, at least in part, by impermissible discrimination).

I find that, after the strike concluded, Respondent violated Section 8(a)(5) and (1) and Section 8(a)(3) and (1) of the Act because it reduced the number of work shifts on the Amarillo rod line without bargaining and because the Respondent made the reduction because of the employees' protected strike activity.

C. Respondent's Use of Supervisors to Perform Unit Work in Amarillo

The complaint alleges that, since about September 14, 2020, Respondent has assigned supervisors to perform bargaining unit work at the Amarillo facility and has done so in violation of its bargaining obligations (Sec. 8(a)(5) and (1)) and discriminatorily based on employees' protected concerted and union activity (Sec. 8(a)(3) and (1)). Complaint ¶¶ 6(g), 6(o), 9, and 10. The testimony of Farley (Amarillo facility manager), and the record as a whole, supports finding that Respondent rarely used supervisors to perform bargaining unit work before the strike, but that doing so was "frequent" after the strike. (Tr. 7033–7034.) For the reasons discussed below I find that Respondent made this change in violation of its bargaining obligations and because of the employees' strike and other union activity.

Regarding the bargaining allegation, under Board precedent, Respondent triggered a bargaining obligation by transferring bargaining unit work to supervisors outside the bargaining unit, and that this is true even if Respondent lawfully used supervisors in that way during the recent strike. *J.W. Rex Co.*, 308 NLRB at 498 (use of supervisors to perform unit work during a strike was lawful, but continued use of supervisor to do so after the strike ended was an unlawful unilateral change); see also *Regal Cinemas, Inc.*, 334 NLRB 304, 312–313 (2001), enfd, 317 F.3d 300 (D.C. Cir. 2003) (employer required to bargain over the transfer of bargaining unit work to non-bargaining unit managers and assistant managers). Moreover, the fact that, before the strike, Respondent occasionally used nonunit staff such as supervisors to fill in for unit employees, does not entitle the Respondent to materially and substantially increase that usage without bargaining. Cf. *Cascades Containerboard Packaging*, 370 NLRB No. 76, slip op. at 17 (2021) ("an employer must bargain when it substantially increases or expands the use of contractors to perform bargaining unit work even if it had subcontracted to some degree in the past") and *Tri-Tech Services, Inc.*, 340 NLRB 894, 895 (2003) (rejecting employer's argument that, because it had intermittently laid off employees in the past, it did not have to bargain over the layoff of 24 bargaining unit employees).²²⁷

²²⁷ The applicable terms and conditions of employment permitted the Respondent to use supervisors to

Respondent contends that the transfer of bargaining unit work from employees to supervisors at the Amarillo facility was justified because bargaining unit employees quit or declined to return to work after the strike. (R. Br. at 210.) While I do not doubt that some strikers quit or were uninterested in returning, Respondent's claim that a lack of available unit employees forced it to assign unit work to supervisors cannot be squared with the evidence. Moreover, at the Amarillo facility in particular, Respondent announced on September 15, 2020, that it was laying off 14 other unit employees. (GC Exh. 328 at 2.) In addition, as previously pointed out, Alward told the Union that the Respondent was using salaried employees to perform bargaining unit work because that was how management had done things during the strike. In light of the evidence, Respondent's contention that any increase in the use of supervisors to perform bargaining unit work was necessitated by a shortage of unit employees is not credible.

For the above-stated reasons, Respondent had an obligation to bargain before substantially increasing its use of supervisors to perform bargaining unit work (and thus reducing the work available for bargaining unit employees). Respondent, however, implemented this change without giving the Union notice or an opportunity to bargain. When the Union discovered the change, and union representative Saavedra initiated a discussion with the Respondent about it, Alward blithely declined to negotiate over the change—stating that it had used supervisors to do unit work during the strike and would continue to do so now that the strike was over.

I also find that Respondent's action was discriminatorily based on the employees' protected strike and other union activity. The discrimination is established by the same evidence that established discrimination with respect to the reduction in shifts. Specifically: after the strike ended, and the former strikers made an unconditional offer to return to work, the Respondent unlawfully offered to hire additional replacement workers, possibly instead of returning the former strikers to those positions; Respondent unlawfully interfered with employees' right to distribute union literature to coworkers; and, when the Union raised Respondent's use of supervisors to displace unit workers and other staffing-related safety concerns, Respondent answered that the unit employees would have to work under those conditions because it was way Respondent operated the facility when the employees were on strike. Moreover, I find that Respondent's contention that it had a lawful reason that would have caused it to use supervisors to perform the bargaining unit work even absent the employees' protected activity is not persuasive. See *Camaco Lorain Mfg. Plant*, supra; *Community Motor Bus Co.*, supra.

I find that poststrike, Respondent violated Section 8(a)(5) and (1) and Section 8(a)(3) and (1) of the Act by substantially increasing its use of supervisors to perform bargaining unit work at the Amarillo facility without bargaining with the Union over the change and by making the change because employees engaged in protected strike activity.

D. Layoff of Amarillo Employees Bliss, Carreon, Decorte, Mares, Montano, and Spangler

The complaint alleges that on about September 25, 2020, Respondent laid off Amarillo employees Jared Bliss, Juan Carreon, Jordan Decorte, Jon Mares, Pat Montano, and Clay Spangler in violation of Sections 8(5), (3) and (1), because it took that action without meeting its bargaining obligations and because the action was motivated by employees' protected activities.

perform bargaining unit if the work was "experimental," or for the purpose of a "demonstration" or "training," or was required to prevent "interference operations, bodily injury or loss of damage to material or equipment." (GC Exh. 2 at 5, GC Exh. 245 at 28, GC Exh. 248.) None of those circumstances pertain here.

Complaint ¶¶ 6(i), 6(o), 9 and 10. On September 15, 2020, the Respondent notified the Union that it would, on September 28, lay off 14 employees at the Amarillo facility, including Bliss, Mares, Montano, and Spangler. (GC Exh. 328 at 2.) That, however, was not the final list. On September 30, 2020, the Union provided the Union with an updated layoff notice, which still included Bliss, Mares, Montano, and Spangler, and added Carreon and Decorte (two employees who had not participated in the strike),²²⁸ while sparing ten of the employees who had previously been slated for the layoff. (GC Exh. 329 at 3.) The record shows that Respondent laid off Bliss, Carreon, Decorte, Mares, Montano, and Spangler employees on dates in September and early October 2020.

The Board has held that the layoff of employees constitutes a material change to employees' working conditions and is a mandatory subject of bargaining. *McClain E-Z Pack*, 342 NLRB 337, 342 (2004). Respondent defends against the allegation that it unlawfully laid off the six employees without bargaining by arguing that it decided which employees to lay off using the seniority terms set forth in both the expired basic collective bargaining agreement and in the implemented terms. (R. Br. at 215.) Assuming, without deciding, that Respondent is correct that its decision about which six employees to lay off was in accordance with the existing seniority terms, that does not mean that the decision about whether to lay off six employees was pre-authorized by the existing seniority terms.²²⁹

With respect to the decision to lay off Bliss, Mares, Montano, and Spangler, the evidence shows that, in a letter dated September 15, 2020, Respondent notified the Union that it would layoff those, and ten other, unit employees on about September 28. In that letter Respondent said it was willing to bargain over the effects of the action, but pointedly, did not say it willing to bargain over the decision itself. Respondent stated that the Union should "[f]eel free to contact me if you would like to discuss this further." (GC Exh. 328.) In a letter dated September 30, 2020, Respondent provided a finalized list of the employees who would be part of the layoff, which excluded most of the employees previously identified for layoff, but still included Bliss, Mares, Montano, and Spangler in the layoff and also added to the layoff two employees—Carreon and Decorte—who had not participated in the strike. Respondent's letter stated that the effective date of the layoff would be on or around October 2, 2020—just 2 days later.²³⁰ In the September 30 letter, as in the September 15 letter, Respondent offered to engage in effects bargaining over the layoff, but not in decisional bargaining, and also stated that the Union should "[f]eel free to contact me if you would like to discuss this further and/or provide dates for

²²⁸ See Tr. 6819, 6837–6852.

²²⁹ To the extent that the expanded "Company Rights" provision that Respondent implemented after impasse, (GC Exh. 245 at 7, Respondent's LBFO at 8), facially permits Respondent to unilaterally lay off unit employees, that aspect of the Company rights provision is invalid. Under Board precedent, an employer is not permitted, even after impasse, to unilaterally adopt management rights rules that allow the employer "to make future unilateral changes in . . . key terms and conditions of employment." *California Offset Printers, Inc.*, 349 NLRB 732, 736 (2007); cf. *Altura Communication Solutions*, 369 NLRB No. 85, slip op. at 3-4 (2020), enfd. 848 Fed. Appx. 344 (9th Cir. 2021) (an employer's proposal for a management rights clause is evidence of bad faith if it is sufficiently broad). A layoff constitutes a material, substantial and significant change to working conditions and therefore the unilaterally implemented management-rights clause is invalid to the extent it gives the Respondent the right to lay off employees without bargaining. *Seven Seas Union Square, LLC*, 368 NLRB No. 92, slip op. at 54 (2019) ("employer's decision whether to reduce its workforce and who to layoff are key terms and conditions of employment"), enfd. 2021 WL 4538590 (2d Cir. 2021); Cf. *Public Service Co. of Oklahoma*, 334 NLRB 487, 489 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003) (employer found to be seeking "discretion over hours, a major component of wages rates, and benefits, clearly the most basic terms for bargaining, as well as . . . layoffs . . .").

²³⁰ Respondent's September 30 letter itself gave the October 2 date, but the attachment to that letter stated that the effective date was October 5, 2020—5 days later.

a meeting.” (GC Exh. 329.) The precise dates when five of the six employees were laid off is not clear from the record, but one of the employees—Spangler—had been laid off on September 24 or 27 (GC Exhs. 436 to 438 Tr. 6837–6838), which was prior to either the September 28 layoff date referenced in the Respondent’s first layoff notice or the date of the September 30 notice.

I find that Respondent did not meet its obligation to bargain over the decision to lay off the six employees but rather presented the layoff decision as a fait accompli regarding a matter that it claimed to be within its discretion. Respondent did not provide the Union with the final notice of which employees would be laid off until September 30—only 2 days before it indicated that layoff would take effect and after the Respondent actually laid off Spangler. Moreover, in the September 15 and 30 letters, Respondent offered to bargain over the “effects” of the layoff, but pointedly, did not offer to bargain over the layoff decision itself. Even assuming that Respondent’s offer was adequate with respect to the duty to engage in effects bargaining, it did not meet the Respondent’s obligation “to bargain over the layoff decision itself, not just its effects.” *Print Fulfillment Services, LLC*, 361 NLRB 1243, 1247 (2014). To the extent that Respondent’s statement left any doubt as to its unwillingness to engage in decisional bargaining on that subject, that doubt was erased in early October when the Union objected to the staffing changes and Farley and Alward responded by, as discussed earlier, making clear that the Respondent considered the staffing decisions to be wholly within its discretion.

General Counsel did not show that the Union made a formal request to bargain regarding the layoff of the six employees. However, as discussed immediately above, the Union objected to the post-strike staffing decisions, Respondent reacted by making clear that it would treat the staffing decisions as within its sole discretion. The Board has recognized that, under such circumstances, Respondent was presenting the staffing decisions as a fait accompli and that, therefore, the Union was not required to make a formal request to bargain because doing so would have been futile. *Technocap, LLC*, supra; *Westinghouse Electric*, supra.²³¹

Respondent’s offer, in both the September 15 letter and the September 30 letter to “discuss” the matter, does not justify a different finding regarding the question of whether the Respondent met its bargaining obligations with respect to the decision to lay off employees. As noted above, the Respondent’s unwillingness to engage in decisional bargaining was confirmed by management’s dismissive reaction when the Union objected to the staffing changes and expressed concerns about safety. The Board has held that an employer cannot satisfy its statutory duty to bargain by expressing a willingness to “‘discuss’ a mandatory subject while at the same time maintaining that it has no duty to bargain.” *Endurance Environmental Solutions*, 373 NLRB No. 141, slip op. at 19 (2024). Even viewing the facts most favorably to the Respondent, that is what the Respondent did here.

I find that Respondent failed to meet its bargaining obligations and violated Section 8(a)(5) and (1) of the Act in September and October of 2020 when it laid off employees Bliss, Carreon, Decorte, Mares, Montano, and Spangler.

I also find that the layoffs of the six employees was discriminatory in violation of Section 8(a)(3) and (1) of the Act. As discussed previously with respect to the unilateral reduction in shifts and staffing, the increase in the use of supervisors to perform unit work, and the assignment of additional job duties, the evidence showed that the Respondent told the Union

²³¹ It is true that on November 3, 2020, after the Union grieved the staffing changes, Respondent asked the Union to provide information about its safety concerns (GC Exh. 331), and, on November 11, 2020, returned four bargaining unit employees, to work, but it did this without conferring about staffing with, or soliciting staffing input from, the Union (Tr. 6881–6888, 7382–7383; GC Exh. 332.)

that this was the way Respondent had completed the work during the strike and, so, was the way unit employees were required to complete the work after the strike ended. This makes clear that the changes resulted from the employees' protected strike activity, as opposed to considerations unrelated to labor relations. Moreover, Respondent's hostility towards the employees' protected union activity is evidenced by, as discussed above, its unlawful attempts to hire permanent striker replacements after the strikers made an unconditional offer to return to work. Additionally, since, as previously found, the Respondent's reduction of shifts and use of supervisors to perform unit work were unlawfully discriminatory, and since the layoff of the six employees was part and parcel of those discriminatory actions, those layoffs were "fruit of the poisonous tree," and were also unlawful, even if the laid off employees were not specific targets of the Respondent's discrimination. *Cayuga Med. Ctr. at Ithaca, Inc.*, 367 NLRB No. 21, at 33 (2018), quoting *FiveCAP, Inc.*, 331 NLRB 1165, 1169 (2000), *enfd.* 294 F.3d 768 (6th Cir. 2002).²³²

For the forgoing reasons, I find that the Respondent discriminated in violation of Section 8(a)(5), (3), and (1) of the Act in September and October 2020 by laying off employees Bliss, Carreon, Decorte, Mares, Montano, and Spangler.

E. Post strike Reductions in Amarillo Rod Line Positions for Bander, Mobile Equipment Operator (MEO) and Mechanic; Assignment of Second Shift Banders to First Shift Work; and Modification of Job Duties for Pickling Operators and Crane Operators

The complaint alleges that on about September 14 and 30, 2020, Respondent eliminated Amarillo bargaining unit positions for banders, mobile equipment operators, and mechanics/general mechanic when it reduced the staffing levels for rod line shifts, and that on about September 30, 2020, Respondent began requiring second shift banders to work on the first shift and added to the duties of pickling operators and crane operators, and that it took all these actions in violation of its bargaining obligations (Sec. 8(a)(5) and (1)) and discriminatorily based on employees' protected concerted and union activity (Section 8(a)(3) and (1)). (Complaint ¶¶ 6(h), 6(j), 6(k), 6(l), 6(m), 6(o), 9, and 10.)

As previously found, Respondent operated the rod lines at the Amarillo facility for an unlawfully reduced number of daily shifts following the strike. The record shows that, in addition, the Respondent began staffing the remaining post-strike shifts with fewer banders, mobile equipment operators and mechanics per-shift than it had before the strike. Specifically, the evidence shows the following staff reductions: Respondent had a total of nine banders across the three shifts pre-strike, but reduced that to a total of only four banders across two shifts post-

²³² I note that my finding is that Respondent's decision about whether to lay off six employees was motivated by protected union activity, not that the decision about which six employees to lay off was based on the particular employees' protected activity. At any rate, Respondent's argument that the layoffs could not have been unlawfully motivated because two of the six employees affected did not participate in the strike is based on a fallacy. The Board has repeatedly recognized that employees who are not known union supporters, or are even known to be union opponents, can be unlawfully swept up in adverse actions motivated by antiunion animus. *Bardon, Inc.*, 371 NLRB No. 78, slip op. at 18 (2022), *enfd.* 2024 WL 81099 (4th Cir. 2024); *McGaw of Puerto Rico, Inc.*, 322 NLRB 438, 451 (1996), *enfd.* 135 F.3d 1 (1st Cir. 1997); *Weldun International*, 321 NLRB 733, 734 (1996); *Davis Supermarkets*, 306 NLRB 426 (1992), *affd.* and remanded 2 F.3d 1162, 1168 (D.C. Cir. 1993); *Mini-Togs, Inc.*, 304 NLRB 644, 648 (1991), *enfd.* in part 980 F.2d 1027 (5th Cir. 1993); *ACTIV Industries*, 277 NLRB 356, 356 fn. 3 (1985); *Alliance Rubber Co.*, 286 NLRB 645, 647 (1987); *Richardson Paint Co.*, 226 NLRB 673, 673–674 (1976), *enf. denied* in relevant part 574 F.2d 1195 (5th Cir. 1978). Although I consider it curious that, on September 30, Respondent revised the previously issued layoff notice by adding two nonstrikers to it, I give no weight in this decision to the possibility that the Respondent added those nonstrikers "to lend an 'aura of legitimacy'" to a discriminatory layoff. *Pillsbury Chemical & Oil Co.*, 317 NLRB 261, 261 (1995).

strike; Respondent had a total of six mobile equipment operators (MEOs) across the three shifts pre-strike, but reduced that to a total of only three mobile equipment operators across the two shifts post-strike; Respondent had a total of four to five mechanics across the three shifts pre-strike, but reduced that to a total of only two mechanics across the two shifts post-strike. (Tr. 7343 et seq.) One would expect that reducing staff levels meant that the Respondent had to change how the remaining staff accomplished the work on the Amarillo rod lines. The evidence showed that, in fact, the Respondent imposed additional duties on the bargaining unit employees who were left working on the Amarillo rod line. Specifically, a mechanical equipment operator was also assigned to perform bander work and an acid pickler was assigned to operate a crane. General Counsel does not, however, identify any meaningful evidence to support the complaint allegation that Respondent required second shift banders to work during the first shift.

An employer's decision to "combine jobs, to reassign work, and to lay off employees –[is] a mandatory subject of bargaining." *Holmes and Narver*, 309 NLRB 146, 146–147 (1992); see also *Westinghouse Electric*, 313 NLRB at 453. Here, the Respondent did not give the Union an opportunity to bargain about the September 2020 changes to the prestrike staffing levels.²³³ To the contrary, the evidence shows that it was the Union who, after observing staffing changes, raised the matter with Respondent while meeting regarding grievances in October 2020.²³⁴ At that time, the Union complained about the post-strike staffing at the Amarillo facility and about purported safety concerns arising from the staffing changes. Farley and Alward, the managers to whom these objections were made, did not reverse the unilateral staffing decisions, nor did they bargain over those decisions. Rather, the managers stated that this was the way the Respondent had handled the work during the strike and that the Respondent required the employees to do the same post-strike.

General Counsel did not show that the Union made a formal request to bargain regarding the change in staffing levels and the combining of jobs, but it did show that the Union told the Respondent it objected to those changes and that management's response was to make clear that the Respondent considered the post-strike staffing changes to be within its sole discretion. As previously noted, the Board has recognized that, under such circumstances, the Respondent was presenting the change as a *fait accompli* and that, therefore, the Union was not required to make a formal request to bargain because doing so would have been futile. *Technocap, LLC*, supra; *Westinghouse Electric*, supra.²³⁵

With respect to the assignment of new duties to acid picklers and mobile equipment operators, the evidence showed that the Respondent did reference that change in an attachment to a September 30, 2020 letter to the Union. (GC Exh. 329 at 3.) That letter, however, did not provide the Union with a meaningful opportunity to bargain over the decision to assign the new duties. The September 30, 2020 letter stated that changes were planned for October 2, 2020—only 2 days later—which did not allow time for meaningful negotiation.

²³³ As is discussed in the previous section, in a September 30, 2020, letter the Respondent did notify the Union about plans to lay off specific individuals at the Amarillo facility. Arguably that letter constituted notice of the decision to reduce the total complement of bargaining unit employees at Amarillo, even though the letter does not specify staffing totals or foreclose the possibility that the staff levels will be maintained through the use of personnel other than those discussed in the letter. For purposes of this analysis, I assume, without deciding that the September 30 letter provided notice of the staffing reduction, but, as discussed above, not an offer of decisional bargaining over the reduction.

²³⁴ The record shows that on October 21, 2020, the Union filed a grievance over the layoffs of banders and mechanical equipment operator. (Tr. 49:7371–7372; GC Exh. 330.)

²³⁵ It is true that on November 3, 2020, after the Union grieved the staffing changes, Respondent asked the Union to provide information about its safety concerns (GC Exh. 331), and, on November 11, 2020, returned 4 unit employees, to work, but it did this without conferring about staffing with, or soliciting staffing input from, the Union (Tr. 6881–6888, 7382–7383; GC Exh. 332.)

Moreover, Respondent told the Union that it was prepared “to negotiate with the union over the effects of . . . these job duty adjustments,”²³⁶ leapfrogging over its obligation to negotiate with the Union over the decision itself. Given the short time frame, and the wording of the letter, I find that the Respondent was providing the Union with notice of a fait accompli regarding the addition of new job duties to unit positions, not with a meaningful opportunity to bargain over those changes. Indeed, as noted above, when the Union objected to the new post-strike staffing arrangements, the Respondent declined to negotiate or rescind the changes, but rather gave responses that made clear that the Respondent considered staffing decisions to be within its sole discretion. *Technocap, LLC*, supra; *Westinghouse Electric*, supra 313 NLRB at 453.

For the above reasons, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to meet its bargaining obligations regarding its post-strike decisions at the Amarillo facility to: eliminate a number of bargaining unit positions for banders, mobile equipment operators and mechanics; reduce per shift staffing levels; and add new duties to the bargaining unit positions of crane operator and pickling operator. However, as noted above, the record did not show that Respondent assigned second shift banders on the rod line to work during the first shift, and the violations alleged regarding that putative change should be dismissed.

General Counsel has also succeeded in showing that Respondent discriminated against employees on the basis of their union activity, including union strike activity, when it eliminated bargaining unit positions for banders, mobile equipment operators and mechanics, reduced per-shift staffing levels, and added additional duties to the bargaining unit positions of crane operator and pickling operator. Respondent’s anti-union animus connected to these decisions is demonstrated by the violations previously found, including the Respondent’s: offering to hire additional striker replacements after the unit employees made their unconditional offer to return to work; elimination of a rod line shift; transfer of bargaining unit work from the bargaining unit to supervisors; and, most notably, management’s statements relying on the recent strike to explain why, post-strike, Respondent was requiring bargaining unit employees to work under conditions the employees considered difficult and unsafe. As discussed previously, the Respondent has not demonstrated that efficiency or another non-discriminatory reason would have caused it to adopt post-strike changes to the pre-strike staffing arrangements absent the employees’ protected union activity. Therefore, a violation is established. *Camaco Lorain Mfg. Plant*, 356 NLRB at 1184-1185; see also *Community Motor Bus Co.*, 180 NLRB at 680 (where an employer makes changes that affect former strikers’ access to shifts, the employer has “the burden . . . to come forward with evidence of legitimate objectives for its conduct.”).

I find that Respondent discriminated on the basis of employees’ protected activities in violation of Section 8(a)(3) and (1) of the Act at the Amarillo facility when on about September 14 and 30, 2020, it reduced staffing levels and eliminated bargaining unit positions for banders, mobile equipment operators, and mechanics, and when it added to the job duties of bargaining unit mobile equipment operators and acid picklers.

F. November 11, 2020 Recall of Employees

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act on November 11, 2020, by failing to meet its bargaining obligations before recalling and reinstating four employees to work on the Amarillo facility rod line. (Complaint ¶¶7(j), 7(p), 10.)

As discussed above, prior to the November 11 recall, the Union expressed its objections to Respondent about the layoffs and other post-strike staffing changes at the Amarillo facility. At the time that the Union lodged those objections, Respondent nevertheless proceeded to

²³⁶ *Emphasis added.*

implement the staffing decisions without bargaining. The record shows that Respondent did, however, subsequently select four bargaining unit employees—two banders, one mobile equipment operator, and one mechanic—for recall to work. It notified the Union that it was recalling those employees on November 11, 2020, but did not confer with, or solicit input from the Union prior to announcing the decision. Alward (an Amarillo manager) met with Union representative Saavedra in November 2020 but did not offer to bargain over the decision to recall the four employees at that time; indeed, during that meeting Alward made clear that Respondent considered the post-strike staffing decisions to be within Respondent's sole discretion. Although the Respondent did not bargain, Alward testified that the November 11 recall was directed at addressing safety issues and appeasing the Union. (Tr. 688–6888, 7382–7383; GC Exh. 332.)

The recall of employees from layoff is a mandatory subject of bargaining. *Lockhart Concrete*, 336 NLRB 956, 958 (2001); *Contech Div.*, 333 NLRB 875, 875 n.1 and 887 (2001).²³⁷ The Respondent made the November 11 decision about how many, and which, employees to recall without meeting its bargaining obligations regarding a mandatory subject of bargaining and, therefore, violated Section 8(a)(5) and (1) of the Act. Although the Respondent hoped that the November 11 recall would appease the Union's staffing and safety objections that is not tantamount to good-faith bargaining. Respondent's November 11 recall action deprived the Union of an opportunity to negotiate and forward reasons why, inter alia, recalling a greater number of unit employees, or different unit employees, would better serve the employees' concerns about safety and understaffing. Respondent, therefore, exercised unilateral control over decisions about which the Union had a right to confer and bargain.

I find that the Respondent violated Section 8(a)(5) and (1) of the Act on November 11, 2020, by selecting four employees for recall to the Amarillo facility rod line to the Amarillo facility rod line without first meeting its obligation to bargain with the Union.

X. RESPONDENT TERMINATED THE LAID OFF EMPLOYEES FROM THE RECALL LIST AT HAYDEN AND AMARILLO

Complaint ¶¶6(n) and (o) allege that about September 15, 2021, Respondent terminated the employment of and removed from any recall list, certain employees at Hayden and Amarillo due to their union and/or concerted activities, in violation of Section 8(a)(3). The complaint also alleges that the terminations are the result of Respondent's failure to bargain with the Union to an overall good-faith impasse for a successor BLA

Respondent admits that about September 15, 2021, its terminated these employees because they had not worked in 12 months, which was in accordance with the seniority provisions of the implemented Terms and Conditions. It denies terminating these employees due to any other reason.

A. Facts

On August 25, 2021, HR Manager Kim Decker sent a letter to "union leaders" for the local unions that employees at Hayden Smelter and Concentrator who were on continuous layoff since September 15, 2020, would be considered to have a seniority break on September 15, 2021, in accordance with the implemented Terms and Conditions. (GC Exh. 349.) In the draft letter dated August 25, 2021 that Decker enclosed to the "union leaders," Decker advised the employee that the employee was no longer on any recall list, and the employee was eligible

²³⁷ The order in *Contech* was subsequently vacated on the basis of a non-Board settlement reached post-decision by the employer and union. 337 NLRB 439 (2002).

to apply for future job openings; however, if hired, the “previous seniority would not carry over.” (GC Exh. 349 at 3.) The letter, entitled “Notice of Break in Seniority on September 15, 2021,” stated:

5 On or about July 15, 2020, you were notified that you were placed on
layoff from ASARCO’s Hayden facility, effective September 15, 2020.

10 The language in the Seniority section of the Terms and Conditions
provides that Your Company and Plant Seniority will break after 12 months off of
work. When your seniority is broken on September 15, 2021, you will no longer
be on the ASARCO recall list for Hayden facility job opportunities. In the event the
Company posts job opportunities in the future, you may, and are welcome to,
apply for those positions, but your previous seniority will not carry over.

15 (GC Exh. 349 at 3.)

 Over 100 employees received the letters, according to Respondent’s lists. (GC Exhs.
349(a) and (b).) However, the record does not identify that all employees on Respondent’s lists
were strikers.

20 On August 31, 2021, Sinele notified Prescott and Terrazas that employees from the
Amarillo Refinery, who were on continuous layoff since September 15, 2020, received a letter
similar to what Decker sent at Hayden, regarding the break in seniority pursuant to the
implemented Terms and Conditions’ Seniority provisions. (GC Exh. 350.)

25 On August 31, 2021, Alward sent letters to those employees laid off effective September
15, 2020, and still in layoff status. The letters stated:

30 On or about July 15, 2020, you were notified that you were placed on
layoff from ASARCO’s Amarillo facility, effective September 15, 2020.

35 The language in the Seniority section of the Terms and Conditions
provides that your Company and Plant Seniority will break after 12 months off of
work. As your seniority is broken on September 15, 2021, you will no longer be on
the ASARCO recall list for the Amarillo facility. You will be separated from
employment at ASARCO effective September 15, 2021.

40 In the event the Company has open job opportunities in the future, you
may, and are welcome to, apply for those positions, but your previous seniority
will not carry over. You may search for job opening at ASARCO on the Company
website

45 (GC Exh. 350 at 2.)²³⁸ Approximately 70 employees were notified of their break in seniority and
termination. (GC Exh. 350(a).)

 Alward did not discuss the break in seniority and termination with the Union before these
letters were issued. (Tr. 46:6896–6897.)

²³⁸ Ultimately the Amarillo rod line was placed in “temporary indefinite” shutdown in October 2022, with only care and maintenance activities continuing.

B. Parties' Positions

General Counsel contends that Respondent's letters to the employees constituted a threat because the employees engaged in an unfair labor practice strike. (GC Br. at 224, citing *KSM Indus., Inc.*, 336 NLRB at 134 (2001). General Counsel's position is largely based upon its contention that Respondent unlawfully implemented the LBFO, so Respondent's statements punish these employees with the layoff requirement.

General Counsel also contends that employees at Hayden Smelter and Concentrator and the Amarillo Refinery, which had been shuttered during the strike, were terminated and removed from the recall list because Respondent implemented a new seniority rule: After 12 months, the employees were removed from the list and terminated, in violation of Section 8(a)(3) because they were unfair labor practice strikers. General Counsel also contends that the removal violated 8(a)(5) as a unilateral change and the statements in letters sent to employees violated Section 8(a)(1).

The Union argues that the seniority provisions from the implemented Terms and Conditions constituted a material change that Respondent was not provisioned to do. (U Br. at 169, citing *Socony Motor Oil Co., Inc.*, 147 NLRB 337, 340 (1964) (seniority as a mandatory subject of bargaining)).

Respondent contended that the Hayden smelter was shut down during the strike and, as of the hearing, had not reopened due to the capital investment necessary to restart it in that time period. Ray GM Lammers undisputedly explained what the chemical damages were to the smelter and the duct work over time. From the shutdown in 2019 to Lammers' testimony in 2023, the cost of restarting would be \$100 million. (Tr. 54:8152–8154.) Respondent argues that it lawfully followed the seniority provision of the implemented Terms and Conditions and the terminations, with the accompanying break in seniority, was a "neutral application" of the Terms and Conditions. The strike was almost two years before, so timing did not indicate a reason Respondent issued these letters. Nor were the letters necessarily sent to only strikers. (R. Br. at 241–242.)

Analysis

In assessing these allegations, I begin with the alleged unilateral change due to the implemented Terms and Conditions, then the 8(a)(3) and ultimately whether the letters constituted threats to the employees.

Regarding the unilateral change, the implemented Terms and Conditions Seniority provision allows seniority to be broken if an employee has not worked for more than 12 months. (GC Exh. 245 at 27.) General Counsel relies upon what it terms the unlawful implementation of the LBFO and argues that Respondent should have relied upon the expired BLA, in which seniority would not be broken until an employee did not work for 36 months (per *Orchids Paper Products Co.*, 367 NLRB No 33, slip op. 1 n. 5 (2018)). General Counsel again bootstraps its arguments with the alleged unfair labor practice strike and alleged unlawful implementation, plus other unlawful changes post-strike.

General Counsel argues that Respondent's unfair labor practices, including unilateral implementation of the LBFO, made this change unlawful. (GC Br. at 225–226.)²³⁹ However, the implemented Terms and Conditions were lawfully implemented, so I do not find a 8(a)(5) violation.

²³⁹ Accord U. Br. at 169.

Regarding the 8(a)(3) allegations, I come to a different conclusion. Since the first layoff of these employees was discriminatory, the break in seniority and terminations are “fruit of the poisonous tree,” and therefore unlawful. Although Respondent maintains it did not select anyone based upon their union activities, laid off employees were not specific targets of the Respondent’s discrimination. I find that the employees terminated after an unlawful layoff were also discriminatorily terminated. Similarly, despite invoking the seniority provisions of the implemented Terms and Conditions, Alward and Decker threatened to terminate these employees in violation of Section 8(a)(1).

XI. ALLEGATIONS REGARDING CHARGING PARTIES PUHARA AND MCCRAY

The complaint contains a number of allegations related to employees Puhara and McCray:

- About June 20, 2020, Respondent by Esther Romero, at the Ray Complex, told employees that they were unfit for duty because they could hardly walk from the parking lot to the mill shop in response to their union and protected concerted activities, threatened employees with unspecified reprisals for engaging in union and protected concerted activities. (Complaint ¶¶5(e);
- About August 18 and 28, 2020 Manager Dean Alonzo accused employees of falsifying documents and threatened them with unspecified reprisals because of their Union and protected concerted activities (Complaint ¶¶5 (i), (j)).
- About June 18, 2020, Respondent suspended Puhara from work; suspended McCray from work; required employee Puhara and McCray to submit to a fitness for employment exam as a condition of continued employment. (Complaint ¶¶5(f)(7).)
- About Aug 21, 2020 Respondent suspended McCray. (Complaint ¶¶5(f)(8).)
- About Aug 25, 2020, Respondent suspended Puhara. (Complaint ¶¶5(f)(9).)
- About Aug 28, 2020, Respondent issued Puhara 2 written disciplinary warnings. (Complaint ¶¶5(f)(10).)
- About August 28, 2020 Respondent discharged McCray. (Complaint ¶¶5(f)(11).)
- About September 4, 2020 Respondent discharged Puhara. (Complaint ¶¶5(f)(12).)
- About mid-to late August 2020, Respondent by Kenny Hatfield, at Respondent’s Ray Complex, denied the request of employee Puhara for to be represented by Steelworkers Local 915 during an interview. Puhara had reasonable cause to believe the interview would result in disciplinary actions. About mid to late August 2020, Respondent, by Hatfield, Romero, Alonzo and Kim Decker at Ray Complex, conducted the interview anyway. (Complaint ¶¶5(h)(1-3).)

To better understand what happened to the two alleged discriminatees (and others), I first discuss Respondent’s disciplinary procedures, then discuss the events alleged.

A. Respondent's Disciplinary Procedures:

Respondent does not have a written HR policy or procedure regarding investigation and discipline, nor does it necessarily follow progressive discipline. Serious violations are likely to result in termination if upheld. MSHA regulations provide some guidance on what the serious issues are.

Investigations are supposed to be completed within a "reasonable time." Sinele testified that, once a complaint was received, a human resources representative and HR leadership and/or local management at the respective work site would start an investigation and determine who were witnesses. The investigation then turned to asking witnesses questions and gathering information. If the incident involves safety (e.g., potential or actual fatality, injury, near misses), a supervisor makes an accident investigation report (supervisor investigation report, SIR) to assess the cause. The SIR is issued to Safety and HR may obtain a copy (per Mora). Each aspect of the related issues would be investigated thoroughly. Whether more levels of management become involved depends on the situation, and a member of management makes the final determination on the investigation. (Tr. 22:3402–3405.) However, Mission Supervisor Samuelson stated that the employee at issue is not always interviewed before the SIR is completed. (Tr. 41:6160.) The same process would be used for a termination. The General Manager makes the final decision at each site. For attendance, the HR Director does not get involved. (Tr. 22:3405–3406.) An employee may be placed on suspension pending investigation for serious safety issues. (Tr. 39:5738.) The employees are required to follow the Code of Conduct and Conflict of Interest policies. (Tr. 22:3424.) Safety rules also apply.

If Respondent determines the discipline, suspension or termination is warranted, the Union is informed about having a hearing, during which the employee gives a statement. If the determination at the hearing is to suspend or terminate the employee, the next step is for the Union to grieve the decision. Terminations automatically move to the third step of the grievance process. (Tr. 39:5729.)

After investigation, the manager of the department, with the counsel of the HR manager, determines whether to hold a nonperemptory discharge hearing to determine whether an employee's actions warrant a termination or suspension. (Tr. 39:5730–5732.) The employee, union representatives, HR and departmental representatives attend this meeting. The length of meeting typically lasts 30 to 90 minutes, depending upon the complexity of the case. (Tr. 39:5736–57.) Once the hearing is held, the manager has five business in which to issue his decision whether to issue formal discipline. (Tr. 39:5732–6733.) If the matter goes to a third step grievance, the GM, department manager, supervisor, and HR attends on behalf on management and Respondent has 10 business days to notify the Union of its decision. The general manager makes the third step decision. The decision includes review of prior discipline. (Tr. 39:5734–5735.) Respondent sometimes offered employees last chance agreements in lieu of termination. (Tr. 38:5817; e.g., GC Exh. 413.)

The Union's timeframe for filing a grievance begins once discipline is issued, e.g., for an investigatory suspension. The human resources department answers the grievances.

After an employee has not worked for a period of time, the employee is required to submit to a fitness for duty examination performed by a physician retained by Respondent. (Tr. 22:3468.) The time for an exam is usually after at least a 6-month absence, such as a leave of absence. Sending a current employee to see a physician might arise if an employee had an accident on the job or if someone suspected drug and/or alcohol use; however, the physician determines whether the fitness for duty exam is needed. (Tr. 22:3474.)

B. Employees Puhara and McCray Complain About the Change in Maintenance Employee Parking and Using Company Trucks

5 These events occurred during the strike and within 2 months after the strike conclusion, on July 5, 2020.²⁴⁰ Jeff Puhara and Winford Paul McCray,²⁴¹ maintenance employees at the Ray facility, were first suspended and back to work when Respondent terminated them in August 2020. McCray was a Class A mechanic at the Ray mine in 2019 until his termination in August 2020. Puhara worked as a Class A Mechanic, in concentrator repair from January 2020 until the
10 end of August 2020. Both worked throughout the strike and afterwards. Their work involved working on the crusher. They also worked on mobile equipment, such as boom trucks and forklifts.

15 For the mobile equipment, the mechanics were required to perform pretrip inspections. Puhara also was certified for mobile crane operation and a certified crane instructor. (Tr. 53:7990.) Puhara determined how much instruction to give an individual based upon whether he knew the individual was competent and then walk through the machine; if he believed the individual was less competent he spent more time on instruction. Whenever Puhara trained an individual, he was required to complete a Mine Safe and Health Administration (MSHA) form.
20 (Tr. 53:7991–7992.)

25 Manager Esther Romero (Manager Romero) worked at Ray as General Maintenance Manager through April 2022, and had one supervisor, Maintenance Supervisor William “Kenny” Hatfield. She oversaw maintenance, including for the crusher and the mill. From February 2020 to April 2022, she served as General Supervisor at the Ray mine and then worked at Hayden operations from April to October 2022, at which time she was terminated. She reported to Concentrator Manager Dean Alonzo, and later Keith Kenyon. (Tr. 52:7783–7784.) Alonzo reported to General Manager Michelle Lammers.

30 Manager Romero gave McCray discipline, which McCray believed was discriminatory. In one example, Manager Romero gave him a written discipline for not performing a pretrip check on a forklift when a few minutes before, she only gave a verbal warning to an employee for failing to perform the pretrip check on the same piece of equipment. In another instance, Manager Romero yelled at McCray about finishing the work on a rock crusher while also yelling
35 about cleaning. These instances occurred before the alleged protected concerted activity that General Counsel contends led to Respondent’s alleged discriminatory actions. (Tr. 53:7959–7961.)

40 1. Manager Romero makes a change to parking for the maintenance employees

45 Around June 2020, Manager Romero changed a practice of allowing Ray mill employees to drive company vehicles to and from the parking lot to the mill.²⁴² She instead required employees to walk from the employee parking lot instead of driving company trucks from the lot to the mill. Manager Romero estimated that the walk from the parking lot was about 10 minutes. Supervisor Hatfield estimated the distance was 1/8 of a mile. Concentrator Manager Alonzo said

²⁴⁰ Given the 3-year lapse in time, most witnesses had somewhat fuzzy recall, which was clarified by some written documents. However, alleged discriminatee McCray’s testimony was sometimes contradictory, which was less credible.

²⁴¹ McCray was called Paul by all participants in the case.

²⁴² Manager Alonzo testified that the decision was made in a managers’ meeting with the safety manager, mine manager, GM Lammers and herself. Alonzo agreed with some of the reasons for the change that Manager Romero cited, which in turn were communicated to Manager Romero. (Tr. 52:7901–7902.)

the distance was 200 yards or at the most, a quarter of a mile, with mechanics required to walk up a few more flights of stairs to reach their shop. McCray estimated the walk was 1/2 mile; Puhara estimated the walk was slightly shorter than the 1/2 mile or a 15-minute walk on a good day. (Tr. 53:7952, 7995.)²⁴³

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Manager Romero determined to make the change because the hourly employees were not appropriately braking and placing chucks behind the truck tires to secure the trucks. Additionally the employees did not store keys appropriately or took the keys home, depriving of other workers' the use of the trucks during working hours.²⁴⁴ She testified that the employees were not supposed to drive the vehicles but had been taking them up and down from the parking lot instead of leaving them at the mill. The trucks were to remain at their specific shops. (Tr. 52:7790–7791.) Manager Romero also wanted safety checks performed on the trucks. (Tr. 52:7852.)

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- 15 2. Puhara and McCray complain separately to management after receiving the announcement of the change

Manager Romero advised Supervisor Hatfield to tell the employees about the change. Supervisor Hatfield, without Manager Romero present,²⁴⁵ advised the maintenance employees of the change during a morning “standup” meeting.²⁴⁶ Puhara recalled that the employees were not happy about the change but could not recall any specific statements made. (Tr. 53:7995.)

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McCray testified that he told Manager Romero and Supervisor Hatfield that this change was a hardship on him due to his underlying medical conditions. He could not recall whether anyone else was present during the conversation. (Tr. 53:7954.) Manager Romero ordered the exam for both Puhara and McCray after each spoke separately with Ray HR Manager Decker. McCray instead testified that, after the safety meeting, he was called to Manager Romero's office, where she told McCray that he was suspending from work because he was unable to walk from the parking lot to the mill shop and McCray was required to see the company doctor.

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Puhara went to the HR trailer and spoke alone for about 15 to 20 minutes with Manager Decker about the change. Puhara testified he told Decker “My concerns that many of us—I was mostly referring to myself—are older.” Puhara further testified Decker essentially stated the decision about the change was left to Manager Romero. Decker did not recall Puhara specifically raising any health issues but also sent him for the examination with the company doctor.

35

In HR Manager Decker's version,²⁴⁷ McCray took 30 minutes in his meeting with her. McCray said it was hard for him to walk and raised health issues, which concerned Decker. Due to these concerns Decker referred McCray for a fitness-for-duty test. (Tr. 52:7677–7678, 7582–7686.)

40

²⁴³ Mechanics walk up and down six flights of stairs all day in the mills.

²⁴⁴ Manager Romero received reports from Supervisor Hatfield and other shop supervisors complaining about trucks left at the parking lot or other issues with truck availability.

²⁴⁵ McCray testified that Hatfield and Manager Romero announced the change in a morning safety meeting with mechanics, including Puhara. However, McCray could not recall anyone's specific comments about the change. (Tr. 53:7952–7954.)

²⁴⁶ Hatfield recalled that employees were complaining among themselves about how Manager Romero treated them, but McCray and Puhara did not complain to him about her and they did not say such things where Hatfield could hear them. Hatfield advised her about the complaints. (Tr. 52:7854–7855.)

²⁴⁷ Decker admittedly had limited memory of this discussion.

Decker told Manager Romero about the complaints about her but did not recall what she said. Manager Romero did not receive any discipline. Decker raised making a reasonable accommodation for McCray's arthritis by using the company vehicle to and from the employee parking. Manager Romero said that McCray was one of the people who was not chocking the vehicle tires. Chocking tires uses blocks to stop a truck's wheels from accidentally moving and potentially causing damage or injury.²⁴⁸

Manager Romero also said that the employees had to be able to walk the stairs as part of their jobs. Decker also looked into whether anyone was injured walking through the mill. Decker reported to McCray that all employees working in the mill could not park and drive as they previously had. Hatfield also noticed that McCray was having difficulty breathing while working in the tool room but apparently made no recommendations for McCray to receive a medical evaluation.

No one else was present for the conversation with Manager Romero and Puhara. Manager Romero told Puhara that he was "being sent home pending a fit for duty evaluation . . . and until [I] was signed off, I wasn't to come back to work."

C. Puhara and McCray See the Company Doctor With Different Outcomes

1. McCray

McCray thought his appointment with the company doctor was likely the same day or the next after speaking with Manager Romero. The company doctor told McCray his blood sugar was high and he needed to stay off work until his blood sugar stabilized. (Tr. 53:7956–7957.) McCray saw his personal physician and stayed off work for 7 to 8 weeks. McCray received short-term (sickness and accident) payments²⁴⁹ while he was off work. (Tr. 52:7691–7694, 7698.)

On June 23, 2020, while in off-duty status, McCray emailed Ann Videna, a senior HR IT employee, about a hostile work environment that started after Manager Romero began working at the facility. He reported that employees were required to walk during off-the-clock time 1/2 mile through the mill, which was an unsafe area. McCray also complained that he was suspended for one mistake but later complained that Romero harassed him because the rock hammer was broken.²⁵⁰ He stated that Ray HR Manager Decker did not want to hear what happened. He also complained that he went sent home and had to contact his physician because of his high blood sugar; the company doctor told him to get his sugar under control. (GC Exh. 386 at 2.)

On June 30, 2020, McCray sent an email to Decker about failing to get paid for the "day," as promised; he was paid for 4 hours only and thought he should have been paid for 12 hours. He said he felt everything happening to him was unfair and wanted the pay fixed. (GC Exh. 386 at 4.) The timekeeper needed an approval to change the hours for the day to pay

²⁴⁸ See, e.g., <https://engineerfix.com/what-does-it-mean-to-chock-the-tires/> (Dec. 16, 2025); <https://www.safetymanualosha.com/chocking-and-blocking-safety/> (Nov. 3, 2016). Sites last checked March 12, 2026.

²⁴⁹ Short-term disability may last as long as six months. However, short-term disability is paid at a flat rate and does not cover 100 percent of wages.

²⁵⁰ In hearing McCray testified that Manager Romero gave him written discipline for operating a forklift without completing an inspection form first. She later asked another time whether he completed a pretrip inspection on another forklift, which he admitted to not performing, but another mechanic was not written up for the same thing.

McCray the corrected amount. Decker advised McCray that he would not receive the corrected hours until the following paycheck and would not receive July 4 holiday pay because he was receiving short-term disability. (GC Exh. 387 at 1.)

5 While off work, McCray controlled his blood sugar, improved his walking, and lost weight. (Tr. 53:7955, 7963.) Once his personal physician cleared him for work, McCray saw the company's physician, who sent him back to his full duty status. (Tr. 52:7708–7710.) McCray was able to resume walking without difficulty. (Tr. 52:7864.)

10 2. Puhara

The day after Puhara saw Manager Romero and received the order for the “fit-for-duty” examination, On June 18, 2020, Puhara had an examination on the Ray premises the following day and was released to work. (Tr. 53:7995–7997.)²⁵¹

15 Only Puhara and McCray were sent for fitness-for-duty examinations, but the record reflects that the Ray managing staff did not directly receive complaints except from Puhara and McCray. Further, no documentation shows that either was suspended for their complaints.

20 *D. McCray Returns to Work; Puhara and McCray are Disciplined for Different Reasons*

About August 2020, McCray returned to work. Shortly thereafter Manager Romero suspended McCray for allegedly forgetting to perform a verbal assignment of greasing a part,²⁵² which McCray said was unnecessary as it had been performed 2 days before Manager Romero gave the order. McCray testified that he simply forgot despite at least two reminders. (Tr. 53:7965.)

30 On August 12, 2020, Supervisor Hatfield gave Puhara a written warning, “failure to follow a directive to set up parts and tools and . . . pump resulting in failure to complete jobs that will cause down time and production loss to include crane rental.” (GC Exh. 449.) Hatfield testified that he gave Puhara a copy of the warning for failing to set up the parts and tools on August 11. By failing to set up the parts and tools, the mechanics lost four to 6 hours on the task on August 12, 2020.

35 Puhara and another mechanic, Luis, initially started the work on the pump on August 12. Puhara eventually left to seek attention for heat exhaustion with the company nurse. Luis later required treatment as well.²⁵³ (Tr. 52:7886–7890, 53:8000.)

40 Romero testified Puhara was not disciplined for going the next day to seek treatment for the effects of heat. However, Puhara later maintained that he did not finish the task due to heat exhaustion and needing to see the occupational nurse. Manager Romero maintained that she

²⁵¹ Puhara did not testify about any conversation with Concentrator Manager Alonzo. However, Alonzo testified Puhara alone complained to him in his office about the change and that his knees were hurting because of the change. Alonzo suggested he seek medical treatment and the doctor could write him a note about it. Alonzo did not send him for a company evaluation immediately. Alonzo instead conferred with the safety department and the nurse, who apparently suggested Puhara needed a fit-for-duty examination. (Tr. 52:7903–7904.) Alonzo told Manager Romero to order the examination for Puhara. However, Alonzo testified he never spoke with McCray and made no recommendation about sending him for a fitness-for-duty exam

²⁵² McCray testified he received another written warning. Puhara allegedly witnessed the incident.

²⁵³ GC called it heat stroke, but Hatfield testified it was overheating. Hatfield did not know on what date it occurred. It was the same day Puhara was working on the pump, per Hatfield. (Tr. 52:7882–7883.)

was not advised about the heat exhaustion and no one would be suspended for seeing the occupational nurse.

E. Issues with A Boom Truck Lead to McCray's Suspension and Raises Questions about Puhara's Documentation of McCray's Training on the Boom Truck

The events leading to the termination started when the day shift said the boom truck was damaged. (Tr. 52:7868.) The truck shop identified damage to the spool of a boom truck. Another manager, Kenyon, brought the damage to Alonzo's attention. The last person to use the truck was McCray.

McCray volunteered to move the boom truck from the shop to the crusher the day before the damage was found. McCray admitted at hearing that he was not checked off to run that piece of equipment. Puhara nonetheless volunteered to sign him off, showing McCray had been trained.²⁵⁴

On the day McCray moved the boom truck, McCray inspected the truck but not the boom itself because he was not intending to operate the boom portion, only move the truck. McCray wrote on his inspection that the equipment had no defects and proceeded to drive the boom truck about 5 minutes, from the shovel and drill to the pressure shop. He denied that he operated the boom itself and stated he had no problems parking the truck. (Tr. 53:7968–7971, 8002.)

The following day, another employee discovered the cables on the boom were frayed, which caused the maintenance schedule on the crusher to be changed. (Tr. 53:7974.) Despite McCray denying at hearing that he operated the boom portion, Hatfield testified that McCray admitted to him that McCray was the last person to operate the boom truck and had operated the boom. (Tr. 72:7872.)

About August 21, 2020, Manager Romero suspended McCray pending a non-peremptory hearing (NPH) for damage to a spool on a boom truck. (Tr. 53:7976; GC Exh. 448(a).) Supervisor Hatfield then investigated and completed a supervisor investigation report (SIR). Hatfield brought the evidence to Manager Romero, which included a review of the pre-operation forms on the boom truck. McCray had not correctly completed the pre-operation form. (Tr. 52:7818.) Manager Romero advised HR Manager Decker of the steps taken. Romero testified that McCray's suspension pending NPH was warranted because McCray had progressive discipline. (Tr. 52:7816.) However, Hatfield testified that the suspension was to permit time to investigate. If found innocent of any wrongdoing, McCray would have been paid for his time. (Tr. 52:7869.)

Decker also conduct her own investigation by interviewing Puhara on August 21, 2020. (GC Exh. 451.) Decker testified Puhara said Manager Romero "had it out" for McCray ever since she began work there. Regarding the disciplinary action taken against McCray for not greasing the equipment, Puhara told Decker that McCray just forgot. Regarding the boom truck, Puhara told Decker that McCray inspected the boom truck and Puhara had helped him and saw him do it. Puhara admitted that McCray was never trained on the other part of the truck, but McCray could not have caused the damage when he moved the truck. (GC Exh. 451.) In short, McCray had not properly completed a pre-operation inspection of the truck because he did not check the boom portion.

²⁵⁴ McCray and Puhara testified that this boom truck was similar to two other boom trucks on which he had received appropriate training. (Tr. 53:7974, 8003.) Puhara testified that a line supervisor asked him to check off McCray on the boom truck. (Tr. 53:8002.)

Decker testified that McCray had received discipline in the past for property damage but she did not know how many. McCray sent Decker an email about his suspension, stating he worked on a problem that was greased 3 days before the events. McCray stated he inspected the drive train to drive the truck. He was not operating a boom truck, only the drive train because he was not trained for boom truck operation. He again complained that Manager Romero was looking for anything “to suspend us and I’m speaking for the whole team” In the course of the email, McCray stated several complaints about Manager Romero’s conduct, including discrimination, and asked to file a grievance against Manager Romero.²⁵⁵ (GC Exh. 386(c).)

McCray admitted he was not trained for boom truck operation, yet he and Puhara completed a form saying that McCray was adequately trained to operate the boom truck. The form was MSHA 5000–23, which reflects task training to indicate the individual is competent to either run a task or a piece of equipment. It was required by the Mine Safety and Health Administration (MSHA). Puhara was the trainer who agreed that McCray was trained on the boom truck. Every box on the form has to be checked to reflect adequate training by the trainee and trainer. Supervisors did not necessarily check whether the individual was adequately trained; according to Manager Romero, the supervisor should know who is and is not adequately trained. Once the form was completed, the individual could operate the equipment. The form has three copies behind the original, with the pink copy going to the individual. No follow-up is needed. (Tr. 52:7747, 5598–7802.)

Hatfield gave his investigatory findings to Decker. In preparation for McCray’s non-peremptory hearing, Decker talked with some of the people in the mill maintenance department where McCray worked. At hearing Decker could not recall everyone she spoke with. Decker recalled learning that Manager Romero was exacting and had a “very rough manner to everybody. She wasn’t singling anybody out.” Decker also examined McCray’s prior disciplinary record and training record to make sure everything was done correctly. (Tr. 52:7728–7731.)²⁵⁶

F. On August 25, 2020, Respondent Holds McCray’s Nonperemptory Hearing and Then Terminates Him

On August 25, 2020, Respondent was represented by Decker, Hatfield, Dean Alonzo, and Manager Romero, with Michelle Sanchez taking notes. One of the largest issues for the non-peremptory hearing was the recent task training form for McCray to operate a boom truck. Respondent had different kinds of boom trucks and McCray was not previously trained on this particular model. Puhara was the trainer who signed off on the form showing McCray was adequately trained for this model.

The management team made no determination of how to handle McCray before the nonperemptory hearing. Decker asked McCray whether he wanted union representation. He said he wanted Puhara to represent him. Puhara thereafter spoke on McCray’s behalf. Decker showed McCray’s training and disciplinary records to Puhara. After the initial charges were read, Puhara stated that McCray could not have caused any damage to the boom because McCray only drove the truck and did not operate the boom; in addition, McCray had no reason to operate the boom and he was not signed off on the crane/boom portion—only the driving portion. (Tr. 53:8006–8007.)

²⁵⁵ Decker could not recall following up on the complaints about Manager Romero but never opened a formal investigation. She recalled other employees complained about McCray. (Tr 52:7724–7728.)

²⁵⁶ Manager Romero denied that she knew anything about McCray or Puhara’s complaints about her.

McCray was asked why he only inspected part of the boom truck. McCray stated he was only trained to drive the truck and he was moving the truck as a favor.²⁵⁷ In the nonperemptory hearing, Puhara stated that McCray, during the operation of the boom truck, could not have seen the damage to the truck's spool. Puhara admitted that he, as a trainer, signed off on the MSHA form to show McCray was competent to perform certain tasks but only was trained on driving the boom truck. Manager Romero testified why this statement was problematic: The MSHA form is supposed to show that the individual was trained on operating the entire boom truck, not just driving it, and McCray and Puhara signed the MSHA form as if he had been trained on the entire boom truck operation. (Tr. 52:7806.)²⁵⁸

Alonzo, relying on the facts presented to him by the supervisors, stated that McCray had not completed pre-inspection form correctly and had done so in the past. Manager Romero also talked about McCray not completing the form correctly before this incident. (Tr. 52:7922–7925.) According to Decker, Alonzo became agitated and yelled at Puhara for about one minute.²⁵⁹ Alonzo stated he was not upset or yelling but shocked to hear Puhara make the admission because he had worked with Puhara for years. Alonzo was concerned that Puhara admitted he knew McCray was not adequately trained and yet they signed the form. Alonzo said the form was a legal document and the entire mine could be trouble for it, that they falsified documentation. Puhara did not say much in his own defense. The meeting lasted about 30–45 minutes, per Decker. (Tr. 52:7731–7736.) Both Puhara and McCray were asked to leave to meeting and wait.

After about 10 minutes, Supervisor Hatfield told Puhara and McCray that two managers wanted to keep McCray and two others wanted him terminated. Hatfield then advised McCray that he would be contacted before Friday with the decision and McCray could leave. He directed Puhara to reenter the meeting room. The managers then spoke with Puhara, which is discussed below.

When the meeting was over, the managers stayed behind and discussed what to do with McCray. Within a few days they decided to terminate McCray based upon his past history and the previous disciplinary level that warranted termination.

Decker testified she ultimately made the decision to terminate McCray based upon the number of incidents he previously had and that he signed off as trained on equipment he did not believe he had adequate training and operated that equipment as well. The Friday after the August 25 meeting, McCray called HR Manager Decker about his status and she advised him he was terminated. (Tr. 53:7983.) By certified letter dated August 27, 2020, Decker advised McCray he was terminated “for poor work performance.” Although the letter does not state property damage or falsifying records, Decker thought the damage was part of poor work performance and not performing tasks correctly. (Tr. 52:7757–7758; GC Exh. 447 at 2.)

²⁵⁷ McCray testified openly and honestly that Puhara signed him off only on portions of driving the boom truck.

²⁵⁸ McCray also said that he had performed a DOT inspection and the truck was clean. (Tr. 52:7878.)

²⁵⁹ In Decker's opinion, both Alonzo and Puhara both talked loudly. Puhara testified that Alonzo was “extremely confrontational, bordering on violence. . . . [H]e took a photocopy of Paul's sign off sheet and started shaking it in my face and screaming . . . leaning closer and closer, getting louder and louder.” (Tr. 53:8007–8008.) However, Manager Romero testified that Alonzo did not appear agitated and no one raised their voice. I do not doubt that both are loud speakers, as Decker so testified.

G. Puhara is Suspended After McCray's Nonperemptory Hearing and Later Terminated

1. Respondent suspends Puhara after McCray's meeting

5 After McCray's nonperemptory meeting on August 25, 2020, the managers stayed behind and discussed Puhara's action. The group agreed that Puhara should be suspended. (Tr. 52:7926.) However, even before McCray's NPH, Supervisor Hatfield completed a disciplinary action form for suspending Puhara pending his own hearing for completing the MSHA form "without doing a complete hands-on truck set up and operation." (Tr. 52:7829-7830, 7882; GC Exh. 449.)²⁶⁰

15 Decker told Puhara why she suspended him: Falsification of documents by signing off on McCray's training. Puhara maintained he had no idea what "falsification of documents" meant and it never was explained to him. (Tr. 53:8008-8009.)

20 On the following evening, August 26, 2020, Puhara emailed Decker and Sinele about his suspension. He stated that Manager Romero and Alonzo attempted to intimidate him about McCray, who he said was only guilty of "poor completion of a 'white card.'" He said he signed off on McCray on the boom truck because McCray had a history as a commercial driver and that he was trained on two other trucks, which "vary only in outrigger configuration: and the truck in question was simpler to operate. (GC Exh. 387.) Puhara cited the online manual for this machinery, and admitted McCray did not know about it. Yet Puhara said Respondent used it to discipline McCray for poor work performance as equal to the proper procedure. He also suggested that the entire mill/crusher maintenance personnel should be taken to a safe environment to discuss the hostilities from their managers. He concluded that his goal was "to help a coworker in need, which clearly was a mistake" (GC Exh. 387.) Decker took no further action after receiving this email, except to speak to Supervisor Hatfield about some concerns. (Tr. 52:7742.)

30 Once Puhara was suspended, Decker further investigated the issues on falsification and training. She did not ask the employees anything specific about the situation involving Puhara or McCray. (Tr. 52:7743-7748.) Someone took affidavits from employees about their training. Hatfield did no further investigation into allegations specific to Puhara falsifying the MSHA form. (Tr. 52:7885.)

35 Around August 28, 2020, HR Manager Decker, Manager Romero, Supervisor Hatfield, and Alonzo called Puhara back to the office to share their findings. Decker testified adamantly that the meeting was a disciplinary meeting, not an investigatory meeting. (Tr. 52:7756.)

40 No union representative was in the room. Puhara testified he spoke to Supervisor Hatfield before the meeting regarding union representation:

Q. Did you have a Union rep with you for this hearing.

A. No, I did not.

45 Q. Was there any discussion about that?

A. Yes, I had asked [Supervisor Hatfield] who was the representative for this one.

Q. And what did Mr. Hatfield tell you?

A. He said he had no idea.

50 (Tr. 53:8014.)²⁶¹

²⁶⁰ Decker testified that she and Alonzo made the decision to suspend Puhara. (Tr. 52:7743.)

²⁶¹ Esther Romero recalled Puhara did not want a union representative. (Tr. 52:7835.)

Decker and Manager Romero recalled little of what happened at the meeting. Puhara maintained that he was shown first the disciplinary action for failing to complete the task assignment, e.g., setting up for the following day's work. Puhara testified he did not know about this disciplinary action before this meeting and it was a surprise to him, plus he interpreted it as punishment because he sought treatment for heat exhaustion. Puhara claimed Manager Romero said it was for heat exhaustion but none of the management team corroborated Puhara's claim. Puhara further testified that Alonzo asked him whether he, Puhara, thought Alonzo to be a violent person. Puhara said he believed Alonzo was more than capable of becoming violent. Puhara denied that the MSHA form was discussed at the meeting. Puhara said he was just told he would be informed of the decision. (Tr. 53:8014–8018.)

Before the meeting, the management team met and may have agreed that termination was the appropriate course of action. (Tr. 52:7929.) Certainly after the meeting, Decker and perhaps Alonzo determined to terminate Puhara; Manager Romero thought that all of them decided to terminate Puhara.²⁶² At hearing, Decker explained that Puhara was not subject to progressive discipline because falsifying documentation is a terminable offense. (Tr. 52:7763.)²⁶³ By certified letter dated August 31, 2020, Decker told Puhara that he was terminated for falsifying documentation. (Tr. 52:7758; GC Exh. 447.)

*H. Analysis for Allegations Regarding McCray and Puhara.*²⁶⁴

1. *Wright Line* Analysis for Protected Concerted Activity

The mixed motive analysis for protected concerted activity differs slightly from the traditional *Wright Line*²⁶⁵ analysis.²⁶⁶ General Counsel bears the burden of producing a prima facie case with the following elements:

1. The employee engaged in Section 7 activity;
2. The employer knew of that activity; and
3. The employer had animus against the Section 7 activity.

Animus must be proven with evidence sufficient to establish a nexus, or causal relationship, between the discipline and the Section 7 activity. *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 1, 6 (2019). Animus can be established by direct evidence and circumstantial evidence based on the record as a whole. *Morgan Corp.*, 371 NLRB No. 142, slip op. at 3. Factors supporting an inference of antiunion motivation include employer hostility towards unionization, timing of the adverse action in relation to union activity, and the employer's reliance on pretextual reasons to justify adverse action. *Roemer Industries*, 367 NLRB No. 133, slip op. at 16 (2019). A number of these factors are examined for each alleged discriminatee. *Bannum Place of Saginaw, LLC*, 370 NLRB No. 117, slip op. at 4 (2021) (animus

²⁶² Decker (Tr. 52:7754); Esther Romero (Tr. 52:7838).

²⁶³ Alonzo testified he told Puhara during the meeting he was terminated. (Tr. 52:7934.)

²⁶⁴ The Puhara and McCray charges were filed by Puhara. The Union did not brief anything about these two alleged discriminatees.

²⁶⁵ *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 880 (1st Cir. 1981), cert. denied 455 U.S. 989 (1981), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

²⁶⁶ If the employer's action is only partially motivated by the alleged discriminatee's protected concerted activity, the adverse action still violates the Act. See, e.g., *Branthaven, Inc. d/b/a Hospitality Home*, 192 NLRB 1062, 1064 (1971) (discharge partly motivated by discriminatee's union activity despite other valid reasons for discharge).

shown with disparate treatment of discriminatee); *Corn Bros., Inc.*, 262 NLRB 320, 325 (1982) (timing of discharge within a week of union organizing meeting evidence of antiunion animus).

If General Counsel makes a strong showing of discriminatory motive, Respondent's rebuttal burden "is substantial." *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 936 (D.C. Cir. 2011), enf. 355 NLRB 1319 (2010); *A.S.V. Inc. a/k/a Terex*, 366 NLRB No. 162, slip op at 1 fn. 1 (2018). Respondent must persuade by a preponderance of credible evidence that it would have taken the same action for legitimate reasons even in the absence of "'related" protected activity. *General Motors, LLC*, 369 NLRB No. 127, slip op. at 10 (2020); *Wendt Corp.*, 369 NLRB No. 135, slip op. at 3 (2020); *Manno Electric, Inc.*, 321 NLRB 278, 280 n. 12 (1996); *T & J Trucking Co.*, 316 NLRB 771 (1995).

If the employer's reasons are found to be pretextual—reasons that are false or not in fact relied upon—the employer fails to sustain its burden and the inquiry is terminated. See, e.g., *Lucky Cab Co.*, 360 NLRB 271, 275–276 (2014) ("finding of pretext defeats an employer's attempt to meet its rebuttal burden"); *Servicios Sanitarios De Puerto Rico d/b/a A-1 Portable Toilet Services*, 321 NLRB 800, 804 (1996); *Caruso & Ciresi, Inc.*, 269 NLRB 265, 268 (1984). When pretext is found, dual motive no longer exists. *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002). Also see *Shamrock Foods*, 366 NLRB No. 117, slip op. at 27-28 (2018), and cases cited there (employer's shifting, false, or exaggerated reasons for an adverse action are evidence of unlawful motive); *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 509 (2007) (finding that "an employer's shifting explanation for a discharge, or . . . its post hoc attempt to rationalize such a decision, are suggestive of a pretext").

2. Were Puhara and McCray engaged in protected concerted activities?²⁶⁷

I do not find that these alleged discriminatees were engaged in protected concerted activities because their complaints were just that—complaints, which were not concerted.

General Counsel must prove the employee engaged in Section 7 activity, which is not necessarily union activity. *Morgan Corp.*, 371 NLRB No. 142, slip. op. at 2–3 (2022). General Counsel must prove that the alleged discriminatee engaged in protected concerted activity, which in turn required a showing that the activity was concerted and that it was protected, which are two distinct issues. *Id.*; *Quicken Loans, Inc.*, 367 NLRB No. 112, slip op. at 2–3 (2019). Concerted activities and protected activities are those

"where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management. *Meyers Industries*, 281 NLRB 882, 887, (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). "Mutual aid or protection," in turn, focuses on the *goal* of concerted activity; chiefly whether the employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise improve their lot as employees.'" *Fresh & Easy [Neighborhood Market, Inc.]*, 361 NLRB 151, 153 [2014] (emphasis in the original) (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).)

²⁶⁷ Complaint ¶15(e) states: About June 20, 2020, Respondent by Esther Romero, at the Ray Complex, by telling employees that they were unfit for duty because they could hardly walk from the parking lot to the mill shop in response to their union and protected concerted activities, threatened employees with unspecified reprisals for engaging in union and protected concerted activities. General Counsel raises no union activities.

Morgan Corp., 371 NLRB No. 142, slip op at 3.

Working in concert requires a speaker and listener but goes beyond “mere griping.” The individuals are looking forward to initiating, inducing or preparing for group action and the individual employees bringing to management group concerns. If it does not look forward to action, the talk is “mere griping” and therefore not protected. *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

The discussions, if any, between employees after Supervisor Hatfield (or Manager Romero) made the announcement has no indications that the employees only had generalized complaints, if one credits Puhara’s testimony. General Counsel’s brief admits that McCray and Puhara complained separately. McCray’s email to Vidina only indicates that McCray acted for himself and no one else. The discussions indicate that Puhara and McCray each had health issues exacerbated due to Manager Romero’s change in parking practice. McCray spoke to management solely for himself. Puhara testified that he was speaking for the employees, but he admittedly was speaking for himself and raised only his knee problems. I do not find that Puhara raised the other employees as he was not honest about the problems with the MSHA form, and find that he only spoke for himself and his health issues.²⁶⁸ The employee discussions after the employees were advised of the change indicate only that they were displeased, but nothing was said about bringing their complaints to management or taking any other action. These facts point towards “mere griping,” and not group action. *Quicken Loans*, 367 NLRB No. 112, *supra*.

3. Manager Romero’s alleged threats

Statements that have a reasonable tendency to interfere, restrain or coerce employees in their exercise of Section 7 rights, when taken in context, violate Section 8(a)(1). *Roemer Industries, Inc.*, 367 NLRB 133, slip op. at 6 (2019), *enfd.* (unpub.) 824 Fed. 396 (6th Cir. 2020). The statement is assessed in the context in which it is made and whether it tends to coerce a reasonable employee. *Westwood Health Care Center*, 330 NLRB 935, 940 fn. 17 (2000). The standard for assessing the alleged 8(a)(1) threat is objective, not subjective. *Multi-Add Services*, 331 NLRB 1226, 1228 (2000), *enfd.* 255 F.3d 363 (7th Cir. 2001). The threat of suspension is coercive when it involves a previously approved practice and complaints when withdrawn. *Hoffman Bros.*, 199 NLRB 319, 322 (1971).

Here, Manager Romero allegedly told Puhara and McCray that they were suspended pending the fit for duty examination. However, General Counsel rests its argument in that the supervisor told the employees about suspension because of the protected activities. (GC Br. at 173–174.) I do not credit that Manager Romero told the employees that they were suspended due to their concerted complaints about parking. As above, the employees were not engaged in concerted activity. I therefore recommend dismissal of this allegation.

4. Alleged suspension for fit for duty exams

Following the mixed motive test above, I do not find that McCray and Puhara were engaged in concerted activity. Just in case my above analysis is found incorrect and the Board finds Manager Romero may have presumed they were working together, the same *Wright Line* analysis applies. See generally *Andronaco Inc., d/b/a Andronaco Industries*, 364 NLRB 1887 fn. 1 (2016).

Nothing shows, however, that the two were actually suspended, despite McCray and Puhara relying upon Manager Romero’s statement. The two complained about health issues,

²⁶⁸ Puhara sounded as if he shifted when testifying about his discussion on his health issues.

which needed evaluation. McCray was paid through sickness and accident as required. Nothing shows he or Puhara suffered a suspension. No documentation shows that the two were actually suspended. I therefore recommend that the alleged suspensions be dismissed.

5 5. Alleged threat, suspensions terminations and Weingarten in Late August 2020

 a. Alleged threat from Alonzo during McCray's nonperemortory meeting

10 The conduct alleged occurred at McCray's nonperemortory hearing on August 25, 2020, when Alonzo shouted across the table at Puhara. General Counsel argues that "Alonzo's accusation that Puhara falsified documents was a threat in response to Puhara's attempts to concertedly assist McCray." GC maintains that several managers and supervisors agreed that Alonzo yelled at Puhara in the August 25 and 28 meetings (which GC admits here were
15 disciplinary meetings). (GC Br. at 182–183.) Not all managers and supervisors agreed that Alonzo's conduct was aggressive. Further, I disagree with GC's analysis based upon the surrounding circumstances and the relevant events.

20 Alonzo, a high-ranking manager, directly stated that Puhara falsified MSHA documentation. While GC correctly states the standard for 8(a)(1) coercion, it maintains that Alonzo's yelling was a direct result of Puhara assisting McCray during the nonperemortory meeting. Notably, McCray and Puhara falsified the documentation, which will be discussed in more detail below.

25 Even presuming that Alonzo was yelling, which is controverted, Alonzo's statements point out that Puhara, someone he trusted, falsely documented that McCray completed *all* aspects of training for the boom truck, not just driving. Notwithstanding that Puhara's participation in McCray's defense was a protected concerted activity, Alonzo and Puhara were talking about what Puhara did: Falsifying the legal document, MSHA documentation. The
30 standard here is the objective employee's understanding, not Puhara's subjective belief. A reasonable employee would understand the issue was falsification and betrayal of trust in the employee who did so. I recommend that this allegation be dismissed because the facts do not point to a violation of 8(a)(1).

35 b. McCray's termination

 For the alleged suspensions and terminations, one again applies *Wright Line*. Once General Counsel makes a prima facie case, the burden shifts to the employer that it would have taken the same action despite protected activity. *SBM Site Services, LLC*, 367 NLRB No. 147, slip op. at 2 (2019). If the employer's actions are pretextual, the employer cannot overcome this
40 evidence. But if the actions are not pretextual, the employer "must persuade by a preponderance of the evidence that it would have taken the same action even in the absence of the protected conduct. See *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984)." *SBM*, supra. "To meet its defense burden, the Respondent must show that 'it had a reasonable belief that the employee committed the offense, and that it acted on that belief when it discharged [the employee]' [internal cites omitted]." *SBM*, 367 NLRB No. 147, slip op. at 3.
45

 I do not find sufficient evidence for animus, even presuming that General Counsel proved activity and knowledge. General Counsel makes much of Manager Romero's alleged
50 picking on McCray. Crediting McCray's description of his interactions with Manager Romero, Romero always treated him with disregard, even before the events leading to the fit for duty exam. Employees generally complained about Manager Romero and her stringent management

style. These interactions are not evidence of animus: They are evidence of a supervisor who is demanding towards all.

General Counsel contends that the problems with the boom truck are a made-up excuse for McCray's suspension and termination. Respondent also maintains, and I agree, that McCray would have been terminated even if he had engaged in protected activity.

General Counsel misconstrues the meaning of the facts: First, the two alleged discriminatees falsified MSHA documents, which alone is a terminable offense. *Medi-Plex of Stanford*, 334 NLRB 903, 914 (2001) (falsification of charting records was valid reason for terminating union adherents). Secondly, had procedure been followed and McCray appropriately checked off on all aspects of the boom truck, and not just driving, McCray and/or Puhara may have found the difficulty on the boom before McCray drove it. Respondent points out that the suspension pending the nonperemptory disciplinary hearing was lawful for operating the boom truck when McCray was not appropriately trained. McCray admitted that he and Puhara signed off and checked boxes on the MSHA form reflecting training he had not received. Because procedure was not followed, the blame lies with the last person driving the vehicle, which was McCray.

Respondent contends that all of what transpired with McCray could be classified as "poor work performance." I agree. After he returned from his medical leave, McCray failed to follow Manager Romero's direct order to grease equipment, for which he received a suspension. This suspension is not alleged as a violation. He had a previous record of discipline for poor work performance as well. He failed to properly inspect the truck. Respondent met its *Wright Line* burden of demonstrating it would have taken the same action regardless of protected concerted activity.

c. Puhara and Weingarten

The complaint alleges that Respondent unlawfully denied Puhara union representation at his own nonperemptory hearing. I find no violation. First GC's brief previously identified the meeting as disciplinary. (GC Br. at 183.) An employee is not entitled representation at disciplinary meetings. GC then shifts, saying the meeting was investigatory. (GC Br. at 184–186.) I disagree that the meeting was investigatory.

In 1975, the Supreme Court recognized that Section 7 of the Act guarantees an employee the right to be accompanied and assisted by a union representative at an "investigatory" interview, that is, one which an employee would reasonably believe may result in disciplinary action. *NLRB v. Weingarten*, 420 U.S. 251, 260 (1975). The Court found that recognizing this employee right to representation—now commonly referred to as the "Weingarten right"—effectuates the Act's stated purpose of eliminating the "inequality of bargaining power between employees . . . and employers." *Id.* at 262. The Court specifically noted that an employee's need for representation and assistance was heightened in view of employers' use of surveillance techniques in the workplace, such as closed-circuit televisions, to monitor and investigate employee conduct. *Id.* at 256 fn. 10. Whether an employee has a right to representation is evaluated from an objective standpoint. *Consolidated Edison of New York, Inc.*, 323 NLRB 910 (1997).

Puhara either did not testify credibly about documentation of McCray's checkoff or does not understand the gravity of what he did. As a result, I do not credit Puhara's testimony requesting representation from Supervisor Hatfield. As such, the Act is not violated. *Starbucks Corp.*, 374 NLRB No. 8, slip op. at 21 (2024), citing *Praxair Distribution Inc.*, 358 NLRB 27 fn. 2

(2012) (no violation without a showing that the employee requested representation). I therefore recommend dismissal of this allegation.

d. Puhara's suspension and termination:

I do not find that General Counsel proved a prima facie case in Puhara's suspension and termination. General Counsel contends that Respondent "threw anything it could find to justify Puhara's discharge including irrelevant allegation that he had improperly training other employees on equipment, which was never mentioned before. (GC Br. at 182, citing Tr. 7753 but see GC Exh. 447.)

General Counsel presumably proves activity and knowledge but fails to demonstrate animus. Puhara was engaged in protected concerted activity while representing McCray. However, General Counsel cannot prove animus. What General Counsel takes for animus, the alleged suspension for a fit for duty examination, is insufficient. Alonzo's statements in the McCray nonperemptory hearing, are not sufficient to make a finding of animus. General Counsel takes Alonzo's statements in the nonperemptory hearing as animus and cover. I cannot take such a violation that lightly. Compare *In re Tomatek, Inc.*, 333 NLRB 1350 (2001).

Even presuming General Counsel made a prima facie case beyond Puhara's suspension for walking from the lot, Respondent has a strong legitimate business reason for terminating Puhara: falsification of the MSHA form. Here, Respondent stated throughout the suspension and termination proceedings that it believed Puhara falsified the MSHA records. His intent on signing off on the form was immaterial, as is his conclusion that the documentation was adequate. *Medi-Plex*, supra.

General Counsel maintains that Respondent presented shifting reasons for Puhara's termination and relies upon *Sound One Corp.*, 317 NLRB 854, 858 (1995) (shifting reasons for action can develop inference that real reason for conduct not among those asserted). I find that Respondent did not shift its reasons for terminating Puhara and stuck with the reason for termination as falsification of the MSHA documentation from August 25 forward.

In *SBM*, 367 NLRB No. 147, slip op. at 3, the Board found that the employer reasonably believed the alleged discriminatee lied about the date of an on-the-job injury and that the alleged discriminatee also provided false information in an attempt to avoid discipline. The discharge notice for the alleged discriminatee was consistent with that belief and the handbook. *Id.*²⁶⁹ As in *SBM*, Puhara's verbal attempts to cover the insufficient documentation are not adequate to undercut Respondent's legitimate business reason for suspension and termination.²⁷⁰

The facts also show that Respondent conducted a thorough investigation into Puhara's actions and his other trainings before getting to the ultimate nonperemptory hearing. Regardless of whether Decker and Alonzo, or all Respondent participants, decided to terminate Puhara, the reason always was falsification of documentation. See *Merillat Industries, Inc.*, 307 NLRB 1301, 1303 (1992) (although Respondent's defense has flaws and inconsistencies, it "does not fail

²⁶⁹ The comparitors that GC presented there also were not as severe as the conduct of the alleged discriminatee, so the Board found them distinguishable. *SBM*, supra, slip op. at 3. Here, General Counsel showed no comparitors.

²⁷⁰ A case like *Carolina Steel Corp.*, 296 NLRB 1279, 1283–1284 (1989), shows General Counsel proving the employer demonstrated animus with "unsupported and unpersuasive reasons" for discharge with alleged: a biased and incomplete investigation and failing to give due to the employee's long and fairly unblemished record.

simply because not all the evidence supports it, or even because some evidence tends to negate it.”). I therefore recommend that these allegations regarding Puhara and McCray be dismissed.

XII. BEN LUCERO’S ALLEGED UNLAWFUL SUSPENSION AND DISCHARGE.

The complaint alleges that, about February 3, 2021, Respondent suspended Ben Lucero and discharged him on February 16, 2021 due to union and/or protected activities. (Complaint ¶¶5(m), (n).) Although Respondent admits the discharge, it denies it did so for any protected rationale.

A. Lucero’s Employment and Union Activity

Benjamin Lucero²⁷¹ was hired in about mid-October 2019 as a heavy haul truck driver at Respondent’s Mission Mine. (Tr. 43:6422.) On February 16, 2021, Respondent terminated Lucero for an alleged safety violation.

At the time of his hire, Lucero had approximately 20 years of experience in mining, with 10 of those years as a heavy haul truck driver. (Tr. 43:6423–24.) At Mission, Lucero drove a haul truck (approximately 26 feet wide, 24 feet tall, and 46 feet long), which carried waste and ore from the mine to the crusher or waste dump. A haul truck weighs 383,000 pounds empty and 1.1-1.2 million pounds when loaded. Visibility is limited close to the truck. Although support equipment, such as pickups, water trucks, repairs and forklifts, drive on the mine roads, none are as large as the haul trucks. All vehicles have the same standard operating procedures, which includes driving on the left side of the road. Haul trucks are considered “high risk.”

Employees operating these vehicles are educated on day 1 of employment about safety requirements and receive refreshers throughout the year at safety meetings, plus annual MSHA training. (Tr. 41: 6168–6173, 43:6436.) The training points out that haul trucks have the right of way, except at controlled intersections, and drivers of all vehicles stay on the same radio channel to communicate. All drivers are supposed to practice defensive driving. (Tr. 41:6203–6204; GC Exh. 408(b) at 5.)

B. Lucero’s Chain of Command, Union Representation

Lucero’s “frontline” supervisor was Jeff Samuelson, who oversaw approximately 35 employees and assigned those employees to equipment, such as heavy haul trucks. (Tr. 41:6140–41.) Samuelson, the mine supervisor in pit operations, reported to Colby Shelstad, (at the time) mine supervisor 3; Greg Grochowski, a general supervisor; and Rachael Kuro, another general supervisor. (Id.; Tr. 39:5785, 60:9069.)

Bjorn Meyer was the manager for Mission Mine at the time Lucero was employed by Respondent. (Tr. 59:8893.)²⁷² Meyer was responsible for hearing initial grievances and making initial disciplinary decisions (Tr. 59:8897; Tr. 42:6288.) Lastly, Geoffrey Fehr was Mission’s General Manager, responsible for hearing third-step grievances and issuing final disciplinary decisions. (Tr. 59:8898; Tr. 39:5813.) Other relevant personnel at Mission Mine during Lucero’s employment included Human Resources Manager Juan Mora, who reported to Stacy Sinele. (Tr. 39:5669–70; Tr. 39:5671.)

²⁷¹ The transcription of Mora’s testimony erroneously refers to Lucero as Lasaro.

²⁷² Meyer started a new position in March 2023, as operations technology manager. However, at times relevant here, he remained mine manager. (Tr. 59:8899.)

There are multiple unions with members at Mission Mine. USW Chief Steward Anthony (Tony) Jose represented Lucero. (Tr. 41:6086.) Other union members involved in Lucero's grievance process included Eduardo Placencio, President of USW Local 915 and Jason Goeke of the Teamsters. (Tr. 39:5803.)

Respondent uses a progressive discipline policy, subject to the severity of the violation. (Tr. 39:5739; Tr. 41:6157, 6271.) Additionally, Respondent offers "last chance agreements" to some employees instead of termination. (Tr. 56:8517.) Jose testified that only the Respondent can use its discretion to offer last chance agreements; employees and their union representatives may not request them. (Tr. 41:6113.)

C. Lucero's Union and Protected Activities

During his employment, Lucero joined USW Local 915. (Tr. 43:6436.) Shortly after his hire, Lucero participated in the strike. (Tr. 43:6422.) Lucero testified that he did a mix of day and night shifts on the picket line but "it was a majority of nights." (Tr. 43:6477.) Lucero testified he was "on the picket line [at Mission Mine] at the beginning of every day." (Tr. 43:6426.) Lucero also volunteered as a strike shift lead, where he was responsible for picket attendance and providing snacks and water to those on the picket line. Id. During his time on the picket line, Lucero gave two media interviews which resulted in publications: one with the Arizona Public Media and the other with the Militant. (Tr. 43:6427; GC Exh. 413(a).) Lucero also testified that he displayed USW/Union YES stickers "about the size of [his] palm" on his hard hat and lunch box. (Tr. 43:6437.)

Samuelson and Mine Supervisor Shelstead knew that Lucero was on strike and that he returned after the strike concluded. They were unaware whether Lucero had a union sticker on his hard hat or lunchbox. He also did not know about any of Lucero's specific activities during the strike. (Tr. 6176, 6280–6281.)

Post-strike, Respondent did not call Lucero back to his position as heavy haul truck driver until October 2020. (Tr. 43:6426, 6435.) Before the incident leading up to his termination in February 2021, Lucero had not incurred any discipline. (Tr. 41:6291, 43:6437.)

D. Alleged Safety Violation as Basis for Discharge

On February 1, 2021, Lucero attended a safety meeting for the night shift. (R. Exh. 44.) This safety meeting focused on "coming to complete stops at stop signs" and "the accountability of not coming to a complete stop." (Tr. 60:9073.) The safety meeting was held after "three or four other incidents where people had . . . run stop signs" in early 2021. (Tr. 60:9074.)

On February 3, 2021, Lucero operated a haul truck on the night shift. At 5:45 a.m., near the end of his shift, Lucero was driving to the waste dump. (GC Exh. 408; Tr. 43:6440.) Lucero arrived at a three-way controlled intersection and performed the relevant stop procedure for heavy haul trucks. (Tr. 41:6200–01; GC Exh. 408(c).)

Once he stopped, Lucero looked forward, where he saw another haul truck descending the ramp before him, moving toward him. Then he looked right and left. (Tr. 43:6443.) Lucero waited for the other haul truck to signal and move through the intersection, stopping for 20-30 seconds. (Tr. 43:6448.) Once the haul truck proceeded through the intersection, Lucero ended his stop procedure and proceeded into the intersection, checking his mirrors to make sure he

did not spill any material. (Tr. 43:6442.) Lucero did not look left again before entering the intersection. (GC Exh. 408; Tr. 41:6189; 59:8956.)

Once Lucero was approximately halfway into the intersection, he saw a pickup²⁷³ truck, which carried employees Nick Grant and Sam Zukowsky, to his left. (Tr. 41:6239.) The pickup truck was traveling downward. Lucero testified that the truck was stopped on the ramp leading up to the intersection, approximately “two or three pickup truck lanes back.” (Tr. 43:6442; GC Exh. 408.) After Lucero was through the intersection, he received a radio call from the pickup truck, asking if Lucero had seen them. Lucero replied that he did not see them. They asked if he had looked and he said yes but had not even seen the pickup truck’s strobe light. (Tr. 43:6442.) Afterwards, Lucero completed his shift and returned to the Mission Mine office. Id.

E. Investigation, Disciplinary Action and Grievance Procedure

Grant and Zukowsky notified Samuelson of a “near miss” incident at the intersection at the end of their shift. (Tr. 41:6178–6179, 6187, 43:6444.) Samuelson took written statements from Grant and Zukowsky, then spoke with Lucero. Samuelson did not recall whether he asked Lucero for a written statement. He then reported the incident to his supervisor at the time, Rachel Kuro, telling her about “a near miss involving a haul truck and pickup truck coming up Mission ramp . . . that a haul truck pulled out in front of a pickup truck coming up the ramp.” (Tr. 41:6180.)

Samuelson and Kuro then met with Lucero and Shop Steward Tony Jose for an investigatory meeting that same morning. (Tr. 41:6181.) Kuro took notes during the meeting. (Tr. 41:6192; GC Exh. 408(a).) Kuro told them that the incident was a “near miss.” During the investigatory meeting, Lucero shared his account of the incident, stating that he did the stop procedure at the intersection, saw another haul truck coming down the ramp, looked both ways, and waited approximately 20–30 seconds for the haul truck to pass. Lucero also stated that the beacon from the other truck must have been in a blind spot. Once the other haul truck was through the intersection, Lucero shared that he did not look left again and proceeded into the intersection. Lucero stated that he did not see the cable truck until he was halfway through the intersection and that the cable truck was “three or four pickup truck lengths away” down the ramp. (GC Exh. 408(a).)²⁷⁴ Afterwards Lucero submitted to a drug test, which was negative. (Tr. 39:5775–76, 42:6452.)

Samuelson testified that he wrote the Supervisors Accident Incident Report (SIR) after the meeting with Lucero and the pickup truck inhabitants. (Tr. 41:6182, 6237; GC Exh. 408.) The SIR listed the incident as high for loss severity and low for probability and incident time as 5:45 a.m., close to the end of Lucero’s night shift.

Samuelson admitted that Lucero followed the standard operating procedures for stopping. (Tr. 41:6200–6201; GC Exhs. 408, 408(c).)²⁷⁵ Meyer admittedly never reviewed the SIR before recommending that Lucero be suspended and relied only upon Samuelson’s verbal statements. (Tr. 58:8990–8991.) Lucero testified that Rachael Kuro²⁷⁶ told him that Lucero was

²⁷³ The record also called the truck a “cable” truck.

²⁷⁴ Samuelson testified that he believed Lucero was honest and fully cooperated with the investigation. (Tr. 41:6199.)

²⁷⁵ Samuelson testified that Lucero made a “California stop” because he did not look back to the left; he then admitted that a “California stop” was rolling a stop sign. However, Lucero had made a complete stop, so the California stop does not apply by Samuelson’s agreed definition. (Tr. 41:6200.)

²⁷⁶ Lucero called her “Tadeo.” However, it is most likely that it was Rachael Kuro, a general supervisor,

suspended pending an investigation. (Tr. 43:6451.) Meyer testified that he advised Samuelson over the phone to suspend Lucero because the incident “could have been a fatality” and because there had been “a rash” of these kinds of incidents with other employees. (Tr. 59:8949–50.)²⁷⁷ Meyer maintained that he determined to suspend Lucero, based only upon Samuelson’s verbal report and without review of the SIR. On the other hand, Shelstad testified that the suspension was a collective decision between himself, Samuelson, Kuro, and Grochowski based on the “severity of [the] near miss.” (Tr. 41:6282.) Samuelson testified that he did not know who issued the suspension. (Tr. 41:6197.)

On February 5, 2021, Lucero and Union Representatives Jose²⁷⁸ attended Lucero’s nonperemptory discharge meeting. (Tr. 43:6453.) Samuelson, Shelstead, Kuro, Grochowski, Meyer, and HR Representative Mora also attended for Respondent. (Id.; Tr. 59:8955.) Mora took notes for Respondent. (GC Exh. 409.) Samuelson and Shelstead thought Lucero was remorseful and honest in his testimony before the nonperemptory discharge meeting, plus cooperated fully with the investigation. (Tr. 41:6240–6241, 6287)

During this meeting, Lucero was given another chance to explain what happened. He repeated the same story as he did in the investigatory meeting. Id. Lucero was asked whether he looked to his left before accelerating, to which Lucero responded that he “glanced” and waited at least 10–15 seconds. Id. Lucero admitted again that he did not see the truck until he was approximately halfway through the intersection. Id. Jose told management that this incident was different from other recent incidents because Lucero came to a complete stop. (Tr. 43:6453.) Meyer testified that, 2 or 3 days after this meeting, he decided to terminate Lucero. (Tr. 59:8994.) Meyer also testified that he reviewed the “dot tracings” (GPS ping system in the haul truck) before and after he determined to terminate Lucero. (Tr. 59:8995.)

After the nonperemptory discharge meeting, Lucero received a telephone call from Meyer and Mora with Shop Steward Jose on the line: Respondent terminated Lucero for his violation of various Safety and Health Rules, his failure to “leverage his training properly,” and the risk of fatality. (GC Ex. 410; Tr. 59:8957–58.) On February 16, 2021, Mora called Lucero to read a letter notifying Lucero that Respondent intended to terminate his employment. (GC Exh. 410.) On February 18, 2021, Jose, as chief steward for the mine, filed a third step grievance for Lucero; on February 17, Placencio filed a grievance from the PACT unions. (Tr. 45:6659; GC Exh. 411, 411(a).)

Lucero’s third-step grievance meeting was held on February 23, 2021. Lucero was represented by Jose, Placencio, and Goeke. Fehr, Meyer, Mora, Shelstad, and Grochowski represented management. (Tr. 39:5802, 45:6661.) Mora took notes. (GC Exh. 412(a).) Lucero gave his account of the incident once more, explaining that he stopped at the intersection, saw another haul truck coming down, looked left and saw nothing, and waited for the haul truck to pass before proceeding into the intersection. (Id.; Tr. 39:5803.) Lucero said he stopped for 25–30 seconds at the intersection before proceeding. (Tr. 39:5804.) Jose explained that the incident was due to inadequate training; Lucero stated that he was confident to operate a haul truck alone but that this was his first time operating a haul truck alone at night and a more senior

who notified Lucero and that Lucero mis-remembered her name. Rachael Tadeo is a clerk. See the credibility analysis below for more details

²⁷⁷ Meyer testified that he considered Lucero’s training records. Respondent did not provide those in response to GC’s subpoena and instead pointed out the records were in a position statement. Because Respondent failed to provide these records in response to the subpoena, I do not consider them. (Tr. 59:8973–8981; R. Exh. 42.)

²⁷⁸ Jose testified that another steward Goeke, attended the meeting with him. (Tr. 41:6099–6100.)

person should have been with him during his first night shift.²⁷⁹ (Tr. 39:5805–5806, 42:6461; GC Exh. 412(a).) Management did not show who checked off Lucero for night driving. The Union asked for more training in the pit for Lucero. (Tr. 45:6666.) Grochowski disputed that it was Lucero's first night driving alone during the meeting, but neither version was verified. (Id.; Tr. 39:5805–5807.) Respondent did not offer Lucero a last chance agreement. (Tr. 45:6668.)

After the third step meeting, Fehr terminated Lucero. (Tr. 39:5811.) Mora drafted the response letter, with Fehr's signature, and delivered the letter to Jose on March 1, 2021, to share with Lucero. (Tr. 39:5813; GC Exh. 412.) Mora and Meyer, with Jose on the line, called Lucero and told him he was terminated. (Tr. 42:6461.) The letter stated that Lucero failed to see the pickup truck approaching the intersection, but Lucero was preoccupied with the haul truck and therefore failed to look to his left before leaving the intersection. (GC Exh. 412.)

Grant and Zukowsky, who were in the pickup truck involved and both of whom worked during the strike, received no discipline for the incident with Lucero. (Tr. 41:6244.)

F. Disparate Treatment Evidence

In a short timespan before Lucero's incident, four other employees were disciplined for similar incidents. Three out of four employees were given last chance agreements and only one was terminated.²⁸⁰

Luis Noriega, a heavy haul truck driver at Mission, "rolled through" an intersection on January 28, 2021. (Tr. 45:6647–6648; GC Exh. 413.) The SIR listed loss severity as high and probability as low. Meyer initially terminated Noriega, but during his third step grievance meeting, GM Fehr decided to offer Noriega a last chance agreement. (Tr. 39:3820, 59:8984.) Respondent asserts that it offered the last chance agreement because of Noriega's nine-year tenure. (Id.; R. Br. at 192.) Noriega crossed the picket line. (Tr. 41:6104.)

Another incident occurred two minutes before Noriega's near miss; three more occurred within a week of Noriega's near miss. (Tr. 39:5819–5820, 41:6104, 59:8959–60.) On February 1, 2021, at 11:41 a.m. during a day shift, David Scroggins, a heavy haul truck driver at Mission, also failed to come to a complete stop at a controlled intersection. Kuro was the supervisor. (Tr. 45:6649; GC Exh. 413.)²⁸¹ The SIR noted loss severity was high and probability was low. (GC Exh. 413 at 10.) Scroggins admitted a lapse in judgment at his non-peremptory meeting. (Tr. 39:5822.) Scroggins was initially terminated, but during his third step grievance meeting, GM Fehr decided to offer Scroggins a last chance agreement. (Tr. 45:6650, 59:8984.) Respondent asserts that it offered the last chance agreement because of Scroggins's 15-year tenure. (Id.; R. Br. at 192.) Scroggins crossed the picket line. (Tr. 41:6113.)

Austin Gebben, a heavy haul truck driver, failed to come to a complete stop at a controlled intersection, causing a van with employees inside to take "evasive action." Gebben's incident occurred just under 1 month before Lucero's incident. (R. Exh. 18 at 1.) Mora testified that this incident was a "very significant near miss." (Tr. 56:8486.) Gebben was employed by

²⁷⁹ On cross-examination, Lucero testified that the haul truck drivers worked day shifts and night shifts in rotation. Respondent did not present any schedules to dispute Lucero worked night shifts at Mission before this incident.

²⁸⁰ Samuelson testified that four were terminated. Cross-examination revealed that three were given the last chance agreements. (Tr. 60:9060–9081.) The original answer was misleading and casts a pall on the credibility of Samuelson's testimony.

²⁸¹ Meyer testified that Scroggins failed to yield at a controlled intersection without stopping. (Tr. 59:8960.)

Respondent for 2 1/2 years. (R. Br. at 193.) Gebben likely crossed the picket line. (Tr. 56:8489.) Gebben was terminated when his third step grievance was denied. (R. Exh. 18 at 6.)

Ed Henley drove a water truck that crashed into another water truck, almost injuring an individual who was climbing down from the other water truck. (Tr. 41:6105.) Jose testified that he estimated the property damage to be over \$100,000 and that the incident “could have been a fatality.” Id. The record does not reflect how long Respondent employed Henley. Henley crossed the picket line. Henley was offered a last chance agreement. (Tr. 41:6106–6107.)

Samuelson testified that near misses occur fairly regularly and depending on the severity is subject to progressive discipline. A near miss might be a slip and fall, such as slipping when getting out of the cab of a vehicle or could be more serious.

G. Other Controverted Facts

It is unclear how far Lucero’s truck was from the other truck approaching the intersection. The SIR report says nothing of the distance, only that the truck “came to a complete stop outside of [Lucero’s] path of travel.” (GC Exh. 408.) Lucero testified that the other truck was “two or three pickup truck lengths back.” Tr. 43:6442. Samuelson recalled that during the investigatory meeting, Lucero said the other truck was about “three or four truck lengths” away. (Tr. 41:6195; GC Exh. 408(a).) Note that the other trucks do not register “dot traces” which are GPS pings, whereas haul trucks do. (Tr. 59:8995.) This means that when Respondent reviewed the dot traces of the trucks involved in the incident, only Lucero’s truck was shown. (GC Exh. 408(c).)

Furthermore, it is unclear how far another vehicle must be or how long a haul truck must wait before a haul truck can proceed into an intersection. Samuelson testified that another vehicle would have to be at least a quarter mile away for a haul truck to safely proceed. (Tr. 41:6228.) Additionally, he testified there was no set time duration for a haul truck to stop at an intersection. (Tr. 41:6227.) Ultimately, it was up to the driver’s discretion to “operate any piece of equipment in the pit in a safe manner at all times.” (Tr. 41:6231.)

It is also disputed whether it was Lucero’s first time driving alone at night on the day of the incident. Mora’s notes from Lucero’s third step grievance meeting reflect that Lucero said it was his first night driving alone. (GC Exh. 412(a).) Additionally, the notes reflect that Grochowski and Meyer denied this. Id. When asked about this discrepancy, Mora testified that he was not sure whether it was Lucero’s first night alone in the pit. (Tr. 39:5806.)

H. Credibility

I credit most of alleged discriminatee Lucero’s testimony. Lucero remained consistent in his account of the incident across multiple meetings and in his testimony. Any variation in his story is minor. Additionally, Lucero consistently stated that he was stopped at the intersection for 20–30 seconds, but Mora’s notes from the nonperemptory discharge meeting on February 5 recorded Lucero saying he was stopped for 10–15 seconds. (GC Exh. 409.) Despite this variation, Lucero’s overall account of the incident was corroborated by Samuelson, who took down written statements from the other two witnesses of the event (Grant, Zukowsky). Specifically, when Samuelson was asked if stopping for 10–15 seconds was consistent with standard operating procedures, Samuelson responded “yes.” (Tr. 41:6196.) From the day of the incident, Lucero was honest about his mistake in not looking left for a second time once the haul truck passed. (GC Exh. 408.) Mora testified that he thought Lucero was truthful during the investigation and took responsibility for his actions. Management also testified that Lucero appeared honest and fully cooperated with the investigation.

I credit Union Representative Jose's testimony. Jose was consistent throughout his testimony, acknowledging where he could not recall specific details. Jose provided detailed testimony about the incidents of Lucero, Noriega, Scroggins, and Henley because he was involved in their grievances. (Tr. 41:6106.) Jose testified that Lucero's incident was a "near miss" but he could not "remember the distance that the near miss was at as far as even considering [it] a near miss." (Tr. 41:6101.) He shared that very close to Lucero's incident, Noriega ran a stop sign while no one was around, which was a "blatant violation of our safety rules." Jose also provided the only detailed testimony about Henley, who ran into another water truck causing damage and threatening the safety of another employee. Tr. 41:6105. Samuelson briefly corroborated this testimony, sharing that Henley had a near miss incident and that he returned to work after that incident. (Tr. 41:6167.) As for Scroggins, Jose testified that Scroggins "had more than one incident" (referring to other discipline) and then did not come to a complete stop at an intersection. (Tr. 41:6107, 6109.) Jose explained that "we were trying to save his job [because] . . . Mr. Scroggins is a very, very, very experienced individual." (Tr. 41:6110.)

I do not credit Samuelson's testimony except where he corroborated Lucero or made admissions. Samuelson was inconsistent with details and at times exaggerated. Some of this inconsistency may be due to a broader problem amongst management: a lack of information on who is making specific disciplinary decisions. Nevertheless, Samuelson was inconsistent in his description of when Zukowsky and Grant reported the "near miss" incident. At first, Samuelson said that he was notified of the incident at shift change, approximately 1 hour after the incident. (Tr. 41:6178-79.) Samuelson also said that Zukowsky and Grant told him that they were "almost run over" but when pressed on that description and the timing, Samuelson said he couldn't recall what exactly the men said and that the employees reported the incident immediately after it happened. (Tr. 6179, 6183.) This casts doubt on Samuelson's accurate reporting of the incident, especially as he wrote the SIR which was a component of Meyer's decision to terminate Lucero. (Tr. 59:8954.) Respondent did not admit Zukowsky's and Grant's written statements into evidence. However, Samuelson admitted that Lucero followed the correct procedure for stopping. Additionally, Samuelson testified that four other employees were terminated for failing to stop, when he revealed on cross examination that three of the four received last chance agreements; this testimony was somewhat misleading. However, Samuelson also testified that near misses occur almost all the time, which I credit.

I also do not credit all of Bjorn Meyer's testimony. Meyer was inconsistent multiple times. Meyer testified that Samuelson called him on the day of the incident and that he advised Samuelson to place Lucero on suspension pending investigation. (Tr. 59:8949.) Samuelson did not testify to ever placing a call, and when Samuelson was pressed on who made the decision to suspend Lucero, Samuelson did not know or did not recall. (Tr. 41:6197.) Furthermore, Meyer recommended suspension based on only the purported call with Samuelson. Meyer did not talk to Lucero or anyone else, not even Kuro, who was also at the investigatory meeting. (Tr. 59:8949.) Later, Meyer testified that he made the decision to terminate Lucero after the nonperemptory discharge meeting. (Tr. 59:8957.) Meyer also said he drafted Lucero's termination letter "with help from HR" which conflicts with Mora's testimony that Mora alone wrote the termination letter (which included rationale for the termination) and did not recall if Meyer made any changes. (Tr. 59:8947; Tr. 39:5796.)

I partially credit HR Manager Mora's testimony. Like Samuelson, Mora struggled to identify who exactly made the decision to suspend Lucero. (Tr. 39:5775.) Mora testified that the "department" made the decision to suspend Lucero, but he could not identify who specifically made the decision. Id. Additionally, Mora could not explain the delay for the decision from the nonperemptory discharge meeting. Mora testified that Respondent has "a limit of five [business]

days” to issue a decision from a discharge meeting. (Tr. 39:5794.) The decision from Lucero’s meeting was issued after 11 days. (GC Exh. 410.) When asked about the delay, Mora was unclear whether he had requested an extension and did not give a reason for the delay other than for “want[ing] to make sure that [they] had everything lined up.” (Tr. 39:5795.) Lastly, Mora did not corroborate important testimony from Meyer about why two employees were given last chance agreements. Meyer shared that Noriega and Scroggins were not terminated because of their “long company tenure,” but Mora did not share any information beyond the fact that the two employees were not terminated. (Tr. 59:8984; Tr. 39:5820, 5823.) Fehr, the general manager and ultimate decision maker, did not testify at all, leaving Meyer’s testimony and Respondent’s brief as the only evidence of the use of tenure in granting last chance agreements.

GM Fehr was not called to testify. Although Respondent offered no explanation why Fehr was not available, Stonehouse is now GM for Mission. Without more information, I cannot draw a negative inference in Respondent’s failure to present Fehr as a witness.

ANALYSIS

A. Lucero’s Union Activities

The Board has consistently found that participation in a strike is protected activity. See, e.g., *National Steel Supply*, 344 NLRB 973, 976 (2005), *enfd.* 207 Fed. 9 (2d Cir. 2006) (finding an 8(a)(3) violation where employees were terminated for engaging in lawful strike); *In re Golden Stevedoring Co.*, 335 NLRB 410, 412 (2001) (finding 8(a)(3) violation even though the Board found the strike to be an economic, not an unfair labor practice strike). Here, Lucero participated in the strike shortly after his hire and became a regular fixture on the picket line. Tr. 43:6426. He also served as a shift leader for the strike. *Id.*

The Board has also found that wearing union paraphernalia is a protected activity. See, e.g., *Basic Industries, Inc.*, 348 NLRB 1267, 1267 (finding employee engaged in protected activity in part because employee “wore a union sticker on his hardhat”). Lucero testified that he wore union paraphernalia at work, specifically “Union Yes” USW stickers on his hard hat and on his lunch box that were approximately the size of his palm. Tr. 43:6437.

Further, the Board has generally protected employee efforts to improve working conditions outside of the immediate employee-employer relationship. See *Allied Aviation Service Co. of New Jersey, Inc.*, 248 NLRB 229, 231 (1980), *enfd.* mem. 636 F.2d 1210 (3d Cir. 1980) (finding employee communications about issues “cognate to the ongoing labor dispute” to third parties protected activity). While striking Lucero gave interviews to two local media sources. (Tr. 43:6427; GC Exh. 413(a).) In his interview with The Militant, Lucero was quoted: “[T]he biggest issue is raises for all, not just the skilled trades people,” indicating that his communications with the local media emphasized and focused upon issues connected to the labor dispute. GC Exh. 413(a).

B. Knowledge

To find unlawful motivation, an employer must have known of the alleged discriminatee’s protected activities, but this knowledge need not be established directly. Instead, knowledge may rest on circumstantial evidence from which a reasonable inference of knowledge may be drawn. *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995). Relevant circumstances may include “the employer’s demonstrated knowledge of general union activity, the employer’s demonstrated union animus, the timing of the discharge in relation to the employee’s protected activities, and the pretextual reasons for the discharge asserted by the employer.” *Kajima*

Engineering & Construction, 331 NLRB 1604, 1604 (2000). Furthermore, it is enough to show that the employer “suspected or believed that the employee engaged in protected conduct—it is not necessary to prove that the [employer] knew of the protected conduct.” *S & S Enterprises, LLC*, 370 NLRB No. 59, slip op. at 20 (2020).

It is also established that the Board “imputes the knowledge of other supervisors and managers to the decisionmaker unless the employer affirmatively establishes a basis for negating such imputation.” *Intertape Polymer Corp.*, 372 NLRB No. 133, slip op. at n. 85 (2023), enf'd. 2024 WL 2764160 (6th Cir 2024).

Despite the confusion between managers, it appears that Meyer made the initial decision and Fehr the final decision to terminate Lucero. (GC Exh. 410; GC Exh. 412.) The evidence suggests Meyer knew of Lucero’s protected activities. General Counsel established that Lucero participated in the strike. Furthermore, Lucero was part of the unconditional offer to return to work issued by the Union on July 6, 2020. (GC Exh. 276.) Lucero was later called back to work as a heavy haul truck driver in October 2020. (Tr. 43:6435.) When asked about the process of returning strikers to work, Mora testified that the company sought to return strikers to substantially similar positions, considering strikers’ abilities in coordination with “the department.” (Tr. 39:5716.) Mora also testified that he, Sinele, and “GM” (who likely is general manager Fehr) reviewed the preferential hire list of which Lucero was a part. (Tr. 39:5715; Tr. 43:6435.) Taken as a whole, Mora’s testimony implicates upper-level managers, such as Meyer and Fehr, as part of the process of returning strikers to work, including Lucero, which illustrates that Meyer and Fehr knew that Lucero participated in the strike.²⁸²

Respondent’s brief emphasizes Samuelson’s testimony that Samuelson did not know that Lucero gave interviews to local media, nor that Lucero wore union stickers. R. Br. at 191. This is irrelevant, as the General Counsel sufficiently demonstrated employer knowledge of Lucero’s protected activities: Samuelson testified that he was aware that Lucero was out on strike. (Tr. 41:6176.) Even if Meyer and Fehr did not have direct knowledge of Lucero’s participation in the strike—which seems unlikely given the return to work procedure, Samuelson’s knowledge could be imputed to Meyer (and Fehr) because Meyer did not deny having that knowledge. See also *Dobbs International Services*, 335 NLRB 972, 973 (2001) (whether the general manager knew of employees’ protected activity was immaterial insofar as the supervisors, who were involved in the adverse action, knew of employees’ protected activity).

C. Animus

General Counsel “must establish a connection or nexus between the Respondent’s antiunion animus and the discharge” *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 1 (2019). Determining whether the employer harbored anti-union animus is a fact-based inquiry, and evidence may be direct or circumstantial. *Robert Orr/Sysco Food Services, LLC*, 343 NLRB 1183, 1184 (2004); *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1428-1429 (11th Cir. 1985). The Board has inferred animus and causal connection from “the timing of the action in relation to the union or other protected conduct; contemporaneous unfair labor practices; shifting, false, or exaggerated reasons offered for the action; failure to conduct a meaningful investigation; departures from past practices; disparate treatment of the employee; and reliance on pretextual reasons for the action.” *Intertape Polymer Corp.*, 372 NLRB No. 133,

²⁸² Meyer testified that he saw picketers at Mission Mine during the strike that began in October 2019, in the same location that Lucero stated that he and others picketed. (Tr. 59:8939; Tr. 43:6424.) However, Meyer did not testify to seeing Lucero and other factors more strongly point to knowledge of Lucero’s union activities.

slip op. at 14 (2023), enfd. 2024 WL 2764160 (6th Cir. May 9, 2024). General Counsel need not produce separate or additional evidence of particularized animus toward the employee; instead, GC may rely on the foregoing evidence to support a reasonable inference that the employee's protected activity was a motivating factor in the employer's adverse action. *Id.*

1. Timing

Lucero was fired approximately 4 months after he returned to his position as a heavy haul truck driver after participating in the strike. While this timing does not immediately suggest anti-union animus on the part of the Respondent, it does not foreclose the possibility. The Board has recognized that "an employer might wait for a pretextual opportunity to discipline an employee, and thus, the Board has found animus even when several months have passed since an employee's protected activity." *Genpak, LLC*, 372 NLRB No. 76, slip op. at 4 (2023) (internal quotations omitted). See also *United Parcel Service*, 340 NLRB 776, 776 fn. 10 (2003) (respondent's expression of hostility toward an employee's protected activity made 6 months prior to employee's discharge was "not too remote in time" from the discharge to establish animus).

2. Disparate treatment

Disparate treatment is evidence of Respondent's animus and pretext. *Wismettac Asian Foods*, 371 NLRB No. 9, slip op. at 7, enfd. (unpub.) 2022 WL 14915659 (9th Cir. 2022); (failure to come forward with evidence of similarly treated employees points to pretext); *BS&B Safety Systems*, 370 NLRB No. 90, slip op. at 2 (2021) (employer's defense pretextual when it failed to explain why it discharged an employee when it did not discipline others for similar conduct).

First, Samuelson admitted that Lucero followed the correct procedures. Despite Samuelson's admission, Respondent granted last chance agreements to others who had similar or worse incidents. For example, Noriega and Scroggins did not fully stop at controlled intersections whereas Lucero came to a full stop for at least 10–15 seconds. (Tr. 41:6196.) Noriega and Scroggins both admitted to a lapse of judgment during their nonperemptory discharge meetings, just as Lucero did. (GC Exh. 408 at 5, 13; Tr. 59:8956.) Noriega and Scroggins allegedly were very experienced individuals, so Respondent did not make clear why employees with such a level of experience should be "cut extra slack" than a newer individual; after all, should not an extremely experienced haul truck driver do better than one who had less experience in that mine?

Respondent also points to the termination of Gebben as evidence that it did not treat Lucero disparately because Gebben crossed the picket line. (R. Br. 193.) However, Gebben's misconduct presented a much greater safety risk than the conduct of Noriega, Scroggins, or Lucero. The SIR states that another van carrying multiple employees had to take "evasive action" to avoid Gebben and his heavy haul truck. (R. Exh. 18 at 1.) In contrast, Lucero completed the full stop procedure and was at least halfway through the intersection when the cable truck with Grant and Zukowsky inside "came to a complete stop outside of [Lucero's] path of travel." (GC Exh. 408 at 1.) The distance between Lucero and the cable truck was not corroborated: Lucero stated it was approximately three or four truck-lengths away whereas the SIR did not state the distance. (GC Exh. 408(a), 408.)

Finally, Lucero did not inflict any property damage. According to Jose's testimony, Henley, a water truck driver, crashed into another water truck, causing an estimated \$100,000 in damage and nearly injuring an employee. Respondent did not offer any evidence about Henley because the incident "did not involve a haul truck and took place under different circumstances."

(R. Br. 193 fn. 66.) Samuelson testified that Henley returned after this incident, since Henley is on Samuelson's crew. (Tr. 41:6242–43.) According to Jose, Henley crossed the picket line. (Tr. 41:6106.) Henley caused significant damage and almost caused an injury, yet Respondent allowed non-striker Henley to continue working.

The disparate treatment evidence directs the finding of animus against Lucero. Respondent granted last chance agreements to other employees who engaged in similar or more serious misconduct.

D. Respondent's Affirmative Defenses

General Counsel established a prima facie case that Lucero's protected activity was a motivating factor in Respondent's decision to terminate him. The burden shifts to the Respondent to show that it would have terminated Lucero even absent his participation in the strike. See *Lucky Cab Co.*, 360 NLRB 271, 276 (2014). Respondent must show that it has consistently and non-discriminatorily applied its disciplinary rule although Respondent does not have to "rebut the General Counsel's prima facie case by adducing evidence that at least one other employee [] was terminated for the exact same violations." *Septix Waste, Inc.*, 346 NLRB 494, 496 fn. 15 (2006). Respondent failed to demonstrate by a preponderance of the credible evidence that it would have terminated Lucero even in the absence of Lucero's protected activity.

Specifically, Respondent failed to produce evidence of similar treatment of other employees. Meyer testified that he recommended termination for Noriega, Scroggins, and Gebben for similar incidents. (Tr. 59:8959–60.) However, when asked why only Noriega and Scroggins received last chance agreements, Meyer testified that GM Fehr made the decision solely based on the employees' long tenure with the company. (Tr. 59:8985.) Respondent argues that it was Noriega's and Scroggins's 9–and 15-year histories, respectively, with the company that merited the last chance agreements, but this is not sufficiently supported by the evidence. Henley received a last chance agreement even after causing considerable damage and potential physical harm to another employee, although his tenure is unknown. Gebben, who had similar tenure to Lucero (approximately 1 to 2 years), was terminated after driving his haul truck in such a way to force another van carrying employees to take "evasive action." Lucero was then terminated for proceeding into an intersection without looking left again when a cable truck stopped on the ramp at an unknown distance away. Without any testimony from Fehr and additional documentation from Respondent, Respondent's proffered rationale for granting last chance agreements to Noriega and Scroggins, not Lucero, is unsupported. See also *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004) (finding Respondent failed to establish affirmative defense when oral testimony was uncorroborated and Respondent did not offer additional documentation).

Lastly, Respondent regularly emphasized the importance of safety in the mine. (R. Br. at 182–184.) Meyer testified that training to become a heavy haul truck driver is intensive because "haul trucks are the highest risk machine [sic] in the mine." (Tr. 59:8962.) When asked about why he terminated Lucero, Meyer said "[Lucero] didn't leverage his training properly. He did not leverage situation awareness. He didn't look a second time, and the outcome would have been a fatality, literally within seconds, if that cable truck had not stopped." (Tr. 59:8958.) The same logic should apply to Noriega and Scroggins, who committed the same violations of safety rules when they did not fully stop at controlled intersections, and who had many more years of experience in that mine. The logic also should apply to Henley, who caused substantial property damage in an accident and physically threatened another employee. However, all three received last chance agreements and crossed the picket line.

With Respondent's emphasis on safety in the haul trucks, Respondent unevenly applied its safety standards and allowed those who crossed the picket line to stay on the job in last chance agreements. Lucero, who did not cross the picket line and was reinstated post-strike, was not afforded a second chance. Respondent had knowledge of Lucero's protected union activities and was treated disparately. With Samuelson's admission that near misses are a frequent occurrence, apparently they are not written up consistently. Respondent does not rebut General Counsel's prima facie case. See *NLRB v. Advance Transportation Co.*, 965 F.2d 186, 193–194 (7th Cir. 1992), *enfg.* 299 NLRB 900 (1990) (terminating driver for violating unauthorized coffee break policy when no driver ever received a warning shows employer failed to meet its burden it would have fired driver but for protected activities). I therefore recommend finding that Respondent violated Section 8(a)(3) and (1) when it suspended and discharged Lucero.

XIII. ELI LARACUENTE'S ALLEGED UNLAWFUL SUSPENSION AND DISCHARGE

Elisha "Eli" Laracuate worked at the Mission Mine from October 2017 until Respondent suspended and subsequently discharged him, on February 19, 2021, on March 3, 2021 respectively. (Tr. 22:3464.) General Counsel maintains that the suspension and discharge were due to Laracuate's union and/or protected activities. (Complaint ¶¶5(o), (p).)

A. Laracuate's Employment

Eli Laracuate worked as a diesel mechanic at Respondent's Mission North Mine from October 2017 to March 2021. (Tr. 44:6502.) He had 14–15 years of experience working with diesel engines before working for Respondent. (Tr. 44:6504.) He started as an apprentice in the Truck Shop, where he spent 60 days working in the Preventative Maintenance Bay (PM) working on routine maintenance on the larger wheeled equipment, which did not include equipment in the pit (Tr. 44:6503, 6516, 60:9083–94.) Laracuate was then promoted to the rank of Class 2 Diesel Mechanic. (Tr. 44:6503.) His duties in that role included troubleshooting, basic repairs and maintenance, and teaching apprentices. (Tr. 44:6503.) Laracuate worked rotating day and night shifts, spending 2 weeks per month on each. (Tr. 44:6512.) Regular shifts in the Truck Shop were 4 days on and 3 days off, then work 3 days on and 4 days off. *Id.* On nightshifts, Laracuate always worked in "the pit." (Tr. 44:6525.)

Fifty to 60 pieces of equipment in the pit ran on diesel fuel. (Tr. 44:6512–13.) This equipment included haul trucks, loaders, cranes, and drills. (Tr. 44:6512–6513.) Despite MSHA/ASARCO policy requiring that mechanics must be licensed or trained on a piece of equipment to operate on it, Laracuate was frequently called to perform maintenance on equipment for which he had no training. (Tr. 44:6518, 6564–65.)

As part of the "pit crew," Laracuate was dispatched to help operators who had issues with their equipment in the pit. (Tr. 44:6516–17.) Operators explained what was happening to Laracuate, who would perform an inspection and diagnose the issue. (Tr. 44:6511.) If Laracuate could not identify the issue from training/experience, then he consulted the equipment's diagnostic manual, if he could find it. *Id.* No diagnostic tools were available while a mechanic was working in the pit. Diagnostic manuals were not kept in the pit crew's truck, so Laracuate would have to call the markup supervisor to ask whether they had a manual for a certain piece of equipment in the truck shop. (Tr. 44:6511, 6517, 6530.) If not, then he called the shovel repair department, but they never answered the radio at night. (Tr. 44:6530.) If unable to find the manual, Laracuate put a "red tag" on the equipment (placing a large "Do Not Operate" sign) until the next morning, when shovel repair or the equipment manufacturer could look at it. *Id.*

Before working on a piece of equipment, Laracuate conducted a safety inspection. (Tr. 44:6531.) This inspection entailed looking for tripping hazards, electrical hazards, water hazards, or any other health hazard, and then filling out a safe work permit. These permits are two pages long and must be signed and dated. Id.

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B. Laracuate's Union and Protected Activities

Laracuate was a member of Teamsters Local 104, which he joined at the end of his employment probation period. (Tr. 44: 6518.) He placed a union sticker "front and center" on his hardhat, which he was required to wear every day while working and communicating with his supervisors. (Tr. 44:6418–6519.) He also placed a union sticker on his toolbox, which he frequently carried in view of his supervisors. Id.

Laracuate joined the strike in October 2019. Id. He stood on the picket line 5 days a week for 4-hour shifts from 10 p.m. to 2 a.m. at the I-19 corridor, at the north side of Pima Mine Road. (Tr. 44: 6520–21.) Any traffic coming or going from the Mission Mine facility would have to pass the strikers, who made themselves conspicuous by using signs, flashlights, a small drum, and fire to catch the attention of passing cars. (Tr. 44:6519–21.) Laracuate held a sign reading "Strength in Unity." (Tr. 44:6521.) HR Manager Mora denied that he knew Laracuate was a member of a union, but admitted he knew Laracuate did not work during the strike and, at the time, would have recognized him. (Tr. 39:5829.) Mora also admitted that he knew Laracuate was brought back to work post-strike. (Tr. 39:5829–5830.) De La Ossa also admitted that he knew Laracuate did not work during the strike. (Tr. 60:9155.)

Shortly after the strike was over, Mora called Laracuate to return to work with a 75-cent per hour raise. Laracuate was reinstated to Class 2 diesel mechanic in about August 2021.

C. Laracuate's Chain of Command, Union Representatives

General Supervisor Paul De La Ossa was in charge of the truck shop. (Tr. 60:9083.) The post-strike nightshift crew consisted of two apprentices, Laracuate, and a Class 1 Mechanic acting as a "markup" supervisor. (Tr. 44: 6524–25.) Class 2 Mechanics are a step below Class 1 Mechanics. (Tr. 44:6503.) The markup stayed in the Truck Shop's office, so Laracuate was the ranking mechanic in the pit. (Tr. 44:6525.) Mark Burton was acting as the markup supervisor on the nightshift of February 11–12. (Tr. 44:6539–40.) Scott Stonehouse was a maintenance truck supervisor at the time. (Tr. 39:5828.) De La Ossa reported to the Maintenance Manager Daniel Howard who in turn reported to General Manager Brad Stonehouse. (Tr. 60:9091; GC Exh. 415 at 7.)

Multiple union stewards at Mission Mine represented the Steelworkers, engineers, electricians, and boilermakers. (Tr. 44: 6586.) Laracuate consulted with the Teamsters steward about joining the Union, as well as about coming back to work after the strike. (Tr. 44:6519, 6522.) The stewards involved in Laracuate's disciplinary hearings included Eduardo Placencio, Jason Goeke, Michael Marquez, Sal Liotta, and Anthony (Tony) Jose. (Tr. 44: 6588; GC Ex. 415, 416.)

D. February 11-12, 2021 Incident

This incident involved a drill used to dig holes in the mine pit. The drill is a huge piece of equipment, with hoses as tall or taller than four to five stories high, operating with a diesel hydraulic engine. It drills holes to a depth of approximately 40 to 50 feet and 10–12 inches in diameter. (Tr. 43:6528-6529.) After the holes are drilled, a blast crew places explosives, which

are detonated to move rock. After the detonation, a shovel removes the blasted material. (Id., Tr. 39:5826.) The drill costs approximately \$2 million to \$3 million and are usually serviced on site. (Tr. 39:5831.) The drill is fueled approximately every 10–12 hours; the tank holds 270–280 gallons. (Tr. 44:6597.)

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Laracuate was working the nightshift on February 11 and into the early morning hours of February 12. (Tr. 44:6526.) His ranking markup supervisor was Mark Burton. (Tr. 44:6524.) Post-strike, no salaried supervisors worked the night shift. (Tr. 44:6525.)

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Laracuate received a call from drill operator Aaron (Ron) Burr at approximately 9 p.m., reporting that the drill had an oil leak. (Tr. 44: 6527; 61: 9247.) Laracuate was busy answering higher priority calls, so Burr called again at approximately 12:30 a.m. (Tr. 44: 6527.)

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Burr testified that during his shift, he called lubeman Connor Strom to refuel the drill.²⁸³ (Tr. 61:9243.) Lubemen operate the lube truck, which involves refilling fuel and engine oil and greasing equipment. Burr shut the drill down while he waited and examined it. (Tr. 61:9244–45.) He noticed that the oil was “way over full” (6”) and it felt thin. Id. He described its texture as slippery. (Tr. 61:9266.) Burr testified that he was never trained to test engine oil to know its viscosity; his opinion was based on his experience running the equipment. (Tr. 61:9267.) But Burr testified he knows how oil is supposed to feel because of his seven years of experience as a drill operator. (Tr. 61:9240–45) Burr described seeing a puddle of engine oil on the ground; he could tell it was engine oil because it was black. (Tr. 61:9247.) Strom suggested that Burr call Laracuate. Id.

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When Laracuate arrived, he found that the oil was coming out of the blow-by tube. (Tr. 44:6535.) Blow-by is a common issue with diesel engines and is still safe to operate with it. (Tr. 44:6535.) The term means any excessive amount of oil or fuel is purged through the engine, either through a tubing or through a pressure release valve, depending on the engine. Sometimes an excess amount of air in multiple turbos/supercharges causes blow-by. Some diesels have return lines for unspent fuel but some motors have tubing that causes excess to go out the bottom of an engine. (Tr. 42:6507–6509.)

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Laracuate checked the dipstick three times, which showed that the oil was overfilled by 1.5-2” and for this machine, only the dipstick would indicate whether the fluid level was correct.²⁸⁴ He suspected that it was overfilled while receiving Preventative Maintenance, so he called Burton and asked when the drill had been serviced last. (Tr. 44:6539–40.) Burton told him the drill received preventative maintenance that week but did not know the date and gave no indication that any issues were detected. (Tr. 44:6540–41.)²⁸⁵ Burr told Laracuate the drill had been operating fine and had no alarm bells. Laracuate then presented Burr with two options: (1) stop drilling and wait for the lube man to come drain the excess oil, which could require waiting 2–3 hours; or (2) continue to run the drill. (Tr. 44:6543, 61:9250–52.) The manual for the equipment was located in the truck shop, which was a distance from where these events took place and, unlike other locations, Respondent did not provide laptops to the mechanics to access the manuals and the wifi in Mission was limited. (Tr. 39:5874.)

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²⁸³ This particular drill is also called the 586 drill. See, e.g., Tr. 61:9243.

²⁸⁴ Both Laracuate’s and Burr’s estimates of the oil overfill fluctuated. At hearing, Laracuate said 0.75”. As discussed below, I credit Laracuate’s 2” estimate, which he gave shortly after the incident.

²⁸⁵ Laracuate explained that during an oil change, multiple oil filters require additional oil, e.g., although the engine alone may take 75 gallons, it may also have 3 three-gallon oil filters, so 9 additional gallons must compensate for the filters. (Tr. 44:5436.)

Burr told Laracuate he had to finish drilling and it would take 2 to 3 hours for the lube man to arrive. Burr expressed some concerns about continuing to run the drill, but Laracuate told him it should be fine. (Tr. 44:6543.)²⁸⁶ Laracuate told Burr to call him if he encountered any other issues or if the drill started showing any codes. Laracuate documented that the drill had an overfilled crank case and oil leak. (Tr. 44:6542–44.)

Other details of Burr and Laracuate's conversation are controverted. Burr testified that he told Laracuate that the oil was only slightly overfilled at the beginning of his shift, but Laracuate denies that he received this information. (Tr. 44: 6567–68, 61:9249.) Burr also testified that he told Laracuate that the oil felt thin and looked clear, which Laracuate also refuted.

Burr operated the drill for the rest of his shift without any problem. (Tr. 61:9254.) The drill had been fueled at about 10:25 p.m. on February 11, taking 253 gallons, and again after Laracuate left, at 3:18 a.m. on February 12, taking 109 gallons of fuel. (GC Exh. 433 at 2.) Strom's documentation at 3:18 a.m. also does not show any leaks. (GC Exh. 433(a).) Burr completed a post-op inspection and did not notice any more leaks. (Tr. 61:9255.) However, Burr testified that he had not seen any warning lights for the remainder of his shift and had "no idea" whether the level were normal. (Tr. 61:9284.) Burr's documentation for that shift did not mention any leaks after Laracuate's visit. (GC Exh. 433 at 3.) When Burr spoke to the oncoming shift, he told them to keep an eye for the leak. (Tr. 61:9278.) Burr also testified that he told his supervisors at the end of the shift. (Tr. 61:9286-9287.)

The drill failed thereafter but the amount of time between failure and the end of Burr's shift is controverted. One says 14 hours and another said, "several days." (e.g., Tr. 60:9135.) The operator on January 13 did not note any deficiencies, according to notes Mora took during the grievance meeting. (Tr. 39:5836.)

The drill's last monthly test occurred on February 10 but Respondent did not receive the results of this test until February 18. The results showed that the drill had a fuel injector malfunction, resulting in 14 percent dilution. It is possible that this issue would have been caught sooner, but the previous month's test, conducted in January, led to inconclusive results because the test was performed incorrectly. (Tr. 60:9163.) None of this information was available to Laracuate when he checked Burr's drill. The damage to the drill was estimated to be \$132,000, which was not a total loss of the drill. (Tr. 39:5831.)

E. Investigation, Disciplinary Action and Grievance Process

De la Ossa conducted his own investigation, which included examining the drill's preventive maintenance records, examining the drill's manual and interviewing a number of involved employees. De la Ossa collected statements from Laracuate, Burr, the lube man and other individuals. (Tr. 60:9102–9106; R. Exh. 45.)

Laracuate came back to work on Wednesday, February 18, 2021. His shift supervisor, Mike Marquez,²⁸⁷ came into the breakroom as he was getting ready and told him to go to the Maintenance office. (Tr. 44:6545.) In the office, Supervisors De la Ossa, Matt Boyd, and Supervisor Marquez asked Laracuate what happened with the drill, so he gave them a brief rundown of the events on February 11–12. (Tr. 44:6546.) He was then asked to give a written

²⁸⁶ Some of Laracuate's statements say he gave Burr the choice of running the drill. (Tr. 39:5885.)

²⁸⁷ Not to be confused with Union Steward Michael (Mike) Marquez.

statement, but he did not know why. He did as he was asked. (GC Exh. 414(b).)²⁸⁸ The supervisors told Laracuenta he was good to go after giving his statement, and he worked that evening. (Tr. 44:6551.) No one told him anything about the drill breaking. Id.

5 Laracuenta came into work the next day and Supervisor Marquez took him into an office where Marquez and Jeff _____ waited. Laracuenta was told that he was being placed on investigative leave based on his actions with the drill. Laracuenta was told that he was the last mechanic to work on the drill, despite the drill running for approximately 14 hours after the February 12 incident. Marquez told Laracuenta to call his union representative and warned him
10 not to say anything about the incident to anyone in the breakroom. (Tr. 44:6552–54.)

On February 19, 2021, Respondent directed drill operator Burr to provide a statement. Burr had been off and was returning to work. Upon his return and before he wrote his statement, Burr learned from supervisors that one of the drill's injectors "went bad." He asked
15 his supervisor what was wrong with the drill and its engine. (Tr. 61:9285.)

Respondent gave Burr an entire day to write his statement. Burr testified that he had to think about it but still had to do his job. Burr gave his written statement (Tr. 61:9290.) Once De La Ossa completed his investigation, he reported his results to Dan Howard. Howard, with De
20 La Ossa agreeing, determined that Laracuenta should be terminated. (Tr. 60:9148.)²⁸⁹

On February 24, 2021, Respondent held Laracuenta's non peremptory discharge hearing, which lasted 45 minutes to an hour. (Tr. 39:5836, 44:6565; GC Exh. 415, pg. 2.) Attending for Respondent were HR Manager Mora, Paul De La Ossa, Maintenance Manager
25 Dan Howard, and Manager Scott Stonehouse. The union representatives present were Eduardo Placencio, Tony, Jose, and Richard Steinbach. (Tr. 39: 5837, 44:6673.) Burr was not present. (Tr. 44:6556.) Laracuenta told them he was called to investigate an oil leak in the drill. Mora testified that Laracuenta asked whether the drill ran on the day shift and that he called "Mike" in shovel and drill to see if the drill recently had maintenance, which showed 2 days
30 before it had "some maintenance." However, Respondent supposedly investigated that Maintenance was done but Mora did not know what was found or whether that employee was disciplined. Laracuenta stated that at the end of his examination, the drill indicated the oil pressure was fine, had no warning lights and was safe to run. (Tr. 39:5839–5840.) Towards the end of the meeting, Union Representative Placencio stated that the paperwork was important,
35 and Stonehouse responded that supervisors were to follow through at the end of the shift. Nothing in the meeting reflects what Laracuenta's supervisor did at the end of the shift to follow through. At the end of the meeting Respondent raised that Burr said at the beginning of his concerns about the drill, it had 1/4" of oil too much and moved up to 2 inches in give hours.²⁹⁰ Laracuenta said that, had the operator told him that the oil level was at 1/4 inch and then raised
40 to 2 inches, he would have red tagged the drill. (Tr. 44:6559–6561; GC Exh. 414(a) at 8.)²⁹¹ After the meeting, Respondent again decided to terminate Laracuenta. De La Ossa testified that

²⁸⁸ The statement says that there was no leakage, but Laracuenta clarified that he found no visible leakage from any portion of the engine except the overflow, and the overflow did not leak oil while he observed it. (Tr. 44:6550; GC Exh. 404(b).)

²⁸⁹ Burr testified that he gave his statement within a week or two of the incident. (Tr. 61:9257.)

²⁹⁰ Some of the information in Burr's statement would have been important to Laracuenta's assessment of the drill, which has 16 operating cylinders and a fuel injector. Burr's report does not say that he shared all of this information except for showing him oil on the ground and the alleged overfill at that time. Laracuenta's testimony indicates it would have been impossible to make a diagnosis in the pit without the complete picture. (Tr. 44:6570–74.)

²⁹¹ Mora testified Laracuenta was told the oil level was at 1/4 inch, but Mora's notes and Manager Howard's notes show Laracuenta never said so in the nonperemptory meeting or. (Tr. 39:3849–3850; GC Exh. 414(a), 414(b).)

the managers thought Laracuate's error with overfilling the drill was egregious. (Tr. 60:9150–9151.)

On March 3, 2021, Juan Mora notified Laracuate and the union representatives of its intent to terminate Laracuate, pending the results of the grievance procedure. The decision to terminate was based upon violating "safe operating procedures, manufacturer recommendations, ASARCO Safety and Health Rules" (GC Exh. 415 at 2.) The Union filed a grievance on March 6 and requested a third step grievance hearing. (GC Exh. 415 at 3–4.)

On March 23, the parties held the third step grievance hearing, which lasted almost 2 hours. Present for Respondent were General Manager Geoff Fehr, Manager Howard, Supervisor De La Ossa, and HR Manager Mora. (Tr. 39:5825.) In addition to Laracuate, the Union representatives present were Placencio, Mike Marquez, Jason Goeke, Tony Jose, and Steinbach. (Tr. 39:5867; GC Exh. 416.) During the grievance meeting, Marquez raised that someone may have falsified records and Mora admitted that Respondent never investigated for it. (Tr. 39:5870.) Marquez also raised that the machine operator had a right not to operate the equipment. (Tr. 39:5873.) Placencio recalled that GM Fehr stated that Respondent was not paying for the failure or repairs but the drill manufacturer, Caterpillar, was. (Tr. 45:6685.)

Laracuate had no written disciplinary record at ASARCO prior to the incident. (Tr. 44:6619.) Although Laracuate testified he may have had verbal warnings, a hearing is required for all verbal and written warnings, and there is no record of any prior hearings for Laracuate. Respondent never raised any issues with his production or absenteeism. (Tr. 39:5729, 44:6619.) HR Manager Mora's notes show that GM Fehr raised a last chance agreement with a time limit but Chief Steward Jose and Placencio testified that offer was not brought to the Union. (Tr. 45:6684, 51:6122; GC Exh. 416 at 13.)

By letter dated March 26, 2021, General Manager Fehr notified the Union that the grievance was denied. The letter, drafted by HR Manager Mora, did not show any reasons for termination, as the nonperemptory discharge letter stated the reasons. Respondent terminated Laracuate's employment effective March 26, 2021. (GC Exh. 415 at 7–8.) No one else received any discipline for the drill's failure, including the person who failed to test the drill correctly in January or Burr.

F. Disparate Treatment Evidence

De La Ossa collected statements from Laracuate, Burton, Burr, and Strom within 3–4 days of the engine failure. (Tr. 60: 9105–06; R. Exh. 45.) De La Ossa did not identify or interview any of the employees who ran the drill after Burr, including the operator at the time of the engine failure. (Tr. 60:9136.) Laracuate wrote his statement in one sitting, in the supervisors' office. (Tr. 44:6546.) Burr, on the other hand, was given his entire shift to complete his statement. (Tr. 61:9289–90; GC Exh. 432.) Burr wrote his statement on February 19, after he learned about the drill's fuel injector malfunction. *Id.*

While De La Ossa testified that the company has previously disciplined people for incorrectly performing maintenance before, he could not think of any employee who was terminated him for failing to do their duties. (Tr. 60:9169–70.) He testified that the company's decision to terminate is dependent on the severity of the circumstances, and in this case, the alleged negligence of Laracuate resulted in \$132,000 of damage. (Tr. 60:9170.)

Despite multiple employees working with the drill after Laracuate, including at the time that the engine failed, no other employees involved with the drill's failure were disciplined. (Tr.

60:9171.) De La Ossa testified that the company “didn’t feel that [the other employees] made any wrong decisions, nor did the investigation unveil anything they did that would have been incorrect.” (Tr. 60:9171.)

5 However, De La Ossa admitted that the January 5 fuel dilution test was performed incorrectly, leading to inconclusive results that prevented the company from being able to address the issue before the engine failed. (Tr. 60:9163; GC Exh. 430.) Despite performing their duties incorrectly, the mechanics who performed the January 5 test were not disciplined. (Tr. 60:9164.) And the January 10 test results, showing the problem with the fuel and oil, were not
10 available under after the drill failed.

Analysis:

A. Credibility

1. Eli Laracuente

15 I partially credit Laracuente’s testimony. While he was mostly consistent, his estimates of how overfilled the oil on the drill was on February 12 have fluctuated. In his testimony on March 2, 2023, Laracuente claimed that he checked the drill’s dipstick three times and it indicated that the engine oil was overfilled by 0.75 inches. (Tr. 44:6535–36.) In his subsequent testimony, Laracuente amended his estimate and stated that he “felt [the engine oil] was between three-quarters and one inch.” (Tr. 44:6561.) However, General Counsel Exhibit 414 reflects that in his nonpreemptory discharge hearing, which took place 12 days after the incident, Laracuente
20 stated that the oil was overfilled by 1.5-2”. HR Manager Juan Mora’s notes from the nonpreemptory discharge hearing corroborate that Laracuente stated the oil was overfilled by 2” when he first got to the drill to examine it. (GC Exh. 414(a).) I credit Laracuente’s testimony in the nonpreemptory discharge hearing in March 2021, when the incident was still fresh in his mind, rather than his testimony 2 years later. Further, the 2” estimate is an admission against
25 Laracuente’s self-interest and thus more credible.

30 As previously mentioned, details about the conversation between Burr and Laracuente on February 12 differ. Burr testified that after examining the drill, Laracuente told him he could continue running the drill and had “nothing to worry about,” which Laracuente denied. (Tr. 61:9253; 44:6571.) Since both men testified about this conversation more than two years after the date of the incident, I attribute the minor conflicting details to memory issues. However, I credit Laracuente’s testimony that he was not told that the oil (1) was only slightly overfilled at the beginning of Burr’s shift and (2) looked and felt thin. For a mechanic with as much
35 experience as Laracuente—and no prior disciplinary issues for failing to perform his job correctly—it seems very unlikely that he would have failed to act on that information and red-tag the drill.

2. Aaron (Ron) Burr

40 I fully credit Burr’s testimony that he ran the drill for the rest of his shift without any problems and that, at the end of the shift he had no further leaks. However, Burr’s written statement, provided the day after Laracuente wrote his statement, is missing information about what he exactly told Laracuente.

50 On the stand Burr attempted to hurry his testimony and get out his entire story, which seemed like he memorized a speech for his testimony. He had to be stopped to allow counsel to

interject questions. See, e.g., Tr. 61:9242–9245. He would discuss difficulty in recalling details from so long ago.

I do not fully credit the remainder of Burr's testimony, which contained multiple inconsistencies. For example, Burr testified that drill operators have full discretion to determine whether to run their drills. (Tr. 61:9262.) If Burr thought something was wrong with his drill, he said he would shut it down. (Tr. 61:9263.) If he thought it was operating fine, then he would continue to operate it. Id. However, later in his testimony Burr said that he followed Laracuate's suggestion against his own judgment because "[w]ho am I to argue with the guy?" (Tr. 61:9276.) Given this discrepancy, I credit that Burr believed that he had specific expertise in working with his drill and could shut it down if he wanted.

Burr testified that Strom helped him look for the leak. (Tr. 61:9269.) However, Strom's documentation dated February 12 does not report any leaks. (GC Exh. 432, 433.)

Burr also failed to credibly testify about the time constraints placed upon him. According to Laracuate's testimony, Burr said that, due to his drill assignment, he did not have time to wait 2–3 hours on the lube man. (Tr. 44:6543.) However, in his own testimony, Burr stated that he was not under any time constraints as a drill operator, i.e., he is not required to make a certain number of drill holes per shift. (Tr. 61:9254.) Laracuate's testimony that Burr was under time constraints works against Burr, because it helps to justify Burr's decision to continue drilling. On the other hand, Burr admitted that he was not under any time constraints and fully capable of waiting 2-3 hours for the lube truck to come and empty the oil. Burr also testified that he questioned Laracuate's decision to run the drill, which he thought was wrong, but ran it anyway based upon Laracuate's review. He then became defensive, testifying that he did everything an operator was supposed to do and did nothing wrong. (Tr. 61:9276–9277.) Since Burr's testimony is generally more inconsistent than Laracuate's, I credit Laracuate.

Burr and Laracuate also disagreed about feeling the oil viscosity. Burr testified that, when Laracuate arrived, he told Laracuate the oil felt thin, and like fuel was getting into it. (Tr. 61:9248.) Burr also testified that he repeated his concern that the oil felt thin after Laracuate had examined the drill. (Tr. 61:9250.) However, Laracuate testified that Burr did not tell him that the oil looked and felt thin, like fuel was getting into it. (Tr. 44:6567–68.) Laracuate claimed that only a skilled mechanic would have been able to use his bare fingers to determine the viscosity of oil with fuel in it at 1:30 in the morning, when it was "blackier than hell out there." (Tr. 44:6568-69.) Since Burr is a drill operator, not a mechanic, Laracuate doubted that he would be capable of determining that fuel was getting into the oil. (Tr. 44:6568.) Laracuate testified that Burr never mentioned fuel at all during their interaction on February 12. (Tr. 44:6570–71.) Laracuate himself rubbed the oil between his fingers and smelled it. (Tr. 44:6561.) He testified that fuel has a distinct odor, which he did not smell. Id. The oil smelled normal to him, based on his 14–15 years of experience as a mechanic. Id. I credit Laracuate's evaluation, given that he has more experience and a higher degree of training than Burr. Further, Burr only testified that the oil felt thin and looked clear after learning about the drill's February 10 fuel dilution test results.

3. Juan Mora

I do not credit Mora's testimony that he was unaware as to whether Laracuate belonged to a Union. (Tr. 39:5828.) He also denied knowing that Laracuate participated in the strike from October 2019 to July 2020. (Tr. 39: 5829.) However, Mora called Laracuate to bring him back to work after the strike was over, in July or August 2020. (Tr. 44:6521–22.) He offered Laracuate his job back with no time lost and a \$0.75/hour raise. (Tr. 44:6522.) Mora and

Laracuate had multiple conversations regarding his return to work, as Laracuate needed to consult his wife and the Teamsters steward before giving Mora an answer. *Id.*

It is unclear how long the drill ran after Laracuate worked on it. De La Ossa estimated that it ran for another 14 hours before the engine failed. (Tr. 60:9135.) Mora estimated that it ran for “several days” after the February 11–12 incident, then amended it to “a few days.” (Tr. 39:5831.) Given that De La Ossa supervised the Truck Shop, I will credit his estimation rather than Mora’s. More importantly, it is not disputed that multiple people worked on and operated the drill after Laracuate and Burr. (Tr. 39:5832–33; 60:9135.)

4. Paul De La Ossa

Paul De La Ossa’s testimony was inconsistent and exaggerated at times. For example, he testified that the drill should have 0 percent fuel dilution and implied that the percentage was elevated due to Laracuate’s work on the drill. (Tr. 60:913–35.) He directly contradicted himself by claiming that the fuel dilution was at 14 percent at the point of the engine failure. (Tr. 60:9155.) After reviewing the February 10 test results (GC Exh. 430), he confirmed that the drill was already at 14 percent before Laracuate even touched the drill. (Tr. 60:9157.)

De La Ossa testified that the drill “had to have” continued spewing oil after Laracuate worked on it. (Tr. 60:9134.) However, he then claimed that the operators running the drill after Laracuate would not have necessarily noticed this spewing oil, because it happens gradually. (Tr. 60:9134.) Burr consistently maintained that he had no further problems with the drill. He could not state whether they noticed it for certain because he does not know who operated the drill after Burr. (Tr. 60:9136.)

In regard to the level of oil overfill in the drill, De La Ossa claimed that a reading of 1.25” overfull was an “egregious amount” and the equipment should never be allowed to continue running at that level. (Tr. 60:9119–20.) He further testified that “anybody kind of acting reasonably” in Laracuate’s position would have downed the drill and taken the oil level down. (Tr. 60:9122.) However, De La Ossa never worked on the 586 as a mechanic. (Tr. 60:9127.) Laracuate and Burr both testified that some amount of overfill (anywhere around 1”) was common on this type of equipment and does not hurt its operation. (Tr. 61:9243, 44:6538.) When filling these engines during preventative maintenance, lube men are dealing with 100+ feet of hose and have multiple ladders to climb up, and it only takes a split second to overfill. (Tr. 44:6538.) Thus, I do not credit De La Ossa’s exaggerated statement that 1.25” of overfill is “egregious.”

Paul De La Ossa testified that Laracuate had multiple resources available to him to help diagnose the drill’s problem but neglected to use them. (Tr. 60:9140.) He stated that Laracuate’s first step should have been to consult the manual, which was kept in the truck shop (where “all” manuals are kept). (Tr. 60:9141.) However, diagnostic manuals were not kept in the pit crew’s trucks. (Tr. 44:6517.) Nevertheless, De La Ossa testified that Laracuate could have called his markup supervisor (Burton) to have him go into SYS (online manual) to talk him through it. (Tr. 60:9140.) However, when Laracuate got back to the office and told Burton about what happened with the drill, Burton did not express any concerns or provide any follow-up. (Tr. 44:6544–45.) Burton did not go to the pit himself because he was “stuck in the office.” *Id.* The fact that Laracuate and other mechanics could not access the online manuals themselves was an issue previously raised by the Union. (Tr. 44:6613.) Laracuate and other mechanics were frequently required to perform maintenance on pieces of equipment they had no training on, including the drill. (Tr. 44:6518.) The Union argued in Laracuate’s third step grievance hearing that if the Respondent wanted Laracuate and its other technicians to

succeed, then they needed to be able to check online manuals with tablets/Wi-Fi. (Tr. 44:6614.) Laracuate testified that GM Geoff Fehr rejected this idea during the hearing without giving any explanation. Id.

5 *B. General Counsel Established a Prima Facie Case*

1. Protected union activity

10 Section 7 of the Act guarantees employees' right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. "Activity is 'concerted' if it is engaged in with or on behalf of other employees, and not solely by and on behalf of the employee." See generally *Lhoist N. Am. of Alabama, LLC*, 370 NLRB No. 112, slip op. at 13 (2021). Striking is a concerted activity that falls under the
15 protection of the Act, if the strike itself is lawful. In this matter, no party has challenged the lawfulness of the strike.

The Board has also held that wearing union stickers on hardhats is protected activity." *Basic Indus., Inc.*, 348 NLRB 1267 (2006) (affirming ALJ's finding that the General Counsel
20 established that the discriminatee engaged in protected activity by showing that he wore a union sticker on his hardhat). See also *Pac. Bell Tel. Co.*, 362 NLRB 885 (2015) (wearing union buttons and stickers is protected activity, as long as they are not overtly vulgar or obscene); *Cintas Corp.*, 353 NLRB 752 (2009) (employer discriminated against protected activity by banning employees from wearing union stickers and hats). Laracuate engaged in protected
25 activity by wearing his union sticker "front and center" on his hardhat and on his toolbox. Id.

2. Knowledge

30 An employee's open union activity can be sufficient circumstantial evidence to establish employer knowledge. See generally *House of Good Samaritan*, 320 NLRB 421, 428 (1995) (employer admits knowledge of alleged discriminatee's protected conduct of engaging in strike). At least two managers had direct knowledge that Laracuate was a striker and additional evidence points to circumstantial knowledge. General Supervisor of the Truck Shop during the strike, Paul De La Ossa, had knowledge of Laracuate's active and open union activities. (Tr.
35 60:9155.) De La Ossa testified that he knew Laracuate did not work during the strike. Id. It is also reasonable to infer that as General Supervisor, De La Ossa would have had face-to-face contact with Laracuate on a regular basis while he was wearing his union sticker-adorned hardhat. See *Vulcan Iron Works, Inc.*, 315 NLRB No. 169 (1995) (holding that the employer clearly had knowledge of employees' union activity because they wore union insignia on their
40 hardhats).

HR Manager Juan Mora also had knowledge of Laracuate's active and open union activity. Mora admitted that he knew Laracuate did not work during the strike. At the end of the strike, Mora called Laracuate directly to offer him his job back with no time lost and an hourly
45 raise. It is reasonable to infer from these conversations that Mora knew Laracuate belonged to the Union and participated in the strike. See *Marvin C. Threlkeld Co.*, 196 NLRB 1146 (1972) (finding one telephone conversation to be sufficient circumstantial evidence of employer knowledge of union activity).

50 There is no dispute that Dan Howard and Geoff Fehr were the ultimate decision-makers—not De La Ossa or Mora. However, "[i]t is well established that the Board imputes the knowledge of other supervisors and managers to the decisionmaker unless the employer

affirmatively establishes a basis for negating such imputation.” *Intertape Polymer Corp.*, 372 NLRB No. 133 n. 85 (2023). See *State Plaza, Inc.*, 347 NLRB 755, 756-757 (2006) (imputing supervisor’s knowledge to employer was appropriate because employer did not establish basis to negate); see also *Dobbs International Services*, 335 NLRB 972, 973 (2001) (same). Cf. *NLRB v. McCullough Environmental Services, Inc.*, 5 F.3d 923, 932 (5th Cir. 1993) (“In establishing the knowledge element, the Board may not simply ‘impute’ the knowledge of a lower-level supervisor to the decision-making supervisor.”). Respondent failed to do so by not calling either decisionmaker to testify that he had no knowledge of Laracuate’s union activity.

An adverse inference “may be drawn based upon a party’s failure to call a witness within its control having particular knowledge of the facts pertinent to an aspect of the case.” *Michael Cetta, Inc. d/b/a Sparks Rest.*, 366 NLRB No. 97, slip op. at 10–12 (2018). Thus, it can be inferred that Howard and Fehr were not called because they could not truthfully testify that they had no knowledge of Laracuate’s union activity. See *Flex-N-Gate Texas, LLC*, 358 NLRB 622 (2012) (“Respondent’s failure to gain a denial of knowledge from [the ultimate decisionmaker], a witness distinctly under Respondent’s control . . . presents a far more compelling basis to draw an adverse inference.”).

3. Animus

Determining whether animus motivated the employer’s decision to terminate the employee is a fact-based inquiry. *Roemer Industries, Inc.*, 367 NLRB No. 133, slip op. at 15–16 (2019), *enfd.* 824 Fed. 396 (6th Cir. 2020); *SCA Tissue North America LLC*, 371 F.3d 983, 988-989 (7th Cir. 2004), *enfg.* 338 NLRB 1130 (2003). Evidence of animus “must support finding that a causal relationship exists between the employee’s protected activity and the employer’s adverse action against the employee.” *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 5 (2019). The Board recognizes that direct evidence of animus (the “proverbial smoking gun”) is rarely available, so animus may be inferred from circumstantial evidence. *In Re Overnight Transportation Co.*, 335 NLRB 372, 375 (2001) (holding that circumstantial evidence includes animus, timing, and disparate treatment), overruled on other grounds by *United Site Services of California, Inc.*, 369 NLRB No. 137 (2020). See also *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999) (holding that motive may be demonstrated by circumstantial evidence). This circumstantial evidence may include “the timing of the action in relation to the union or other protected conduct; contemporaneous unfair labor practices; shifting, false, or exaggerated reasons offered for the action; failure to conduct a meaningful investigation; departures from past practices; and disparate treatment of the employee.” *Intertape Polymer Corp.*, 372 NLRB No. 133, slip op. at 6–7 and fn. 27 (2023).

Respondent argues that the General Counsel failed to produce evidence establishing that Howard and Fehr personally harbored or demonstrated antiunion animus, which is necessary for General Counsel to sustain its burden. However, under the “cat’s paw” theory of liability, an employer may be held liable “for the animus of a supervisor who was not charged with making the ultimate employment decision.” *Staub v. Proctor Hospital*, 562 U.S. 411, 415 (2011). The Board has found that it is not necessary to determine whether the ultimate decisionmaker(s) demonstrated antiunion animus if there is a lower-level supervisor “whose antiunion animus caused the termination decision.” *Bardon, Inc.*, 371 NLRB No. 78 (2022).

In this case, De La Ossa certainly contributed to a termination decision. He conducted the investigation and made the recommendation to terminate Laracuate to Dan Howard before and after the nonperemptory discharge hearing. Respondent acknowledged that De La Ossa may have known about Laracuate’s participation in the strike, but implied that that knowledge had no bearing on his decision because 8 months had passed between the strike and the

February 11–12 incident. However, the Board has found animus even when the discipline comes several months after the employee’s protected activity, because employers may wait for a pretextual opportunity to discipline or terminate an employee. *Genpak, LLC*, 372 NLRB No. 76, slip op. at 4 (2023) (holding that a 6-month gap between the employee’s protected activity and their discipline “does not undermine the strong evidence of animus.”). See also *United Parcel Service*, 340 NLRB 776, 776 fn. 10 (2003) (an adverse employment action taken 6 months after the employee’s protected activity was “not too remote in time” to establish animus), citing, inter alia, *Smith Auto Service, Inc.*, 252 NLRB 610, 613 (1980). Thus, General Counsel establishes that De La Ossa harbored antiunion animus, which they did by showing that (1) his investigation was perfunctory and (2) his treatment of Laracuate was disproportionate compared to the other employees involved in the drill’s engine failure.

a. Investigation

“The failure to conduct a meaningful investigation and to give the employee who is the subject of the investigation an opportunity to explain are [likewise] clear indicia of discriminatory intent.” *Nat’l Dance Inst.—New Mexico, Inc.*, 364 NLRB 342 (2016) (citing *New Orleans Cold Storage & Warehouse Co., Ltd.*, 326 NLRB 1471 (1998)). While De La Ossa gave Laracuate the opportunity to write a statement and explain what happened on February 12, his investigation into the incident was far from thorough. He did not interview or even identify the individuals who worked on the drill after Laracuate, including the person operating the drill at the time of the engine failure. Despite claiming that the drill “had to have” continued spewing oil after Laracuate worked on it, De La Ossa did not bother to ask the operator(s) who continued to run the drill after Burr. Further, De La Ossa failed to take into consideration the results of the January 5 and February 10 fuel dilution tests, which he received prior to taking disciplinary action against Laracuate. Those tests proved that the drill had a major fuel dilution problem prior to Laracuate working on it, and that problem is ultimately what led to the drill’s engine failure.

b. Disparate treatment

“Circumstantial evidence of disparate treatment of the discriminatee constitutes strong evidence of animus under *Tschiggfrie Properties*.” *Constellium Rolled Prod. Ravenswood, LLC*, 371 NLRB No. 16 (2021). See also *Wendt Corp.*, 369 NLRB No. 135, slip op. at 4 (2020) (“circumstantial evidence of animus . . . is clearly established by the Respondent’s disparate treatment of [discriminatee].”), enfd. in part and remanded on other grounds, 26 F.4th 1002 (D.C. Cir. 2022); *Overnite Transportation Co.*, 335 NLRB at 375 (unlawful motive inferred from disparate treatment).

An employer taking disproportionate adverse action against a union employee in comparison to nonunion employees is evidence of animus. *American Wire Products*, 313 NLRB 989, 994 (1994); *Smyrna Ready Mix Concrete, LLC*, 371 NLRB No. 73, slip op. at 3–4 (2022). While disparate treatment cases often hinge on the comparison between similarly situated employees, the Board has also found disparate treatment where an employee is disciplined while employees ranking both above and below him are not. *General Trailer, Inc.*, 330 NLRB 1088 (2000) (Board found animus/pretext where a union employee was allegedly fired for subpar work repairing a trailer, while four other nonunion employees (ranking above and below him) were also involved in the repair and not disciplined).

In this case, no other employee involved in the February 11–12 incident was disciplined other than Laracuate, who also happened to be the only union employee who participated in the strike. De La Ossa blamed the drill engine failure on Laracuate, despite having evidence in

his possession that (1) the fuel dilution problem predated Laracuente's involvement and (2) the January 5 fuel dilution test was performed incorrectly, which prevented the issue from being diagnosed and resolved before the engine failed. None of the supervisors held Burr accountable, even though he violated the "mine rule" that operators should shut down their equipment if they feel that it is unsafe. (Tr. 60:9136–37.) Respondent did not make the markup supervisor, Mark Burton, take any responsibility despite the February 11–12 incident happening under his watch.

De La Ossa repeatedly stressed that Laracuente was terminated due to the severity of the damage on the drill—approximately \$132,000. However, another employee at Mission Mine (Ed Henley) caused a comparable amount of damage just months earlier and was not terminated. Henley was parking a water truck when he crashed into another water truck, nearly killing a coworker. (Tr. 41:6105.) He "destroyed" a brand-new Triple Seven truck, resulting in more than \$100,000 in damage. Id. Despite the severity of the incident—including the monetary damages and the near fatality—Henley was offered a last chance agreement. Id. Henley notably crossed the picket line. (Tr. 41:6106.)

Unlike Henley, Laracuente was not solely responsible for the February 12 incident. Respondent argues that Laracuente is most responsible for the damage, but cannot deny that other factors were at play, including the fuel dilution issue that predated Laracuente's involvement. Unlike Henley, Laracuente's actions did not nearly cause a fatality. While Henley's and Laracuente's actions both cost the company more than \$100,000 in damages, only Henley was offered a last chance agreement. The bottom line is that Henley crossed the picket line and Laracuente did not.

4. Respondent failed to meet its burden

The burden shifts to Respondent to show that it would have taken the same action for legitimate reasons even in the absence of Laracuente's protected activity. *Roemer*, supra; *Monroe Mfg.*, 323 NLRB 24, 27 (1997); *T & J Trucking Co.*, 316 NLRB 771, 771 (1995), enfd. mem.86 F.3d 1146 (1st Cir. 1996). However, where "evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). In other words, a finding of pretext "leav[es] intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). Sufficient record evidence shows that Respondent's proffered reasons for terminating Laracuente were pretextual, and thus it fails to meet its responsive burden.

Respondent stated that it terminated Laracuente because his conduct was "grossly negligent" and in clear violation of safe operating procedures (SOPs); manufacturer recommendations; and ASARCO Safety and Health Rules, including 5.0, 5.7, and 28.1. (GC Exh. 415 at. 2). De La Ossa further clarified that the reason Laracuente was terminated, as opposed to disciplined, was the severity of the incident, which was gauged by the fact that (1) the drill engine failed and (2) it cost the company \$132,000. I find these reasons to be pretextual.

(1) Engine failure: As already discussed, De La Ossa's testimony around the cause of the engine failure was inconsistent. He suggested that if Laracuente had caught the issue, then the fuel dilution would not have gotten to 14 percent because it does not happen "instantaneously." Tr. 60: 9134. This is not true. The February 10 test results show that the fuel dilution issue was

already critical before Laracuate became involved, and that is what ultimately caused the engine to fail.

(2) Cost of drill: Respondent does not clearly demonstrate that it had to pay \$132,000 for the drill's repair. Eduardo Placencio testified that during Laracuate's third-step grievance hearing, GM Fehr said that the drill manufacturer (Caterpillar) would pay for the damage because the drill was under warranty. (Tr. 45:6685.) De La Ossa testified that even though the drill was under warranty, the company still had to cover the cost of the damage because it was due to negligence. (Tr. 60:9171–9172.) However, he could not say whether the negligence in question was the incorrect January 5 test, the February 10 test, the work Laracuate did on the drill, or something else. (Tr. 60:9176.) Even if the company had to pay for the drill's damage in full, and they could somehow isolate Laracuate's negligence as the sole cause, it has already been established that cost of damage alone has not been a determinative factor for other non-union employees like Ed Henley. Respondent's shifting and inconsistent answers surrounding the cost of the drill make it clear that they could not have relied upon that issue as the basis for Laracuate's termination. Additionally, as previously discussed, Respondent's treatment of Laracuate was disproportionate compared to the other employees involved in the February 11–12 incident and the drill engine failure. Instead of offering a last chance agreement, it terminates Laracuate.

While Respondent did not have a written progressive discipline policy, it is surprising that it terminated an experienced mechanic with no prior disciplinary record and then is terminated for one incident while failing to give the other employees involved so much as a slap on the wrist. Respondent also gave a last chance agreement to an employee who created an almost equal value of damage. Worse, Caterpillar was likely covering the damage created in Laracuate's case. The difference is that Laracuate participated in the strike while the others did not. Respondent failed to prove that it would have terminated Laracuate absent his union activity. I therefore find Respondent violated Section 8(a)(3) and (1) when it suspended and terminated Laracuate.

XIV. ALLEGED UNILATERAL CHANGE TO THE COVID-19 POLICY

Complaint ¶7(k) alleges that, about March 12, 2021, Respondent unilaterally implemented a COVID-19 policy update applicable to the bargaining unit(s) employees. Respondent maintains that it lawfully implemented the policy because the parties were at impasse.

A. What Was the COVID Pandemic?

To better understand the situation in 2021, one examines the extent of the COVID pandemic:

. . . Initially, COVID-19 was reported to the World Health Organization ("WHO") on December 31, 2019, and on January 30, 2020, WHO declared the outbreak a global health emergency.³ On March 11, 2020, WHO declared the outbreak a global pandemic, something not done since the declaration of H1N1 influenza as a global pandemic in 2009.⁴ As of October 2021, COVID-19 has infected over 245 million individuals and has caused more than 4.9 million deaths around the world.⁵ In the United States alone, COVID-19 has infected more than 93 million individuals and has caused more than 2.2 million deaths.⁶ COVID-19 is an infection caused by the SARS-CoV-2 virus.⁷ Although infected individuals experience mild to moderate respiratory illness, most infected individuals recover without the need for special treatment.⁸ However, some infected

individuals require medical attention, as the infection may lead to serious medical conditions.⁹ Particularly, older infected individuals and individuals with other underlying medical conditions, such as cardiovascular diseases, diabetes, chronic respiratory diseases, or cancer, are more prone to develop serious medical conditions after contracting COVID-19.¹⁰ The disease can affect anyone, of any age and background, sometimes leading to serious illness and even death.¹¹

COVID-19 spreads through small liquid particles, anywhere from larger respiratory droplets to smaller aerosols, from an infected individual's mouth or nose.¹² Experts advise individuals to stay at least one meter apart from others, wear properly fitted masks, practice proper respiratory etiquettes, such as sneezing into a flexed elbow, and regularly wash hands.¹³ Infected individuals are advised to stay at home and practice self-isolation until they recover.¹⁴ Further, experts promote proper vaccination to help reduce the spread and lower the risk of infection.¹⁵ Lawmakers, government leaders, and public health experts have attempted to reduce the spread of the disease through mandates, lockdowns, vaccines, and other similar types of actions. Yet, the pandemic continues to affect a significant number of individuals and continues to harm the economy and social life in the United States.¹⁶

Farhan I. Mohiuddin and Hina I. Mohiuddin, Comment, *To Force Or Not To Force: Analyzing the Implications of the Executive Employer Vaccine Mandate*, 12 HOU. L. REV. 25, 26-27 (Fall 2021) (footnote citations omitted). By the time the above events took place, the COVID pandemic killed more than 180,000 Americans. Id. at 27 fn. 16 (citation omitted).

In March 2020, the Center for Disease Control and state and local health departments began issuing guidelines on how to deal with the COVID-19 pandemic. As of June 24, 2020 Respondent implemented a COVID policy for bargaining unit employees. It included a screening process of questions that, if answered in the negative, would permit the employee to report for work unless HR stated otherwise. (GC Exh. 360(a).)²⁹² As a result, efforts to contain COVID-19 brought profound and unprecedented changes to just about every aspect of daily life including work, travel and basic social interaction” but also the response to develop vaccines. Chelsea Hill, *Improving New York City’s COVID-19 Vaccine Mandate For Public Section Workers: A Collaborative Framework for Labor- Management Relations in High Impact Circumstances*, 25 CARDOZO J. CONFLICT RESOLUTION 79 (2023). As the pandemic wore on, the Center for Disease Control and state and county health departments updated their guidelines, particularly when vaccines became available.

B. Facts

The facts essentially are undisputed. In 2020, Respondent notified the Union that it wanted to implement a COVID policy. Because the Union was on strike, the Union opted not to bargain. Respondent implemented the 2020 COVID procedure it proposed.

In February 2021, Respondent wanted to prepare for the COVID vaccines about to come on the market. On February 16, 2021, Sinele sent USW District Director Gaylan Prescott an email about making changes to COVID policies based upon the availability of vaccinations and notifying Respondent when the employee obtained a vaccination. Respondent’s proposal included a mandatory vaccination requirement or face disciplinary action, and a mandatory reporting requirement. Sinele provided a red-lined copy of the previous COVID policy with the updates and requested the Union “communicate” as soon possible that week. (GC Exh. 368.)

²⁹² General Counsel admits that the Union did not try to bargain about Respondent’s earlier COVID policies because the employees were engaged in a strike. (GC Br. at 212.)

Two days later, Prescott objected to the policy, demanded to bargain and for Respondent to refrain from implementing the policy. (GC Exh. 369.)

On February 23, 2021, Prescott, Assistant District Director Terrezas, and other local presidents met on videoconference with Sinele and some of the HR managers. The Union provided a written counterproposal with paid time off for employees to be vaccinated, plus limited disciplinary action for violation of the policy. Sinele stated Respondent was concerned that employees could take more time off than needed to be vaccinated and the cost itself, including the time off. The Union only encouraged employees to report getting vaccinated, without any requirement of disciplinary action for failing to report. The parties did not reach an agreement. (Tr. 37:4386–5491; GC Exh. 370.)

On February 26, 2021, Sinele emailed Prescott and Terrazas Respondent's counterproposal. Respondent increased unpaid unexcused time off for vaccinating to 3 hours and added the Center for Disease Control's (CDC) guidance for quarantine after vaccination, which was previously discussed by the parties but not included in Respondent's first proposal. Respondent continued to maintain that employees must provide proof of vaccination, contrary to the Union's position. Sinele asked for a Union response as soon as possible. (Tr. 37:5491–5492, 5579; GC Exh. 372.)

On March 8, 2021, Sinele sent Prescott and Terrazas an email stating that, because the Union had not responded, Respondent intended to implement the COVID policy, as proposed on February 23, that same day. Prescott then provided a revised proposal that included 4 hours of paid time off for vaccination and progressive disciplinary action only for "willful and egregious" violations of the policy. The Union's proposal would encourage employees to report vaccinations rather than Respondent's mandatory reporting requirement. (GC Exh. 373.)²⁹³ Respondent did not implement its proposal.

On March 11, 2021, Sinele sent Prescott and Terrazas additional revisions, superseding the prior COVID policy proposal. Respondent's policy now granted 4 hours instead of previously proposed 3 hours of unpaid leave for obtaining vaccinations and progressive disciplinary action. Respondent also incorporated absence forgiveness for certain COVID absences. However, Respondent rejected paid time off, nonmandatory reporting and any limits on terminating employees of what was called "this critical Policy." Respondent would not make any further changes:

The Company is not willing to provide paid time off for obtaining vaccinations (however, the Company continues to pursue opportunities to offer vaccinations onsite) and is not willing to limit its ability to terminate employees for violation of the Policy (especially when the disciplinary provision has been in effect for months without issue). Moreover, for the health and safety of employees, the Company is not going to move off its position that employees having a mandatory reporting obligation to the Company regarding receipt of the vaccinations.

²⁹³ At some point, Prescott apparently had conversations with local union leadership about the vaccination issues: The mine locations were a long way from the vaccination sites, and at the time, many of the vaccination sites were tents with long lines of cars, which could result in significant time away from work. Prescott also testified that the miners might have problems having free time to get vaccinations when the vaccinations were available. (Tr. 37:5494–5496.)

That said, the parties are at an impasse to the remaining open issues for the updated COVID-19 Policy, and the Company is hereby providing notice that it will be implementing the attached clear version . . . [on] March 12, 2021.

5 (GC Exh. 374.)²⁹⁴ Sinele advised that Respondent would monitor further developments regarding the pandemic and was open to revisiting the policy. (GC Exh. 374 at 2.) As promised, Respondent implemented the revised COVID policy on March 12, 2021.²⁹⁵

10 On March 14, 2021, Prescott emailed Respondent a denial of impasse with a counterproposal. The Union still rejected mandatory disclosure of receipt of the vaccination and only would allow discipline in “egregious” cases. (GC Exh. 375, 375(a).) As of the date of hearing, no one had received discipline due to the COVID policy implementation.

15 C. Parties’ Positions

General Counsel states that the initial response to the pandemic gave Respondent a requirement to act quickly, but as the pandemic wore on, the need lessened. Once the emergency wanes, Respondent has an increased obligation to bargain. GC cites *Metro Man IV, LLC*, 372 NLRB No. 37, slip op. at 4 (2022), part. enfd., part. den. *NLRB v. Metro Man IV, LLC*, 113 F.4th 692 (6th Cir. 2024). The parties were not at a good faith impasse, which did not meet the *Bottom Line*²⁹⁶ exception of exigency. GC cites *Goddard College Corp.*, 372 NLRB No. 85, slip op. at 1, fn. 2 (2023) (unlawful unilateral change where, absent overall good faith impasse, employer changed from mask mandate to mask recommendation and implemented a new return to campus date) (GC Br. at 215–216.)²⁹⁷

25 The Union maintains that it continued negotiations and objected to Respondent’s declaration of impasse. (U. Br. at 152–153.)

30 Respondent does not rely upon exigent circumstances but affirmatively defends that the parties were at impasse. The March 14 denial of impasse demonstrates the impasse because Respondent made clear that mandatory reporting and the disciplinary provisions were Respondent’s requirements, and those were not going to change. (R. Br. at 228–229.)

35 D. Analysis

An employer must provide a union sufficient time to allow a meaningful chance to bargain before the change is implemented on a mandatory subject of bargaining. *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 and fn. 10 (1993). Over the years, the vaccination requirements have stirred controversy. For example, public health standards have required vaccinations. See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (smallpox vaccination requirement by public health decree).

²⁹⁴ At hearing Prescott denied that the parties discussed the remaining open issues. However, the emailed proposals show some exchange of positions.

²⁹⁵ General Counsel maintains that implementation took place on March 11. (GC Br. at 214 and fn. 170.) However, the evidence shows that Respondent surely implemented on March 12 when enforcement began at the facilities.

²⁹⁶ *Bottom Line Enterprises*, 301 NLRB 373 (1991).

²⁹⁷ General Counsel also argues that the parties “were still, technically if not practically, engaged in negotiations for a successor BLA” and had not reached impasse there either. With the Union failing to respond to Respondent’s last offer to meet in January 2020, the parties were not actively engaged in any bargaining specific to a new BLA.

The COVID vaccination requirements dealt with the health and wellbeing of the employees while they work. Respondent's vaccination policies are a mandatory subject of bargaining as the policies affect the working conditions of the bargaining unit employees. In re *Virginia Mason Hospital*, 357 NLRB 564, 566 (finding that hospital requirement for RNs who did not receive the flu vaccine to wear face masks was a work rule and therefore a mandatory subject). Also see *Keeler Brass Co.*, 327 NLRB 585, 589 (1999) (failure to provide paid flu vaccinations was paid health benefit and mandatory subject). More generally, a new work rule, particularly where discipline is involved, is a mandatory subject of bargaining. *Id.*

General Counsel argues that Respondent had no exigency in implementing the 2021 COVID policy. Respondent has the burden of proof to demonstrate exigencies exist. *Dresser-Rand Co.*, 362 NLRB 1100 fn. 6 (2015). However, Respondent does not argue any exigency as a defense for its action. Respondent contends that it could implement the policy due to impasse. The Board has long held that the party asserting a defense of impasse has the burden of proof. *The Baytown Sun*, 255 NLRB 154, 157 (1981). Here that burden of proof lies with the Respondent.

Impasse is fact based without a "rigid formula for assessing so subtle an issue as the precise time when an impasse occurs . . ." *Dallas General Drivers, Warehousemen and Helpers, Local Union No. 745, IBT v. NLRB*, 355 F.2d 842 (D.C. Cir. 1966). A party is not required to engage in bargaining indefinitely if the parties have no likelihood of reaching an agreement. *Richmond Electrical Services*, 348 NLRB 1001, 1002 (2006). If impasse is indeed reached, an employer is free to unilaterally institute changes that are "reasonably comprehended within its pre-impasse offers." *Sierra Publishing Co. v. NLRB*, 888 F.2d 1394 (unpub.) (9th Cir. 1989) (Table), available in WESTLAW, 1989 WL 132029 (9th Cir. 1989), citing *American Federation of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). As previously noted:

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations, are all relevant factors ...

Sierra Pub. Co. v. NLRB, supra.

Unlike *Goddard College*, supra, Respondent maintained impasse by March 8 and again on March 11. The parties were at loggerheads about mandating vaccines and the reporting requirements. Even when the Union responded after implementation, it still did not waver on mandatory vaccinations and reporting requirements. I therefore recommend dismissing this allegation as the parties were at impasse over these two points.

XV. ALLEGED UNILATERAL IMPLEMENTATION OF PAYROLL DATES

Complaint ¶7(l) alleges About April 9, 2021, Respondent changed the payroll date for employees in the Units. Respondent admits that after bargaining in good faith to impasse regarding a standardized payroll date of Friday for the Ray Mine, Hayden Concentrator and Hayden Smelter. Respondent claims it lawfully implemented the proposed standardized payroll date of Friday on 4/9/21; otherwise denied.

A. Facts

Before April 9, 2021, the various mines had different payroll dates. On March 15, 2021, Sinele notified District Director Prescott that Respondent intended to streamline its payroll by changing payroll dates at Ray, and the two Hayden locations, effective April 9. Sinele stated that Respondent wanted to notify employees by March 22, with an attached letter. Ray and Hayden Concentrator were on bi-weekly pay period, and the proposed new date would be Friday April 9, 1 day after the expected payroll date of April 8. For Hayden Smelter, employees were paid weekly, with the last pay period April 4, 2021, but now April 9, instead of 4 days later, April 12. (GC Exh. 333.)

On Thursday, March 18, Prescott notified Sinele that Respondent must cease and desist and bargain over the changes. Sinele responded asking for dates for negotiation, offering Friday, March 19. She further asked if the Union had a counter proposal, or needed information, or had questions, concerns, or ideas. (GC Exh. 333.) The Union discussed the effects of payroll date changes and found that employees already had various deductions arranged with banks to take out of their accounts based upon pay dates, and changes in the pay date could include fees. The Union also requested information, that identified only a few employees did not have direct deposit and instead received hard copy checks. Respondent also had not calculated any cost savings at that point. (Tr. 37:5506; GC Exh. 334.)

On March 26, 2021, the Union proposed setting payroll dates on the last day of the bi-weekly payroll period for Ray and Hayden Concentrator, which was a Thursday, and the last day of the weekly payroll period at Hayden, which also would be a Thursday; the Union stated its proposal created the "uniformity that {Respondent} is seeking." (GC Exh. 334 at 2.)²⁹⁸ On March 31, Sinele emailed the Union that "After giving careful consideration to your proposal, for efficiency and serviceability . . . we have determined that Friday is the best day of the week for pay day." Sinele advised Respondent would give employees a week's notice to plan for the change. For Ray and Hayden Concentrator, the pay dates would change to bi-weekly, beginning April 9, 2021; for the Hayden Smelter, the pay days would be weekly, beginning April 9 as well. (GC Exh. 334.) Respondent's implemented procedure was no different than what Respondent proposed.

B. Analysis

An employer must bargain over material and substantial changes in wages, hours, or terms and conditions of employer that are mandatory subjects of bargaining. *Fresno Bee*, 339 NLRB 1214 (2003). To establish a prima facie case for Section 8(a)(5) unilateral change, General Counsel must demonstrate "the employer made a material and substantial change in a term of employment without negotiating with the union." *Id.* at 1214. Pay dates are mandatory subjects of bargaining. A unilateral change in pay date is unlawful. *SMI, Division of DCX-Chol Enterprises, Inc.*, 365 NLRB 1618, 1621 (2017); *El Vocero de Puerto Rico*, 357 NLRB 1595, 1602 (2011) (mandatory subject and change in pay date from Thursday to Friday unlawful).

Respondent's March 15 letter was more of a fait accompli announcement than a notice and opportunity to bargain: It specified the dates of implementation. In order to implement in less than a month, Respondent needed to identify exigent circumstances making it necessary to change payroll dates this quickly. Respondent did not do so, thereby making an unlawful unilateral change in violation of Section 8(a)(5). *SMI*, supra.

²⁹⁸ District Director Prescott could not recall other discussions with Respondent, much less any regarding the Union's counterproposals. (Tr. 37:5508.)

XVI. ALLEGED UNILATERAL IMPLEMENTATION OF A FATIGUE MONITORING SYSTEM

Complaint ¶7(n) alleges that about August 2021 and May 2022, Respondent implemented a Fatigue Monitoring System for employees in the units at Silver Bell Mine, Ray Complex and Mission complex. Respondent denies it violated the Act but does not deny implementation.²⁹⁹

A. Introduction to the Fatigue Monitoring System

General Counsel alleges Respondent unilaterally implemented a fatigue monitoring system in haul trucks at three properties: Silver Bell, Ray and Mission. Haul trucks are approximately 40 feet wide and as tall as a 2-story house. (Tr. 35:5377.) A haul truck weighs over 1 million pounds when fully loaded. The job is considered monotonous. The trucks move slowly and usually travels from the bottom of a pit on a 10 percent ramp grade, moving 5-7 miles per hour with a loud roar. The roads are maintained according to MSHA standards, including maintaining berms on the edges of the roads. (Tr. 55:8328–8329.) These conditions make operating the haul trucks risky. (Tr. 40:6027–6030.)³⁰⁰

Before 2021, Respondent did not have any fatigue monitoring system in the haul trucks and relied upon drivers to self-report fatigue or near misses. Respondent decided to consider the Hexagon Fatigue Monitoring Systems (FMS), which uses cameras, buzzers and seat vibrators installed in trucks. The FMS uses facial recognition software to see whether drivers are distracted or fatigued through the driver's facial features and blinks. For example, one parameter observed is eye lid motion. If it detects the driver is falling asleep, the driver chair shakes to wake up the driver. The video of this "critical event" is sent to Hexagon headquarters, which reviews the event. If verified to be critical, the supervisors receive notification at the mine via email. The system also sends non-critical information, such as distractions within a time period. Respondent does not own the software.

Respondent maintains it began the bargaining process on FMS at the local level, through the Joint Safety and Health committees at the three properties. However, the Union contends that the Joint Safety Committee is supposed to deal with concerns related to safety topics from the property, MSHA standard compliance, safety reports, safety numbers (including near misses), and lost time injuries, personal protective equipment. (Tr. 45:6690.) The local Labor-Management meetings do not give the local unions a way to negotiate anything specific because the local agreements are in effect and the locals never have had this authority. (Tr. 45:6691–6692.) The local unions can only handle grievances at steps 1–2 and the International Union handles later steps; further, changes are supposed to be negotiated through the International (e.g., like the payroll dates that involved only a limited number of facilities).

Respondent's Safety Manager Eastless engaged with the general managers and safety managers at the local sites to discuss obtaining FMS. (Tr. 40:6023.) General managers from each mine met with their respective department managers about FMS to determine which system to purchase but apparently the mine manager and general manager made the ultimate decision. (Tr. 42:6321.)

²⁹⁹ The consolidated complaint did not allege the parties' later bargaining about potential disciplinary action with the fatigue monitoring system. I therefore do not address those facts here.

³⁰⁰ The Silver Bell mine property also has about a 200 Big Horn sheep herd. The sheep are not shy about coming to the haul roads and drinking water after water trucks go by. (Tr. 55:8329.)

B. First Up: Local Negotiations for the Fatigue Monitoring System (FMS)

1. Mission discussions

On January 8, 2021, Angel Lopez, Mission's safety compliance officer, notified the local union officials and management officials that Respondent was considering installation of FMS, which could be discussed during the January 18 Joint Safety Committee. (Tr. 45:6687–6688; GC Exh. 335.) Respondent's January 4, 2021 notification said the FMS was designed "to both decrease the rate and severity of injuries, decrease lost time and increase efficiency." (GC Exh. 335.)

As scheduled, the parties met in a Joint Safety Meeting to consider installing FMS. For the Union, the individuals were Chief Steward Jose, Placencio, Mike Marquez, and Jason Goeke; no representative from the International Union was notified or present. Respondent was represented by GM Geoff Fehr, Mine Manager Bjorn Meyer,³⁰¹ Colby Shelstead, Mission HR Manager Mora,³⁰² and Lopez. (Tr. 35:5357, 39:5650.)³⁰³ The meeting lasted 30 to 45 minutes. Shelstead gave a PowerPoint presentation about the FMS. Respondent denied that the system would be used for discipline but was there for safety purposes and limited use to haul trucks. (Tr. 41:6125–6128, 42:6328.)³⁰⁴ The Union's position was that FMS was an infringement of privacy, particularly with facial recognition, and did not agree to implementation. No written agreement was reached.

HR Manager Mora vaguely recalled that the local union officials asked for a demonstration of the FMS; he was unsure of the date. He did not recall the parties reaching any written agreement.³⁰⁵

On February 2, 2021, the parties met in a labor-management meeting. The local unions' attendees were Local Union President Placencio, Mission Chief Steward Marquez, Jose, and Goeke. For Respondent, GM Fehr, HR manager Mora and Bjorn Mayer attended. Placencio testified that Respondent already had a collision avoidance system, which gave an alert or would brake in case of a close call. The GM said the system was too costly. Mike Marquez, the chief steward, raised that a nearby copper mine had conducted sleep studies and mentioned programs to teach drivers to be more active and healthier; he suggested exploring those options. However, the parties did not have additional discussions about FMS; Placencio did not recall reaching any agreement about FMS. (Tr. 45:6692–6698; GC Exh. 392.)

At an April 1, 2021 Joint Safety Committee meeting, Respondent was represented by GM Fehr, Bjorn Mayer, Ed Howard, HR Manager Mora, Mission safety director Lopez, Jason Medlock, and Paul De la Rosa; the only local union representative was Placencio. (Tr. 45:6703; GC Exh. 394.) However, Placencio testified he told Respondent to call off the meeting when he discovered Tony Jose was involved in other representative duties and could not attend. However, the meeting continued despite Placencio's protestation. FMS was the topic. GM Fehr

³⁰¹ Meyer could only recall that Marquez agreeing to try out the FMS on two trucks. Otherwise he had no recollection of events, which makes this testimony suspect.

³⁰² Mora supervised a HR business partner and a HR generalist.

³⁰³ Placencio testified that only Lopez, Meyer, and Mora attended. (Tr. 45:6689.)

³⁰⁴ Information about when Respondent notified the local union about the possibility of disciplinary action is conflicting. One testified that GM Geoff Fehr, in a labor-management meeting, stated Respondent was discussing discipline. (Tr. 35:5356.)

³⁰⁵ Mora testified that the Steelworkers Local Stewards Mike Marquez and Tony Jose and GM Fehr reached a verbal tentative agreement to allow installing FMS in two trucks. (Tr. 42:6326–6328, 6331.) The Union denies any such agreement was reached.

said that Marquez told him that the local agreed to install two FMS. Placencio denied that there was any agreement and that FMS was a mandatory bargaining subject. Placencio, characterizing Fehr as having a “smart alecky” tone, asked whether a backup alarm was a mandatory subject, but Placencio said that MSHA required it, so it was not a mandatory subject. The meeting lasted only about 5 minutes. (Tr. 45:6704–6707; GC Exh. 394.)

2. Ray discussions

Ray had 21 haul trucks. (Tr. 50:7496.) Poststrike, GM Lammers noted that the drivers had high turnover and a number of the haul truck drivers were inexperienced. Lammers wanted to reduce the incidents of accidents. (Tr. 55:8239.) Ray and Hayden Safety Manager Rose DiBona sent the Joint Safety Committee members an announcement, dated February 2, 2021, that Respondent was considering installing the FMS in Ray haul trucks and said it could be discussed at the Joint Safety Committee meeting scheduled for March 2, 2021.

Manager Kim Decker also issued an announcement to union members, dated February 3, 2021, that Respondent was considering installing the FMS in Ray haul trucks and asked for feedback by February 22, 2021. Decker also sent the same announcement to local union officials Manny Armenta Jr., Lyle Murphy and others. Until this time Respondent never met with the Union or locals about the FMS. Apparently, Armenta Jr. did not respond. (Tr. 50:7469–7475, 52:7766–7769; GC Exhs. 337(a)-(c).)³⁰⁶

Safety Committee Member Lyle Murphy from USW Local 5252 testified that upon receipt of these notices the Union verbally notified Respondent that it had to bargain and wanted a meeting. (Tr. 50:7476.) During a meeting, the local union leadership said they were not in favor of the monitors because they were intrusive. (Tr. 51:7768–7769.)

3. Silver Bell discussions

On January 11, 2021, HR Manager Debbie McMorrow emailed Local 937 officials about a fatigue monitor system, which was up for “questions” at the Joint Safety Committee, scheduled for January 14, 2021. McMorrow explained at Respondent was considering installation of the FMS at Silver Bell “to decrease the rate and severity of injuries, decrease lost time, and increase efficiency.” (GC Exh. 336 at 2; R. Exh. 9.)³⁰⁷ She also notified Kerry James, the chief steward for Silver Bell. (Tr. 55:8412; R. Exh. 10.)

On January 14, 2021, Local 937 President Placencio,³⁰⁸ and Local 937 officers Gregory Schuett and Cary James met with Silver Bell GM Brad Stonehouse, HR Manager Debbie McMorrow, Safety Manager DeVar Cluff and other Respondent officials in a joint safety and health meeting. The meeting lasted approximately 1 hour. GM Stonehouse introduced the subject of FMS, stating it was a discussion. Respondent presented a slide show about the system. (Tr. 35:5330.) Placencio questioned how the monitoring would take place and how a supervisor would notify the driver. Schuett asked about whether drivers would be disciplined and if progressive discipline would ever be used. Stonehouse said that if an individual was fatigued all the time, some kind of progressive discipline could be applied. (Tr. 36:5434.)³⁰⁹ A union representative also raised privacy concerns. (Tr. 40:6036.) The Union objected to the use

³⁰⁶ The announcements indicated it included information about the FMS, which General Counsel did not present as part of these exhibits.

³⁰⁷ Silver Bell GM Stonehouse did not recall telling the Union anything about FMS before this date. (Tr. 40:6024.)

³⁰⁸ McMorrow testified that Placencio did not attend. (Tr. 42:6389.)

³⁰⁹ Stonehouse testified that Respondent was not prepared to discuss discipline. (Tr. 40:6034.)

to FMS. (Tr. 36:5435–6.) The parties reached no agreement in that meeting. (Tr. 40:6036, 42:6390.)³¹⁰

In a February 2, 2021 meeting, Placencio wrote in his meeting notes that the parties had no agreement about FMS. (GC Exh. 392.) On February 4, 2021, Placencio emailed HR Manager Debbie McMorrow. He repeated the results of the February 2 meeting and that the Union demanded to bargain over this issue before any implementation. (Tr. 35:5327–5328; GC Exh. 338.) Although McMorrow’s email response stated she did not recall the Union opposing or even commenting on FMS at that meeting, McMorrow testified that she did recall the Union’s opposition and questioned about possible discipline for findings from the FMCS. (Tr. 42:6393; GC Exh. 338.)

On March 25 2021, Placencio, Schuett, and Kerry James attended a meeting with GM Stonehouse, HR Manager McMorrow, and a mine manager. Placencio reminded Respondent that the FMS was a mandatory subject of bargaining. GM Stonehouse stated he believed the FMS was approved to be installed by Respondent and thought the Union agreed to install two units. Stonehouse stated he had this information from the company. Placencio again stated that they had discussions but never reached any agreement. (Tr. 35:5335.) No one was present from the International Union. Placencio denied the existence of any agreement for Mission, noting that a trial basis was a necessary but insufficient condition for any FMS installation.

On April 28, 2021, GM Stonehouse emailed Placencio regarding the Silver Bell FMS and asked if the Union had a counter proposal or wanted to discuss further, offering May 18 Or 19 as negotiation dates. Stonehouse stated, “We will continue to address these issues regarding our Silver Bell equipment at a local level and will not involve safety committees or employees from other sites, but as you have mentioned you would possible like to bring a high-level Union official . . . you are more than welcome to do so. . . .” Placencio forwarded this email to District Director Prescott and Assistant District Director Terrazas.” (GC Exh. 339.)

At this point HR Manager McMorrow did not know whether any equipment had been installed at Silver Bell but believed no written agreement had been reached for Silver Bell. (Tr. 42:6397.)

C. Next: The International Union and Discussions

Despite Respondent’s representation that the negotiations were conducted at the local level, the general managers of the three facilities discussed with each other the negotiations at their sites, including alternatives and training. GM Stonehouse maintained that the system was a large investment and bulk buying was beneficial. (Tr. 40:6046–6048.)³¹¹

On April 29, 2021 Director Prescott sent Respondent’s lead negotiator Stacy Sinele an email in which he and District Sub-Director Terrazas agreed to participate in the negotiations of the FMS at Silver Bell and Ray and asked whether similar plans were in the works for Mission. Prescott also stated the Union was not agreeing to use of FMS at Silver Bell or Ray and

³¹⁰ Although McMorrow testified that the parties had no agreement, she emailed Placencio on February 4, 2021, that she could not recall the Union presenting an objection or commenting about FMS on January 14. (GC Exh. 338.)

³¹¹ Stonehouse later denied that they were discussing negotiations, but his previous testimony indicates otherwise. Stonehouse testified that Hexagon maintained standards but also had the opportunity to tell Hexagon when to notify the supervisors. However, Stonehouse testified that the sites may not have coordinated at the time, but since he also took over Mission, he has attempted to standard such reporting. (Tr. 40:6049–6051.)

demanded that Respondent not implement any surveillance through FMS until the parties reached a complete agreement, “including the effects of such equipment on employees” (GC Exh. 340.)

5 The parties subsequently met by videoconference on May 4, 2021. Respondent was represented by Sinele, GM Stonehouse, Mission HR Manager Jose Mora, and others. The Union, asking for more information on the FMS, learned that a third party would monitor any alerts caused in the systems and that any images captured by the system would be stored in “the cloud.” Prescott listed a number of items why the Union opposed the FMS, including not
10 wanting a camera watching the drivers all day. The parties had no verbal or written agreement at this meeting. (Tr. 37:5535, 42:6402–6403.)

 On May 10, 2021, Prescott sent Sinele an email about continuing negotiations for Silver Bell and Ray but asked again about Respondent’s plans for a similar FMS at Mission.
15 Respondent had not yet answered that question. The Union learned Respondent was indeed presenting the FMS at Mission’s Joint Safety & Health meeting. Prescott stated, for the sake of efficiency, the Union wanted to discuss all locations together rather than pursuing negotiations for the individual locations. Prescott demanded information about any FMS Respondent intended to use at Mission. (GC Exh. 341.)

20 Local Union President Placencio advised District Director Prescott and Assistant Director Terrazas that Respondent intended to make a presentation to the Mission safety committee on May 13, but Respondent had not notified the Union of its plans. (Tr. 37:5542.) On May 13, 2021, Sinele responded to Prescott about Mission and stated the local parties reached an agreement
25 on February 2 for two pieces of equipment on a trial basis at Mission and, subsequently on April 1, the local union and Respondent discussed the “agreed upon installation” at Mission. Sinele added regarding Mission, “Should the Company decide to add [the FMS] to additional equipment or propose to change the terms of the agreed upon FMS installed in two pieces of equipment, I will follow up with you to [. . .] discuss.” Sinele attached the alleged agreed-to
30 plans for Mission. (GC Exh. 342.)

 Similarly, on May 13, Local President Placencio also emailed Sinele and others with eight questions about focus group meetings for bargaining unit employees, and the slide presentation at the Mission Joint Safety and Health Meeting of that day. (GC Exh. 343.) Juan
35 Mora emailed Placencio with the requested information. Respondent did not provide a written agreement with the local union or International union to reflect the alleged agreement. Prescott did not recall attending any May 13 meeting.

40 On May 27, 2021, Respondent and the Union met via Zoom. District Director Prescott, Sub-Director Terrazas, Armenta Jr., Rick Sosa and Lyle Murphy attended for the Union; Respondent was represented by Sinele, Rose DiBona and Zack Gifford. Prescott demanded bargaining. He asked whether Respondent had evidence of fatigue occurring in the last three years; Gifford only had three incidents. Sosa pointed out that of the three incidents, two occurred when the haul trucks were parked and the individuals were caught sleeping in the
45 truck, the third also was not in motion with brakes set when the truck was waiting to dump. Gifford could provide no other incidents. Respondent said it was going to install the FMS on all haul trucks eventually but start with installing a couple to see how it worked.

50 The Union stated the cameras were intrusive and annoying, and Respondent had no evidence of fatigue related incidents. Prescott also raised the costs for monitoring. The Union also stated it did not want employees to incur any progressive discipline. Respondent said Grupo was installing the FMS at other properties, including Mission and Silver Bell, and in Peru

and Mexico. The parties did not reach an agreement and the Union verbally objected to Respondent's plan. Respondent said it would try to get more information for the Union and they would meet further. (Tr. 50: 7479–7481, 7530–7535; GC Exh. 444(a).)

5 On June 8, 2021, the parties met for another negotiation session. (GC Exh. 398, 399.)
The Union was represented by Prescott, Terrazas, Local 937 President Placencio and other
Local 937 officials; Respondent was represented by Sinele, GM Stonehouse, HR Manager
Debbie Morrow, and Don Buchanan. At some point during the meeting, the Union stated that
10 FMS was a “big table” issue; GM Stonehouse could not recall if Respondent gave a response.
(Tr. 40:6058–6059.) Placencio denied that he agreed to any use of the system and said that he
sent an email to that effect. (Tr. 38:5628.) Silver Bell GM Stonehouse said it was locally agreed
to. GM Stonehouse presented a slideshow about the FMS and Don Buchanan, another
manager, presented some of the answers on the system. The Union asked the FMS’
15 capabilities, how it would be used, why necessary and anything that Respondent was doing to
mitigate fatigue absent the FMS. The Union also had questions about the technology and its
costs.³¹² The FMS would only record when the vehicle was operating at 3 to 5 miles per hour.
Respondent was unable to answer a number of the questions, such as how quickly the off-site
control room needed to figure out abnormal event, customization of system to each individual
and how quickly a supervisor would be notified of an event. Buchanan admitted that
20 Respondent did not have all questions answered about the system. (Tr. 38:5629; GC Exh.
398.)

Prescott testified that Respondent maintained employees could be disciplined as they
would for any safety violation; the Union responded that most safety violations were not
25 monitored continuously with numerous cameras. The parties did not reach any agreement at
this meeting, nor did the parties reach an agreement about Silver Bell. (Tr. 37:5548–5550,
40:6059–6060.)³¹³

D. Respondent Deadlines the Union For Any Further Discussions

30 During June and July 2021, the parties exchanged requests for information requests,
which each party duly answered. (GC Exhs. 345–346.) On August 3, 2021, Sinele notified the
Union:

35 We have answered all outstanding requests for information and have
evaluated your proposals, including the information you sent to me on July 16,
2021. After careful consideration of your feedback, proposals, and the
information provided, we will be moving forward with installation of the fatigue
monitoring equipment consistent with the discussions had at each site. Unless I
40 hear otherwise by August 9, 2021, I understand the Union has no other
proposals regarding fatigue monitoring. Each site will be in communication with
its joint safety committees and local union leadership regarding any updates with
respect to installation timing.

45 (GC Exh. 347.)

Prescott did not testify to any further communications about the FMS in 2021.

³¹² Respondent later notified the Union that the cost was irrelevant when it came to safety.

³¹³ GM Stonehouse recalled that the Union proposed some type of training in lieu of installing a FMS, but Respondent never discussed further with the Union.

At Silver Bell, on September 22, 2021, HR Manager McMorrow, at the direction of GM Stonehouse, notified Local 937 officers Placencio and Schuett that FMS would be installed shortly in all haul trucks. By September 26, Placencio had information that all Silver Bell haul trucks had FMS installed. However, Respondent had not reached any agreement with the local or International unions regarding installation at Silver Bell. Eventually all nine trucks at Silver Bell had FMS. (Tr. 40:6065–6067; GC Exh. 348.)

At Ray, after October 2021, local union officials met with Mine Operations Manager Zach Gifford about the FMS in the weekly Continuous Improvement Meetings. Gifford raised the FMS every week. Gifford said he wanted the Union to get members on board and the Union should agree to it. The local union officials protested any implementation because the review time was up to 40–60 minutes and the intrusiveness of having the driver watched for 12 hours: Cameras moved up and down, which the drivers would see; and the female drivers did not like that they were watched. Gifford said the cameras would be fixed to only view faces. The local union officials stated they wanted to bargain about the FMS and did not want discipline. Gifford said he would take that into consideration. At one point, Gifford said Respondent was going ahead anyway. (Tr. 50:7484–7488.)

The Ray local union made an information request about the FMS installation of software and dates to start monitoring on December 1, 2021. On December 17, 2021, Ray HR Manager Kim Decker stated the FMS “may be activated for use at Ray, following a test period, in March 2022.” (GC Exh. 446.) The Ray FMS was scheduled to go “live” on May 18, 2022, despite the local union continuing disagree about the FMS use. (GC Exh. 445.)³¹⁴

HR Manager Decker reports that no one has been disciplined or terminated, only counseled. The Union participates in the counseling sessions. Decker recommended that one employee be reassigned and apparently met no resistance for doing so. (Tr. 52:7772–7773.)

Eventually the FMS was installed in all 9 haul trucks at Silver Bell. No employee was disciplined due to fatigue alerts; instead, the driver was allowed to rest or switch to a less monotonous task. (Tr. 40:6018, 42:6408, 55:8360–8362.)

By November 2022 Respondent had installed in all 21 haul trucks at Mission, which was a “much bigger property” than Silver Bell. Of those, 19 were installed in October or November 2022 as two were previously installed for testing earlier. Stonehouse admitted that he did not notify the Union or engage in any further negotiations before installing the FMS in the remaining 19 trucks. (Tr. 40:6068–6071, 40:6032, 41:6292.)

E. Analysis

Respondent contends that the parties were at impasse because they were “diametrically opposed in their positions” and that no one had been disciplined. (R. Br. at 239–241) General Counsel relies almost exclusively on *Bottom Line Enterprises*, 302 NLRB 373–374 (1991) and progeny, regarding why Respondent had no exceptions giving it the right to implement its FMS proposal. (GC Br. at 207–211.) The Union also examines the *Bottom Line* exceptions, arguing none applied here and Respondent therefore violated the Act. (U Br. at 168–171.)

³¹⁴ General Counsel did not specifically allege that Respondent violated Sec. 8(a)(5) regarding the disciplinary discussions that took place in 2022. See discussion at Tr. 50:7500–7502. As General Counsel does not raise the issue in its brief, I will not include the facts here and will not make findings below.

Without a doubt, the installation of FMS and cameras is a mandatory subject of bargaining. *Endurance Environmental Solutions, LLC*, 373 NLRB No. 141, slip op. at 17 and fn. 81 (2024) citing, inter alia, *Colgate-Palmolive Co.*, 323 NLRB 515, 515–516, 519 (1997). Installation of surveillance cameras, particularly when used to catch employees who may be sleeping or driving unsafely, is a mandatory subject of bargaining, similar to “physical examinations, drug/alcohol testing requirements and polygraph testing” *Colgate-Palmolive*, 323 NLRB at 515. The Board also reasoned that the matter was not one of entrepreneurial control because using cameras were not fundamental to the basic direction of the enterprise and could impinge directly upon an employee’s job security. *Id.* at 515-516.

Accord: *National Steel Corp. v. NLRB*, 324 F.3d 928, 922–923 (7th Cir. 2003), *enfg.* 335 NLRB 747 (2001); *Brewers & Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36 (D.C. Cir. 2005) (hidden cameras in area where employees occasionally worked and took breaks was mandatory subject). The information gleaned from the cameras has the potential to give Respondent the opportunity to discipline employees also makes the FMS a mandatory subject of bargaining. *Springfield Day Nursery*, 362 NLRB 261, 276 (2015) (installation of cameras created new circumstances for discipline and is not limited to decisional bargaining). Any addition of safety provisions has long been held an essential term and condition of employment. See, e.g., *Gulf Power Co.*, 156 NLRB 622, 624–625 and fn. 2 (1966); *AK Steel Corp.*, 324 NLRB 181–183 (1997) (new safety requirement of metatarsal guard safety shoes for all employees, with employer’s internal deliberations, show mandatory subject). Installation and use of FMS, with its cameras and software interpretations of employee actions while driving, are a mandatory subject of bargaining.

Respondent admits it had no exigencies warranting installation and use of the FMS. I therefore do not spend time on GC’s *Bottom Line* arguments.

It is undisputed that no overall bargaining agreement was reached. It is also undisputed that no agreement on the FMS installation was reached at Silver Bell or Ray. Respondent contends that an agreement was reached at Mission, the General Counsel and the Union dispute this. First, it is undisputed that no permanent agreement was reached at Mission. The dispute concerns whether a temporary agreement was reached to install the FMS in two vehicles. While this is not a material dispute given the lack of a permanent agreement, I find not even a limited temporary agreement was reached. It is undisputed that there was no written agreement. Respondent argues there was a verbal agreement. The only Respondent witness who testified about the issue was Mine Manager Bjorn Meyer. He could only recall that Marquez agreed to try out the FMS on two trucks, but otherwise had no recollection about the meeting, including when it was, who was there, or what he told the Union. By contrast, Placencia’s testimony that not even a temporary agreement was reached is corroborated by his meeting notes as well as Anthony’s testimony. I found Placencia to be more credible than Meyer, based on his more specific recollection of the meeting, and his demeanor during testimony.

The standard for impasse (a deadlock where further bargaining would be futile and both parties recognize they have reached the end) was not met; the union made continued proposals, remained flexible, and expressly objected to any company claim of impasse. In 2021, although the parties did not reach any verbal or written agreement, Union District Director Prescott did not respond to Sinele’s August 3, 2021 email about FMS, much less provide any protest of the actions. Sinele stated that Respondent intended to install the cameras. Although Respondent engaged in some bargaining, Respondent’s refusal to engage on the merits of its own proposals, or the Unions’, shows a lack of good-faith bargaining. In such a situation, the Unions were not obligated to respond with further counters as requested in Sinele’s August 3, 2021 email; Respondent had indicated since January 2021 that it would move forward with installation regardless of any input from the Unions. The evidence, detailed above, shows that

no party claimed finality, refused further communication, or that both sides recognized continued discussions would be pointless. Instead, all evidence demonstrates live controversy and objection right up to—and after—the time the company implemented the FMS across the mines. Accordingly, all available and cited evidence refutes a finding that the parties were at impasse regarding FMS installation.

I therefore find that Respondent violated Section 8(a)(5) by implementing the fatigue monitoring systems at Ray, Silver Bell, and Mission, when the parties were not at an impasse.

CONCLUSIONS OF LAW

1. ASARCO is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Silver Bell Mine, located in Marana, Arizona, owned and operated by Silver Bell Mining LLC, which is fully owned by AR Silver Bell Inc., which in turn is wholly owned by ASARCO, is an employer engaged in commerce within the meaning of Section 2(6) and (7) and of the Act.

3. For the period of November 2019 through January 2020, AFIMAC was an agent of Respondent as defined in Section 2(13) of the Act.

4. The following individuals are Respondent ASARCO's supervisors within the meaning of Section 2(11) and/or agents within the meaning of Section 2(13):

Manuel Ramos	President through August 31, 2018
Leonardo Contreras	Chief Operating Officer
Tracy Morris	Operations Manager through July 31, 2020
Rose Guillot	Finance Manager
Agustin Trevino	Director of HR through October 18, 2019
Erica Sandoval	Director of HR
Stacy Sinele	Labor and Employee Relations Director
Paul Eastless	Corporate Safety Manager
Ann Videna	Senior HRIS Analyst
Jeff Fehr	General Manager, Mission
Tom Phillips	General Manager, Mission
Juan Mora	HR Manager, Mission
Bjorn Meyer	Mine Manager, Mission
Jeff Samuelson	Mine Supervisor, Pit Operations, Mission
Colby Shelstead	Mission
Rachel Kuro	Supervisor, Mission
Daniel Howard	Maint. Mgr., Mission 8/31/20 – 3/18/22
Paul De La Ossa	General Supervisor, Truck Shop, Mission
Angel Lopez	Safety Compliance Officer, Mission
Brad Stonehouse	General Manager, Silver Bell
Donald Buchanan	Mine Manager, Silver Bell
Debbie McMorrow	HR Manager, Silver Bell

	DeVar Cluff	Safety Manager, Silver Bell
	Michelle Lammers	Ray General Manager, 2019-2020; added Hayden Concentrator in late 2019; late 2020 Hayden smelter added
5	James Tulk	Pit Training Supervisor (2019 -) Ray Safety Compliance Officer
10	Kim Decker Michelle Sanchez Lori Neumann	HR Manager, Ray (since 2020) and Hayden HR Generalist, Ray and Hayden HR Supervisor, Ray (2016-2020) Corporate office (2020-2021) HR Business Partner, Mission (2021-)
15	Rose Alonzo Jeremiah Armstrong Keith Kenyon Cecelia Rios Brian Lee	Ray Safety Manager Environmental Manager, Ray Operations General Manager, Ray and Hayden Warehouse Coordinator, Ray Front Line Supervisor (2015-2021) Chief Supervisor (2021-)
20	Mike Hamill	General Supervisor Maintenance, North Mill, through September 15, 2020
	Esther Romero Dean Alonzo William "Kenny" Hatfield	General Supervisor, Maintenance, until 4/22 Concentrator Manager Ray Maintenance Supervisor
25	Samuel Reidhead Zach Gifford	Senior Environmental Engineer Ray Mine Operations Manager
30	Rudolfo Rubio Brenda Alward Mitchell Farley Kenneth Vines John Brown Tracy Morris	General Manager, Amarillo, dates unknown Plant Comptroller, Amarillo, 2008 - Sept. 2022 Manager, Refined Casting Rod Line Supervisor, Amarillo, until 10/28/22 Amarillo anode casting, 2019-? Amarillo South Side Manager, 2019-?
35	5. The following Unions and their locals are labor organizations within the meaning of Section 2(5) of the Act:	
40	a. United Steelworkers of America b. Steelworkers Local 886-2; c. Steelworkers Local 915; d. Steelworkers Local 937; e. Steelworkers Local 5252; f. Steelworkers Local 5613; g. International Brotherhood of Electrical Workers (IBEW) Local 576; h. IBEW Local 519;	
45	i. Boilermakers Local 617; j. International Brotherhood of Teamsters Local 104; k. International Union of Operating Engineers Local 428; l. Machinists Local 419;	
50	m. United Brotherhood of Carpenters and Joiners of America, Millwrights Local 1607; and n. UA Local 469.	

6. The unions are the exclusive bargaining representatives for the following groups of employees:

- 5 a. The USW; International Union of Operating Engineers, Local 4528; International Brotherhood of Electrical Workers, Local 570; and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 104; as the exclusive joint representative of a bargaining unit made up of employees at the Mission Complex as certified by the National Labor Relations Board in Case 28-RC-3311, dated June 27, 1977;
- 10 b. The International Brotherhood of Electrical Workers, Local 518, as the exclusive bargaining agent for all employees in the Electrical Department and Powerhouse at the Hayden Smelter, as certified by the National Labor Relations Board of August 15, 1949 in Case No. 21-RC-818 and September 4, 1953, Case 21-RC-3069. All other employees at that location are excluded from representation by Local 518;
- 15 c. The USW as the exclusive bargaining agent for its production and maintenance employees at the Hayden Smelter in accordance with the Certification of the National Labor Relations Board of June 12, 1951. Hourly-paid Employee(s) assigned to the Warehouse will be recognized as being part of the bargaining unit but such assignment(s), if any, shall be at the discretion of the Company. Executive, administrative, technical employees, supervisors, assistant
- 20 supervisors, engineers, metallurgist, chemist, assayers, secretaries, clerks, accountants, auditors, watchmen, electrician, electrician helpers and electrician apprentices, power house operators, powerhouse utilitymen and powerhouse helpers are excluded from representation by the USW;
- 25 d. United Brotherhood of Carpenters & Joiners of America, Local 1912, 4547 W. McDowell, Phoenix, Arizona; and,
- 30 e. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 469, 3189 North 24th Street, Phoenix, Arizona 85016.

7. About September 2019, Respondent removed union literature from the break room at the Amarillo facility, in violation of Section 8(a)(1) of the Act.

8. About September 2019, Respondent told an employee that it removed union literature, in violation of Section 8(a)(1) of the Act.

35 9. During November 2019 to about March 2020, AFIMAC guards stationed at ASARCO properties were Respondent's agents within the meaning of Section 2(13) of the Act.

40 10. From November 2019 through January 2020, in violation of Section 8(a)(1) of the Act, Respondent, by its agent AFIMAC, surveilled employees by video recording and gave the impression of surveillance to employees engaged in picketing at the Mission and Silver Bell facilities.

11. After the Unions made a valid unconditional offer to return to work, after July 6, 2020, Respondent continued to make offers for replacement workers, in violation of Section 8(a)(3) and (1).

12. In about October 2020, Respondent, by Alward and Farley, threatened employees that staffing at the Amarillo facility would not change from Respondent's strike operations, in violation of Section 8(a)(1) of the Act.

13. In September 2020, Respondent, at its Amarillo, Texas facility on the rod line, unilaterally and discriminatorily decreased the number of shifts from three to two, in violation of Section 8(a)(5), (3), and (1) of the Act.

14. In 2020, Respondent, at its Amarillo, Texas, and Hayden facilities, failed and refused to reinstate striking employees to their former or substantially equivalent positions of employment in the absence of a legitimate and substantial business justification, in violation of Section 8(a)(5), (3), and (1) of the Act.

15. In September and October 2020, Respondent laid off Jared Bliss, Juan Carreon, Jordan Decorte, Jon Mares, Pat Montano, and Clay Spangler without bargaining with the Union to a lawful impasse or an agreement, in violation of Section 8(a)(5) and (1) of the Act.

16. In September and October 2020, Respondent laid off Jared Bliss, Juan Carreon, Jordan Decorte, Jon Mares, Pat Montano, and Clay Spangler in violation of Section 8(a)(3) and (1) of the Act.

17. Respondent, in violation of Section 8(a)(5), (3), and (1), post-strike on the Amarillo rod line unlawfully:

- a. reduced the following positions: bander; mobile equipment operator, mechanic;
- b. imposed additional duties upon the mobile equipment operator and the acid pickler; and
- c. modified the duties of pickling operators and crane operators.

18. On November 11, 2020, Respondent unilaterally recalled four Amarillo employees from layoff in violation of Section 8(a)(5) and (1).

19. On August 25, 2021, Respondent, by Decker, told laid off Hayden employees that they had a break in their seniority and would be terminated, in violation of Section 8(a)(1).

20. On September 15, 2021, Respondent, by Decker, discriminatorily eliminated the seniority and terminated, laid-off Hayden employees, in violation of Section 8(a)(3) and (1).

21. On August 31, 2021, Respondent, by Alward, told laid-off Amarillo employees that they had a break in their seniority and would be terminated, in violation of Section 8(a)(1).

22. On September 15, 2021, Respondent, by Alward, discriminatorily eliminated the seniority and terminated Amarillo laid off Amarillo employees, in violation of Section 8(a)(3) and (1).

23. Respondent unlawfully disciplined and discharged the following employees in violation of Section 8(a)(3) and (1):

- a. Ben Lucero, suspended about February 19, 2021 and terminated March 26, 2021.
- b. Eli Laracuate, suspended about February 5, 2021 and terminated March 3, 2021.

24. On April 9, 2021, Respondent unilaterally changed payroll dates at its Ray and Hayden facilities, in violation of Section 8(a)(5) and (1).

25. In 2021 and 2022, Respondent unilaterally implemented the Fatigue Monitoring System at its Silver Bell, Ray and Mission facilities, in violation of Section 8(a)(5) and (1).

5 26. Respondent's unfair practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

27. The Act has not been violated in any other way.

REMEDY

10 Having found that Respondent engaged in unfair labor practices, I shall order Respondent to cease and desist therefrom and to take certain affirmative action designated to effectuate the policies of the Act.

15 Respondent continued to offer "replacement" positions after the Union's unconditional offer to return. However, whether any employee suffered harm is not clear from this record and should be resolved in compliance. Regarding those employees who may have been unlawfully denied reinstatement to their previous positions after the Union made their unconditional request for reinstatement and when Respondent continued to make offers to replacements workers after July 6, 2020, with the goal of restoring the status quo, I recommend the following:

20 Respondent shall make immediate and full reinstatement offers to their former positions, or substantially equivalent positions, without prejudice to their seniority or other rights and privileges. Respondent shall make them whole for any loss of earnings they may have suffered by reason of the discriminatory failure to reinstate them by payment to each of a sum equal to that which each normally would have earned as wages from the date of the unlawful failure to

25 reinstate each to the date of Respondent's offer of reinstatement. *American Machinery Corp. v. NLRB*, 424 F.2d 1321, 1328-1329 (5th Cir. 1970), enfg. 194 NLRB 130, 135 (1969). The determination of the exact date when an opening or vacancy arose, to which a specific striker would have been instated, absent the unlawful failure to reinstate then him, is deferred to the compliance stage of this proceeding. *American Machinery Corp.*, 174 NLRB at 135.

30 Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent shall compensate the specific striker for the adverse tax consequences, if any, of receiving a lump sum backpay award, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324

35 (2016), Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 29 a report allocating backpay to the appropriate calendar year(s). The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. In addition, pursuant to *Cascades*

40 *Containerboard Packaging*, 370 NLRB No. 76 (2021), Respondent will file with the Regional Director a copy of the specific striker's W-2 forms reflecting the backpay award. In accordance with the Board's decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), Respondent will compensate them for any direct or foreseeable pecuniary harms incurred as a result of Respondent's failure to reinstate according to *Laidlaw*, supra. including reasonable search-for-work and interim

45 employment expenses, if any, regardless of whether these expenses exceed interim earnings. If the striker has not been instated to his previous position, Respondent shall offer the striker full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. Respondent will be required to remove from its files any reference to the unlawful layoffs and

notify the discriminatees within 3 days that this has been done and that the unlawful layoffs will not be used against them in any way.

5 Having found employees Jared Bliss, Juan Carreon, Jordan Decorte, Jon Mares, Pat Montano, and Clay Spangler were subject to the unlawful layoffs, Respondent will offer reinstatement, if it has not already done so, to their previous jobs, or if those no longer exist, to a substantially equivalent position. Respondent should make whole, with interest, for any loss of earnings and other benefits suffered as a result of the unlawful layoffs. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with the Board's decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), enf. denied on other grounds, 102 F.4th 727 (5th Cir. 2024), Respondent shall also compensate them for any other direct or foreseeable pecuniary harms incurred as a result of their unlawful layoffs, including reasonable search-for-work and interim employment expenses, if any regardless of whether these expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Respondent shall compensate the laid off employees for the adverse tax consequences, if any, of receiving a lump sum backpay award, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016), Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 28 a report allocating backpay to the appropriate calendar year(s). The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. In addition, pursuant to Respondent will file with the Regional Director a copy of the specific laid off employee's W-2 forms reflecting the backpay award. *Cascades Containerboard Packaging*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 24 (2021). Respondent will be required to remove from its files any reference to the unlawful layoffs and notify the discriminatees within 3 days that this has been done and that the unlawful layoffs will not be used against them in any way.

35 Having found Respondent unlawfully laid off employees in Amarillo and Hayden, Respondent shall be ordered to rescind the layoffs and reinstate the employees to their previous positions, or if those positions are no longer available, to substantially equivalent positions. The laid off employees should be made whole, with interest, for any loss of earnings and other benefits suffered as a result of the unlawful layoffs. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with the Board's decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), enf. denied on other grounds, 102 F.4th 727 (5th Cir. 2024), Respondent shall also compensate them for any other direct or foreseeable pecuniary harms incurred as a result of their unlawful layoffs, including reasonable search-for-work and interim employment expenses, if any regardless of whether these expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Respondent shall compensate the laid off employees for the adverse tax consequences, if any, of receiving a lump sum backpay award, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016), Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 28 a report allocating backpay to the appropriate calendar year(s). The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate

manner. In addition, pursuant to Respondent will file with the Regional Director a copy of the specific laid off employee's W-2 forms reflecting the backpay award. *Cascades Containerboard Packaging*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 24 (2021). Respondent will be required to remove from its files any reference to the unlawful layoffs and notify the discriminatees within 3 days that this has been done and that the unlawful layoffs will not be used against them in any way. Although the Complaint does not name the specific discriminatees, the matter can be covered in the compliance stage of the case. But see *H&F Binch Co.*, 188 NLRB 720, 722–723 (1971) (Board determines that the discriminatees not named in the complaint were not entitled to a remedy).

Having found Respondent discriminatorily broke the seniority and terminated the laid off Amarillo and Hayden employees, Respondent shall be ordered to rescind the terminations and reinstate their seniority. Respondent will compensate them for any direct or foreseeable pecuniary harms incurred as a result of their unlawful layoffs, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), Respondent shall compensate them for the adverse tax consequences, if any, of receiving a lump sum backpay award, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016), Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 29 a report allocating backpay to the appropriate calendar year(s). The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. In addition, pursuant to *Cascades Containerboard Packaging*, 370 NLRB No. 76 (2021), Respondent will file with the Regional Director a copy of the specific laid off employee's W-2 forms reflecting the backpay award. In accordance with the Board's decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022). Respondent will be required to remove from its files any reference to the unlawful breaks in seniority and terminations and notify the discriminatees within 3 days that this has been done and that the unlawful layoffs will not be used against them in any way.

The terminated discriminatees for Hayden, as found in GC Exh. 349 (b), are the following:

Alderete, Steven	Almanzo, Antonio S.	Alrvarado, Mark Anthony
Alvarado, Vincent	Amador, Albert	Anderson, Scott
Apodaca, Patrick A.	Athey, Terry R.	Badillo, Monica Carmen
Baez, Paul A.	Bainter, Patrick Leon	Baldenegro, Angel A.
Ballard, Michael G.	Barragan, Francisco D.	Baugher, Anothony E.
Beikes, Enrique J.	Bejarano, Francisco A.	Black, Jamie
Boger, Joseph D.	Boltarez, Isiah	Burwell, Zachary
Cabrera, Julio M.	Camarena, Joaquin L.	Camarillo, Juan
Carender, Patrick A.	Chavez, Michael	Clark, Robert B.
Cline III, Roy G.	Cluff, David	Corona, Francisco
Cruce, Tim Wayne	Cruz, Frederick M.	Davila, Estaban
DeVos, Michael D.	Diaz, Jesus M.	Dietz, Alexander R.
Dominguez, John A.	Duarte, Raul E.	Elvira, Christopher Lawrence
Encinas, Peter	Esquivel, Martin	Frisby Carillo, Jose R.
Gallego, Salvador R.	Gamez, Mark A.	Garbiso, Daniel D.
Garcia, Anthony L	Garcia, Eduardo R.	Garcia Reyes, Etzael

Garrick, Cameron	Gomez, Julian	Gomez, Nicholas A.
Gonzales, Cruz A. ³¹⁵	Gonzales, Vincent E.	Gonsales, Jonathan
Gonzales, Jr. Joseph	Gonzalez, Frank V.	Gutierrez, Steve Joseph
Guzowski, Michael J.	Harden, James P.	Hernandez, Juan Diego
Hernandez, Christopher G.	Hernandez, Gabriel G.	Hopkins, Efton Tony
Howard, Juan	Ivy, Richard Phillip	Jacquez, Jorge E
Lopez, Jacob	Madrid, Tobias	Marinez, Josphe Ray
Mariscal, Mario A.	Marquez, Anothny	Martinez, Samson S.
Martinez, Jose R	Moreno, Mauro E.	O'Hara, Patrick
Ochoa, Daniel J.	Ortega, Manuel George	Ortiz, Brian
Ortiz, Jose A.	Pacheco, Joseph C.	Philpot, Orval
Polenco, Lawrence	Powell, James E.	Rabago-Phelan, Michael
Rippey, Matthew	Rivera, Ramon J.	Rivera, Manuel George
Robles, Pablo M.	Rodriguez, Abelardo	Rodriguez, Aramdno G.
Romero, Erk D	Romero, Gegory	Romero, Raul L.
Romero, Luciano M.	Rosales, Ermin	Saiz, Steve J.
Salazar, Michael A.	Samaniego, Ramon	Samaniego, Ramon I.
Sanchez, David M.	Sanchez, Raymond D.	Sanchez, Ramon Z.
Sanchez, Gilbert	Sandoval, Gabriel A.	Santa Maria, Antonio L.
Seely, Emerson	Segovia, Tony	Sharff, Jacob
Smith, Larry J.	Smith, Royce	Snelgrove, Illiam G.
Snelgrove, Zebulon G.	Tacchia, Donald	Tamayo, Mark
Tamayo, Francisco X.	Tamayo, Mark A.	Taylor, Vincent T.
Trujillo, Steven A.	Tuck, Tanner L.	Tyler, Trent,
Vasquez, Mario I.	Velasquez, David	Verduzco, Juan
Villanueva, Alex	Waddell, Matthew J.	Walker, Patrick A.
Walker David A.	Waltermire, Timothy S.	Watson, Herbert E.
White Austin	Woods, Thomas	Zazueta, Gino
Zeiler, Roger		

The named discriminatees for Amarillo, as found in GC Exh. 350(a), are the following:

Aguilar, Luis A.	Alcala, Matthew R.	Andrews, Tannen R.
Barakovic, Nihad	Becerra, Juan C.	Bliss, Jared D.
Bridgeman, Willie R.	Browder, Pierce L.	Carroll, Shay R.
Chamberlain, Timothy D.	Dawson, Brian P.	Decorte Jordan
Diaz, Michael,	Eakin, Steven M.	Edgar, Hanner A.
England, Maria Del Rosario	Escoto, Nickolas Frank	Frigo, Gerald A.
Garcia, Derrick K.	Gerzon, Gregoy Allen	Hernandez, Antonio
Hodge Willie R.	Hurst, Kyle L.	Inthirath, Khieosomphone
Jaramillo, Michael A.	Kataneh, Kay K	Khamphoumy, Souphanh
Kirksey, Lance	Lagunas, Seth D.	Lam, Thien Quang
Lee, Taylor B.	Lemons, Brad M.	Lucas, Truman J.
Mabry, Jeffery L.	Martinez, Jose C.	McCallops, Christopher A.
McClendon, Carla R.	Merriman, Tommy B.	Morales, Efrain T.
Mubarek, Neil H.	Muniz Jr., Jorge A.	Nelson, JHW
Nunez, Ercik E.	Ouellette, Brian F.	Parscal, Carlos Crag
Perdue, Brittany D.	Brittany D.	Portugal, Renato

³¹⁵ Cruz A. Gonzales is listed twice in the exhibit with the same post office box address. Whether this person was inadvertently listed twice or represents two individuals may be determined in compliance.

Resendes, Jesus A.	Roberts, Nathan Joseph	Rockholt, Dakota
Ruiz, Guerrero	Saavedra Jr., John P.	Sandoval Tellez, Miguel A.
Sarrels, Billy W.	Sellers, Bradly D.	Shepherd, Robby LK.
Smith, Jedediah M.	Smith Nicholas H.	Soumphonphakdy, Vivay
Swajn, Kevin A.	Tarrango, Daneil	Thompson, Donald C.
Tijerina, Francisco F.	Tillmon, Raymond L.	Very, Sounthone
Walker, Kenneth D.	Walker, Steven H.	Watson, Jacoby J.
Wilkinson Kerri L.	Worrell, Brennen S.	Worrell, Trent A.
Zurita, Juan R.		

Respondent shall be ordered to offer Ben Lucero and Eli Laracuente reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions.

- 5 Respondent will make whole, with interest, for any loss of earnings and other benefits suffered as a result of their unlawful suspensions and discharges. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Thryv, Inc.*, supra, Respondent shall
- 10 also compensate them for any other direct or foreseeable pecuniary harms incurred as a result of their unlawful suspensions and terminations, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Respondent shall compensate Lucero and Laracuente for the adverse tax consequences, if any, of receiving a lump sum backpay award, and, in accordance with
- 15 *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016), Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 28 a report allocating backpay to the appropriate calendar year(s). The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. In addition,
- 20 pursuant to *Cascades Containerboard Packaging*, supra, Respondent will file with the Regional Director a copy of Lucero and Laracuente's W-2 forms reflecting the backpay award.

- Respondent will be required to remove from its files any reference to the unlawful suspensions and discharges of Lucero and Laracuente, and within 3 days, Respondent shall
- 25 then notify them in writing that their unlawful suspensions and discharges will not be used against them in any way.

- Within 14 days after service by the Region, Respondent will be ordered to post the notice attached hereto as "Appendix." The notices should be written in English and Spanish
- 30 and any other language the Regional Director deems necessary. Copies of the notice, on forms provided by the Regional Director for Region 28, 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
- 35 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 Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

- 40 In addition,, within 14 days after service by the Region, Respondent also shall duplicate and mail at their own expense, a copy of the signed notice to all employees at the last known addresses, to all employees who were employees since November 15, 2019, approximately the time when Respondent's agents unlawfully surveilled or gave the impression of surveilling

picketers. I so order due to the shrinking employee complement post-strike, termination of laid off employees, and the shutdown of certain Respondent's facilities. *John P. Westrum d/b/a J. Westrum Electric and JWE LLC*, 365 NLRB 1479 fn. 3 (2017), enfd. 753 Fed. Appx. 421 (8th Cir. 2019), cert. denied 140 S. Ct. 2271 (2020).³¹⁶ These employees would not otherwise be notified of Respondent's surveillance during the strike, Respondent's unfair labor practices related to the *Laidlaw* lists, layoffs and terminations after the layoffs. Additionally, 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, copies of the notice to all current employees and former employees employed by the Respondent at any time since November 15, 2019.

General Counsel requests a number of remedies related to the alleged bad faith bargaining and Respondent's alleged "disregard for employees' Section 7 rights. These remedies are: meet and bargain with the Union for a minimum of 16 hours per week until the parties reach a CBA, the Unions agree to a hiatus in bargaining or reach lawful impasse; prepare written bargaining reports every 30 days, which are served upon the Unions with an opportunity to reply; engage a Federal Mediation and Conciliation Service mediator upon the Unions' request; and compensative the Union for its bargaining expenses from the date negotiations began, identified as November 18, 2018. GC also requests reading of the Notice by a senior member of management or a Board agent. reading of the notice, with the Union present; an affirmative bargaining order; publication of the notice in location publications of broad circulation and local appeal (including electronically). GC also requests a broad cease and desist order.³¹⁷ The Union suggested a number of other remedies, such as: Posting for 4 years' providing notices to all visitors at Respondent's facilities; purchasing billboards for a year and bumper stickers with the phrase "We are a proud Union facility and respect our employees" or something to that effect; and giving the administrative law judge's decision to all bargaining unit employees, with 3 hours of paid time to read it. I decline to grant the remedies GC and the Union suggest. *Erie Brush & Mfg.*, 700 F.3d at 24 (decision on impasse moots need for bargaining order). Traditional methods should suffice given the fewer unfair labor practices than General Counsel alleged.

On these findings of fact and conclusions of law, and on the entire record, I recommend the following Order should issue.

ORDER³¹⁸

Respondent ASARCO, LLC their agents, officers, successors and assigns, shall

1. Cease and desist from

- a. Removing union literature from break rooms.
- b. Telling employees that the union literature was removed from the breakroom.

³¹⁶ I also consider the passage of time for the allegations.

³¹⁷ On September 28, 2025, General Counsel moved to withdraw its request to overrule *American Security Programs*, 368 NLRB No. 151 (2019). In response, on December 8, 2025 Respondent contended that any portions of the transcript related to this case also be withdrawn. Respondent does not identify which portions of the transcript should be withdrawn. Because Respondent's request is too nebulous, I deny Respondent's request as I will not search almost 10,000 pages of transcript to identify what areas are involved. I therefore grant General Counsel's request.

³¹⁸ If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- c. Surveilling and creating the impression of surveillance of striking employees' union activities by video recording lawful picketing at Respondent's Silver Bell and Mission facilities.
- d. Offering employment to replacement workers after the Unions make an unconditional offer to return to work.
- e. Threatening employees at Amarillo that staffing would not change from strike operations.
- f. Decreasing the number of shifts at the Amarillo facility.
- g. Laying off employees without first bargaining with the Union to a lawful impasse or reaching an agreement.
- h. Laying off employees due to discriminatory reasons.
- i. Reducing positions on the Amarillo rod line, including the positions of bander, mobile equipment operator and mechanic.
- j. Modifying duties for pickling operators and crane operators on the Amarillo rod line.
- k. Imposing additional duties upon the mobile equipment operators and the acid pickling operators on the Amarillo rod line.
- l. Unilaterally recalling Amarillo employees from layoff.
- m. Telling laid off employees that their seniority would be broken and they would be terminated subsequent to an unlawful layoff.
- n. Discriminatorily eliminating laid off employees seniority and terminating them after an unlawful layoff.
- o. Suspending and/or terminating employees due to the Union and/or protected concerted activities.
- p. Unilaterally changing payroll dates.
- q. Unilaterally implementing fatigue monitoring systems.
- r. Failing and refusing to bargain collectively with the following union regarding the unilateral changes stated above:
 - i. The USW; International Union of Operating Engineers, Local 4528; International Brotherhood of Electrical Workers, Local 570; and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 104; as the exclusive joint representative of a bargaining unit made up of employees at the Mission Complex as certified by the National Labor Relations Board in Case 28-RC-3311, dated June 27, 1977;
 - ii. The International Brotherhood of Electrical Workers, Local 518, as the exclusive bargaining agent for all employees in the Electrical Department and Powerhouse at the Hayden Smelter, as certified by the National Labor Relations Board of August 15, 1949 in Case No. 21-RC-818 and September 4, 1953, Case 21-RC-3069. All other employees at that location are excluded from representation by Local 518;
 - iii. The USW as the exclusive bargaining agent for its production and maintenance employees at the Hayden Smelter in accordance with the Certification of the National Labor Relations Board of June 12, 1951. Hourly-paid Employee(s) assigned to the Warehouse will be recognized as being part of the bargaining unit but such assignment(s), if any, shall be at the discretion of the Company. Executive, administrative, technical employees, supervisors, assistant supervisors, engineers, metallurgist, chemist, assayers, secretaries, clerks, accountants, auditors, watchmen, electrician, electrician helpers and electrician apprentices, power house operators, powerhouse utilitymen and powerhouse helpers are excluded from representation by the USW;

- iv. United Brotherhood of Carpenters & Joiners of America, Local 1912, 4547 W. McDowell, Phoenix, Arizona; and,
- v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 469, 3189 North 24th Street, Phoenix, Arizona 85016.

- s. 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 from the Union, restore the number of shifts on the Amarillo rod line to three shifts.
- b. Upon request from the Union, bargain about the number of shifts at the Amarillo facility until the parties reach a lawful impasse or an agreement.
- c. Upon request from the Union, restore the prestrike shift times for employees at the Amarillo facility.
- d. Within 14 days of the date of this Order, offer Jared Bliss, Juan Carreon, Jordan Decorte, Jon Mares, Pat Montano, and Clay Spangler reinstatement to their previous positions, or if the position no longer exists, to a substantially equivalent position, if Respondent has not already done so, without prejudice to their seniority or any other rights or privileges previously enjoyed.
- e. Make Jared Bliss, Juan Carreon, Jordan Decorte, Jon Mares, Pat Montano, and Clay Spangler whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the discrimination against them, in the manner set forth in the Remedy section of this decision.
- f. Compensate Jared Bliss, Juan Carreon, Jordan Decorte, Jon Mares, Pat Montano, and Clay Spangler for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.
- g. File with the Regional Director for Region 28 within 21 days of the date the amount of backpay is fixed by agreement or Board order, or such additional time as the Regional Director may allow for good cause shown, a copy of corresponding W-2 forms reflecting backpay awards for Jared Bliss, Juan Carreon, Jordan Decorte, Jon Mares, Pat Montano, and Clay Spangler.
- h. Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs of Jared Bliss, Juan Carreon, Jordan Decorte, Jon Mares, Pat Montano, and Clay Spangler, and within 3 days thereafter, notify them in writing that this has been done and that the unlawful layoffs will not be used against them in any way.
- i. Upon the Union's request, bargain until an agreement or good faith impasse is reached regarding the post-strike Amarillo rod line:
 - i. Reduction in bander, mobile equipment operator and mechanic positions;
 - ii. Assignment of second shift banders to first shift work; modification of duties for pickling operators and crane operators; and imposition addition duties to the mobile equipment operator and acid pickler.
 - iii. Modification duties for pickling operators and crane operators.
 - iv. Imposing additional duties to the mobile equipment operator and acid pickler.

- j. Upon the Union's request, bargain until an agreement or good faith impasse is reached regarding recalling Amarillo employees from layoff.
- k. Regarding the laid off employees at Hayden and Amarillo in September 2020, within 14 days after compliance has notified Respondent of the affected employees:
 - i. Offer reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice his seniority or other rights or privileges previously enjoyed.
 - ii. Within 14 days after notification of the Region's compliance officer, make whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the Remedy section of this decision.
 - iii. Compensate any affected employee for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director of Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).
 - iv. File with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of the affected employee's corresponding W-2 form(s) reflecting the backpay award.
 - v. Within 14 days from the date after notification of the Region's compliance officer regarding any employee affected, remove any reference to Respondent's unlawful failure to reinstate the striker, and within 3 days thereafter, notify the striker in writing that this has been done and that the failure to instate will not be used against him in any way.
- l. Regarding Hayden and Amarillo employees whose seniority was broken and terminated:
 - i. Make whole, including restoration of seniority, the laid off Hayden and Amarillo employees whose seniority was broken and terminated, as identified in the Remedy section, and remove from their files any reference to the unlawful terminations, and within 3 days thereafter, notify them in writing that this has been done and that the unlawful terminations will not be used against them in any way.
- m. Regarding Lucero and Laracuate:
 - i. Within 14 days from the date of this Order, offer Lucero and Laracuate full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights of privileges previously enjoyed.
 - ii. Make Lucero and Laracuate whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the discrimination against them, in the manner set forth in the Remedy section of this decision.
 - iii. Compensate Lucero and Laracuate for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.
 - iv. File with the Regional Director for Region 28 within 21 days of the date the amount of backpay is fixed by agreement or Board order, or such additional time as the Regional Director may allow for good cause shown,

a copy of Lucero and Laracuate's corresponding W-2 forms reflecting backpay award.

- v. Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge of Laracuate and Lucero, and within 3 days thereafter, notify them in writing that this has been done and that the unlawful suspension and discharge will not be used against them in any way.
- n. Regarding any employee who was not instated due to Respondent's continued search for replacement workers poststrike:
 - i. Within 14 days after notification of the Region's compliance officer regarding any employee who was affected, offer the employee(s) full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice his seniority or other rights or privileges previously enjoyed.
 - ii. Within 14 days after notification of the Region's compliance officer, make whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the Remedy section of this decision.
 - iii. Compensate any affected employee for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director of Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).
 - iv. File with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of the affected employee's corresponding W-2 form(s) reflecting the backpay award.
 - v. Within 14 days from the date after notification of the Region's compliance officer regarding any employee affected, remove any reference to Respondent's unlawful failure to reinstate the striker, and within 3 days thereafter, notify the striker in writing that this has been done and that the failure to instate will not be used against him in any way.
- o. Upon the Union's request, rescind the changes in payroll dates and bargain until an agreement is reached or the parties reach a good faith impasse.
- p. Upon the Union's request, rescind use of the fatigue monitoring system and bargain until an agreement is reached or the parties reach a good faith impasse.
- q. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- r. Within 14 days after service by the Region, post at each facility the attached notice marked "Appendix" in English, Spanish and any other languages that the Regional Director for Region 28 deems necessary. Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if

Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other materials. If Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, copies of the notice to all current employees and former employees employed by Respondent at any time since November 15, 2019. Respondent also shall be required to mail or electronically notify all employees at the last known addresses, at Respondent's own expense, copies of the notice to all employees who were employees since November 15, 2019. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, copies of the notice to all current employees and former employees employed by the Respondent at any time since November 15, 2019.

- s. Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

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

Dated: Washington, DC. April 20, 2026



Sharon Levinson Steckler
Administrative Law Judge

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 remove union literature from the break room.

WE WILL NOT tell you that we have removed union literature from the break room.

WE WILL NOT engage in surveillance, or give the impression of surveillance, by video recording while you are engaged in lawful picketing at the Mission and Silver Bell facilities.

WE WILL NOT offer jobs to potential replacement workers after the Union provides an unconditional offer to return from an economic strike.

WE WILL NOT fail and refuse to bargain collectively and in good faith with the following exclusive collective-bargaining representatives in the following appropriate units:

The USW; International Union of Operating Engineers, Local 4528; International Brotherhood of Electrical Workers, Local 570; and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 104; as the exclusive joint representative of a bargaining unit made up of employees at the Mission Complex as certified by the National Labor Relations Board in Case 28-RC-3311, dated June 27, 1977;

The International Brotherhood of Electrical Workers, Local 518, as the exclusive bargaining agent for all employees in the Electrical Department and Powerhouse at the Hayden Smelter, as certified by the National Labor Relations Board of August 15, 1949 in Case No. 21-RC-818 and September 4, 1953, Case 21-RC-3069. All other employees at that location are excluded from representation by Local 518;

The USW as the exclusive bargaining agent for its production and maintenance employees at the Hayden Smelter in accordance with the Certification of the National Labor Relations Board of June 12, 1951. Hourly-paid Employee(s) assigned to the Warehouse will be recognized as being part of the bargaining unit but such assignment(s), if any, shall be at the discretion of the Company. Executive, administrative, technical employees, supervisors, assistant supervisors, engineers, metallurgist, chemist, assayers, secretaries, clerks, accountants, auditors, watchmen, electrician, electrician helpers and electrician

apprentices, power house operators, powerhouse utilitymen and powerhouse helpers are excluded from representation by the USW;

United Brotherhood of Carpenters & Joiners of America, Local 1912, 4547 W. McDowell, Phoenix, Arizona

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 469, 3189 North 24th Street, Phoenix, Arizona 85016.

WE WILL NOT threaten Amarillo employees that we will not change from strike operations.

WE WILL NOT tell you that your seniority is broken and you are terminated based upon a discriminatory layoff.

WE WILL NOT unilaterally and discriminatorily decrease the number of shifts at the Amarillo facility.

WE WILL NOT lay you off post-strike without first affording the Union adequate notice and an opportunity to bargain to a lawful impasse or reaching an agreement.

WE WILL NOT unilaterally and discriminatorily post-strike on the Amarillo rod line, reduce positions, modify duties for pickling operators and crane operators, or impose additional duties.

WE WILL NOT lay off employees due to union and/or protected activities post-strike.

WE WILL NOT unilaterally lay off Amarillo and Hayden employees.

WE WILL NOT unilaterally recall Amarillo employees after layoff.

WE WILL NOT suspend and/or discharge you for your union and/or protected concerted activities.

WE WILL NOT unilaterally change payroll dates without first affording the Union adequate notice and an opportunity to bargain to a lawful impasse or reaching an agreement.

WE WILL NOT unilaterally implement fatigue monitoring systems in haul trucks without bargain to a lawful impasse or reaching an agreement.

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

WE WILL, upon determination by the Region's compliance officer, due to our offering jobs for replacement workers after the striker, if any, offer to reinstate any striker who was not provided his position, or if that is no longer available to a substantially equivalent position, and WE WILL make them whole for any loss of earnings and other benefits resulting from our unlawful conduct, less any net interim earnings, plus and interest, and WE WILL also make affected employees whole for any other direct or foreseeable pecuniary harms suffered as a result of our unlawful conduct, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL, on request, bargain in good faith with the Union about the number of pre-strike shifts at the Amarillo facility and WE WILL, on request, restore the prestrike shifts at the Amarillo facility rod line to three shifts.

WE WILL, on request, bargain in good faith with the Union regarding the number of shifts on the Amarillo rod line until the parties reach a lawful impasse or agreement.

WE WILL, within 14 days from the date of this Order, offer Jared Bliss, Juan Carreon, Jordan Decorte, Jon Mares, Pat Montano, and Clay Spangler reinstatement to their former jobs or if those jobs no longer exist, to substantially equivalent positions, if we have not already done so, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Jared Bliss, Juan Carreon, Jordan Decorte, Jon Mares, Pat Montano, and Clay Spangler for any loss of earnings and other benefits resulting from their layoffs, plus interest, and WE WILL make such employees whole for reasonable search-for-work and interim earnings, plus interest.

WE WILL compensate Jared Bliss, Juan Carreon, Jordan Decorte, Jon Mares, Pat Montano, and Clay Spangler for the adverse tax consequences, if any, of receiving lump-sum backpay awards and WE WILL file with the Regional Director for Region 28 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

WE WILL, within 14 days from the date of this Order, file with the Regional Director for Region 28 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for Jared Bliss, Juan Carreon, Jordan Decorte, Jon Mares, Pat Montano, and Clay Spangler.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful layoffs of Jared Bliss, Juan Carreon, Jordan Decorte, Jon Mares, Pat Montano, and Clay Spangler and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the layoffs will not be used against them in any way.

WE WILL, on request, bargain with the Union about the post-strike reductions on the Amarillo rod line for the positions of bander, mobile equipment operator and mechanics until we reach an agreement or a good faith impasse.

WE WILL, on request, bargain with the Union about the modifications to duties of pickling operators and crane operators on the Amarillo rod line until we reach an agreement or a good faith impasse.

WE WILL, on request, bargain with the Union about additional duties placed upon the mobile equipment operators and acid pickling operators on Amarillo rod line until we reach an agreement or a good-faith impasse.

WE WILL, on request, bargain with the Union about recalling employees from layoff until we reach an agreement or a good-faith impasse.

WE WILL restore seniority and rescind the terminations of the laid off Amarillo and Hayden employees who were terminated in September 2021, and WE WILL make them whole for any loss of earnings and other benefits resulting from our unlawful conduct, less any net interim earnings, plus interest, and WE WILL also make affected employees whole for any other direct

or foreseeable pecuniary harms suffered as a result of our unlawful conduct, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL, within 14 days from the date of this Order, offer Ben Lucero and Eli Laracuate full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Ben Lucero and Eli Laracuate whole for any loss of earnings and other benefits resulting from their discharge and suspensions, plus interest, and WE WILL make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Ben Lucero and Eli Laracuate for the adverse tax consequences, if any, of receiving lump-sum backpay awards and WE WILL file with the Regional Director for Region 28 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge and suspensions of Ben Lucero and Eli Laracuate, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges and suspensions will not be used against them in any way.
m employment expenses, plus interest.

WE WILL compensate Ben Lucero and Eli Laracuate for the adverse tax consequences, if any, of receiving lump-sum backpay awards and WE WILL file with the Regional Director for Region 28 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge and suspensions of Ben Lucero and Eli Laracuate, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges and suspensions will not be used against them in any way.

WE WILL, on request, rescind the changes in payroll dates and WE WILL, on request, bargain with the Union in good faith over payroll dates until an agreement or lawful impasse is reached.

WE WILL, on request, stop using the fatigue monitoring systems in haul trucks at Silver Bell, Ray and Mission and WE WILL, on request, bargain in good faith with the Union over fatigue monitoring systems until an agreement or lawful impasse is reached.

ASARCO, LLC

(Employer)

Dated _____

By _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine

whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov

2600 North Central Avenue, Suite 1400 Phoenix, AZ 85004-3099
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at [www.NLRB.gov/case/ 28-CA-255235](http://www.NLRB.gov/case/28-CA-255235) 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.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF
POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER
MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS
PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE
OFFICER (602) 416-4755.