UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

AMERICAN AUTOMOBILE ASSOCIATION OF NORTHERN CALIFORNIA, NEVADA & UTAH	**Cases 32–CA–321155**
	32–CA–322818
and	**32–CA–322876**
	32–CA–323291
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,	**32–CA–331273**
LOCAL 665	**32–CA–336921**

Amanda Brunt and Leigh Davenport, Esqs.,
for the General Counsel.
Jennifer L. Mora and John Ayers-Mann, Esqs.
(Seyfarth Shaw LLP), for the Respondent.
Thomas Woods, Business Agent (Teamsters Local 665),
for the Charging Party.

DECISION

MARA-LOUISE ANZALONE, Administrative Law Judge. This case was tried in person in Oakland, California between January 13 and May 7, 2025, based on a number of original and amended unfair labor practice charges, captioned above. The General Counsel alleges that American Automobile Association of Northern California, Nevada & Utah (Respondent or AAA) violated the National Labor Relations Act (the Act) by failing and refusing to bargain in good faith with International Brotherhood of Teamsters, Local 665 (the Union or Local 665) during negotiations for an initial collective-bargaining agreement and additionally engaged in numerous violations of Sections 8(a)(1), (3) and (4) of the Act.

STATEMENT OF THE CASE

On August 24, 2024, the General Counsel issued an amended complaint, as further amended during trial. In it, the General Counsel alleged that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of a unit of insurance sales agents employed by Respondent. Specifically, the General Counsel alleged that Respondent:

> (a) by its overall conduct since about September 16, 2021, failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit employees;

(b) by prematurely declaring impasse and implementing its last, best and final offer, unilaterally changed unit employees' terms and conditions of employment, including announcing that, effective February 1, 2025, it would cease paying agents "renewal commissions," which amounted to a significant reduction in pay; and

(c) by imposing new or changed terms and conditions on unit employees that were *not* contemplated by its last, best and final offer, unilaterally changed terms and conditions of unit employees.

It is also alleged that Respondent's announced plan to rescind agents' renewal commissions caused a number of agents to resign; as such, the General Counsel alleges that these resignations amounted to Section 8(a)(3) and (1) constructive discharges. In a related allegation, the General Counsel argues that Respondent violated the Act by offering the resigning agents severance agreements that violated Section 8(a)(1) of the Act. Finally, the General Counsel alleges that Respondent unlawfully disciplined agent Carmen Vasquez based both on her pro-union stance and her testimony in a prior unfair labor practice proceeding against Respondent and additionally denied her requested *Weingarten* representation. Respondent filed a timely answer denying the allegations.

After considering the entire record,[1] including my observation of witness demeanor, and having reviewed the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT[2]

I. JURISDICTION AND LABOR ORGANIZATION

At all material times Respondent, a California corporation with a principal place of business in Walnut Creek, California and approximately 78 Northern and Central California branches, and is a mutual benefit corporation engaged in the business of providing insurance, travel, and safety services to its members. Respondent annually derived gross revenues in excess of $500,000 during the 12-month period ending July 31, 2024. During the same time period, Respondent also purchased and received products, goods, and materials at its California facilities that were valued in excess of $5,000 and came directly from points outside the State of California. Respondent admits, and I find, that Respondent has at all material times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find, that the Union at all material times has been a labor organization within the meaning of Section 2(5) of the Act.

[1] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh. __" for General Counsel Exhibit; "R. Exh. __" for Respondent Exhibit; "Jt. Exh. __" for Joint Exhibit; "GC Br. at __" for the General Counsel's post-hearing brief; and "R. Br. at __" for Respondent's post-hearing brief. Transcript and exhibit citations are intended as an aid only.

[2] Although I have included several citations in this decision to highlight particular testimony or exhibits in the evidentiary record, I emphasize that my findings and conclusions are not based solely on those specific citations but rather are based on my review and consideration of the entire record for this case.

II. GENERAL FACTUAL BACKGROUND

Respondent operates branch offices throughout California, from which it sells—through licensed agents—insurance policies (property and casualty ("P&C") insurance, life insurance and auto), and additionally provides various services to its individual members. As of June 22, 2021, the company operated 78 branches throughout the state. Approximately 10% of the agents sell life insurance (Life Agents); the remaining agents sell P&C (P&C Agents); certain P&C Agents, referred to as Multi-Line Agents, also sell life insurance. Each branch is overseen by a branch manager (BM); sometimes with the assistance of an assistant branch manager (ABM). Also working at the branches are "frontline" employees known as Member Experience Associates (MEAs) and Member Experience Generalists (MEGs) who greet customers, process payments, and offer various motor vehicle services. (Tr. 237–239, 2402–2404).

On March 23, 2021, Local 665 filed a petition to represent Respondent's California-based sales agents on March 23, 2021, in Case No. 20–RC–274587. Pursuant to a Stipulated Election Agreement, a mail-ballot election was conducted among the following unit:

> All full-time and regular part-time Commissioned Insurance Sales Employees employed by Respondent at its 78 Northern and Central California branch offices; excluding all other employees, managers, guards, and supervisors as defined in the Act.

(GC Exh. 108). On June 11, 2021, the Union prevailed. The bargaining unit consisted of approximately 478 employees as of June 2021. On June 22, 2021, Region 32 issued a Certification of Representative that incorrectly identified the unit's new exclusive bargaining representative not as Local 665 but rather as Respondent. A corrected Certification of Representative issued on June 29, 2021, correcting this error and identifying the Union as the unit's bargaining representative. (Tr. 250–253; GC Exh. 109).

III. PROCEDURAL BACKGROUND

The Prior Unfair Labor Practice Proceeding

The timeline of this case overlaps with that of a prior set of unfair labor practice charges against Respondent in Cases 23–CA–280838, et al., heard by Judge Lisa Ross between May 23, 2023 and October 23, 2024 (AAA I).[3] Following her retirement from the Agency, that matter was reassigned to Associate Chief Judge Arthur J. Amchan, who decided it on the written record and post-hearing briefs.

Judge Amchan found that, between July 23, 2021 and September 23, 2022, Respondent, in response to the Union organizing its California insurance agents, unlawfully discharged five agents in violation of Section 8(a)(3) of the Act. As direct evidence of animus against the Union, he specifically credited unrebutted testimony that a senior management official (who would later serve as Respondent's notetaker in bargaining) told managers shortly after the election to "pull back our support on the agents" and not make it obvious. *American Automobile Association of*

[3] References to transcript citations in AAA I read as "AAA I Tr. ___."

Northern California, Nevada and Utah, No. 23–CA–280838, et al., 2026 WL 657280, slip op. at 7 (NLRB Div. of Judges March 4, 2026) (Amchan Decision) (citing AAA I Tr. 2080–2081).

In addition, Judge Amchan found that Respondent unilaterally changed working conditions for the newly represented unit employees at certain of its California branch locations without providing the Union notice and an opportunity to bargain. Finally, Judge Amchan found that Respondent committed a unit-wide unilateral change in February 2021, when it excluded unit employees from a long-standing past practice award program known as the "Circle of Excellence" that Respondent had previously announced would resume in 2021. Amchan Decision at 25, 29, 30, 32. This action he found to violate both 8(a)(5) and 8(a)(3), the latter as "inherently destructive" under *Great Dane Trailers*. Id. at 29.

Judge Amchan further found that Respondent violated the Act by issuing subpoenas to the Union and alleged discriminatees seeking information about their union/protected activity and cooperation with the NLRB; that a portion of Respondent's handbook confidentiality policy could be read to unlawfully bar employees from discussing wages; and that, following the Union's June 22, 2021 certification, Respondent violated a unit member's *Weingarten* rights. Id. at 4.

The District Court Injunction Action

On November 14, 2024, Region 32 Regional Director Christy J. Kwon filed with the District Court for the Northern District of California a petition for temporary injunctive relief under Section 10(j) of the Act, seeking injunctive relief for various unfair labor practices alleged in AAA I, including a request that Respondent be enjoined from carrying through on its announced plan to eliminate the bargaining unit's renewal commissions.

On January 23, 2025, United States District Judge Haywood S. Gilliam, Jr. granted the petition in part, enjoining and restraining Respondent from implementing its policy eliminating renewal commissions effective February 1, 2025. See *National Labor Relations Board Region 32 v. American Automobile Association of Northern California, Nevada & Utah*, Case No. 24-cv-07978-HSG (N.D. Cal) Order Granting in Part and Denying in Part Petition for Temporary Injunction under Section 10(j) (U.S.D.J. Haywood S. Gilliam, Jr.).

IV. ALLEGED BARGAINING-RELATED UNFAIR LABOR PRACTICES [COMPL. ¶ 10]

Factual Background of Bargaining Allegations

A. Agent Compensation and Renewal Commissions

As discussed in more depth throughout this decision, agent compensation, and in particular, their receipt of renewal commissions emerged as the parties' core dispute in bargaining, and Respondent claims that a lawful impasse regarding this subject excused it from bargaining before imposing terms and conditions of employment on the bargaining unit. As such, a description of renewal commissions is appropriate here.

Pursuant to California law, the terms of agents' compensation is set forth in a written compensation plan. See Cal. Labor Code § 2751. Respondent maintains separate plans for its agents who sell property and casualty (P&C) insurance and those who sell life insurance (referred to as the "legacy compensation plans"). Historically, Respondent's agents were paid on a commission-driven model involving a guaranteed draw (i.e., a guaranteed hourly rate calculated (daily) against the commissions the agent earns; if commissions for the period fall below the draw, the agent still keeps the full draw on a non-recoverable basis). This draw was supplemented by bonuses, incentive payments and commissions. These commissions included the "renewal commission"—a percentage of the commission that Respondent charges the insured upon a policy's annual renewal. (Tr. 521–524).

During the spring of 2021—shortly before the Union filed its representation petition for the bargaining unit—Respondent announced that it was eliminating the draw and renewal commissions for agents hired after August 4, 2015 (referred to as "Group B Agents") and replaced these elements with a guaranteed base salary. Those hired pre-August 4, 2015 (referred to as "Group A" Agents) retained renewal commissions based on the draw model. There is no allegation that this action, which took effect March 1, 2021, was undertaken in response to union organizing. (GC Exhs. 48, 50, 51, 125; Tr. 525–528, 2413).

Undisputedly, however, renewal commissions were an issue of central importance to Respondent's workforce during the Spring of 2021, when union organizing was underway. On February 16, 2021, Respondent's top management official, then-Chief Executive Officer Osh O'Crowley (O'Crowley) sent a memorandum to all California-based agents; specifically addressing the Group A (i.e., grandfathered) Agents, he stated: "if you earn renewal commissions…remember, we have never taken away renewals." He testified in AAA I that this language was a response to "rumor" that had agents concerned that AAA was going to take away their renewals as well. (GC Exh. 125; AAA Tr. at 4047–4048).

As part of its response to the Union's organizing campaign, Respondent also touted the value of renewal commissions as part of Group A agents' compensation. On April 29, 2021, O'Crowley sent a memorandum to eligible voters reminding them that "[o]ur P&C agents who earn renewals are the highest paid captive agents in the personal lines insurance industry" and concluding, "it is clear that you are some of the best paid agents in our industry, and you did not have to spend any union dues to get there." (AAA I Tr. Exh. 39).

Following the union's election victory and subsequent certification, renewal commissions would continue to play a major role, emerging during bargaining as the central dispute between the parties, with the Union proposing they again be made available to all agents (regardless of hire date) and Respondent proposing they be eliminated for all agents. The General Counsel's principle argument in support of its bad-faith bargaining allegation is that Respondent intentionally frustrated the bargaining process by proffering, and consistently adhering to, a its position that renewals be eliminated—a proposal it knew the unit members would never ratify.

B. June–July 2021: Woods Requests Bargaining and Respondent Denies Making Changes to the Status Quo

Leading up Local 665's organizing of the bargaining unit was Tom Woods (Woods). On June 28, 2021, Woods requested bargaining dates from Respondent; in response, Thomas Posey (Posey), Respondent's outside counsel—who had been present at the ballot count—emailed, "[l]et us know when the NLRB has certified the Teamsters, and once that happens we can start looking towards scheduling a date to commence negotiations." Woods testified that Posey's response left him "very confused . . . because I was in receipt of the certification. And I hadn't noticed the clerical error." Woods explained that he "didn't know what it was the Company needed to schedule dates," considering that Respondent had filed no post-hearing objections to the election results. (Tr. 245, 252–255; GC Exh. 77).

Upon further review, Woods identified the certification's clerical error in the initial Certification of Representative; he then obtained a corrected certification from the Board. On June 30, 2021, he again emailed Posey, who informed him that he was personally "booked up for July" and therefore proposed August 18, 2021 for a first bargaining session. He gave no explanation as to why the first half of August was unacceptable to the company. On July 2, 2021, Woods agreed to Respondent's proposed date, requesting that the parties arrange to meet weekly, considering that negotiations would not start until two months after the ballot count. Posey did not respond to his request. (Tr. 255–256, 306–307; GC Exh. 78).

On Friday, July 20, 2021, the two men "met" via a Zoom videoconference arranged by Woods. According to Woods' unrebutted testimony, he alerted Posey during the call that he believed that Respondent had engaged in multiple unfair labor practices, including three actions Judge Amchan would later find violative of the Act: one of the 8(a)(3) discharges, as well as two of the 8(a)(3) and (5) unilateral changes, detailed above. Posey responded to these accusations ten days later via email, asserting that the discharge had been lawful and that Respondent had made no unilateral changes to the status quo at the branches in question. (GC Exhs. 82, 83).

C. August 18, 2021: First Bargaining Session

On August 18, 2021, Respondent and the Union met for their first bargaining session, which lasted approximately 2 hours. For Respondent, Attorney Posey served as chief negotiator; he was joined by one of Respondent's Vice-Presidents, Michele "Tracey" Taylor (Taylor), who served as Respondent's designated note taker. Beginning in January 2022, Respondent's Vice President of Labor (i.e., its in-house labor counsel) Karen Williams (Williams) also joined the team. For the Union, Woods served as chief negotiator and was joined by an 18-member employee bargaining committee. Also present for the Union were former Local 665 officer and consultant Ralph Miranda (Miranda), who served as the Union's designated note taker, current Union Principal Officer Tony Delorio (Delorio) and Business Agent Joe Matekel (Matekel). (GC Exh. 80, Tr. 245, 299, 301, 308, 347, 600–602, 2357).

At the meeting's outset, Woods revoiced his concern that the Union had been made aware of "changing practices within the branches" which Posey denied. Woods stated that he needed an agreement that the parties agreed that they were in a "status quo period" during which nothing could change without negotiations, and Posey agreed. Woods then reiterated his request that the parties meet weekly, to which Posey responded, that was "just not going to happen" and that, "realistically," they could meet every three to four weeks. (Tr. 298–299, 302, 349, 356–358; GC Exh. 84 at 1, 3).

Next, Woods presented a full proposed collective bargaining agreement, including 32 provisions, as the Union's initial language proposal. (As he testified, the parties agreed to address language proposals before turning to economics). To demonstrate its good faith, Woods explained, the proposal included "employer-friendly" provisions such as a management rights, a no-amendments clause, a savings clause and a zipper clause. Woods testified that he presented the Union's proposal "line by line," and took some limited questions from the management side. (Tr. 350–351; GC Exh. 70).

D. September 16, 2021: Second Bargaining Session

At the September session, Respondent presented its first counterproposal. Posey did not explain its specifics but simply handed the proposal to Woods and asked whether he had questions; after taking a caucus to review the document, the Union's negotiating team returned and the parties had an article-by-article discussion of the document, summarized below:

- <u>Recognition (Art. 1)</u>: AAA proposed to exclude regular part-time employees from the contract's recognition clause (discussed below).
- <u>Bargaining-unit/exclusive work</u>: AAA took the position that "there was no exclusive work that our sales agents performed" (discussed below).
- <u>Nondiscrimination (Art. 20)</u>: Striking a specific reference to unit employees' Section 7 rights, Posey explained that, while the company would abide by the law but did not need that law inserted into the contract.
- <u>Just cause/progressive discipline</u>: AAA struck the Union's just cause language, with Posey stating it was "covered by the law," that the agents were "at will" employees and a just-cause standard "would be a significant departure." AAA also modified the Union's progressive discipline language to significantly expand the categories of immediately terminable offenses exempted from the progressive system. Posey explained that AAA wanted "the flexibility to determine that someone needs to be fired, period."
- <u>Seniority (Art. 23)</u>: AAA rejected the concept of seniority, with Posey stating that benefits would be awarded based on performance, not seniority.
- <u>Management rights (Art. 27)</u>: AAA thanked the Union for proposing management-rights language but countered with its own two-page version.

(GC Exhs. 76, 86; Tr. 367–380, 689–717).

It appears that the most contentious of Respondent's counters was its removing "regular part-time employees" from the bargaining unit description and its refusal to recognize the concept of exclusive bargaining unit work. With respect to part-time employees, Woods was "absolutely baffled" by Respondent's proposal, as this group had been explicitly included in the parties' stipulated election agreement. He told Posey: "Do I need to print it out and show you your signature on it? … Are we negotiating a contract, or are we just going to screw around for a period of time?" Posey responded Respondent had no part-time employees and should not be required to negotiate over people it did not employ. (Tr. 367–368, 689–717).

The other topic that sparked a lively debate was work exclusivity, which would become a recurring issue in the negotiations. Specifically, Posey represented that there was no work that was performed exclusively by bargaining unit employees and specifically certain MEAs, as well as managers, routinely sold insurance policies. This was apparently news to the agents serving on Local 665's bargaining committee, who insisted it was against AAA's policy and threatened to demand they be paid for such sales, because only agents were supposed to write policies. Woods requested that the company confirm that MEAs were currently selling insurance and additionally requested that Respondent identify any other job classifications whose employees were currently being trained to do so. (Tr. 369–370, 407–411).

Notably, Respondent's proposal did not counter all of the proposals contained in the Union's August document. When Woods asked where the remaining counters were, Posey explained that, if Respondent had not countered a Union proposal, that proposal had been rejected. (Tr. 382–383). However, it then became clear that some of Respondent's "non-counters" (such as on paid sick leave and PTO) were driven by its classification of them as core economic issues put on hold—per the parties' agreement—to bargain later. Respondent ultimately prepared a listing of issues that was rejecting (as opposed to putting on hold), and Woods pressed for explanations for each of those. Initially, Posey responded, "we don't have to explain our rejections to you … we have to explain our counters; we do not have to explain our rejections," but Woods persisted, explaining that he needed to understand Respondent's rationale for rejecting each proposal. (Tr. 387, 398–399).

Ultimately, Posey provided certain explanations: union security was rejected because "it should be an employee choice whether or not they join a union"; rules for part-time employees were rejected because AAA had no part-time employees; maintenance of standards provision was rejected because "you have to bargain over each individual benefit or condition … We are starting from a blank slate"; various leave provisions rejected as "covered by law"; seniority and subcontracting provisions were rejected as an unacceptable incursion on Respondent's management rights. (Tr. 384–400; GC Exhs. 70, 85, 86).

On September 27, 2021, Woods emailed Posey, requesting that he put in writing the company's rationale for each Local 665 proposal it had rejected. Posey replied that AAA "had not obligation to provide a detailed explanation (or for that matter any explanation) for its rejection of various Union proposals" but had done so orally on the 16th as a courtesy. (R. Exh. 8).

Woods testified that the subject of Posey's bargaining authority was addressed at either the August or September session. Specifically, he testified that Posey represented that "everybody necessary to make a decision was at the table." (Tr. 480–481). Posey did not deny making this statement.

E. October–November 2021: The Parties' Language Bargaining Sessions

The parties met for three bargaining sessions during October and November, which focused on non-economic topics.

1. <u>Session 3: October 7, 2021</u>

The parties exchanged two sets of proposals. The Union reproposed its full seniority and just cause/progressive discipline articles. Respondent offered no counter to either proposal. The parties each stood firm on their respective management rights proposals.

The parties reached their first TAs, including the nondiscrimination clause (stripped of its reference to Section 7-protected conduct) and the no-amendment/savings clause. After Woods again confronted Posey with the parties' stipulated election agreement, the parties also TA'd the recognition clause with the part-time employee language retained. (GC Exh. 87, 88, 89, 90, 112; Tr. 417–431, 619).

2. <u>Sessions 4 and 5: November 3–4, 2021</u>

At this session, proposals were exchanged. The Union:

- Dropped its exclusive bargaining unit work demand and adopted the Employer's language stating that "there is no work performed exclusively by the bargaining unit employees" subject to bargaining over the economics of this arrangement.
- Converted its "repropose" placeholders into concrete language on just cause (proposing no discipline without just cause; two written warnings before suspension or discharge) and added full paid-sick leave and vacation-selection proposals, as well as a definition of "seniority."

Respondent, for its part:

- Replaced its language defining a workweek with the Union's formulation.
- Agreed to a definition of "seniority" and agreed to seniority as a basis for vacation selection.
- Did not move on its previously rejected items and continued to offer no counter on just cause.

TA's were reached on No Strike/No Lockout, "Definition of Workweek," and the definition of "seniority." (GC Exhs. 68, 69, 97, 98; Tr. 471–473).

At the close of the session, AAA proposed that, the following day, Woods should present in detail every open proposal the Union had. Posey stated, "you do all the talking. We'll do all the note-taking, and then we're going to go back to the decision-makers." This shocked Woods, given Posey's September 16, 2021 representation that all decision-makers were already at the table. (Tr. 480–482).

The following day, as requested by Posey, Woods re-explained every open Union proposal. This, he testified, amounted to him engaging in an "all day monologue" while Posey took notes. When members of the bargaining committee expressed frustration with the process of Woods having to re-explain the Union's positions, Posey assured them that it wasn't a "waste of time" and that he had taken extensive notes. (GC Exh. 10; Tr. 479, 483–485).

F. December 2021–March 2022: The Parties Engage on Economics

The next six bargaining sessions delved into the parties' respective economic proposals, although they did continue to TA various non-economic subjects. What emerged from these sessions would become the parties' core dispute over renewal commissions.

1. <u>Sessions 6–7: December 7 and 8, 2021</u>

Having received no counter on its just cause/progressive discipline language, the Union refashioned its last proposal to incorporate most of Respondent's expanded list of immediately terminable offenses. AAA did not make a counter to the Union's revised progressive discipline proposal. Later in the session, the Union proposed language basing layoffs, reductions in hours and vacation scheduling on "seniority" as defined by the parties' November 3 TA.

Near the end of the day, Posey—in what would become a pattern for Respondent—dramatically shifted the tone of the discussion, announcing, "We don't see us doing much more. If you want to bargain over economics, now's the time because we don't see us at the table on language for much longer."[4]

In response, the Union hastily prepared its first economic proposal, which it presented the following day. Addressing PTO accrual, overtime, retirement, and medical benefits, plus union security/check-off, the most significant aspect of the Union's proposal was to eliminate the Group A/Group B distinction, so that all agents could receive renewal commissions. The proposal also included language addressing the Circle of Excellence award program, stating the Respondent "shall maintain… the annual Circle of Excellence sales achievement recognition award." AAA did not counter substantively that day. (GC Exh. 102, 103, 104; Tr. 502–505, 524–525, 534–539).

The parties did, however, TA the seniority rights provision, which stated "seniority rights shall apply to layoff, reduction in hours, and vacation scheduling within each branch, based on seniority as defined in Section 23.1." (Tr. 494–500; GC Exh. 101).

2. <u>Sessions 8–10: January 13, 26 and 27, 2022</u>

The parties met in early January, with Respondent's in-house counsel Williams joined AAA's team for the first time; AAA, however, made no economic counter until January 26,

[4] While Posey denied this comment, his own notes reflect that he did categorically address non-economic proposals, stating, "We do not see us agreeing to much more on these than we already have. May change if some of these are withdrawn, positions change or there are moves that get made during economics but right now we do not see much else." (GC Exhs. 65, 67; Jt. Exh. 1 at 000609; Tr. 486–494).

2022. By that time, the Union had sent Respondent a revised[4] copy of its December 8, 2021 proposal, as well as copies of the legacy compensation plans redlined to reflect its economic demands. (Tr. 562–564, 600–601; GC Exhs. 52, 55, 56, 106, 113).

At the **January 26** session, Williams again attended as part of Respondent's bargaining team. AAA delivered its first economic counterproposal, which was simple: Respondent proposed to put both Group A and B agents on the "B" plan — eliminating renewal commissions. This caused an "visceral reaction" on the Local 665 side; Posey stated that Respondent had been considering eliminating renewal commissions since at least 2015 when it had ceased paying them to new agents (creating the grandfathered Group A). He then stated that, on some unspecified date, the Company had engaged outside consultants to assess its business, including agent compensation, resulting in a multi-page study based, in part, on Bureau of Labor Statistics (BLS) data that concluded they were "grossly overpaid."[5] Woods ended the session, stating that he "would not be able to ratify such a significant reduction to [] 60 of the bargaining unit…" (GC Exh. 60; Jt. Exh. 2 at 004086; Tr. 574–575, 595–598, 735–736, 2552–2555, 2558–2560).

The following day (**January 27**), the session opened with unit members questioning AAA's renewal-elimination proposal. Pressed for an economic justification, Williams merely stated that "it was a fair proposal"; Posey repeated his claim that that outside-consultant/market data had shown that the agents were "grossly overpaid." Posey then stated that AAA had costed the Union's economic proposal as "36 million rich" (i.e., above Respondent's current costs); he then stated that AAA's consultants had compared the bargaining unit's salaries to 2021 salaries at eight other companies. Woods requested a copy of the consultant's study but never received it.

Local 665 Business Agent Joe Matekel (Matekel) then confronted Williams, asking whether, in any of her prior collective bargaining negotiations, she had ever proposed to cut a 50% wage reduction, to which she responded, "absolutely." Another member of the Union's bargaining team asked, "you have?" to which William again responded, "Absolutely." Another bargaining team member then asked, "and it happened?" Williams responded, "It happened. And afterwards the union was decertified." At this point, Delorio shouted, "that's bullshit!" and the union side erupted in protest. Woods called for a caucus, and when the parties returned to the table over an hour later, Williams returned and stated she was "sorry that the statements that she made upset people" and that she was committed to working towards getting a contract, to which Delorio replied, "you can't take back the words that you said, so let's move on."

The session continued, with Posey presenting an itemized break down of how AAA had calculated the cost of the Union's proposal. Matekel asked Posey, "is there some kind of counter proposal?" Posey stated that AAA had already made its proposal (i.e., eliminating Group A renewal commissions) and now expected the Union to respond with a proposal. Woods stated that the Union would not be able to develop a counter on the spot and the parties agreed to future

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[5] No copy of this study was offered into evidence, nor did Respondent present the testimony of any "outside consultant" involved in authoring it. Woods did testify that, at some unspecified date, CFO Clay Creasy presented the Union "a PowerPoint presentation …where the company was trying to convince us that we were overpaid and that…based on a Department of Labor Statistics statistic…we should be compensated with only $35,000 a year" (Tr. 1177).

dates for negotiations. (Tr. 633, 628–641, 1087, 1175–1177, 2553–2554; GC Exh. 52; Jt. Exhs. 2 at 004098–004100 & 13).

3. Sessions 11–14: February 16, March 1, 23 and 24, 2022

During February and March, the parties' discussions continued to focus on Respondent's costing of the Union's economic proposal. On February 16, the Union, as requested, presented an economic counter-proposal; it maintained the same headline economics as its December 8 proposal but did make concessions on overtime that moved closer to Respondent's position. The Union also abandoned its effort to negotiate terms and conditions for part-time employees, shifting to proposing only a future bargaining obligation if AAA hired part-timers. AAA did not counter. (GC Exhs. 48, 50, 51; Tr. 731–733).

On **March 1**, Posey provided the Union with a written cost estimate stating that the Company estimated the annual cost of the Union's February 16 proposal to be $43.1 million more than its current costs for the bargaining unit. Respondent also made its first movement on economics, maintaining its proposal to eliminate renewal commissions but increasing its proposed base salary from $34,000 to $35,700 (a 5% increase). AAA also introduced a proposal for a six-month probationary period during which an employee could be discharged at will without recourse to the grievance/arbitration procedure. (GC Exh. 47).

The subject of Respondent's legacy compensation plans was also discussed; while maintaining that it was required by state law to maintain written compensation plans for its agents, Respondent had failed to fashion its economic proposals as revisions to those plans. Near the end of the meeting, Woods asked Respondent to clarify whether Respondent was asserting the right to unilaterally change its bonus formula calculation (a right reserved to it in the legacy compensation plans). (GC Exh. 43).

Following this session, the parties engaged in an extended cost-analysis exchange in which the Union challenged various assumptions underlying AAA's cost estimate. Ultimately, Respondent revised its position, estimating that the Union's February 16 proposal would increase its costs between $40.4 and $43.1 million. Notably, one of the assumptions Respondent insisted on maintaining concerned what it termed the "reinstatement" of the Circle of Excellence award, which it costed at $1.1 million. When Woods objected that O'Crowley had announced the reinstatement of the award on February 16, 2021, Respondent did not dispute this but instead stated:

> This is not part of the agent's [sic] 2021 or 2022 compensation plans, which the Company was required to strictly comply with in order to maintain the status quo following the Union's election as the Agents' representative, so it would be an additional expense if agreed upon.

(GC Exhs. 126, 127, 129 at 8–9; Tr. 756–757).

On **March 23**, the Union proposed a written compensation plan for each of the P&C and Insurance Agent bargaining unit members that maintained its economic demands. The parties extensively discussed the just-cause/progressive-discipline list of terminable infractions. (GC Exhs. 44, 45, 46; Tr. 1327–1332).

On **March 24**, AAA presented language counters but no economic counters. Posey reminded Woods that he should interpret the company's non-response to a Union proposal as a rejection, stating that Respondent was not countering on economics because its team "had to go talk to people that weren't in the room," and that a person was "coming in April" to make a presentation to "help us understand the context of the Employer's proposal." (GC Exhs. 41, 42; Tr. 1335–1339). Posey did not deny making these remarks.

The parties made progress on certain noneconomic items, tentative agreeing to the probationary-period article, albeit with a carve-out retaining grievance/arbitration rights for probationary employees alleging violation of the contract's anti-discrimination clause. Woods also pressed his concern over legacy compensation plans' sole-discretion bonus-formula. (GC Exhs. 43, 166; Tr. 1341–1342, 1352–1353).

G. April–November 2022: Summary of Contract Bargaining and Events

During the next seven months, the parties met for 14 bargaining sessions. Throughout this period, they reached tentative agreements on a steady stream of non-economic items while largely maintaining their respective positions on agent compensation.

1. Sessions 15–20: April 13, 14, May 11, June 6–9 and 23, 2022

On **April 13**, The Company presented a counter-proposal on a variety of topics; in response to Woods' March 1 concern over the legacy compensation plan language, Respondent proposed removing from the plans "any current language that would allow Employer to make unilateral changes to Agents' compensation," plus a health-and-welfare proposal. The parties tentatively agreed to three additional proposals. (GC Exhs. 39, 169; Tr. 1359–1360).

Respondent's CFO Clay Creasey attended this session—apparently he was the individual Posey had identified as being necessary for Respondent to make an economic counterproposal. Creasey made a presentation, ostensibly to explain the Company's rationale for its compensation proposals. The presentation, which concluded that a fair salary for the bargaining unit members was $35,000 included survey of salaries in the industries based on BLS data, as well as an outside study that Creasey claimed had been commissioned by Respondent, of agent compensation at four other, unnamed insurance companies. When Woods requested the identity of those companies, Respondent's team declined, claiming that confidentiality "was part of the deal" when Respondent had contracted the survey and directed them to the BLS website. (Tr. 1177, 1440–1443). Neither Posey nor Creasey (who did not testify) denied this.

Several members of the Union's bargaining team immediately logged onto the BLS website and challenged what Creasey was holding out as legitimate comparator employees (who, as it turned out, included non-agents who merely happened to hold a license to sell insurance). When one of them openly critiqued his selection of BLS data as "worthless," Creasey, pantomiming tearing up a piece of paper, responded, "when you guys decided to join the Union, you tore up your contract into little itty bitty pieces...and we are starting from scratch." (Tr. 1088–1089, 1180–1181; *AAA I* Tr. 2362–2363).[6]

On the following day (**April 14**), The Union countered on a variety of topics, including softening its demand to extend renewal commissions to Group B agents; it now proposed that these agents become eligible for renewal commissions only after achieving 8 years' seniority, while increasing the Group B base salary from $34,000 to $48,000 and eliminating the minimum threshold for the membership incentive. The company responded with a fresh cost analysis, concluding the Union's proposal would cost an additional $34.3 to $37 million above its current costs; by Respondent's own costing, then, the Union had lowered its ask by $6.1 million (on average a 16.4% reduction from its February 16 proposal). (GC Exh. 38; R. Exh. 14).

On **May 11**, AAA proposed terms on layoffs and how agents are paid while on a leave of absence. The parties tentatively agreed to a layoff proposal. (GC Exhs. 179, 180) On **June 8**, AAA countered on numerous topics, including bargaining unit work, compensation, health and welfare, and retirement. (GC Exh. 36) The following day (**June 9**), the Union countered on bargaining unit work and compensation, but its position on the core economic items remained the same. The parties tentatively agreed to six additional proposals. (GC Exh. 35, 173, 222).

On **June 23**, The parties exchanged various non-economic proposals and tentatively agreed to four more, including a TA on discipline that stated prohibited Respondent from disciplining any employee without just cause, while reserving it the right to immediate termination for a number of specific offences. Woods considered this a major, hard-fought win for the Union, describing it as a "big moment for us."

2. Sessions 21–28: July 13–14, August 15–16, September 8, 13–14 and October 4, 2022

During the following three months, the parties met seven times, exchanging various non-economic proposals and tentatively agreeing to 13 of them. See GC Exhs. 17–30, 177, 183, 189. Their competing economic positions, however, had become well defined:

> AAA sought to eliminate renewal commissions for Group A Agents upon contract ratification and pay all Agents an annual base salary of $35,700 (up from $34,000).
>
> The Union sought to continue renewal commissions for Group A Agents; additionally begin paying renewal commissions to certain Group B Agents who met the 8-year seniority requirement; raise the base for other Group B Agents from $34,000 to $48,000; and raise the renewal-commission rate from 2% to 2.5%.

(GC Exhs. 11–13).

At the **September 14** session, Respondent finally presented its written compensation proposal. As had become somewhat routine, it contained a contentious item—apparently carried

[6] The General Counsel alleges that this statement constitutes an independent violation of Section 8(a)(1).

over from the legacy agent compensation plan—that caused significant consternation on the part of the Union's bargaining team. The language stated:

> Employment at-will
> Eligibility and participation in the Plan in no way implies or reflects any guarantee or contract of employment. A Plan Participant's employment with AAA is at will (except where limited by Montana law). Participation in this Plan does not confer any right to continue in AAA's employ or limit the right of AAA to terminate a Plan Participant's employment at any time, with or without cause for advance notice. A Plan Participant's employment with AAA is not for a specified duration, and this Plan is not an employment contract for a specified duration.

Woods immediately objected that this language contradicted the tentative agreement on just cause/progressive discipline the parties had reached three months earlier. (GC Exhs. 14, 15, 16, 184; Tr. 1563–1568). Posey's response was simply to state that the compensation plan was boilerplate pursuant to California law and "not something to be bargained."[7]

Another notable aspect of Respondent's compensation proposal was its failure to include any mention of the "Circle of Excellence" award, i.e., the lucrative award program Judge Amchan would later find had been eliminated for unit employees during the organizing campaign in violation of Section 8(a)(5) and (3) of the Act.

H. December 2022–February 2023: Mediation Sessions

After roughly a year of bargaining, the parties turned to a federal mediator. There were four mediation sessions — November 4, December 2, and December 12, 2022, and January 4, 2023 — with two additional direct bargaining sessions (December 19 and 28, 2022) that took place prior to the final mediation session. (R. Exhs. 28 and 40; GC Exh. 188). The sessions took place in two venues: a large conference room where the parties, including their full bargaining committees, exchanged proposals, as well as a small breakout room where Woods, the Union's outside counsel Andy Baker, and Delorio met with Posey, Taylor and the mediator for confidential settlement discussions. (Tr. 1593, 1595).

Over the course of the mediation sessions, both sides offered concessions. On December 19, 2022, Respondent offered to delay the elimination of renewals for 12 months following the contract's ratification. The Union, for its part, dropped what Woods described as its most significant demand—that Group B agents begin receiving renewal commissions—instead focusing on retaining the commissions for the grandfathered Group A agents. On January 4, 2023, Respondent proposed continuing Group B renewals for 18 months following contract

[7] While Posey in his testimony denied that Respondent regressed on this subject, his notes make clear that—consistent with Woods' testimony—the tentative agreement had been reached, stating, "22 – Just Cause – TA as written." (Tr. 1477; GC Exhs. 29, 32, 33, 34, 176; Jt. Exh. 1 at 000473).

ratification and additionally offered a severance benefit equal to the existing severance program for Group A agents for the first 18 months. (R. Exh. 6; GC Exh. 5, 193; Tr. 2567).

With respect to Respondent's proposals to delay elimination of renewals, however, Woods maintained that he could not get such terms ratified by the membership unless the elimination occurred following the contract's expiration. Posey protested that, because under federal law, the commissions would continue in the status-quo period after any contract expiration, this was simply an "illusory proposal" in that the parties would have to address the issue in any negotiations for a successor contract. According to Woods, Posey then said "there was no more work to do, that the company wasn't going to make any more movements or concessions unless we agreed to renewal sunsetting during the period of an agreement." Woods replied that "I guess we are going to have to vote it" and requested that Posey prepare a full set of proposals for a ratification vote. (GC Exhs. 3, 188, 193; Tr. 1660–1661, 2564–2569).

On February 24, 2023, the Company did so. (Tr. 2571–2572; Jt. Exh. 8). The agents rejected Respondent's proposal by a 99% margin. (Tr. 1677).

I. May 2023 – The Final Meetings and Impasse Declaration

The parties met by Zoom videoconference on May 19 and 25, 2023, in what would be their final meetings. Present for the sessions were Woods, Matekel, Delorio, Miranda and the Union's bargaining committee, as well as Posey, Williams and Taylor for AAA. (Tr. 1727, 1736, 2573).

1. <u>The May 19 Session</u>

The **<u>May 19 session</u>** opened with Woods stating that the bargaining unit had voted down Respondent's proposal. He then stated, "you need to sweeten the deal." He then listed six items that, if met, the Union "think[s] we can get it ratified":

1. Renewals through the term of the CBA, with the caveat that the Union did not care how long (or short) the contract was in duration;
2. A cost-of-living adjustment to base for the Life and B agents;
3. A bonus-calculation adjustment for reduced coverage (e.g., high-fire areas);
4. Stop clawbacks for failing to meet quality/underwriting; [8]
5. Membership goal lowered to 10; and
6. A "Circle of Excellence"-equivalent trip/award.

When Posey asked whether there was "[a]ny written version of this list of 6," Woods replied, that the points were a "supposal, so no. We just want to get this done." (Tr. 1727–1729, 2574–2575; GC Exh. 2, 118 at 710).

[8] This item sought to end Respondent's then-practice regarding penalizing agents for failure to comply with underwriting requirements policed by Respondent's internal compliance program (known as the "IPC program"). The penalty for failing to correct errors flagged by the IPC program is for the company to "claw back" (i.e., rescind) the agent's commission on the policy in question. (Tr. 931).

The company caucused briefly and, upon returning, Posey asked "if renewals was a deal breaker for the Union." Woods responded, "my membership had told me it is, but we are listening…to any reasonable proposal you make on the topic." Woods then suggested that the parties agree to convert agents' renewals into a base salary; this would involve converting each agent's current renewal rate to an "equivalent base so that it wouldn't increase over time and let attrition take its course." Williams then asked, "what astronomical base would the Union accept?" to which Woods replied, "well, $500,000 is astronomical." Posey responded, "okay, but talking realistic numbers, we do not see your position changing."[9]

Woods next stated that the parties discuss the Union's other proposals (i.e., 2–6) at their next session, to which Posey responded, "okay, but there is no situation we can see where we change our position on [renewals], but we are willing to discuss 2–6." (Tr. 1730–1732, 1816; GC Exh. 118 at 20–21; Jt. Exh. 1 at 711–712).

2. The May 25 Session

On **May 25**, a brief (10 minute) session began with Posey stating that renewals were "an absolute deal breaker" so if the Union did not have a counter that did not include renewals, "we do not see where else there is to go here." Woods then raised the issue of his "conversion" plan for renewals, stating that if Respondent was willing to convert agents' renewals into a large enough base pay figure, the Union could "potentially get rid of" its demand for continued renewals. According to Posey's notes, the following exchange then occurred:

> Posey: No, you said if $500K went into [base pay] you could. We know that was facetious but there is no amount we see that you would take and we would offer on [base pay] that gets rid of [renewals].
>
> Woods: So you have no counter today?
>
> Posey: Unless you have a counter for us to our Feb[ruary] offer that you voted on that does not include renewals, then you have already seen the last and best offer we are going to make.

The Union took a brief caucus, after which Woods told Posey, "okay we both know our options going forward. If you decide you are ready to negotiate more, let us know, to which Posey replied that Woods should let *him* know if the Union had a counter that included giving up renewals. (Tr. 1736–1737, 2578–2581; Jt. Exh. 1 at 713–714).

[9] I have largely credited Woods' recollection of this exchange, as corroborated by the parties' bargaining notes; Posey's account notably omitted the term "astronomical," despite the fact that it was reflected in his own notes. See Jt. Exh. 1 at 711; Tr. 2576.

3. June 15 Impasse Declaration

The next communication was an email from Posey's office declaring impasse, explaining:

> [a]fter lengthy discussions regarding such renewals, both parties have indicated that they consider their respective positions on renewals as a "deal breaker" and one that they are not willing to move on. Given both parties' indication in the last several bargaining sessions that they will not move further on those positions, the parties are at irreconcilable odds on this central issue and have reached an impasse in the negotiations.

Posey also indicated that, effective August 1, 2023, Respondent intended to implement the terms of its February 24, 2023 offer. The Union's attorney responded, rejecting impasse and asking for the specific terms to be imposed (GC Exhs. 196, 197; Tr. 1737–1739). The company then sent an edited last, best and final offer (LBFO) highlighting the items that would not be implemented (Jt. Exhs. 7, 9; Tr. 1741–1742).

Discussion and Analysis of 8(a)(5) Bad-Faith Bargaining Allegations

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Union as the exclusive collective-bargaining representative of the bargaining unit.[10] In particular, the General Counsel alleges that Respondent bargained with no intention of reaching an agreement by: (a) insisting on proposals that are predictably unacceptable to the Union, including the elimination of renewal commissions; (b) refusing to provide explanations for its bargaining positions; (c) engaging in regressive bargaining by insisting on "at will" language in its compensation plan proposal; (d) committing unlawful unilateral changes that prejudiced the Union's bargaining position, compounded by Respondent's misrepresentations regarding having done so; and (e) making coercive statements at and away from the bargaining table.[11]

Respondent avers that it engaged in hard but lawful bargaining over the course of 29 bargaining sessions and 21 months, and that the parties were legitimately deadlocked on the issue of renewal commissions at the time it declared an impasse.

[10] Although the complaint asserts August 18, 2021 as the starting date for Respondent's bad faith bargaining, I find the 6-month limitations period set forth in Section 10(b) of the Act, dictates that the operative date is February 3, 2023 (6 months following the charge filed in Case 32-CA-321155). Based on well-established precedent, evidence about events before February 3, 2023 remains relevant to shed light on the nature of events that occurred within the limitations period (i.e., on or after May 25, 2020). See *Machinists Local 1424 v. NLRB*, 362 US 411, 416 (1960); *Regency Service Carts*, 345 NLRB 671, 672 fn. 3 (2005).

[11] Although not alleged in the complaint, the General Counsel also claims that Respondent's bad faith is evidenced by its failure to meet at reasonable times and refusal to respond to two items in a July 2, 2021 information request by the Union. I find that neither of these theories, however, is supported by the record evidence insofar as the General Counsel failed to demonstrate their effect on the parties' course of bargaining and/or Respondent's impasse declaration.

A. Credibility Findings

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, 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. Credibility findings need not be all-or-nothing propositions — indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014) (noting that an administrative law judge may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). To the extent that credibility issues arose in this case, I have stated my credibility findings in the Findings of Fact above.

B. The Bargaining Allegations: Legal Standards

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." Mandatory areas of collective bargaining include "wages, hours, and other terms and conditions of employment." An employer violates this duty to bargain by unilaterally imposing changes in the terms and conditions of employment. See Sec. 8(d); see also *Litton Fin. Printing Div. v. NLRB,* 501 U.S. 190, 198 (1991); *NLRB v. Katz,* 369 U.S. 736, 742–743 (1962).

Although the Act imposes an obligation to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment," it also expressly provides that "such obligation does not compel either party to agree to a proposal or require the making of a concession." Section 8(d); see generally *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952). Put more simply, the government may not force a party to agree to a particular collective bargaining agreement or any specific term in an agreement.

1. The *Taft Broadcasting* impasse standard

This statutory regime provides for a declaration of lawful "impasse" (i.e., a honest deadlock or standstill in negotiations between the parties) that permits a unionized employer to operate its business without a negotiated contract by unilaterally imposing certain terms and conditions of employment. Lawful impasse requires that the collective-bargaining process has been exhausted and, "despite the parties' best efforts to reach an agreement, neither party is willing to move from its position." *Excavation-Construction, Inc.*, 248 NLRB 649, 650 (1980); *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973), enfd. denied on other grounds 500 F.2d 181 (5th Cir. 1974).

Since impasse is a defense to allegations of bad-faith bargaining, it must be proven by the party asserting it and it will not be lightly inferred. *Sacramento Union,* 291 NLRB 552, 556 (1988). A party claiming impasse carries the burden of proving that, at the time of its impasse declaration, "no realistic possibility that continuation of discussions. . . would have been fruitful." *Truserv Corp. v. NLRB*, 254 F.3d 1105, 1114 (D.C. Cir. 2001) (quoting *Television*

Artists AFTRA v. NLRB 395 F.2d at 628 (alteration in *Truserv*), cert. denied 534 U.S. 1130 (2002)).

"Whether a bargaining impasse exists is a matter of judgment, and bargaining history, the good faith of the parties in negotiations, the length of the negotiations . . . [t]he importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding to the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed." *Taft Broadcasting Co.,* 163 NLRB 475, 478 (1967).

2. <u>The good-faith requirement</u>

Not all of these factors, however, carry equal weight; as the Board has explained, one of them—the declarant's good faith during bargaining—may be dispositive, in that it is required for a lawful impasse to occur. *NLRB v. Noah's Ark Processors*, LLC, 98 F.4th 896, 899 (8th Cir. 2024) ("impasse presupposes a reasonable effort at good -faith bargaining" as it is a "prerequisite" to impasse); *Corporation for General Trade (WKJG-TV 33)*, 330 NLRB 617, 627 (2000) ("good-faith bargaining is a prerequisite to reaching bona fide impasse"). This is because the Board's impasse regime creates an incentive for "unscrupulous employers…[to] sabotage[e] the negotiations to manufacture an impasse while making a show of negotiating in good faith," a practice known as "surface bargaining" that violates § 8(a)(5) of the Act. *ConAgra, Inc. v. NLRB*, 117 F.3d 1435, 1444 (D.C. Cir. 1997) (citing *Horsehead Resource Dev. Co.,* 321 NLRB 1404, 1407 (1996)).

C. Respondent Failed and Refused to Bargain in Good Faith

As explained below, I find that the totality of Respondent's conduct during negotiations evidenced an intent to frustrate agreement on a collective-bargaining contract with the Union, and that such conduct constitutes bad-faith bargaining in violation of Section 8(a)(5) of the Act.

1. <u>Applicable legal standard</u>

The Supreme Court has held that the statutory duty to "meet . . . and confer in good faith" is not fulfilled by "purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it.'" Instead, "[c]ollective bargaining . . . presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 485 (1960); see also National Labor Relations Act, Sec. 8(d).

"In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table." *Public Service Co. of Oklahoma*, 334 NLRB 487, 487 (2001) (internal citations omitted), enfd. 318 F.3d 1173 (10th Cir. 2003). "From the context of an employer's total conduct, it must be decided whether the employer is lawfully engaging in hard bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement." *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984); *Public Service Co.*, supra at 487. However, it has never been required that a respondent must have engaged in "wholesale and wide-ranging" misconduct in every aspect of its actions before it can be concluded that bargaining has not been conducted in good faith under the Act. *Altorfer Machinery Co.*, 332 NLRB 130, 148 (2000). Rather, "bad faith is prohibited though done with sophistication and finesse." *Herman Sausage Co.*, 275 F.2d at 232; *Regency Service Carts, Inc.*, 345 NLRB 671, 671–672 (2005).

As the Board has explained:

> In determining whether a party has bargained in good faith, making a genuine effort to reach agreement, [the Board] will seldom find direct evidence of a party's intent to frustrate the bargaining process. Rather, [it] must look at all of [the party's] conduct, both away from the bargaining table and at the table, including the substance of the proposals on which the party has insisted.... Such an examination is not intended to measure the intrinsic worth of the proposals, but instead to determine whether, in combination and by the manner in which they are urged, they evince a mindset open to agreement or one that is opposed to true give-and-take.

Sivalls, Inc., 307 NLRB 986, 1008 (1992) (citations omitted).

Based on this evidence, it must be decided whether the employer is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. *District Hospital Partners, L.P., d/b/a George Washington University Hospital*, 373 NLRB No. 55, slip op. at 1–2 (2024).

2. Analysis

I find that, by insisting on eliminating renewal commissions, withdrawing from the parties' tentative agreement on just cause, misrepresenting the status quo on its Circle of Excellence program, as well as by other conduct both at and away from the bargaining table, Respondent manifested a lack of good faith that prevented lawful impasse.

(a) Insistence on eliminating renewal commissions

The General Counsel principally argues that Respondent's position that renewal commissions be eliminated—amounting to a deep pay cut for the bargaining unit—was presented in a manner that suggests it was intended not for legitimate economic reasons but rather to because Respondent knew it was anathema to the bargaining unit and intended it to derail the parties' efforts to reach agreement. Respondent maintains it genuinely held its position and engaged in lawful hard bargaining when it came to the pay cut. I agree with the General Counsel.

Board law is clear that specific contract proposals may be considered in determining whether a party has bargained in bad faith. *Reichhold Chemicals*, 288 NLRB 69, 69-70 (1988), enfd. 906 F.2d 719 (D.C. Cir. 1990); see also *NLRB v. Wright Motors*, 603 F.2d 604, 609 (7th Cir. 1979) ("Sometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered to."). "[U]nrealistically harsh or extreme proposals can serve as evidence that the party offering them lacks a serious intent to adjust differences and reach an acceptable common ground." *International Alliance of Theatrical Stage Employees,* *Local 15 v. NLRB*, 957 F.3d 1006 (9th Cir. 2020); see also *NLRB v. A-1 King Size Sandwiches, Inc.*, 732 F.2d 872 (11th Cir. 1984) (proposals “so unusually harsh, vindictive or unreasonable that they were predictably unacceptable” may support finding of surface bargaining).

These principles, however, must be balanced against the Act’s express provision that the duty to bargain does not compel either party to agree to a proposal or make a concession; as such, “it is not the Board’s role to sit in judgment of the substantive terms of bargaining” (i.e., to assess whether any particular proposal is categorically “acceptable” or “unacceptable”). *Altura Communication Solutions, LLC*, 369 NLRB No. 85 (2020) (citing *Rescar, Inc.*, 274 NLRB 1, 2 (1985)). Rather, the Board examines a party’s motive behind presenting the proposal on the basis of objective factors to decide whether it is designed to frustrate agreement. *Reichhold Chemicals*, 288 NLRB 69 (1988), affd. in relevant part 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991). Put differently, while a harsh or extreme proposal may serve as evidence that that the party offering it “lacks a serious intent to adjust differences and reach an acceptable common ground,” the mere “harshness” of a proposal—absent conduct showing an intent not to enter into a contract—is insufficient to do so. *Horsehead Res. Dev. Co. v. NLRB*, 154 F.3d 328 (6th Cir. 1998).

Proposing a significant wage cut—where it is objectively defensible by reference to the relevant labor market—will be deemed “a hard sell” but not so unreasonable as to have been predictably unacceptable where the levels are not below those of competitors and the employer “[does not] categorically refuse to alter its proposals as the negotiations continued.” *ConAgra, Inc. v. NLRB*, 117 F.3d 1435 (D.C. Cir. 1997). However, where an employer insists on eliminating a form of compensation that employees have historically received, and that proposal is predictably unacceptable to the union, that insistence — particularly when combined with other indicia of bad faith — supports a finding of surface bargaining under Section 8(a)(5). In this regard, a parties’ conduct surrounding its proposal—including statements that independently violate Section 8(a)(1)—may “manifest[] the objective of frustrating and preventing an agreement from being reached.” *In Re Hardesty Co., Inc.*, 336 NLRB 258 (2001).

I find that Respondent’s conduct in proposing to eliminate renewals demonstrated an intent to frustrate any agreement between the parties. Respondent’s proposal amounted to a demand that a majority of unit members accept a dramatic reduction in take-home pay. There is no doubt that issue of renewals was of major consequence to the bargaining unit; Respondent had, during the Union’s organizing campaign, eliminated them for all but its more senior, Group A agents. Prior to the certification vote, concern among the “grandfathered” Group A agents that their renewals were next on the chopping block had admittedly prompted Respondent’s then-CEO to assure them that *their* renewals had never been eliminated.

Following the Union’s certification, Respondent seized on the membership’s concerns and targeted renewals. Beginning with the January 26, 2022 negotiation session, Respondent categorically insisted on the wholesale elimination of Group A’s renewals. Its position was rigid; it offered only the barest of economic movement on its base salary figure (an approximately 5% increase from $34,000 to roughly $35,700). While it eventually proposed a delay in eliminating renewals, there is no evidence that Respondent offered any meaningful economic concessions or benefits to the bargaining unit in exchange for elimination of renewal commissions it proposed. See *Sweeney & Co.*, 176 NLRB 208, 211–212 (1969) (finding that the employer’s rigid refusal to make any meaningful concessions on critical economic issues supported a finding that the employer bargained in bad faith), enfd. in pertinent part, 437 F.2d 1127 (5th Cir. 1971).

Moreover, Respondent never provided more than a "lip service" justification for eliminating a source of agents' income that O'Crowley had previously insinuated was secure. Williams cagily claimed it was "fair" and Posey accused the agents of being "grossly overpaid." For months, these characterizations were not backed up with any data. The Board has held that a significant manifestation of bad-faith bargaining is a refusal to offer explanations for one's bargaining proposals beyond conclusory statements. See, e.g., *Liquor Industry Bargaining Group,* 333 NLRB 1219, 1221 (2001) (respondent made no attempt to explain its proposal but merely asserted that wages and seniority were a matter for management alone to decide) (citing *Alba-Waldensian*, 167 NLRB 695, 696 (1967)); *Summa Health System, Inc.*, 330 NLRB 1379 (2000) (respondent failed "to provide any specific economic justification for the absolute discretionary powers it demanded which lessened protections for bargaining unit work, other than generalized insistence on some vague concept of 'flexibility[.]'").

When Creasey eventually presented the company's rationale for eliminating renewals, he refused to reveal the identity of the rival insurance providers with which Respondent claimed to be seeking competitive alignment and instead referred the Union's bargaining committee to questionably relevant BLS wage data. When challenged, he resorted to coercive theatrics, pantomiming tearing up a contract and declaring that the parties were "bargaining from scratch." See *TRW-United Greenfield Division*, 245 NLRB 1135, 1138 (1979), enfd. 637 F.2d 410 (5th Cir. 1981) (finding unlawful "starting from scratch" comments, accompanied by manager holding up a blank sheet of paper). This conduct, which independently violated Section 8(a)(1), was hardly consistent with "a mindset open to agreement." *Sivalls*, supra at 22.

Nothing, however, was more telling of Respondent's motive in proposing the elimination of renewals than Williams' January 27, 2022 conduct. Asked whether she had ever previously proposed such a massive wage reduction, Williams affirmed that she had and then gratuitously added, "and afterwards the union was decertified." This remark serves not just as an additional 8(a)(1) violation but also as compelling evidence of Respondent's true motivation for demanding to eliminate renewals. The 'end game' of such a maneuver—by Williams' admission—was to engender such dissatisfaction with employees' selected bargaining representative that it would simply not survive as such. This is the antithesis of a good-faith intent to reach common ground. See *Overnite Transp. Co*., 296 NLRB 669 (1989) (employer's pre-bargaining statements that it would not sign a contract with the union, that it would not yield to any sort of strike pressure, and that it would hire replacements for strikers, constituted unlawful threats under Section 8(a)(1)); see also *Northern Wire Corp*., 291 NLRB 727, 731 (1988) ("An employer—particularly through its lawyer— should be careful when making statements of this sort not to engage in "brinksmanship" or make "conscious overstatements he has reason to believe will mislead employees") (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969)).

Finally, Williams' comment eviscerates Respondent's claimed market-based defense for eliminating renewals. Posey repeatedly characterized the cut as justified by a third-party consultant study and BLS data purportedly showing the agents were overpaid, but no copy of the study was placed in evidence and no consultant testified to support it. Moreover, there is no evidence that Respondent ever complied with Woods' requests for the study or its underlying assumptions. Ultimately, Williams' decertification threat exposed Respondent's motivation and conduct at the bargaining table by expressly manifesting Respondent's objective in insisting on a massive wage cut: to prevent a collective bargaining agreement from ever being reached. Id; see also *In Re Hardesty Co., Inc*., 336 NLRB 258 (2001) (supervisor's statements indicating the company's plan to wait for a decertification vote, combined with its regressive and largely unexplained bargaining positions, amounted to sufficient evidence of surface bargaining), enfd. 308 F.3d 859 (8th Cir. 2002).

(b) Insistence on "at will" language and withdrawal from just-cause tentative agreement

As further evidence of Respondent's bad faith, the General Counsel relies on its September 14, 2022 compensation plan proposal, which characterized unit employees' employment as "at will" despite the fact that the parties had previously tentatively agreed to a progressive discipline article that included a just-cause standard. I agree.

Regressive proposals, i.e., those that materially reduce existing terms of employment or retract terms of a prior proposal, are not—standing alone—per se violative of the Act. Instead, the Board examines a respondent's explanation for a change in position to determine whether it was undertaken in bad faith and designed to impede agreement. *White Cap, Inc*., 325 NLRB 1166, 1169 (1998) (citations omitted). Withdrawing from a tentative agreement without justification has been found to constitute regressive bargaining designed to frustrate bargaining. *Golden Eagle Spotting Co. v. Brewery Drivers & Helpers, Loc. Union 133*, 93 F.3d 468, 471 (8th Cir. 1996) (employer's withdrawing from a tentative agreement on union security without good cause constituted part of pattern to frustrate bargaining); see also *Suffield Academy,* 336 NLRB 659, 669 (2001) (party may withdraw from tentative agreement only when it has good cause to do so), enfd. 322 F.3d 196 (2d Cir. 2003).

Respondent's insistence on at-will language in its compensation plan proposal constituted a paradigmatic example of regressive bargaining. The parties had engaged in extensive, months' long negotiations on the subject of just cause discipline, culminating in a tentative agreement the Union considered to be a major milestone in the negotiations. The at-will language buried within Respondent's first full compensation proposal would act to strip bargaining unit employees of the just-cause protection the Union had won them. Respondent's only explanation for including the language— that the compensation plan was legacy boilerplate maintained in writing under California law and "not something to be bargained"—was simply not borne out by the credible record evidence. As such, the regressive nature of Respondent's at-will language proposal, without justification, and the seemingly pretextual explanation of its purpose, suggest that it was not made as part of any good-faith effort to reach an agreement, but instead, constituted bargaining in bad faith designed to frustrate a collective-bargaining agreement, in violation of Section 8(a)(5) of the Act. See *Leader Communication, Inc*., 359 NLRB 730, 738 (2013) (bad faith bargaining where employer, without credible explanation, repudiated tentative agreement on just cause discipline).

(c) Commission of prior, unremedied unfair labor practices
and misrepresentation of the status quo regarding the same

The General Counsel additionally argues that Respondent's prior, unremedied unfair labor practices should be considered further evidence of its bad faith. I partially agree.

It is well established that a lawful impasse cannot be reached in the presence of serious unremedied unfair labor practices that affect the negotiations. *White Oak Coal Co*., 295 NLRB 567 (1989). Not every unremedied unfair labor practice, however, will taint an impasse; the violation must be shown to have detrimentally affected the negotiations and contributed to the parties' deadlock. The Board has identified at least two ways in which an unremedied ULP can contribute to the parties' inability to reach agreement: first, by increasing friction at the bargaining table; and second, by changing the status quo through a unilateral change that moves the baseline for negotiations and alters the parties' expectations about what they can achieve. *Alwin Mfg. Co., Inc*., 326 NLRB 646 (1998), enfd. 192 F.3d 133 (D.C. Cir. 1999).

To the extent that Judge Amchan in AAA I found Respondent to have engaged in numerous unfair labor practices, including discharging union adherents and making unilateral changes to working conditions, I rely on these findings. See generally *Voith Industrial Services, Inc*., 363 NLRB 1020 fn. 2 (2016); *Longshoremen ILWU (ICTSI Oregon, Inc.)*, 363 NLRB 460 fn. 3 (2015). That said, I find that only one of them—Respondent's elimination, for unit employees, of its Circle of Excellence award program—meets the Board's standard for precluding lawful impasse.[12]

As noted, Judge Amchan found that Respondent committed a unit-wide unilateral change when it excluded unit employees from a long-standing past practice award program known as the "Circle of Excellence" that Respondent had previously announced would resume in 2021. During bargaining, however, Respondent treated "reinstatement" of the program as a new $1.1 million cost that was *not* part of the status quo it was obligated to maintain. This characterization inflated the cost of the Union's economic proposal, and in the parties' final meetings, Woods was still attempting to get the program—which was indisputably a priority for the unit—reinstated. Under the circumstances, I agree with the General Counsel that Respondent's unremedied elimination of the Circle of Excellence changed the status quo, thereby moving the baseline for negotiations and making agreement more difficult and therefore evidenced Respondent's bad faith.[13]

D. Impasse was Premature

Even assuming that Respondent had otherwise bargained in good faith, its conduct during the parties' final two negotiating sessions (May 19 and 25) demonstrates that its impasse declaration was premature. The Board has consistently held that a genuine impasse requires that both parties believe they are at the "end of their rope" and that there is no realistic possibility that

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[12] The remaining conduct by Respondent was not demonstrated at hearing to have a sufficient nexus to bargaining to preclude impasse. See *Washoe Medical Center*, 348 NLRB 361, 362 (2006)

[13] I note that the record contains certain instances of Respondent's gamesmanship in bargaining that, standing alone, would not necessarily provide compelling evidence of bad faith. However, viewed alongside some of Respondent's more egregious conduct, they deserve mention. As an example, Posey, a highly skilled lawyer, built delay into the bargaining schedule by failing to inform Woods—who holds no law degree—of a typographical error in the Board's certification of representative. Later, after representing that he had full authority to bargain, he forced Woods to spend an entire bargaining day repeating his explanations of each of the Union's proposals while he took notes to be reviewed by an absent party. Unfortunately, this conduct was consistent with Respondent's overall bad-faith approach to collective bargaining.

continuation of discussions would be fruitful. Because impasse is an affirmative defense, the burden of proving it lies with the party asserting it, and it will not be lightly inferred. *Essex Valley Visiting Nurses Assn*., 343 NLRB 817, 840 (2004); *Serramonte Oldsmobile, Inc.*, 318 NLRB 80, 97 (1995), enfd. in relevant part 86 F.3d 227 (D.C. Cir. 1996).

That an employer had reached its final position does not demonstrate that the union has, and therefore, that there was impasse. *Grinnell Fire Protection*, 328 NLRB 585, 586 (1999) ("even assuming arguendo that the Respondent has demonstrated it was unwilling to compromise any further, we find that it has fallen short of demonstrating that the Union was unwilling to do so"); see also *TruServ Corp. v. NLRB*, 254 F.3d 1105, 1116–1117 (D.C. Cir. 2001) (contemporaneous understanding as to impasse does not require the parties to reach a mutual agreement as to the state of the negotiations; rather, each party must independently, and in good faith, believe that it is at the end of its rope).

Moreover, "[t]he fact that Respondent believed that the Union would never agree to Respondent's . . . proposals does not establish an impasse." *Ford Store San Leandro*, 349 NLRB 116, 121 (2007). As the Board has explained:

> where [] a party has already made significant concessions indicating a willingness to compromise further, it would be both erroneous as a matter of law and unwise as a matter of policy for the Board to find impasse merely because that party is unwilling to capitulate immediately and settle on the other party's unchanged terms. Further, even assuming arguendo that the Respondent has demonstrated it was unwilling to compromise any further, we find that it has fallen short of demonstrating that the Union was unwilling to do so."

328 NLRB 585, 586 (1999).

In this case, Respondent argues that the parties were at impasse on May 25 because the Union had not made an additional offer that eliminated renewals. I disagree. It is true that the parties—over the course of two years—had largely held firm to their respective positions on the subject. That said, by the time of the May 2023 meetings, both parties had made significant concessions on renewals—Respondent had agreed to delay their elimination by first 12 and then 18 months, and the Union had stepped back its demand for Group B renewals and then agreed to withdraw the demand for them entirely. See *Hood River Distillers, Inc*., 372 NLRB No. 126, slip op. at 4 (2023) (parties' "movement on key elements under negotiation was sufficient to forestall impasse"), enfd. 130 F.4th 204 (D.C. Cir. 2025), cert. denied 146 S. Ct. 208 (2025); *Stein Industries, Inc.*, 365 NLRB 227, 230 (2017) (impasse declared premature where union had substantially reduced its initial wage proposal).

It is further true that, on May 19, Woods suggested that renewals were a "deal breaker" for the membership. Even assuming, however, that this established a single-issue impasse on the subject of renewals, it lasted only momentarily, because he then proposed that the parties agree to convert the agents' renewals into a base pay figure. Notably, an impasse, once reached is a temporary state and easily broken. *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 412 (1982); see also *Royal Motors Sales*, 329 NLRB 760, 762 (1999), enfd. sub nom. *Anderson Enterprises v. NLRB*, 2 Fed. Appx. 1 (D.C. Cir. 2001). Anything that creates a new possibility of fruitful discussion breaks impasse. *Airflow Research & Mfg. Corp*., 320 NLRB 861, 862–863 (1996); *Jano Graphics, Inc.*, 339 NLRB 251, 251 (2003) ("[A]ny impasse on July 29 was broken on August 4, when the Union informed the Respondent that it had new proposals and was seeking further bargaining"); *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1399 (5th Cir. 1983) ("Anything that creates a new possibility of fruitful discussion (even if it does not create a likelihood of agreement) breaks an impasse . . . [including] bargaining concessions, implied or explicit").

Woods' proposed "conversion" approach was a major concession on the very issue that had deadlocked the parties; the fact that it took two years of bargaining for the Union to make this movement certainly does not suggest that further bargaining would have been fruitless. *Local 13, Detroit Newspaper Printing and Graphic Communications Union v. NLRB*, 598 F.2d 267, 273 (D.C. Cir. 1979) ("Effective bargaining demands that each side seek out the strengths and weaknesses in the other's position. To this end, compromises are usually made cautiously and late in the process.") (citing *F. A. Reynolds Co.*, 173 NLRB 418, 424 (1968), enfd. 424 F.2d 1068 (5th Cir. 1970)).

Rather than seize upon Woods' opening, however, Williams and Posey immediately set about derailing it, declaring that any base salary the Union would deem acceptable would be an "astronomical" figure. When Woods floated the idea of a $500,000 base salary, Williams immediately characterized the figure as unrealistic and Posey again prognosticated, stating, "talking realistic numbers, we do not see your position changing." The following day's exchange cemented Respondent's position; when Woods again raised the idea of converting renewals, Posey replied "there is no [base pay] amount we see that you would take and we would offer."

Posey's statements made clear that Respondent "chose to assume" that the Union would not make any offer that Respondent would be willing to accept. *Grinnell Fire Protection*, 328 NLRB at 586. Respondent's ungainly effort to manufacture impasse revealed that its bargaining representatives knew that it was dangerously close to wearing down the Union on the issue it had calculated would frustrate any agreement. This possibility is the polar opposite of genuine impasse; accordingly, I find that Respondent's impasse declaration was premature.

V. ALLEGED UNILATERAL CHANGES [COMPL. ¶ 11]

Factual Background of Alleged Unilateral Changes

On the morning of **<u>August 1</u>**, at each of Respondent's branch offices, management read a script to bargaining unit employees (a copy of which is attached as Appendix A to this decision) announcing "policies and procedures that we are implementing on August 1, 2023 and which were part of the Company's last, best & final offer to the union." The changes, employees were reminded, were "effective today." (Jt. Exh. 14).

The General Counsel concedes that <u>Items 11–16</u> (compensation, Group A severance, shop stewards, grievance procedure, health & welfare and titles) of the August 1 directives were part of Respondent's LBFO. Respondent's right to implement these terms and conditions, as discussed above, depends on whether Respondent had legally declared impasse. However, the government also alleges that certain other of the August 1 directives (Items 1−5 and 7−10) violated 8(a)(5) of the Act by altering multiple aspects of unit employees' working conditions in a manner not contemplated by the LBFO. These changes, if proven, violated 8(a)(5) even had Respondent's impasse declaration been lawful.

That these terms were not consistent with the LBFO was established by a comparison of that document with the August 1 script. Moreover, with the exceptions noted below, the General Counsel's witnesses and/or documentary evidence established that each of the non-LBFO directives modified agents' work hours, ability to generate sales or other terms and conditions of employment. In this regard, the government presented witness testimony concerning pre- and post-August 1 conditions at four of its branches. Respondent, for its part, presented limited testimony by two managers on a limited number of unit-wide policies announced on August 1.

What follows is a description of each of the non-LBFO alleged unilateral changes:

1. Counter duty (Item 1)[14]

Complaint alleges that Respondent violated 8(a)(5) by:	August 1 Script states:
Altering the methods and practices by which Unit employees performing counter duty are allowed to sell insurance and memberships to customers; eliminating full-day rotations on counter duty for Unit employees; eliminating assignment of new business to Unit employees when customers request them by name; prohibiting employees from performing counter duty if they are one minute late arriving to work or one minute late returning from lunch; eliminating the ability and autonomy of Unit employees to schedule their own counter duty or to switch or trade counter duty among employees without branch manager approval; requiring Unit employees to service all walk-ins, thereby	• The Manager/ Assistant Branch Manager (ABM) will now create and publish the agent counter rotation schedule • Regarding Flex for Saturday work- It is the Manager's discretion to choose flex day based on branch need • Agents **cannot** opt out of monthly counter schedules • Agents must sell all products, including all Specialty products (if they are properly licensed) • Any agent request to switch or trade an assigned counter shift must have prior approval by Branch Leadership. Agents must find a person to trade and this must be communicated **by email** to the Branch Manager and ABM by end of day on the day before their scheduled shift. This includes trades for Scheduled PTO. • If the agent fails to make these arrangements on time, they will forfeit their shift, and it will go to the agent with the highest seniority. If declined, the shift will go to the next senior agent. If they all decline, Branch Management will assign the shift to the lowest seniority agent. This is called "inverse seniority." • If an agent is late or calls in sick on the day they have Counter Duty, the Manager will first offer it to the

[14] Compl. ¶ 11(a)(i). Paragraph 11(a)(ii) of the complaint, which alleged that Respondent's August 1 directive implemented "new Saturday schedule protocols inconsistent with Respondent's LBFO," went unaddressed by both the General Counsel's witnesses and its post-hearing brief. I therefore consider it withdrawn.

preventing them from prioritizing new business opportunities; and preventing Unit employees from passing non-lucrative counter duty work to non-Unit Team Members, thereby resulting in lost revenue opportunities for Unit employees to earn commissions.

highest seniority agent, and then the next senior - if no one takes it, the Manager will enforce “inverse seniority” as was just described. The missed or late counter shift will **not** be replaced (or switched or traded) for the Agent on Unscheduled PTO.

- For insurance servicing, if an MEA/MEG is unavailable to assist the Member, the Member will be sent to the next available Agent on counter.
- All products count as an “up” including: Ancillary Insurance Products, Membership, Insurance Policy Rewrites and Insurance Policy Servicing.

* * *

- To build out the Saturday Counter Schedule:
    - Branch Management will gather a list of all Saturday dates & shifts for the upcoming quarter, starting with the agent who has the highest seniority, and working down from there.
    - Branch Management will ask if there are volunteers for any particular Saturday(s).
    - Once the volunteer spots are filled, Branch Management will enter the name of the lowest seniority agent in the first available shift that has not been volunteered for, and will continue in inverse-seniority order until all shifts are filled.

- Branch Management will adhere to the following process for Membership distribution:
    - *Membership Only:* Insurance Agent(s)
    - *OMV transactions (with or without Membership):* Team Member conducting the OMV transaction will fulfill the Membership request.
    - *Insurance Servicing:* Team Member conducting the transaction (agent or MEA)
    - *Life Insurance:* Life Insurance Specialist conducting transaction
    - *Travel:* Travel Counselor conducting transaction

The General Counsel’s witnesses testified that counter duty—an opportunity for walk-in business—was considered a plum assignment. Prior to August 1, the agents typically made the counter duty schedule themselves, and there was no company-wide policy regarding counter duty. There was also no penalty for an agent reporting late for their assigned counter duty.[15] However, following August 1, management took over the task and an agent who reported even

[15] I note that, in AAA I, Judge Amchan found that Respondent had in 2019 implemented such a penalty at its Stockton branch; however, the Stockton branch closed effective June 30, 2022. As such, its past practice as of August 1 is not relevant to my analysis. See Amchan Decision at 23, 24, 29.

one minute late for counter duty lost the assignment. (Tr. 909, 1003–1004, 1850–1854, 1938–1939, 1947–1948, 1950–1951, 1955–1956, 2032–2034, 2430).

2. Bilingual language requests (Item 2)[16]

Complaint alleges that Respondent violated 8(a)(5) by:

Altering its existing translation procedures by implementing a "Bilingual Language Request" system that prohibited non-Unit front-line employees from assisting Unit employees to provide translation services to their customers; requiring Unit employees to call an outside-translation service phone line for assistance; and restricting Unit employees from assisting non-English speaking customers with the assistance of multilingual Team Members, thereby resulting in lost revenue opportunities for Unit employees to earn commissions.

August 1 Script states:

- If a customer walks in requesting a particular language for assistance with a "new business" transaction, and there is an agent in the branch that speaks that language, the following will occur:
  - The customer will be granted their request to work with the agent that speaks their language.
  - If multiple agents speak the requested language, priority will go first to the agents on counter who speak the requested language, then to the agent with most seniority who speaks the requested language
- If there is **no agent** available that speaks the language requested:
  - The counter agent who is "up" next will assist the customer using the language line
  - No other branch Team Member will be asked to assist with translation
  - No other licensed Branch Team Member, regardless of language spoken, will be asked to assist with the new business transaction unless all licensed agents in the Branch are actively working with a customer

The General Counsel's witnesses testified that, prior to August 1, they had been permitted to assist each other with translations and that being forced, after August 1, to use the "language line" instead resulted in wasted time and lost sales. (Tr. 928, 1957–1959).

[16] Compl. ¶ 11(a)(iii).

3. Phones (Item 3)[17]

Complaint alleges that Respondent violated 8(a)(5) by:

Eliminating its existing phone duty protocols that routed all non-revenue generating calls to non-Unit front-line staff and new revenue generating business calls directly to Unit employees; establishing a new phone duty protocol whereby Unit employees are responsible for taking all calls and are prohibited from transferring non- revenue generating calls to non-Unit front-line staff or accepting calls on their personal cell phones or transacting business on a non-recorded line, resulting in lost revenue opportunities for Unit employees to earn commissions.

August 1 Script states:

- All agents will be skilled as “1” in Sales Queues (New Membership/Insurance)
- For Service calls (Zero Out, OMV, Existing Member) all agents will be skilled “2” (MEA/MEG will be skilled as “1”)
- Agents must auto-in and be available for calls. There is no more “phone duty”. All Agents are available for all calls when not actively working with a Member.
- MWG expects agents to transact all new and existing business on a recorded line
- In a branch, if the agent receives a call on their cell phone, the agent must ask the caller to call back on their desk line or have EC 500 engaged. The agent could also call the Member back on their desk line.
- If an agent is working **outside** of the Branch, they are also expected to transact on a recorded line - either using their softphone via laptop connection, or EC500.
- All Agents need to log off the Branch phone system at the close of business each day

The August 1 directive had two impacts on how agents used the telephone. First, they were no longer permitted to use their personal cell phones but were required to conduct all business on recorded landlines. In addition, agents were expected to handle service-related (i.e., non-revenue generating) calls,[18] which they had previously been able to transfer to a call center or to another agent assigned to “phone duty.” (Tr. 1872–1873, 1938–1939).

[17] Compl. ¶ 11(a)(iv).

[18] Although the General Counsel in AAA I alleged a similar change had been made at certain of Respondent’s branches in 2021, Judge Amchan explicitly dismissed this allegation, finding that “the only credible evidence of an increase of service calls for unit employees was that this occurred temporarily during COVID, ostensibly because new business calls decreased.” Amchan Decision at 33.

4. IPC (Item 4)[19]

Complaint alleges that Respondent violated 8(a)(5) by:	August 1 Script states:
Altering Respondent's Insurance Compliance Program (IPC) and imposing a new loss of commission penalty and reassignment of an insurance policy written by a Unit employee to a "house account" when that Unit employee fails to timely make corrections or changes to an insurance policy; requiring Unit employees to actually correct errors on an insurance policy rather than merely attempt to correct errors; and prohibiting the practice of allowing Team Members to review the policies written by Unit employees for IPC errors or underwriting guideline corrections.	• Starting August 1st, the following updated remediation process goes into effect and agents will need to **actually correct** errors on a policy, not merely make an attempt to correct errors • Agents will continue to receive a fail notice and have through Day 30 from bind to correct errors. Please refer to the updated remediation guide available on the Hub (will be posted today, August 1st). • If on Day 31 from bind - the error has **not been corrected**, MWG Compensation will be notified, the commission will be adjusted, and the policy will convert to a House Account. The commission will be adjusted in the pay period following Day 31. • Branch Team Members will not inspect agent-written policies for IPC or underwriting guidelines - that is the responsibility of the agent • **To summarize**: Effective August 1st, the agent will need to correct errors on a policy, not just make an attempt to correct errors. The most current IPC guide is available on the Hub

As discussed earlier, Respondent's IPC program monitors and flags agents' underwriting errors (such as failure to obtain a signed application), and the standard penalty is a "clawback" of the agent's commission on the policy in question. The General Counsel's witnesses explained that, prior to August 1, they were required, within 30 days of a policy being bound, to attempt to correct underwriting mistakes caught by the program or risk losing their commission on the policy; in other words, were their attempts unsuccessful, the agent was not penalized. Under what the August 1 script dubbed an "updated remediation process," agents were instead required to actually correct the error within 30 days or lose their commission. In addition, while branch management had previously been involved in monitoring and correcting compliance issues, after August 1, they were removed from the process, placing the onus on agents to interact with Respondent's Quality Assurance Department on their own. (Tr. 989, 998, 1962–1964, 2811–2812, 2911–2912).

[19] Compl. ¶ 11(a)(v).

5. Hours worked (Item 5)[20]

Complaint alleges that Respondent violated 8(a)(5) by:	August 1 Script states:
Rescinding flexible hours, inconsistent with Respondent's LBFO; implementing a requirement to work 8 hours each weekday and 7.5 hours on Saturdays; and requiring the use of PTO or Unscheduled PTO when less than 8 hours on a weekday are worked or less than 7.5 hours on a Saturday are worked.	Agent timecards - each weekday must be 8 hours and Saturday can be 7 .5 hours. If less than 8 hours on a weekday or 7.5 hours on a Saturday, then PTO or Unscheduled PTO (UPTO) must be used. • Unscheduled PTO would be used if the agent did not give at least 24 hours notice • An agent must still use their PTO bank and cannot ask for Unpaid time off if they have PTO available

Prior to August 1, agents at all but three of Respondent's branches[21] were permitted to work outside of normal branch hours (9:00 a.m.–6:00 p.m.). This was consistent with Respondent's January 2023 Mountain West Team Member Handbook (the 2023 Handbook), which indicated that "Flexible Work Options" were available. (Jt. Exh. 5 at 0105–0106).

This benefit was rescinded effective August 1; agents testified that after that date, they were forbidden from clocking in early, working on the weekend and offsetting their hours by taking a shorter lunch. (Tr. 144–146, 888–891, 1009–1011, 1012, 1223, 1935–1936, 1941, 1946, 2042–2044, 2319).

Former Menlo Park employee Hamid Ezzatyar described a specific incident in early August when the new 6:00 p.m. cutoff forced him to cut short his transaction with the members because Branch Manager Antionette ("A.J.") James (James) appeared outside his office at closing time, pacing and staring at him.[22] Agent-witnesses also testified that, prior to August 1, they had not been required to get approval to work over the weekend, which was sometimes lucrative because their prospective clients were more available during those days. (Tr. 892, 904, 915–916, 1010–1012).

[20] Compl. ¶ 11(a)(vi).

[21] The General Counsel alleged—and Judge Amchan found—in AAA I that agents in three branches (Tracey & Turlock, Santa Rosa and Fulsom) had actually been informed in 2021 that the flexible work hours policy was being rescinded, in violation of Section 8(a)(5). See GC 172 at AAA Tr. 1454–1455, 1469, 2028–2031, 2036–2037, 2041–2043, 2045–2046, 2041–2043, 2045–2046, 2090; Amchan Decision at 30, 31.

[22] I found Azzatyar's account of this incident, which was corroborated by agent Ward, credible. James, for her part, did not deny that this incident occurred but testified that she did not "on August 3 or 4" pace in front of Azzatyar's desk or stand in front of it staring at him. (Tr. 2326). This awkward, limited denial was not convincing.

6. Leads (Item 7)[23]

Complaint alleges that Respondent violated 8(a)(5) by:	August 1 Script states:
Implementing a requirement for Unit employees to research leads by logging on to an internal software program and to work leads within 24-hours or risk the lead being reassigned to another Unit employee; eliminating lead duty; and eliminating the daily distribution of leads in an Excel spreadsheet via email from branch management, resulting in lost revenue opportunities for Unit employees to earn commissions.	• Leads - ALL **available** leads (for example, Overnight, 5 Day, Olympic, NBA, etc) will be distributed by Manager or ABM within 2 hours of opening on business days. The process will be the same for Saturday, if the Branch is open on a Saturday. • If a Branch is closed on Saturday or Sunday, and a lead is received that day, that lead will be handled by the receiving Branch on Monday • The Manager will distribute leads as evenly as possible to the Agents working in the branch on the day of distribution • Agents are expected to work the leads within 24 hours. If leads are not updated (in Connect Suite or on the shared Google Sheet), Managers have the discretion to restrict or redistribute leads. There is no more "lead duty."

The General Counsel presented only limited witness testimony explaining the significance of the August 1 script's remarks concerning leads. It appears, based on this evidence, that, effective August 1, Respondent revised the manner in which agents were notified of "overnight leads" (i.e., customers' online requests for insurance quotes made after 9:00 p.m.), and that this resulted in agents losing the opportunity to make sales. Although the script makes reference to eliminating "lead duty," the General Counsel offered no evidence as to what this duty entailed, and Respondent's witness, current Eureka Branch Manager Justin McCray, testified that there had never been, during his tenure, such a thing. I therefore find that General Counsel failed to establish that eliminating this duty constituted a "material, substantial and significant" change. (Tr. 1782–1774, 1872–1874, 2273–2276).

[23] Compl. ¶ 11(a)(vii).

7. PTO/Unscheduled PTO (Item 8)[24]

Complaint alleges that Respondent violated 8(a)(5) by:	August 1 Script states:
Implementing new requirements for the use of PTO, inconsistent with Respondent's LBFO, including, requiring a written request 24-hours in advance by email to employees' branch manager or assistant branch manager for approval, with any notice less than 24-hours coded as Unscheduled PTO; limiting approval to one agent off at a time in offices with four employees or less and limiting approval to 50% of employees in offices with over five employees; and requiring the scheduling of additional PTO in 2023 to be approved on the basis of seniority.	Agent timecards - each weekday must be 8 hours and Saturday can be 7 .5 hours. If less than 8 hours on a weekday or 7.5 hours on a Saturday, then PTO or Unscheduled PTO (UPTO) must be used. • Unscheduled PTO would be used if the agent did not give at least 24 hours notice • An agent must still use their PTO bank and cannot ask for Unpaid time off if they have PTO available

By its terms, the August PTO directive constituted a departure from Respondent's past practice, as evidenced by the PTO provisions contained in Respondent's 2023 Handbook, which include no requirement for agents to submit a request for PTO 24 hours prior and no cap on the number of agents permitted to take PTO at the same time. (Jt. Exh. 5 at 0111–0112). As found by Judge Amchan in AAA I, Respondent had previously made ad hoc unilateral changes to its PTO policy at two locations (at its Capitola branch, requiring 2 weeks' notice for PTO and, at its Folsom branch, requiring 48-hours' notice and capping PTO at 20% of the staff on a given day). Amchan Decision at 31, 32. Effective August 1, however, employees at those branches were subject to Respondent's new, more onerous restrictions on PTO outlined above.

8. Overtime (Item 9)[25]

Complaint alleges that Respondent violated 8(a)(5) by:	August 1 Script states:
Implementing new requirements for working overtime, inconsistent with Respondent's LBFO, including, requiring that Unit employees notify their branch manager in writing via email on the same day overtime	• **All overtime requests must be pre-approved,** with the following two exceptions: o If an agent is actively working with a Member to transact business, they can work overtime to complete that transaction. They will need to notify their manager in writing via email on the

[24] Compl. ¶ 11(a)(viii).

[25] Compl. ¶ 11(a)(ix).

occurs and notifying their branch manager in writing via email on the occurrence date of work performed when a member contacts a Unit employee outside of business hours; requiring that all non-urgent service and sales work should be pushed to the next business day; and prohibiting the use of overtime to catch up on paperwork.	same day this occurs, outlining time worked and the details of the work performed. o If a Member contacts an agent outside of business hours, the agent may take the call, but must accurately log the time worked and advise their manager in writing via email on the occurrence date outlining time worked and the details of the work performed • All non-urgent service and sales work should be pushed to the next business day. • Overtime is intended only for **actual transactions taking place** (i.e. engaged in sales, service or processing of an insurance product). It is **not** to be used to catch up on paperwork.

By its terms, Respondent's August 1 directive limited overtime to be earned only to complete sales transactions that ran into the agent's overtime hours. Prior to August 1, however, according to General Counsel witness Carmen Vasquez, overtime did not require prior approval and agents were also permitted to use it to perform non-sales tasks, such as catching up on paperwork. (Tr. 1853–1854).

9. Branch support (Item 10)[26]

Complaint alleges that Respondent violated 8(a)(5) by:	August 1 Script states:
Implementing new branch support protocols by prohibiting Unit employees from listing Team Members on Unit employees' email signatures, out-of-office replies or voicemail recordings when they are unavailable and/or out of the office; requiring Unit employees to provide the branch main phone or other support numbers; and passing a member to the next Unit employee available on counter duty when a branch manager needs an agent's support for insurance servicing because all non-Unit Team Members are busy.	• Other Branch Team Members should not be listed on email signatures, out-of-office replies or voicemail recordings if an agent is unavailable and/or out of the office • The agent can provide the branch main phone number or other support phone numbers from appropriate partners (i.e. Claims, etc) • If the Manager or ABM needs an agent's support for insurance servicing because all other branch Team Members are busy, the Member will be sent to the next available Agent on counter.

[26] Compl. ¶ 11(a)(x).

The government's witnesses testified that, prior to August 1, agents who were out of the office could refer callers to other licensed team members in their out-of-office email or voicemail messages to quote and bind insurance policies on the agent's behalf. Following the August directive, at least one agent was explicitly ordered by his supervisor to refer customers to Respondent's customer service phone number. (Tr. 1006–1008, 1939–1941, 1959–1961).

Discussion and Analysis of 8(a)(5) Unilateral Change Allegations

The Supreme Court in *NLRB v. Katz* established the foundational principle that an employer's unilateral change in conditions of employment under negotiation is a violation of Section 8(a)(5), because it is a circumvention of the duty to negotiate that frustrates the objectives of the statute much as does a flat refusal to bargain. 369 U.S. 736 (1962).

To establish a violation of Section 8(a)(5) based on a unilateral change to a work rule, the General Counsel must prove that the employer made a "material, substantial and significant" change to a mandatory term and condition of employment without providing the union with notice and a meaningful opportunity to bargain about the change to agreement or impasse. *Hospital de la Concepcion v. NLRB*, 106 F.4th 69 (D.C. Cir. 2024); *Pacific Maritime Association v. NLRB*, 967 F.3d 878 (D.C. Cir. 2020). I find that the General Counsel has easily met its burden to show that the implementation of its LBFO on August 1 was a material, substantial, and significant change to bargaining unit employees' terms and conditions of employment.

As to the remaining August 1 directives, I find that the General Counsel's witnesses established that they each impacted agents' compensation either: (a) directly (i.e., Hours Worked, IPC, PTO/Unscheduled PTO, Overtime) or (b) indirectly by impacting their ability to generate sales (i.e., Counter Duty and Saturday Schedules, Leads, Bilingual Language Requests, Phones, Branch Support). *Graymont PA, Inc*., 364 NLRB No. 37 (2016) (attendance policies); *El Paso Elec. Co. v. NLRB*, 681 F.3d 651 (2012) (changes to break policies); *Guard Publishing Co.*, 339 NLRB 353 (2003) (sales commissions); *Advertiser's Mfg. Co*., 280 NLRB 1185 (1986) (telephone usage); Hedison Mfg. Co, 260 NLRB 590 (1982) (hours of work); *Garrison Valley Ctr., Inc*., 246 NLRB 700 (1979) (lunch and break periods).

Respondent's defense to these allegations is two-fold. First, it argues that it cannot be found to have violated 8(a)(5) because the General Counsel failed to adduce evidence that, following Respondent's August 1 announcement, it actually put into effect, at its various branches, each of the announced changes. Second, it argues that, because the General Counsel presented only limited evidence of Respondent's prior practice regarding the terms and conditions addressed by the August 1 directive, there is no basis for a finding "that any such implementation is inconsistent with the *status quo*" at each branch. (R. Br. at 78). Respondent is incorrect on both points.

Respondent's claim that 8(a)(5) requires independent evidence of actual implementation is misplaced. The Board has consistently held that an announced unilateral change to a mandatory subject of bargaining presented to employees as *fait accompli* is unlawful even if not yet put into practice, where the announcement would cause a reasonable employee to view the change as effectively implemented. See *UPS Supply Chain Solutions, Inc.,* 364 NLRB No. 25 (2016) (citing *ABC Automotive Products Corp.,* 307 NLRB 248, 250 (1992)). As the Board has explained, this is because such announcements signal to employees that the employer "had no intention of dealing with the [u]nion" and thus "the damage to the bargaining relationship had been accomplished." Id. (citing *Centinela Hospital Medical Center*, 363 NLRB No. 44, slip op. at 4 fn. 11 (2015); *Wire Products Mfg. Corp.*, 326 NLRB 625, 627 (1998), enfd. mem. sub nom. *NLRB v. R.T. Blankenship & Associates, Inc.*, 210 F.3d 375 (7th Cir. 2000)).

This authority dictates that the General Counsel has met its burden in establishing that the August 1 directive changed the terms and conditions of bargaining unit employees. The directives, according to Respondent's script "were part of the Company's last, best & final offer to the union," thereby signaling that it was imposing these terms without the Union's consent, effective that same day. The announcement was thus presented to employees as a *fait accompli* that would cause a reasonable employee to view the change as effectively implemented and was therefore unlawful even if not yet put into practice. See *CJC Holdings, Inc*., 320 NLRB 1041 fn. 2 (1996) (employer violated 8(a)(5) by announcing its intention to implement its last offer relating to insurance).

Nor is Respondent correct that the government failed to demonstrate that the August 1 directives departed from the pre-August 1 status quo at each branch. Contrary to Respondent's suggestion, the Board has explicitly found that the very wording of an employer's announcement regarding working conditions may support an inference that a change to the status quo is taking place. A good example of this is found in *Chemical Solvents, Inc.* 362 NLRB No. 164 (2015). In that case, the ALJ dismissed a complaint allegation that the employer had unlawfully implemented a cell phone usage policy by posting it in a written memorandum, finding that the General Counsel had failed to establish what the cell phone policy was before the announcement and therefore could not prove a change had occurred.

The Board reversed, finding that the following wording of the memorandum was sufficient to establish that the policy constituted a material, substantial, and significant change in working conditions:

> COMPANY POLICY — USE OF CELL PHONES
>
> EFFECTIVE IMMEDIATELY — DRIVERS ARE NOT TO TALK, TEXT OR ANSWER CELL PHONES WHILE DRIVING.

Id. at 1472. Rejecting the employer's argument that the absence of clear evidence of a prior policy precluded an 8(a)(5) finding, the Board concluded, "We infer from the text of this memo, and particularly from the 'EFFECTIVE IMMEDIATELY' reference, that the cell phone use restriction was a new rule." Id. The Board further found, "[i]f evidence existed to counter or rebut the General Counsel's showing regarding the Respondent's policy, the Respondent was in an ideal position to produce and present it. It failed to do so." Id. (citation omitted).

A similar inference is appropriate here. It is undisputed that Respondent's managers announced the August 1 directives to bargaining unit employees in each branch by stating, "I want to make sure you are aware of policies and procedures we are implementing effective today." This is analytically indistinguishable from the "EFFECTIVE IMMEDIATELY" language in the *Chemical Solvents* case, warranting an inference that the directives were new, even in the absence of evidence of prior practice at each of Respondent's branches.[27] Moreover, like the employer in *Chemical Solvents*, Respondent—though clearly in a position to do so—failed to adduce credible evidence that the August 1 dictates were consistent with its prior practice.

For these reasons, I find that Respondent's August 1 announcement (except to the limited extent I have described above) unilaterally changed bargaining unit employees' working conditions as alleged.

VI. ALLEGED INDEPENDENT 8(A)(1) STATEMENTS SURROUNDING IMPLEMENTATION[28]

The General Counsel alleges that, following Respondent's impasse declaration, its managers and officials made coercive remarks to unit members, including disparaging and denigrating the Union. Respondent claims that the alleged statements are facially lawful and protected by Section 8(c) (often referred to as the Act's "free speech" provision).

The Applicable Law

Section 7, the Act's fundamental provision, states in part that employees "shall have the right to self-organization, 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." Section 8(a)(1) of the Act provides that an employer may not "interfere with, restrain, or coerce employees" in the exercise of their rights to engage in activity protected by Section 7.

It is well-settled that both employer motive and an employee's subjective interpretation of the employer's conduct are generally immaterial when evaluating an alleged violation of Section 8(a)(1). *Lush Cosmetics, LLC*, 372 NLRB No. 54 at p. 3 (2023) (quoting *KSM Industries, Inc*., 336 NLRB 133 (2001)). Instead, the Board determines whether "statements alleged to violate Section 8(a)(1) . . . have a reasonable tendency to coerce employees in the exercise of their Section 7 rights." Id. In applying this analysis, the Board "considers the total context of the alleged unlawful conduct from the viewpoint of its impact on employees' free exercise of their rights" pursuant to Section 7. Id. (citing *American Tissue Corp*., 336 NLRB 435, 441–442 (2001)).

The Supreme Court in *Gissel* established that an employer may express its general views about unionism, or specific views about a particular union, so long as the communications do not contain a threat of reprisal or force. *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618 (1969). Likewise, Section 8(c) provides that "[t]he expressing of any views, argument, or opinion" by an

[27] I note one exception here: because the record in AAA I contains witness testimony establishing that Respondent had in 2021 rescinded flexible scheduling at three of its branches (Tracey & Turlock, Santa Rosa and Folsom), I make no such inference with respect to them. For that reason, I recommend dismissal of paragraph 11(vi) of the complaint insofar as those branches are concerned.

[28] Unlike the coercive statements made by Williams and Creasey at the bargaining table, I find that the post-implementation statements by Salas, Garcia and O'Crowley lack sufficient nexus to the parties' course of bargaining to be considered evidence of Respondent's bad faith.

employer is not an unfair labor practice as long as the expression "contains no threat of reprisal or force or promise of benefit." The Court further distinguished the statements of opinion protected under Section 8(c) from "coercive ... overstatements" that an employer "has reason to believe will mislead his employees." Id. at 620.

Assistant Branch Manager Salas' July 2023 Statement

The General Counsel alleges that, about late-July 2023, at Respondent's Menlo Park branch, Assistant Branch Manager Marbella Salas (Salas), disparaged and denigrated employees' support for and selection of the Union as their representative. Respondent counters that Salas' remark was noncoercive and protected by Section 8(c) of the Act.

A. Factual Background

This allegation is based on the testimony of agent Clinton Ward, who testified that Salas approached him and stated she had "just got off a Zoom meeting" and that the insurance agents were no longer AAA employees and that they were Teamsters. Ward responded, "wow"; Salas said she couldn't believe it either and walked away. (Tr. 1193).

About August 17, 2023, Ward sought clarification, asking Salas about the source of her remark (i.e., "was this you, or where did this come from?"). Salas explained the remark traced to Vice President Osh O'Crowley: she said that he had informed a group of managers that "they" are AAA, while "those guys over there are Teamsters." Ward reacted, "oh boy." (Tr. 1196–1197).

B. Discussion and Analysis

The NLRB has long and consistently held that employer statements denigrating employees' union support as incompatible with loyalty to the employer constitute unlawful interference, restraint, or coercion in violation of Section 8(a)(1). See, e.g., *HarperCollins Publishers*, 317 NLRB 168 (1995), enfd. in relevant part, 79 F.3d 1324 (2d Cir. 1996). By suggesting that the bargaining unit members had, by selecting the Union as their bargaining representative, lost their full status as AAA employees and then revealing that this sentiment had come from O'Crowley, a senior executive, Salas clearly implied that Ward had to choose a side and would be considered disloyal to Respondent by not lining up on its side against the Union. See *Westwood Health Care Ctr*., 330 NLRB 935, 941 (2000) (supervisor telling employee she could not remain neutral during union campaign violated 8(a)(1)). Such statements exceed that which may be privileged by Section 8(c) of the Act. See *HarperCollins Publishers*, 317 NLRB at 180 (citing cases).

Accordingly, I find that Salas violated Section 8(a)(1) as alleged.

Assistant Branch Manager Garcia's August Statement

The General Counsel alleges that, in July 2023, ABM Elmer Garcia (Garcia) violated Section 8(a)(1) by blaming the Union for the various unilateral changes Respondent imposed with its August 1 directive. Respondent defends that Garcia's statement was simply a "mere explanation that the policies were the result of the parties' attempt to reach a collectively bargained contract." (R. Br. at 142).

A. Factual Background

This allegation is based on the testimony of Celia Solorio (Solorio), who worked for Garcia in Respondent's Daly City branch at the time. Solorio testified that, within a week of the August 1 announcement, she approached Garcia to clarify one of the new rules. After answering her question, Garcia's response to her was, according to Solorio's unrebutted testimony, "well, this is what you guys asked for." (Tr. 1860).

B. Discussion and Analysis

An employer violates Section 8(a)(1) when it misrepresents the union's bargaining positions in a manner that tends to undermine employee support for the union. *In re Miller Waste Mills, Inc*., 334 NLRB 466 (2001); *Faro Screen Process, Inc*., 362 NLRB 718 (2015); see also *NLRB v. Ingredion, Inc*., 930 F.3d 509 (D.C. Cir. 2019) (employer violated 8(a)(1) following unlawful impasse declaration and contract implementation by falsely telling employees that union was refusing to negotiate on certain topics).

Certainly, a reasonable employee informed that their exclusive bargaining representative was in fact responsible for Respondent implementing more onerous terms and conditions on the bargaining unit would be expected to lose a degree of faith in that representative. By denigrating the Union in the eyes of employees, Garcia misrepresented the parties' bargaining in a manner that would reasonably be expected to mislead employees; as such, it was not protected by Section 8(c).

Accordingly, I find that Garcia violated Section 8(a)(1) as alleged.

Vice President O'Crowley's August Statement

The General Counsel alleges that, on August 3, O'Crowley announced to agent Daniece Atencio (Atencio) the discontinuation of Respondent's "milestone award" program. This discontinuation, according to the government, violated Section 8(a)(5) insofar as it had not been encompassed by Respondent's LBFO. It is further alleged that, during the same conversation, O'Crowley violated Section 8(a)(1) of the Act by both implicitly and explicitly blaming the Union for unit employees' loss of benefits, including the award program.

These allegations rest on the testimony of Atencio. Respondent denies the allegations but called no witness to rebut her account.

A. Factual Background

Atencio—a long term employee—testified that from 1985 to 2020, agents were eligible for a two-part "milestone award" for various years of service (i.e., 10, 25, 35 years). This program consisted of a physical gift as well as attendance at an expense-paid banquet in San Francisco. With the onset of pandemic-related social distancing in 2020, the latter component, according to

Atencio, was replaced by an additional physical gift. There is no evidence, however, to support this anecdotal testimony, which Atencio admitted was not announced. Asked how she knew the change had been effected, Atencio claimed that she had viewed physical milestone award-gifts that had been presented to two non-bargaining unit employees. (Tr. 2046–2047, 2062).

Atencio testified that on August 3, 2023, around noon, three senior management officials — O'Crowley, David Rouhani, and Chief of Safety and Organization Todd Burger (Burger)— arrived at the Tracy branch. None of them typically visited the branch. The three began walking around talking to employees. Atencio, who was a member of the Union's bargaining committee, left her cubicle and approached the group. (Tr. 2026, 2043–2044).

She then asked O'Crowley, "can you tell me why we can no longer enter the building prior to 8:55 a.m., not even to use the bathroom or the break room?" According to her unrebutted testimony, he replied in a sarcastic tone, "yeah, well, you have a union, don't you? Why don't you call your union rep?" After she paused, he continued, "well, this was discussed in negotiations." Atencio then responded that she was at the table in negotiations and did not recall that conversation or that agreement being made. O'Crowley said nothing in response. Atencio described the exchange as "very tense." (Tr. 2044–2046).

Next, she testified, Burger walked into her cubicle, looked at her "35-year plaque" (i.e., a tenure award) and returned to the group, asking O'Crowley, "I see that she has the 35 years with AAA. Was she awarded any of the milestone program awards that you created?" According to Atencio, O'Crowley did not respond immediately. At that point, Atencio (who had, in fact, received one but not two physical gifts), jumped in, stating that she had been denied an award. O'Crowley, she testified, agreed, telling Burger, "she didn't get it because she's union." I credit Atencio's unrebutted version of this conversation.[29]

B. *Discussion and Analysis*[30]

It is well-established under federal labor law that an employer violates Section 8(a)(1) when it blames the union for a loss of benefits. *Larid Printing, Inc*., 264 NLRB 369, 369 (1982) (employer unlawfully told an employee that the employer was unable to pay him differential pay for night work due to the fact that the union had filed an unfair labor practice charge); see also *W.E. Carlson Corp*., 346 NLRB 431, 433 (2006) (attributing failure to implement expected wage

[29] While she recalled the exchange slightly differently after being shown her testimony on cross examination, I am convinced that Atencio credibly related O'Crowley's remark about her union-represented status.

[30] The General Counsel additionally alleges that Respondent violated 8(a)(5) by unilaterally denying Atencio a milestone award. I disagree. An employer violates Sections 8(a)(5) and (1) "by unilaterally changing an existing term or condition of employment without first bargaining to impasse." *Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 309 & fn. 5 (D.C. Cir. 2003). Here, the General Counsel failed to establish that, as of August 3, Respondent had in place a practice of granting agents—as opposed to non-bargaining unit members—two physical gifts as part of its milestone award program. This is fatal to its unilateral change allegation, as O'Crowley's remarks could not have announced a change to a nonexistent status quo. As such, I recommend dismissal of this allegation.

or benefit adjustment to union's presence violates 8(a)(1)) (citing *Earthgrains Baking Companies*, 339 NLRB 24 (2003)). Furthermore, as noted above, an employer violates Section 8(a)(1) when it misrepresents the union's bargaining positions in a way that tends to undermine employee support for the union. *In re Miller Waste Mills, Inc*., supra.

O'Crowley's statement that, but for Atencio's status as a represented employee, she would have received a milestone gift explicitly blamed Local 665 for her loss of that benefit and therefore violates the Act as alleged. Furthermore, his suggestion that Respondent's implementation of stricter branch hours had been "discussed in negotiations" disparaged the Union by implying that it had signed off on unit employees being denied this benefit.

Accordingly, I find that O'Crowley violated Section 8(a)(1) as alleged.

VII. 8(A)(1) SEVERANCE AGREEMENT ALLEGATION

The General Counsel alleges that, by offering agents a severance agreement in connection with the implementation of its LBFO, Respondent violated Section 8(a)(1) of the Act. I agree.

The severance agreement's confidentiality and release language

It is undisputed that, on August 1, 2023, Respondent presented its employees with a severance agreement that included the following language:

> **Non-disclosure of Confidential and Proprietary Information**. …Employee (a) will not use or permit the use of Confidential Information in any manner or for any purpose; [and] (b) will not disclose, lecture upon, publish or permit others to disclose, lecture upon, or publish any such Confidential Information to any third party…

(GC Exh. 172 at 3–4). "Confidential Information" is defined by the agreement as including "information regarding the skills and compensation of [the] Company's employees, contractors, and any other service providers of [the] Company. Id. at 1–2.

The agreement further provides the following release of liability:

> **Release of All Claims**. In exchange for the payment set forth in paragraph 2, above, Employee hereby waives and releases the Company, its past or present predecessors, successors, assigns, subsidiaries, affiliates, and related entities, and their respective past and present officers, directors, shareholders, members, insureds, employees, agents, attorneys, insurers, or employee benefit programs (and the trustees, administrators, fiduciaries and insurers of such programs (collectively, the "released entities") from any and all claims, causes of action, or liabilities that Employee might have, known or unknown, arising at any time prior to or after Employee's execution of this Agreement, including (without

> limitation) all claims arising out of or related to Employee's employment with, association with, or termination from the Company. [. . .] **The released claims also include the Employee's express waiver of any right to recovery or relief based on: (a) any of the claims asserted in any pending NLRB Charges, including but not limited to Charge Nos, 32-CA-295908; 32-CA-280838; 32-CA-282213; 32-CA-284409; 20-CA-284659; 20-284664; 32-CA-285247; 32-CA-291041; 32-CA-291138; 32-CA-292625; 32-CA-294216; 32-CA-294483; 32-CA-294816; 32-CA-296162; 32-CA-301979; 32-CA-312204; 32-CA-317752; 32-CA-321155; 32-CA-317752; 32-CA-322876; 32-CA-323291; 32-CA-322818 and (b) any related actions that have been or may be pursued by the union and/or the NLRB related to such charges.**

Id.

The McLaren Macomb standard for evaluating proffered severance agreements

The analysis of whether Respondent's severance agreement violates the Act is governed by the Board's decision in *McLaren Macomb*, 372 NLRB No. 58 (2023). In that case, the Board held that an employer violates Section 8(a)(1) of the Act when it proffers a severance agreement that conditions its benefits on the forfeiture of employees' exercise of their NLRA rights "unless it is narrowly tailored to respect the range of those rights." *McLaren Macomb*, 372 NLRB No. 58, slip op. at 10 (2023). In so finding, the Board explicitly rejected the proposition that the circumstances surrounding the employer's proffer of such an agreement should be considered in assessing whether the Act had been violated, noting that "the mere proffer of the agreement itself violates the Act," based on the "high potential that coercive terms in separation agreements may chill the exercise of Section 7 rights." Id., slip op. at 9.

This holding effectively restricts my examination to whether Respondent offered employees an agreement that facially violates the Act. I therefore reject the General Counsel's arguments based on the circumstances surrounding its offer of the severance agreement—specifically that it was presented as a limited, one-time offer in the context of an unlawfully imposed compensation scheme. I likewise reject Respondent's defense that certain facts outside the four corners of the Agreement, including its claimed arrangement to have the agreement signed only on the pre-arranged effective date of their retirement, warrant dismissal of this allegation.

Application of McLaren Macomb to the severance agreement

As the *McLaren Macomb* Board noted:

> Agreements between employers and employees that restrict employees…from filing unfair labor practice charges with the Board, assisting other employees in doing so, or assisting the Board's investigative process, have been consistently deemed unlawful.

Id., slip op. at 7 & fn. 21 (citing *Shamrock Foods Co*., supra, 366 NLRB No. 117, slip op. at 2–3 & fn. 12; *Ishikawa Gasket America*, 337 NLRB 175, 175–176 (2001); *Clark Distribution Systems*, supra, 336 NLRB at 748–749; *Metro Networks*, supra, 336 NLRB at 64–67; *Mandel Security Bureau*, 202 NLRB 117, 119 (1973)). This guarantees the Board's ability "to protect public rights to give effect to the declared public policy of the Act. Id. (citing See *National Licorice Co. v. NLRB*, 309 U.S. 350, 362–364).

By its terms, Respondent's severance agreement requires the signer's release of all claims arising:

(a) out of or related to their "employment with, association with, or termination from, the Company…

(b) either prior to or after their executing the agreement."

(GC Exh. 137 at 1–2.) I find that this language would lead employees to believe that signing such an agreement would bar them from filing an unfair labor practice charge with the Board, whether based on their discharge (real or constructive) or actions taken against them by Respondent, post-discharge (such as issuing a negative reference). As such, the agreement impermissibly chills employees' access to the Board's processes in violation of Section 8(a)(1).

Moreover, the Agreement's confidentiality language—which is unlimited in temporal scope —requires the signer to refrain from providing any information regarding agent compensation to any third party, which would necessarily include the Board. This provision would thus bar the signing employee—under penalty of liquidated damages and attorney fees—from cooperating with the Board in its investigation or litigation of unfair labor practice charges regarding, for example, Respondent's implementation of its last, best and final offer insofar as it impacted agent compensation. As such, pursuant to *McLaren Macomb*, this language amounts to the unlawful conditioning of the receipt of severance benefits on the forfeiture of statutory rights afforded by the Act.

Accordingly, based on the above, I find that, by offering its agents severance agreements that required them to waive their Section 7 rights, Respondent violated Section 8(a)(1) of the Act as alleged.

VIII. CONSTRUCTIVE DISCHARGE ALLEGATION [COMPL. ¶ 13]

The General Counsel alleges that Respondent, by announcing its plan to reduce agents' compensation by eliminating renewal commissions, Respondent forced certain of its employees to accept its severance package, thereby constructively discharging them in violation of Section 8(a)(3) of the Act. Specifically, the government alleges that Respondent's unilateral implementation of its last, best and final offer acted to constructively discharge an unspecified number of agents "who elected to sever their employment instead of enduring a significant wage cut," in violation of Section 8(a)(3) of the Act. (See Complaint ¶ 13).

Factual Background

In support of its class constructive discharge allegation, the General Counsel presented the testimony of former agent Atencio, who accepted the severance package effective January 24, 2025. She testified that she did so because her only other option would have been to absorb a steep pay cut due to the loss of her renewal commissions. According to her, the planned cut to commissions on renewals would have caused her to lose approximately $65,000. The General Counsel also presented the testimony of former agent Hamid Ezzatyar (Ezzatyar), who worked in the Melo Park branch until November 2023. He testified he accepted a buyout and left around November 10, saying AAA "just became an uncomfortable place to work." The conditions he cited as motivating his decision included several of those unilaterally imposed as part of Respondent's LBFO, including changes to branch hours, use of PTO, working from home and use of the translator line. (Tr. 886–887, 886–914, 921–926, 2024, 2064–2069; GC Exh. 172(b)).

At hearing, the General Counsel introduced evidence demonstrating that renewal commissions made up a significant portion of the pay earned by Group A agents. Over a multi-year period, agents earned on average approximately $98,000 annually in renewal commissions, which amounted to an average of approximately 50% of their gross pay. Respondent does not dispute this but counters that this does not take into account the $35,700 guaranteed base pay contemplated by the LBFO. However, based on the agents' average gross compensation of $223,338, even after adjusting for this added base pay, Group A agents presented with Respondent's severance offer faced a choice of resigning or working for nearly 28% less pay. (GC Exh. 216; GC Br. at Appendix A).

Discussion and Analysis

A. The constructive discharge standard

As the Board has held, a constructive discharge "is not a discharge at all but a quit which the Board treats as a discharge because of the circumstances which surround it." *Remodeling by Oltmanns*, 263 NLRB 1152, 1161 (1982), enfd. 719 F.2d 1420 (8th Cir. 1983). These circumstances typically present one of two scenerios. In the first, an employer with knowledge of an employees' union or other protected activities "harasses the individual to the point that his job conditions become intolerable," causing the employee to resign. *Remodeling by Oltmanns*, 263 NLRB 1152, 1162 (1982), enfd. 719 F.2d 1420 (8th Cir. 1983).

The second situation is referred to as a "Hobson's choice" scenario, i.e., an apparently free choice when there is no real alternative. Under this theory, an employer confronts an employee with a choice between resignation on the one hand and continued employment conditioned on relinquishment of rights guaranteed by Section 7 of the Act on the other. Id. This applies to employees who quit rather than work under conditions established in derogation of the statutory right to bargain. *Control Services*, 303 NLRB 481, 485 (1991), enfd. 975 F.2d 1551 (3d Cir. 1992). In determining whether an employee has been presented with a Hobson's choice, the Board views the circumstances from the employee's perspective. See *Intercon I (Zercom)*, 333 NLRB 223, 224 (2001). The Board does not require that an employer explicitly state that the employee must relinquish a statutory right to keep their job, so long as that message is "unmistakable." Id.

1. Hobson's choice created by unilaterally changed working conditions

Where an employer prematurely declares impasse and then implements a last, best and final offer that contemplates significant wage cuts (and other diminished working conditions), it presents employees with the Hobson's choice of resigning or continuing to work under conditions that flowed from what the Board found to be a violation of their Section 7 rights. *Dish Network Corp.*, 366 NLRB No. 119, slip op. at 11 (2018) (employees who resigned after employer's unlawful implementation of its final offer cut their pay by 30 percent and greatly increased their health insurance costs were constructively discharged); *Electric Machinery Co.*, 243 NLRB 239, 239–240 (1979) (after employer unilaterally changed working conditions before impasse was reached, employees who resigned rather than endure, among other changes, reduced wages and elimination of their union-provided health insurance were constructively discharged). Offering employees a "voluntary" severance buyout under such circumstances does nothing to change the result—such employees are not presented with a true choice but rather are forced to choose between resignation or continued employment conditioned on relinquishment of statutory rights. See, e.g., *Altura Communication Sols., LLC*., 369 NLRB No. 85 (2020).

2. The animus requirement and inherently destructive conduct

To establish that a constructive discharge violates Section 8(a)(3) of the Act, the General Counsel typically must show that the employer's discriminatory conduct was motivated by antiunion animus. However, this is not the case where the employer's conduct is inherently destructive of Section 7 rights. As the Board has held, an inherently destructive classification is "clearly" appropriate "where the employer withdraws recognition from the union and makes unilateral changes," but withdrawal of recognition and/or express total repudiation "is not essential to an 8(a)(3) Hobson's choice constructive discharge finding." *Zeigler Ford of North Riverside*, 370 NLRB No. 41, slip op. at 3 (2020) (citing *Lively Electric, Inc.*, 316 NLRB 471, 472 (1995)).

B. Respondent constructively discharged Atencio and Ezzatyar.

Based on the above principles, the General Counsel established that, by implementing its LBFO, Respondent forced Atencio and Ezzatyar to choose between working under unlawfully established working conditions and that this motivated each of their decisions to resign. I do not believe, however, that the government is entitled to a class-wide remedy beyond these two discriminatees.

In fashioning its remedial order, the Board generally requires the respondent to make whole those persons who lose earnings as a result of an unfair labor practice. Where affected persons remain unidentified at the conclusion of the unfair labor practice hearing, the Board sometimes requires the respondent to make them whole, with the identification of specific unnamed individuals deferred to a compliance proceeding. However, the Board will order the respondent to make whole such unidentified persons only where the General Counsel establishes, at the merits hearing, that they constitute a "defined and easily identified class." *Electrical Workers Local 48 (Oregon-Columbia NECA)*, 342 NLRB 101, 110 (2004).[4]

The Board has clarified that documentary evidence, while preferable, is not the exclusive basis for class-based relief. Testimonial evidence concerning straightforward matters of objective fact—capable of corroboration by other witnesses—may also suffice. *IBEW Local 357 (Newtron Heat Trace, Inc.)*, 343 NLRB 1486, 1488 (2004). However, testimony that would require individualized credibility determinations about each putative class member's subjective state of mind is insufficient to establish a defined and easily identified class. Id.

The *IBEW Local 357* case is instructive. There, the Board rejected the administrative law judge's recommended order that the respondent-union make whole a group of workers allegedly coerced into declining job referrals based on their attendance at events at or near the respondent-union's hiring hall. The Board declined to extend relief to unnamed workers because there was no crisp, clean line of demarcation separating the coerced from the uncoerced, noting that workers regularly declined referrals for reasons unrelated to the coercion, and that the only evidence of whether an individual had been motivated by the respondent-union's coercion would be the worker's own self-interested testimony. 343 NLRB at 1487.

Here, likewise, in order to be within a defined class entitled to a make-whole remedy for Respondent's unlawful conduct—the threat of a wage cut and the imposition of worsened working conditions—a bargaining unit member must be shown to have been motivated to resign because of one or both of them. For this reason, I find that the unidentified bargaining unit members who may have resigned as a result of Respondent's unlawful conduct do not constitute a "defined and easily identified class."

Accordingly, I find that, by implementing its LBFO, Respondent constructively discharged its agents Daniece Atencio and Hamid Ezzatyer, and further recommend dismissal of the allegation that, by the same conduct, Respondent constructive discharged an unspecified number of agents who elected to sever their employment instead of enduring a significant pay cut.

IX. CARMEN VASQUEZ ALLEGATIONS [COMPL. ¶ 14]

The General Counsel alleges that Respondent violated Sections 8(a)(3) and (4) of the Act by reporting Woodland branch agent Carmen Vasquez to Respondent's Ethics Hotline and subsequently disciplining her, and additionally violated Section 8(a)(1) by denying her a requested *Weingarten* representative. Respondent denies violating the Act as alleged.

Factual Background[31]

Carmen Vasquez has worked for Respondent as an insurance agent for approximately 18 years. Since 2008, she has worked at its Woodland branch. Her duties include selling auto, home, rental property, and life insurance; servicing an existing book; and handling general tasks. Since union organizing began, the Woodland branch has had a succession of branch managers; during the period relevant to the General Counsel's allegations regarding Vasquez, the position was held by Damon Andrews (Andrews). (Tr. 974–977).

[31] My factual findings are therefore based on the unrebutted testimony of Vasquez, as corroborated in part by Woods. The only witness called by Respondent in defense of these allegations was Director of Human Resources Melissa Humphrey who was consulted in connection with Respondent's investigation

A. Vasquez' union and other protected activities

Beginning in August 2021, Vasquez served on the Union's bargaining team. Following the Union's certification, she attended bargaining regularly as the Woodland's branch's only employee representative; she regularly informed Branch Manager Andrews in advance that she would be attending bargaining sessions. (Tr. 977–979).

Vasquez has been an open union supporter at work; she purchased and regularly wore a polo shirt with Teamsters insignia and Teamsters pin and also displayed items with union insignia in her work cubicle. On November 2, 2023, Vasquez testified pursuant to subpoena in AAA I; she had alerted Andrews of this fact and provided him with a copy of her subpoena. (Tr. 980–987; GC Exh. 138).

B. Vasquez' pre-implementation scheduling practices

Vasquez testified that, prior to August 1, 2023, she regularly took 30-minute lunches and worked a flexible schedule, sometimes working weekends at home to make up for leaving early or arriving late during the week. She also worked overtime when necessary to catch up on work. None of this, she testified, required management pre-approval, and her timesheets would reflect her actual hours worked. On August 1, Andrews gathered 3 Woodland agents, including Vasquez, in a conference room and read Respondent's implementation script aloud to them. Vasquez and other agents attempted to ask questions but Andrews declined to respond, instead directing them to the Union. (Tr. 999–1002, 1009–1013, 1018–1022).

C. Vasquez' November 17, 2023 confrontation with Branch Manager Andrews

On Friday, November 17, 2023, near the end of the workday, Andrews called Vasquez to his office and told her that, as of August 1, she was required to take a one-hour lunch.[32] She protested that she had always been permitted to take a 30-minute lunch and (in apparent reference to Respondent's last, best and final offer) asked him for a copy of the "contract" or "script" he was relying on. Andrews stated that she should ask the Union for a copy, to which she responded that she was not employed by the Union but rather by Respondent and that is why she was asking him for "a copy of the new contract." Andrews then told Vasquez to contact O'Crowley, but she persisted, noting that Andrews, not O'Crowley, was her manager. During this conversation, Vasquez—who describes herself as someone who frequently "talks with their hands"—was admittedly animated,[33] gesturing to make her points. (Tr. 1026–1029, 1032–1033).

As she exited Andrews' office, Vasquez encountered coworker Denise Pritchett (Pritchett), who was working nearby; she told Pritchett that she was sorry that she had had to hear her conversation with Andrews. Vasquez returned to her cubicle; as she finished her work for the day, Andrews, joined by MEG Irene Garcia (Garcia), appeared, and Vasquez again expressed the

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into Vasquez but had no first-hand knowledge of the underlying events.

[32] I have previously found that this new requirement—which was part of Respondent's August 1 directive rescission of agent's flexible scheduling opportunities—to be an unlawful unilateral change. See Section V.5., "Hours Worked" (Item 5) discussion, supra.

[33] This was a habit she displayed in testifying.

frustration about the imposed contract and her losing the ability to take a 30-minute lunch. In response, she testified, Andrews shook his head and then walked back to his office. (Tr. 1029–1034).

D. Respondent places Vasquez on administrative leave.

Within days of her altercation with Andrews, Vasquez took a week's vacation; she returned to work on November 28, a day before she was scheduled to return. Andrews immediately approached her, stating that she had not been expected that day. He then ordered her to his office where he (accompanied by Garcia) read a script advising that she was being placed on paid administrative leave pending an investigation. Vasquez gathered her personal items from her cubicle. One of her plants had died during her vacation, and she threw it in the trash. Another of her plants leaked water on the floor as she tried to pack it. According to Andrews' later written complaint, as she packed her things, Vasquez repeatedly stated, "this is what you get for being in a union" and "this is retaliation." (Tr. 1046–1053, 1063; GC Exh. 148).

It is undisputed that, prior to being placed on leave, Vasquez was not told why she was being investigated. However, according to Director of Human Resources Melissa Humphrey (Humphrey), Andrews had complained to Human Resources' Pepe about Vasquez on November 20th (the first day of her vacation) that Vasquez had, after accusing Respondent of retaliating against her for her union activities, added "this is not going to end well for you" and then claimed to have "gang-related friends or family." Because neither Andrews or Pepe testified, there is no reliable evidence that Vasquez in fact made such a comment. At best, Respondent's business records reveal communications between Andrews and Pepe, in which he accused Vasquez of threatening him and identifying six witnesses to this event, and additionally indicating that another branch employee—Yolanda Silva (Silva)—was also somehow involved. Because Silva did not testify, the record remains murky as to what role she played, if any. (Tr. 2208; GC Exh. 214).

The record also contains an "Executive Summary of Investigation Findings" authored by Respondent's Security Manager Ted Chang (Chang). Chang did not testify, so this document is of limited evidentiary value. It contains multiple hearsay statements by alleged witnesses to Vasquez' conduct; none of them corroborated Andrews' version of Vasquez' supposed "gang-related" threat. Moreover, it appears that Chang failed to interview four of the six employees Andrews had identified as witnesses. While portions of the report claim that the witnesses described Vasquez as having had "outbursts" in the past, there is no non-hearsay evidence of this. (GC Exh. 212).

E. Vasquez' investigatory interview

On November 28, 2023, Security Manager Chang emailed Vasquez stating that he had been assigned "to investigate allegations involving you and other [team members] at the Woodland branch." He attached an acknowledgement form containing standard *Johnnie's Poultry* admonishments and also stated that she had the "right to representation (shop steward)" at the interview. (GC Exh. 149, Tr. 1063–1064).

The interview was held via video on December 1, 2023. Vasquez was accompanied by Woods; Chang conducted the interview, accompanied by another Security department employee, Doug Keith. Chang began the meeting by stating that he would conduct an impartial, unbiased investigation; when Woods asked what Vasquez was accused of having done, Chang immediately cut him off, stating "don't interrupt. I'm running this meeting. You just sit there and listen." Woods protested that he needed to know what the allegations against Vasquez were, to which Chang responded that his role was "to sit there" and ensure that Vasquez' "rights" were not being violated.[34] He then warned Vasquez that Woods needed to be quiet, or else the meeting would be cancelled as she would "suffer the consequences" of that. (Tr. 1064–1068).

Chang proceeded to question Vasquez about her November 17 confrontation with Andrews over the August 1 directives. After she recounted her version of that event, Chang asked whether she yelled or pounded her fist during the incident, which she denied. He then asked if she had made a statement about "knowing people" who could "handle" things for her, and she flatly denied this. Chang then stated that team members found her threatening; she countered that, due to her workload, she rarely interacted with team members and had never acted threatening at work. (Tr. 1068–1071).

Chang next asked about the day she was put on leave and specifically about her conduct upon leaving the branch. She explained that she had accidentally spilled some water from one of her planters. Chang then said he could understand why her team members felt threatened by her because she had been "antagonizing" him during their video interview. Vasquez responded, "I'm sorry you feel that way, but when I'm being wrongfully accused of something, I'm going to defend myself." The interview concluded with Chang stating he would be in touch and Vasquez would remain on leave until a final determination had been made. (Tr. 1071–1074).

F. Vasquez returns to work and is disciplined.

On December 8, 2023, Vasquez was contacted by a human resources representative and ordered to return to work. When she did, she met with a Human Resources Representative Paula Pepe (Pepe) and Vice President Jesse Navarro (Navarro), who informed her that Andrews was no longer with the company. Next, Navarro read from his computer and stated that Vasquez was receiving a Disciplinary Action Form (DAF), which automatically triggers an agent to lose bonus for the month. Vasquez asked if she needed union representation, to which first Pepe and then Navarro stated she did not need a representative because the discipline had already been decided. (Tr. 1078–1082, 2217, 2407–2408).

Navarro then accused Vasquez of making a threatening statement to Andrews on November 17 about "knowing people" who could "handle" things for her.[35] Vasquez protested, "that's a complete lie. I don't agree with that." Navarro said that she would be permitted to add comments to the DAF disputing the allegation. He then stated that, based on the DAF, she would lose eligibility for the December monthly bonus. Vasquez was not provided a copy of the DAF at that

[34] Chang himself admitted—via his investigative report—that he told Woods that "he was only there to make sure Vasquez' rights were not violated and not a part [sic] of the interviewer's question and answers." (GC Exh. 212).

[35] Navarro's accusation is not alleged as a separate *Weingarten* violation.

time, however (Woods eventually provided her with a copy). It is undisputed that, prior to this occasion, Vasquez had never received a DAF. (Tr. 1082–1084).

The DAF, dated December 19, 2023, accused Vasquez of a "pattern of conduct" that violated two of Respondent's "Standards of Conduct," specifically:

- Harassing, threatening, bullying, intimidating, or coercing any Team Member at any time, including during off-duty or non-working hours; and
- Misconduct, including willful violations of company policy and/or exercise of poor judgment.

(GC Exh. 133). It then recounted that, during Vasquez' November 17, 2023 conversation with Andrews, she had raised her voice and stated, "this is not going to end well for you," left his office and yelled to "the entire branch" that "you guys all heard that right?" Finally, it claimed that, upon returning to her desk, she had stated, "I know people who can handle this and I might have to contact them." According to the document, Vasquez' conduct was witnessed both by several members (i.e., customers) and team members in the branch at the time. Id.

G. Respondent's evidence regarding Vasquez' discipline

As noted, Respondent presented no witnesses to either Vasquez' alleged misconduct or the investigation it claims led to her discipline. Respondent's only called one witness regarding the Vasquez allegations—Human Resources Director Humphrey. She testified generally about Respondent's standard procedures for investigating complaints of employee misconduct and confirmed that it typically involved interviewing witnesses. (Tr. 2205).

Humphrey testified that she believed that Andrews had complained about the November 17 incident by filing a report in the employer's ethics portal and additionally sent an email to Human Resources Generalist Pepe. Complaints such as Andrews', she testified, were assigned to an investigator, a case manager and a legal partner; Humphrey served as the case manager for Andrews' complaint against Vasquez. That said, she admittedly had no contact with Andrews about the matter but claimed she believed Pepe had.[36] Humphrey also denied being the decision maker who determined to issue Vasquez the DAF and further denied knowing who that decision maker was. (Tr. 2204, 2208–2210, 2247–2248).

[36] Although she was admittedly employed by Respondent as of the hearing, Pepe was not called as a Respondent witness. (Tr. 2209).

Discussion and Analysis

A. Respondent denied Vasquez access to a Weingarten representative

1. The *Weingarten* right

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.

In upholding a represented employee's statutory right to union representation in an investigatory meeting, the *Weingarten* Court rejected the premise that representative's presence would necessarily "transform the interview into an adversary contest." Id. at 262–263. Rather, where all parties are acting in good faith, the Court reasoned, the presence of a representative may be mutually advantageous in both clarifying issues and avoiding formal grievances where the action on the part of management appears to be justified. Id. at 262 fn. 7 (citing *Independent Lock Co.*, 30 Lab. Arb. 744, 746 (1958); *Caterpillar Tractor Co.*, 44 Lab. Arb. 647, 651 (1965)).

2. Legitimate employer prerogatives

While lauding the potential benefits of *Weingarten* representation, the Court acknowledged the exercise of that right must accommodate "legitimate employer prerogatives" in effectuating workplace discipline. Id. at 258–259 (citing *Mobil Oil Corp*., 196 NLRB 1052, 1052 (1972)). This includes the employer's right to decline the *Weingarten* request outright, in effect forcing the employee facing discipline to choose between proceeding with the interview unaccompanied or foregoing it altogether, along with its potential benefits. Id. at 258.

Short of exercising this 'nuclear option,' the employer may also, depending on the circumstances, place reasonable limitations on the *Weingarten* representative's conduct during the interview. The *Weingarten* opinion offers limited guidance on when such limitations amount to an effective denial of representation. In this regard, the Court stated, the representative "'is present to assist the employee and may attempt to clarify the facts. . .[t]he employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation.'" Id. at 260 (citing Board's brief).

3. The right to "provide advice and active assistance"

In the years following the Supreme Court's decision, the Board has been charged with interpreting the above-quoted language in order to define, under various circumstances, the appropriate extent of a representative's participation in an investigatory meeting, or as one court has put it, "[t]he careful *Weingarten* balance between employer prerogative and employee right." *Postal Service v. NLRB*, 969 F.2d 1064, 1070 (1992), enfg. 303 NLRB 463 (1991). No hard or fast rules apply, and the representative's permissible role has been described as "seem[ing] to lie somewhere between mandatory silence and adversarial confrontation." *Postal Service*, 288 NLRB 864, 867 (1988).

At a minimum, a union representative is entitled to "'provide advice and active assistance'" and may not be relegated to sitting in silence "'like a mere observer.'" *PAE Applied Technologies, LLC*, 367 NLRB No. 105, slip op at 3 (2019) (citing *Barnard College*, 340 NLRB 934, 935 (2003); *Manhattan Beer Distributors, LLC*, 362 NLRB 1731, 1732 (2015), enfd. 670 Fed.Appx. 33 (2d Cir. 2016); *Washoe Medical Center*, 348 NLRB 361, 361 (2006)). Thus, the employer may not condition the representative's attendance at the meeting on their remaining silent. See, e.g., *Texaco, Inc.*, 251 NLRB 633, 633 (1980), enfd. 659 F.2d 124, 125–127 (9th Cir. 1981).

Moreover, even temporarily silencing a *Weingarten* representative may violate the Act. For example, in *Lockheed Martin*, at the outset of the investigatory meeting, the representative asked what the meeting was about, and the investigator told him to "shut up as she was asking the questions." 330 NLRB 422, 429 (2000). Although the representative was later allowed to ask questions, the Board adopted the administrative law judge's finding that the original admonishment amounted to a violation of the interviewed employee's Section 7 rights as "an improper attempt to limit [the representative's] role in the interview" that was not cured by the representative's later participation. Id. at 429.

Conversely, the Board has found certain behavior by a *Weingarten* representative—such as engaging in adversarial conduct or attempting to force bargaining—may justify silencing or even ejecting them from the interview. See, e.g., *PAE Applied Technologies, LLC*, 367 NLRB No. 105 (2019) (meeting became so adversarial it threatened employer's ability to elicit factual account from employee); *Yellow Freight System, Inc.*, 317 NLRB 115 (1995) (representative attempted to force manager to negotiate a definition of "sexual harassment"); *New Jersey Bell Telephone Co.*, 308 NLRB 277 (1992) (representative repeatedly objected to form of the interview).

4. Chang's admonishments that Woods remain silent violated the Act.

Based on the *New Jersey Bell* case, Respondent claims that Woods' conduct exceeded the boundaries of *Weingarten*-protected conduct, in that he "was interrupting the course of the interview and attempting to interface directly with the investigators by asking them questions and attempting to dictate how the interview would proceed." (R. Br. at 128). This, according to Respondent, privileged Chang to silence Woods. I disagree.

In *New Jersey Bell*, the representative repeatedly interrupted the employer's questioning—not to clarify or ascertain what the employee was accused of—but rather to *object* to the employer re-asking questions the employee had previously answered evasively. This, the Board held, amounted to obstruction of a legitimate investigatory technique exceeding the *Weingarten* role. Here, Respondent concedes that Woods did not, in fact, object to any question during the interview. (R. Br. at 128). As such, *New Jersey Bell* is distinguishable from the instant case.

Instead, the Chang's interview of Vasquez more closely tracks the interview in the *Lockheed Martin* case, in which the representative, at the meeting's outset, attempted to adduce the nature of the conduct of which the employee was accused. Woods likewise began Vasquez' interview with a similar request but was immediately shut down by Chang, who stated, "I'm running this meeting. You just sit there and listen." Like the *Lockheed Martin* representative, Woods sought basic information necessary to fulfill his duty to assist a represented employee. As such, application of the above principles dictates that, when Chang twice told him to remain silent, he improperly attempted to limit Woods' role.[37]

5. Chang's threat of "consequences" for Vasquez if Woods spoke during the interview independently violated Section 8(a)(1) of the Act.

The General Counsel additionally alleges that Chang committed an independent Section 8(a)(1) allegation when Chang threatened that, if Woods did not remain silent, Vasquez' interview would be cancelled and she would "suffer the consequences" of that cancellation. This, the General Counsel asserts, constituted an unlawful threat of unspecified reprisals for Woods' protected conduct as a *Weingarten* representative.

The NLRB and reviewing courts apply an objective test to determine whether an employer's statement constitutes an unlawful threat under Section 8(a)(1). As discussed earlier, the D.C. Circuit has explained, an employer violates Section 8(a)(1) when its statement, considering the totality of the circumstances, has a reasonable tendency to coerce or to interfere with employees' Section 7 rights. *Lush Cosmetics, LLC*, 372 NLRB No. 54. Pursuant to this standard, an employer violates Section 8(a)(1) when it threatens that an employee's protected conduct will produce a negative result. In the *Weingarten* context, the Board has explicitly held:

> The Employer's threat that the exercise of the right to representation would lead to more severe discipline or that the employees' fate would be in more capricious and hostile hands is no less interference and restraint than an outright denial of his right.

Southwestern Bell Telephone Company, 227 NLRB 1223 (1977) (unlawful to tell employees that the result of granting their *Weingarten* requests would be "that the probable consequences would be worse for the employees").

While it is true that, at the meeting's outset, Chang could have lawfully denied Vasquez the right to any representation, his informing statement that Woods was acting outside his proper "role" and had therefore triggered potential "consequences" exceeded the boundaries of any such management prerogative. A reasonable employee in Vasquez' position—having been told that the Union was not only powerless to assist her but also that her *Weingarten* representative had acted inappropriately, potentially placing her in further jeopardy—would certainly be questioning the value of her decision to invoke her Section 7 right to a representative. I therefore find Chang's statements coercive under Section 8(a)(1).

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[37] As in the *Lockheed Martin* case, the fact that Woods was later able to participate in the meeting did not cure this violation of Vasquez' rights. See 330 NLRB at 429.

6. Respondent violated Section 8(a)(1) by disciplining Vasquez.

By its post-hearing brief, the General Counsel asserts that issuing Vasquez the December 19, 2023 DAF violated Sections 8(a)(1), (3) and (4) of the Act. To the extent the complaint refers to 8(a)(1) as a derivative violation and not a separate theory of liability, I nonetheless find it appropriate to consider it as such, insofar as it was fully litigated and is closely connected to the General Counsel's 8(a)(3) and (4) allegations involving Vasquez. See generally *KenMor Electric Co.*., 355 NLRB 1024 (2010) (finding employer's job application referral system violated 8(a)(1) rather than 8(a)(3) as alleged), enf. denied in relevant part sub nom**.** *Independent Electrical Contractors of Houston, Inc., v. NLRB*, 720 F.3d 543 (5th Cir. 2013).

As a preliminary matter, I find that, by challenging Andrews to produce the "contract" or "script" (i.e., Respondent's last, best and final offer) on which he was now relying to force various changes to employees' work schedules, Vasquez engaged conduct protected by Section 7 of the Act.

To be protected under Section 7, employee conduct must be both "concerted" and engaged in for the purpose of "mutual aid or protection." With respect to the latter requirement, it is well established that an employee protest against an employer's unilateral implementation of a last, best and final offer that reduces wages, eliminates benefits or alters working conditions directly concerns the improvement of terms and conditions of employment, satisfying the "mutual aid or protection" element of Section 7. See, e.g., *Hood River Distillers, Inc*., 372 NLRB No. 126, slip op. at 4 (2023).

I likewise find that Vasquez' conduct on November 17, 2023, while a "lone act of a single employee," constituted concerted conduct insofar as it stemmed from and logically grew out of prior concerted activity. This prior activity took the form of the Union protesting the implementation and pursuing a Board charge to address it. Indeed, approximately a month prior to Vasquez' alleged "outburst," an unfair labor practice complaint had issued accusing Respondent of unlawfully implementing its last, best and final offer without first bargaining to a good-faith impasse. As such, Vasquez' conduct was concerted. See *Alton H. Piester, LLC v. NLRB*, 591 F.3d 332 (4th Cir. 2010) (individual employee's complaint over unilateral change affecting all employees logically grew out of prior group protest on same subject).

(a) The legal standards: *Wright Line* vs. *Burnup & Sims*

In cases involving alleged discriminatory discipline where the employer's motive is at issue (i.e., where the employer claims to have based its decision on conduct separate and apart from the employee's alleged protected conduct), the Board employs the burden shifting analysis set forth in *Wright Line.*[38] Under this standard, once the General Counsel establishes, among other things, that the employer was motivated in whole or part by animus against protected conduct, the employer may successfully defend its conduct by proving that the same action would have taken place even in the absence of the protected conduct. Typically, an employer may meet this burden by demonstrating that its decision was based on a good-faith belief that the employee

[38] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

engaged in misconduct and is not required to demonstrate the correctness of this belief. In such a case, whether the employee actually engaged in the alleged misconduct is irrelevant to the merits of the case. See, e.g., *GHR Energy Corp*., 294 NLRB 1011, 1012–1013 (1989) (finding respondent met its *Wright Line* burden by establishing that it would have suspended employees, even in the absence of their protected activity, because based on its investigation, it reasonably believed they had engaged in serious misconduct), enfd. 924 F.2d 1055 (5th Cir. 1991) (unpublished).

Wright Line, however, does not apply to situations in which the employer asserts that discipline was justified by misconduct occurring within the course of otherwise protected conduct. In such circumstances, the Supreme Court's *Burnup & Sims* test provides enhanced protection for employees. As Court explained, it would "weaken or destroy" Section 7 rights and "protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith." *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964). Therefore, in such cases, the Board declines to extend the "good faith belief" defense and will find the employer's action lawful only where the employer's belief is ultimately proven to be correct. Because an employer's good-faith belief in misconduct alone will not carry the day, it follows that, where *Burnup & Sims* applies, the General Counsel need not make an independent showing of animus typically required under *Wright Line*. See *Aqua-Aston Hospitality, LLC*, 365 NLRB 592, 596–597 (2017) ("the existence or lack of unlawful animus is not relevant" under *Burnup & Sims*).

(b) *Burnup & Sims* dictates a finding that Respondent violated 8(a)(1).

By Respondent's own admission, the "misconduct" for which Vasquez was disciplined took the form of her "inappropriate outburst" in Andrews' office on November 17, as well as her "subsequent threats that 'this would not end well' for Andrews and that she 'knew people' who could deal with the situation." Under the circumstances, Respondent cannot sever Vasquez' alleged misconduct from her protected activity; this renders *Burnup & Sims* the appropriate framework. As the Board held in a similar case, "*Wright Line* is inapplicable to cases—like this one—in which the employer has discharged the employee because of alleged misconduct "in the course of" protected activity. See *Shamrock Foods Co.*, 337 NLRB 915, 924 (2002) (applying *Burnup & Sims* to discharge based on discriminatee's alleged physical threats to coworkers while soliciting them for union authorization cards) (citations omitted), enfd. 346 F.3d 1130 (D.C. Cir. 2003).

Under *Burnup & Sims*, "§ 8(a)(1) is violated if it is shown that the [disciplined] employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the [discipline] was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct." 379 U.S. at 23; see also *Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 29 (D.C. Cir. 1998). In this case, as discussed, the first three parts of the *Burnup & Sims* inquiry are easily satisfied: it is clear that Vasquez was engaged in protected activity when she protested Respondent's implementation of its last, best and final offer; there is no doubt that Respondent knew that such activity was protected; and, according to Respondent's own business records, the basis for disciplining Vasquez was her alleged misconduct in the course of that otherwise protected activity.[39]

Thus, the burden shifts to Respondent to demonstrate that it had a good-faith belief that Vasquez engaged in inappropriate outburst and made threatening comments on November 17, 2023. This Respondent utterly failed to do. Rather than calling any first-hand witness to Vasquez' alleged conduct, Respondent relies solely on rank hearsay contained in its business records. Nor did Respondent present the testimony (or even the identity) of the individual responsible for making the decision to discipline. These gaping holes in the record leave me with no choice but to conclude that Respondent did not, in fact, believe Vasquez to have made the statements attributed to her. See *Government Employees (IBPO)*, 327 NLRB 676, 699 (1999) (drawing adverse inference from employer's failure to call the decision maker to explain the basis for challenged termination decision), enfd. 205 F.3d 1324 (2d Cir. 1999); *Dorn Transportation Co.*, 168 NLRB 457, 460 (1967) (failure of the decision maker to testify "is damaging beyond repair"), enfd. 405 F.2d 706 at 713 (2d Cir. 1969); see also *Apex Linen Service, Inc.*, 370 NLRB No. 75, slip op at 39 (2021) (employer's inconsistent testimony as to who made the decision to fire employee indicates unlawful motive).

Even were I to somehow "credit" Respondent's hearsay evidence that it believed Vasquez had engaged in misconduct, this would not change the result because I find that, based on her credible denials, she in fact did not. Indeed, Respondent's own investigation found no corroboration for Andrews' allegation that she made "gang-related" threats; rather, in view of her claim that Respondent was targeting her as a union adherent, even had she made a statement about "knowing people" who could "handle" the situation, this could be reasonably interpreted as a threat to seek the assistance of her union, file a charge and hold Respondent to account for its conduct. As she did.

For the reasons set forth above, I find that Respondent failed to meet its burden, under *Burnup & Sims*, to demonstrate that it had a good-faith belief that Vasquez engaged in the misconduct on which it claims to have relied in issuing the DAF. Accordingly, I find Respondent violated Section 8(a)(1) of the Act when it disciplined Vasquez based on her protected, concerted activity.

7. Respondent violated Section 8(a)(3) by disciplining Vasquez.

By its Section 8(a)(3) violation, the General Counsel contends that Respondent disciplined Vasquez not because of her conduct on November 17, 2023, but because she is an ardent supporter of Local 665. This is a mixed-motive theory calling for a *Wright Line* analysis, for which a showing of anti-union animus is required.

As a preliminary matter, I find that the General Counsel has made out a prima facie case that Vasquez' discipline was motivated by her union conduct. As noted above, this requires a showing of: (1) Vasquez's union activity, (2) Respondent's knowledge of that activity, and (3) antiunion animus, or animus against union activity, on Respondent's part. *Intertape Polymer*

[39] As noted above, application of *Burnup & Sims* means that Respondent's good faith belief that he engaged in an assault and/or later became confrontational with management is not determinative and no showing of animus is required.

Corp., 372 NLRB No. 133, slip op. at 2 (2023), enfd. Nos. 23-1831/1854, 2024 WL 2764160 (6th Cir. May 9, 2024); see also *Medic One, Inc.*, 331 NLRB 464, 475 (2000). There is no serious dispute that Respondent was aware that Vasquez was the sole Woodland branch agent serving on the Union's bargaining committee. Further, she openly wore and displayed Union insignia on a regular basis at work.

I additionally find significant evidence of Respondent's antiunion animus. Proof of an employer's motive can be based upon direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. *Intertape Polymer Corp.*, 372 NLRB No. 133, slip op. at 7. The record contains ample evidence of anti-union animus, including Respondent's bad-faith bargaining, as well as coercive statements made by its various managers and supervisors. Furthermore, to the extent Respondent's business records are to be trusted, they themselves raise serious doubts about its motivation. In particular, it appears that Respondent inexplicably failed to interview four of the six employees Andrews reported as witnesses to Vasquez' conduct on November 17. The Board has long held such conduct supports an inference of animus. See, e.g., *Western Refining*, 366 NLRB No. 83, slip op. at 16 (2018); *Stahl Specialty Co*., 364 NLRB 635, 647 (2016); *The Sheraton Anchorage*, 363 NLRB No. 6 (2015).

This showing acts to shift the burden to Respondent to persuade by a preponderance of the evidence that it would have disciplined Vasquez, even absent her union activity. *Consolidated Bus Transit*, 350 NLRB 1064, 1066 (2007). An employer can meet its *Wright Line* burden where it demonstrates that it held a reasonable belief that the employee engaged in misconduct for which it would have taken the same action absent the employee's protected conduct. *Western Refining*, supra at 16 (citing cases).

By its post-hearing brief, Respondent argues that it had a reasonable belief that Vasquez engaged in an "inappropriate outburst" in Andrews' office and then made threatening comments. The record fails to support this claim. First, Respondent's incomplete investigation into Vasquez' conduct cuts sharply against any finding that it had a reasonable belief that she engaged in the misconduct alleged. See, e.g., *Wendt Corp*., 369 NLRB No. 135, slip op. at 2 (2020) (employer failed *Wright Line* burden where it did not interview witnesses to alleged incident); *Woodlands Health Center*, 325 NLRB 351, 364–365 (1998) (failure to interview two residents whom employee was alleged to have abused indicative of inadequate investigation); *Sheraton Hotel Waterbury*, 312 NLRB 304, 322 (1993) (failure to interview other witnesses to alleged insubordination supported finding of unlawful motivation).

At hearing, Respondent doubled down on its slapdash approach to justifying Vasquez' discipline by declining to present the testimony of: (a) *any* identified witness to Vasquez' alleged misconduct; (b) Chang, who is claimed to have investigated the misconduct; or (c) the unidentified decision maker who determined that a DAF would be issued. The absence of such testimony leaves the evidentiary record devoid of proof that Respondent would have acted the same way absent Vasquez' protected conduct, and its *Wright Line* defense fails on its own merits. See *Whirlpool Corp*., 337 NLRB 726, 727 (2002) (failure to present testimony of employee-witnesses to discriminatees' alleged improper conduct defeats *Wright Line* defense); *Dorn Transportation Co.*, 168 NLRB 457, 460 (1967) (failure of the decision maker to testify "is damaging beyond repair"), enfd. 405 F.2d 706 at 713 (2d Cir. 1969).

Because Respondent failed to rebut the General Counsel's prima facie case, I find Respondent violated Section 8(a)(3) and (1) by disciplining Vasquez based on her union activity.

8. Respondent violated Section 8(a)(4) by disciplining Vasquez.

The General Counsel alternately alleges that Respondent disciplined Vasquez not because of her conduct on November 17, 2023, but rather because she testified in AAA I. Like the General Counsel's 8(a)(3) theory, this allegation is subject to a *Wright Line* analysis.

Section 8(a)(4) provides that "[i]t shall be an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because [s]he has filed charges [with] or given testimony" before the NLRB. This anti-retaliation provision is central to the purposes of the NLRA because, without some protection for employees attempting to access the Act's protections, the Board cannot "assure an effective administration of the Act." *In re Briggs Mfg. Co.*, 75 NLRB 569, 571 (1947). The Supreme Court has interpreted Section 8(a)(4) liberally to effectuate its remedial purpose. See *NLRB v. Scrivener*, 405 U.S. 117 (1972).

I find that the General Counsel has established a prima facie case under Section 8(a)(4). It is undisputed that Vasquez testified in AAA I. Moreover, according to her unrebutted testimony, she alerted Andrews that she would be testifying and provided him with a copy of her subpoena. As noted earlier, I have found significant evidence of anti-union animus both in Respondent's multiple coercive statements and bad-faith bargaining, as well as in handling of Vasquez' investigatory interview and its failure to fully investigate her supposed misconduct.

In the 8(a)(4) context, temporal proximity between protected activity and adverse employment actions has been found compelling circumstantial evidence of animus. See, e.g., *Trader Joe's Company*, 373 NLRB No. 73, slip op. at 2 (2024) (finding animus where one month passed between discriminatee's charge filing and her suspension), enfd. 167 F.4th 766 (5th Cir. 2026); *Airgas USA, LLC*, 366 NLRB No. 104, slip op. at 19 (2018) (finding animus where discipline followed charge filing by just under one month), enfd. 916 F.3d 555 (6th Cir. 2019). Such a finding is especially appropriate where, as here, the facts show a failure to complete a meaningful investigation into allegations of misconduct claimed to have occurred close in time to an employees' protected conduct. See *Trader Joe's*, supra at 2 ("we agree with the judge that the Respondent's animus towards [the discriminatee's] charge filing and other protected activity is shown by the close timing between those activities and the suspension, and by the Respondent's failure to complete a meaningful investigation into any of the allegations of misconduct the Respondent relied upon in discharging [the discriminatee]").

The General Counsel having established its prima facie case, the burden shifts to Respondent to persuade by a preponderance of the evidence that it would have disciplined Vasquez, even absent her union activity. I have already found Respondent to have failed in carrying that burden, in large part based on Respondent's failure to present any evidence of its claimed belief that Vasquez engaged in misconduct on November 17. Respondent's defense, therefore, fails to rebut the General Counsel's prima facie case. Accordingly, I find Respondent violated Section 8(a)(4) and (1) of the Act when it disciplined Vasquez based on her testifying in the unfair labor practice proceeding in AAA I.

CONCLUSIONS OF LAW

1. Respondent, American Automobile Association of Northern California, Nevada & Utah, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Teamsters, Local 665 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and at all material times the Union has been the exclusive collective-bargaining representative of the unit within the meaning of Section 9(a) of the Act:

> All full-time and regular part-time Commissioned Insurance Sales Employees employed by Respondent at its Northern and Central California branch offices; excluding all other employees, managers, guards, and supervisors as defined in the Act.

4. By, since about September 16, 2021, engaging in overall bad-faith bargaining with the Union with the intent to frustrate the possibility of reaching an initial collective-bargaining agreement, Respondent failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit and thereby violated Section 8(a)(5) and (1) of the Act.

5. By prematurely declaring impasse and, on or about August 1, 2023, unilaterally implementing its last, best, and final offer and additionally unilaterally implementing additional changes to the bargaining unit's terms and conditions of employment not contemplated by its last, best, and final offer, without first bargaining in good faith to a valid impasse, Respondent violated Section 8(a)(5) and (1) of the Act.

6. By the following conduct, Respondent coerced employees in the exercise of their Section 7 rights and thereby violated Section 8(a)(1) of the Act:

(a) On or about April 13, 2022, by indicating to unit employees that their continued pursuit of collective bargaining would result in their losing existing benefits;

(b) On or about January 27, 2022, by indicating to unit employees that their continued pursuit of collective bargaining would cost them their renewal commissions and, ultimately, their union representation;

(c) In or about late July 2023, by denigrating employees' selection of and support for the Union by telling an employee that agents were no longer Respondent's employees but were "Teamsters";

(d) In or about August 2023, by misrepresenting the Union's bargaining conduct and blaming the Union for the more onerous terms and conditions Respondent imposed through its August 1, 2023 directive; and

(e) On or about August 3, 2023, by blaming the Union for an employee's loss of a milestone award benefit and by disparaging the Union by implying that it had agreed to Respondent's more onerous work rules.

7. By proffering to unit employees severance agreements containing overbroad confidentiality and release provisions that required employees to waive their rights under Section 7 of the Act, Respondent violated Section 8(a)(1) of the Act.

8. By denying employee Carmen Vasquez (Vasquez) her right to representation during an investigatory interview she reasonably believed could result in discipline, including by directing her union representative to remain silent, Respondent violated Section 8(a)(1) of the Act.

9. By threatening that Vasquez would suffer adverse consequences if her union representative did not remain silent during the investigatory interview, Respondent violated Section 8(a)(1) of the Act.

10. By constructively discharging Daniece Atencio and Hamid Ezzatyar, Respondent unlawfully imposed through its last, best, and final offer—Respondent violated Section 8(a)(3) and (1) of the Act.

11. By disciplining Vasquez on or about December 8, 2023 because of her protected concerted activity, Respondent violated Section 8(a)(1) of the Act.

12. By disciplining Vasquez on or about December 8, 2023 because of her activities on behalf of the Union, Respondent violated Section 8(a)(3) and (1) of the Act.

13. By disciplining Vasquez on or about December 8, 2023 because she gave testimony in the prior unfair labor practice proceeding in AAA I, Respondent violated Section 8(a)(4) and (1) of the Act.

14. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

15. Respondent has not otherwise violated the Act as alleged in the consolidated complaint.

Remedy

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

Because Respondent unlawfully declared impasse and, on August 1, 2023, unilaterally implemented its last, best, and final offer, I shall order Respondent, on the Union's request, to rescind those unlawful unilateral changes and to restore the terms and conditions of employment that existed before the unlawful implementation, including the renewal commissions Respondent announced it would eliminate, and to maintain those terms in effect until the parties bargain in good faith to a valid agreement or lawful impasse. Nothing in this Order shall be construed as requiring or authorizing Respondent to rescind any benefit or improvement in terms and conditions of employment without the Union's concurrence.

Respondent shall make the unit employees whole for any loss of earnings and other benefits suffered as a result of its unlawful unilateral changes and its unlawful bad-faith bargaining. Backpay shall be computed on a quarterly basis as prescribed in *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). Consistent with *Thryv, Inc.*, 372 NLRB No. 22 (2022), Respondent shall also compensate the unit employees for all direct or foreseeable pecuniary harms suffered as a result of the unfair labor practices found, with such compensation calculated separately from taxable net backpay and with interest as set forth above.

Because this case involves Respondent's failure and refusal to bargain in good faith for an initial collective-bargaining agreement, I find that an affirmative bargaining order is warranted. Following the Board's practice of analyzing the propriety of such an order under the three-factor balancing test articulated in *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000), I find: (1) an affirmative bargaining order vindicates the Section 7 rights of the unit employees who were denied the benefits of good-faith collective bargaining, and the attendant bar to challenging the Union's majority status for a reasonable period does not unduly prejudice employees who may oppose representation because its duration is no longer than reasonably necessary to remedy the violations; (2) an affirmative bargaining order serves the policies of the Act by fostering meaningful collective bargaining and industrial peace and by removing Respondent's incentive to delay good-faith bargaining in the hope of dissipating support for the Union; and (3) a cease-and-desist order alone would be inadequate because it would permit a challenge to the Union's majority status before the taint of Respondent's misconduct has dissipated, allowing Respondent to profit from its own unlawful conduct. Accordingly, I shall order Respondent, on the Union's request, to bargain in good faith with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

It is well established that the Board, in appropriate circumstances, may order unusual remedial relief to rectify particular unfair labor practices. *Leavenworth Times*, 234 NLRB 649, 649 fn. 2 (1978); *Crystal Springs Shirt Corp.*, 229 NLRB 4, 4 fn. 1 (1977). Here, the General Counsel requests certain remedies that the Board has deemed extraordinary: first, an extension of the certification year as per *Mar-Jac Poultry*;[40] a notice reading; posting of an explanation of rights; and that Respondent be ordered to submit written bargaining progress reports to the Compliance Officer for Region 32.

Under *Mar-Jac*, the union's certification year can be extended because of an employer's unfair labor practices that impacted bargaining. The Board, as a matter of discretion, can extend the certification year for up to a full 12 months, but the record must show the need for extension and its appropriate length. *American Medical Response*, 346 NLRB 1004, 1005 (2006), in which the Board set out the governing criteria as: (1) the nature of the violations; (2) the number, extent, and dates of collective bargaining sessions; (3) the impact of the ULP's on bargaining;

[40] 136 NLRB 785 (1962). See also *Metta Electric*, 349 NLFB 1088, 1089 (2007).

and (4) the conduct of the union during negotiations. See also *Northwest Graphics*, Inc., 342 NLRB 1288, 1289 (2004). Here, I find that these factors, on balance, warrant extension of the certification year based on Respondent's coercive and unlawful conduct and its impact on the union's ability to bargain. While Respondent arguably engaged in numerous bargaining sessions, I have found that, rather than intending to reach agreement, Respondent aimed to force an economically devastating wage cut on a unit of newly organized employees bargaining for their first contract. Respondent's managers and officials disparaged the union, and its in-house counsel bragged during bargaining that a similar wage cut had previously led to another union being decertified.[41] Respondent's broadside attack against a newly certified unit warrants a full renewal of the certification year. See *Outboard Marine Corp*., 307 NLRB 1333 (1992).

In order to fully dissipate the effects of Respondent's widespread and egregious interference with employee rights, I will recommend that Respondent be ordered to post the standard Board notice, as well as an Explanation of Rights poster. *Noah's Ark Processors, LLC d/b/a WR Reserve*, 372 NLRB No. 80, slip op. at 8, 11–12 (2023). These documents should be posted at Respondent's Walnut Creek, California headquarters and each of its Northern and Central California branch offices for one full year, emailed to bargaining unit employees and additionally posted electronically, via "the Hub" or other intranet site or portal accessible by bargaining unit employees. *J. Picini Flooring*, 356 NLRB 11, 11 (2010) (in ordering electronic notices, the Board notes that "electronic notices will have the same scope as notices posted by traditional means; that is, distribution will be limited to the extent practicable to the location(s) where the unfair labor practices occurred."). Respondent should be ordered to maintain these electronic postings for a period of one year.

Because Respondent's unfair labor practices are numerous and serious, were committed at multiple branches, and included the participation of high-level management officials, I find that the traditional notice posting should be supplemented by a public reading of the notice to dissipate the coercive effects of the violations on employees' willingness to exercise their Section 7 rights. *Amerinox Processing, Inc*., 371 NLRB No. 105, slip op. at 2 (2022), enfd. mem. No. 22-1158, 2023 WL 2818503 (D.C. Cir. 2023). Because Respondent's in-house counsel Karen Williams was involved in the commission of unfair labor practices, I will recommend that Respondent be ordered to post electronically, via "the Hub" or other intranet site or portal accessible by bargaining unit employees, along with its electronic posting of the notice and Explanation of Rights, a link to a video (in a form approved by the Regional Director of Region 32) of Williams reading the notice and Explanation of Rights. See *Absolute Healthcare d/b/a Curaleaf Arizona*, 372 NLRB No. 16 (2022) (notice reading appropriate where high-level management officials openly participated in a widely disseminated course of unlawful conduct). Respondent should be ordered to maintain these electronic postings for a period of one year.

Accordingly, I shall order that the notice be read aloud to assembled employees by a responsible management official or, at Respondent's option, by a Board agent in the presence of a responsible management official.

[41] Indeed, had a district court injunction not staved off Respondent's de facto decertification effort, it may well have succeeded.

I do not believe that requiring Respondent to submit written bargaining reports appropriate in this case. This remedy has typically been reserved for cases in which the employer has continuously refused to comply with a bargaining order issued by the Board; it is unnecessary at this stage in the proceeding to determine the standards under which this may be the case. See *Professional Eye Care*, 289 NLRB 1376, 1376 fn. 3 (1988).

Because Respondent unlawfully proffered severance agreements containing overbroad confidentiality and release provisions, I shall order Respondent to rescind those unlawful provisions and to notify in writing all employees to whom the agreements were offered that the unlawful provisions have been rescinded and will not be enforced.

Having found that Respondent constructively discharged Daniece Atencio and Hamid Ezzatyar, I shall order Respondent to offer each of them 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, and to make each of them whole for any loss of earnings and other benefits suffered as a result of the unlawful constructive discharge, computed as set forth above and including compensation for direct or foreseeable pecuniary harms under *Thryv, Inc.*, supra. Consistent with the findings, make-whole relief for the constructive discharges is limited to Atencio and Ezzatyar and does not extend to any additional or unidentified class of employees.

Having found that Respondent unlawfully disciplined Carmen Vasquez, I shall order Respondent to rescind the December 8, 2023 Disciplinary Action Form, to remove from its files any reference to that unlawful discipline, to make Vasquez whole for any loss of earnings and other benefits suffered as a result of the unlawful discipline (computed as set forth above), and to notify her in writing that this has been done and that the unlawful discipline will not be used against her in any way.

Respondent shall also compensate the affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and shall file with the Regional Director for Region 32, within 21 days of the date the amount of backpay is fixed, a report allocating the backpay awards to the appropriate calendar years.

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

ORDER

Respondent, American Automobile Association of Northern California, Nevada & Utah, Walnut Creek, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with International Brotherhood of Teamsters, Local 665 (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Unilaterally changing the terms and conditions of employment of its unit employees, including by implementing portions of its last, best, and final offer without first bargaining to a good-faith impasse.

(c) Coercively telling employees that by selecting the Union as their representative they are no longer Respondent's employees, or otherwise denigrating employees' support for the Union.

(d) Misrepresenting the Union's bargaining conduct to employees or blaming the Union for changes to, or the loss of, employees' benefits or for more onerous terms and conditions of employment.

(e) Threatening employees that their continued pursuit of collective bargaining will lead to their bargaining representative being decertified.

(f) Proffering to employees severance agreements that require them to waive their rights under Section 7 of the Act, including through overbroad confidentiality and release provisions.

(g) Constructively discharging employees by forcing them to choose between resigning and continuing to work under terms and conditions of employment unlawfully imposed by Respondent.

(h) Denying employees their right to representation during an investigatory interview they reasonably believe may result in discipline, directing employees' representatives to remain silent during such interviews, or threatening employees with adverse consequences because of their representatives' protected conduct.

(i) Disciplining or otherwise discriminating against employees because of their activities on behalf of the Union, because of their protected concerted activity, or because they have given testimony under the Act.

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

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

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

> All full-time and regular part-time Commissioned Insurance Sales Employees employed by Respondent at its Northern and Central California branch offices; excluding all other employees, managers, guards, and supervisors as defined in the Act.

(b) On request by the Union, rescind the unilateral changes of employment for its unit employees that were unilaterally implemented on about August 1, 2023.

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

(d) Make the unit employees whole for any loss of earnings and other benefits suffered as a result of Respondent's unlawful unilateral changes and bad-faith bargaining, with interest, and compensate them for any direct or foreseeable pecuniary harms, in the manner set forth in the remedy section of this decision.

(e) Rescind the unlawful confidentiality and release provisions of the severance agreements proffered to unit employees and notify in writing all employees to whom those agreements were offered that the unlawful provisions have been rescinded and will not be enforced.

(f) Within 14 days from the date of this Order, offer Daniece Atencio and Hamid Ezzatyar 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, and make them whole for any loss of earnings and other benefits suffered as a result of their unlawful constructive discharge, with interest, in the manner set forth in the remedy section of this decision.

(g) Within 14 days from the date of this Order, rescind the December 8, 2023 Disciplinary Action Form issued to Carmen Vasquez, make her whole for any loss of earnings and other benefits, and within 3 days thereafter notify her in writing that this has been done and that the unlawful discipline will not be used against her in any way.

(h) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 32, within 21 days of the date the amount of backpay is fixed, a report allocating the backpay awards to the appropriate calendar years.

(i) 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 and other compensation due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its Walnut Creek, California headquarters and at all of its Northern and Central California branch offices copies of the attached notice marked "Appendix B" and Explanation of Rights marked "Appendix C." Copies of the notice and Explanation of Rights, on forms provided by the Regional Director for Region 32, 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. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be emailed to bargaining unit employees and additionally posted on "the Hub" or other intranet site or portal accessible by bargaining unit employees. If Respondent has gone out of business or closed any facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice and Explanation of Rights to all current employees and former employees employed by Respondent at any such facility at any time since August 18, 2021.

(k) Record a video of Respondent's in-house counsel Karen Williams reading the notice and Explanation of Rights and submit it for approval by the Regional Director of Region 32. Within 14 days after approval by Region, distribute this video via a posting on "the Hub" or other intranet site or portal accessible by bargaining unit employees, along with a copy of the Notice and Explanation of Rights, via a link or caption titled, "An Important Message Regarding Your Rights Under the National Labor Relations Act." These documents are to be posted and available for a period of one year.

(l) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

The certification year shall be extended 12 months from the date that the Respondent commences bargaining in good faith.

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

Dated, Washington, D.C. September 24, 2026

Mara-Louise Anzalone
Administrative Law Judge

APPENDIX A

As Branch Manager of xyz Branch, I want to make sure you are aware of policies and procedures that we are implementing on August 1st, 2023 and which were part of the Company's last, best & final offer to the union.

These are the key policies and expectations California Insurance Agents and California Life Insurance Specialists need to know. The term "agents" here refers to both.

1. Counter Duty and Saturday Schedules

- The Manager/ Assistant Branch Manager (ABM) will now create and publish the agent counter rotation schedule
- Regarding Flex for Saturday work- It is the Manager's discretion to choose flex day based on branch need
- Agents **cannot** opt out of monthly counter schedules
- Agents must sell all products, including all Specialty products (if they are properly licensed)
- Any agent request to switch or trade an assigned counter shift must have prior approval by Branch Leadership. Agents must find a person to trade and this must be communicated **by email** to the Branch Manager and ABM by end of day on the day before their scheduled shift. This includes trades for Scheduled PTO.
- If the agent fails to make these arrangements on time, they will forfeit their shift, and it will go to the agent with the highest seniority. If declined, the shift will go to the next senior agent. If they all decline, Branch Management will assign the shift to the lowest seniority agent. This is called "inverse seniority."
- If an agent is late or calls in sick on the day they have Counter Duty, the Manager will first offer it to the highest seniority agent, and then the next senior - if no one takes it, the Manager will enforce "inverse seniority" as was just described. The missed or late counter shift will **not** be replaced (or switched or traded) for the Agent on Unscheduled PTO.
- For insurance servicing, if an MEA/MEG is unavailable to assist the Member, the Member will be sent to the next available Agent on counter.
- All products count as an "up" including: Ancillary Insurance Products, Membership, Insurance Policy Rewrites and Insurance Policy Servicing.
- To build out the Saturday Counter Schedule:
    - Branch Management will gather a list of all Saturday dates & shifts for the upcoming quarter, starting with the agent who has the highest seniority, and working down from there.
    - Branch Management will ask if there are volunteers for any particular Saturday(s).
    - Once the volunteer spots are filled, Branch Management will enter the name of the lowest seniority agent in the first available shift that has not been volunteered for, and will continue in inverse-seniority order until all shifts are filled.

- Branch Management will adhere to the following process for Membership distribution:
  - *Membership Only:* Insurance Agent(s)
  - *OMV transactions (with or without Membership):* Team Member conducting the OMV transaction will fulfill the Membership request.
  - *Insurance Servicing:* Team Member conducting the transaction (agent or MEA)
  - *Life Insurance:* Life Insurance Specialist conducting transaction
  - *Travel:* Travel Counselor conducting transaction

2. Bilingual language requests

- If a customer walks in requesting a particular language for assistance with a "new business" transaction, and there is an agent in the branch that speaks that language, the following will occur:
  - The customer will be granted their request to work with the agent that speaks their language.
  - If multiple agents speak the requested language, priority will go first to the agents on counter who speak the requested language, then to the agent with most seniority who speaks the requested language
- If there is **no agent** available that speaks the language requested:
  - The counter agent who is "up" next will assist the customer using the language line
  - No other branch Team Member will be asked to assist with translation
  - No other licensed Branch Team Member, regardless of language spoken, will be asked to assist with the new business transaction unless all licensed agents in the Branch are actively working with a customer

3. Phones

- All agents will be skilled as "1" in Sales Queues (New Membership/Insurance)
- For Service calls (Zero Out, OMV, Existing Member) all agents will be skilled "2" (MEA/MEG will be skilled as "1")
- Agents must auto-in and be available for calls. There is no more "phone duty". All Agents are available for all calls when not actively working with a Member.
- MWG expects agents to transact all new and existing business on a recorded line
- In a branch, if the agent receives a call on their cell phone, the agent must ask the caller to call back on their desk line or have EC 500 engaged. The agent could also call the Member back on their desk line.
- If an agent is working **outside** of the Branch, they are **a/so** expected to transact on a recorded line - either using their softphone via laptop connection, or EC500.
- All Agents need to log off the Branch phone system at the close of business each day

4. **IPC**
    - Starting August 1st, the following updated remediation process goes into effect and agents will need to **actually correct** errors on a policy, not merely make an attempt to correct errors
    - Agents will continue to receive a fail notice and have through Day 30 from bind to correct errors. Please refer to the updated remediation guide available on the Hub (will be posted today, August 1st).
    - If on Day 31 from bind - the error has **not been corrected,** MWG Compensation will be notified, the commission will be adjusted, and the policy will convert to a House Account. The commission will be adjusted in the pay period following Day 31.
    - Branch Team Members will not inspect agent-written policies for IPC or underwriting guidelines - that is the responsibility of the agent
    - **To summarize:** Effective August 1st, the agent will need to correct errors on a policy, not just make an attempt to correct errors. The most current IPC guide is available on the Hub

5. **Hours Worked**

    Agent timecards - each weekday must be 8 hours and Saturday can be 7 .5 hours. If less than 8 hours on a weekday or 7.5 hours on a Saturday, then PTO or Unscheduled PTO (UPTO) must be used.
    - Unscheduled PTO would be used if the agent did not give at least 24 hours notice
    - An agent must still use their PTO bank and cannot ask for Unpaid time off if they have PTO available

6. **Biometric Clock**
    - All agents should use the biometric clock if they are not already doing so
    - If agents are entering time for weekend or evening work, agents must send an email notifying their Branch Manager and ABM, outlining time worked and the details of the work performed, along with manually entering their hours

7. **Leads**
    - Leads - ALL **available** leads (for example, Overnight, 5 Day, Olympic, NBA, etc) will be distributed by Manager or ABM within 2 hours of opening on business days. The process will be the same for Saturday, if the Branch is open on a Saturday.
    - If a Branch is closed on Saturday or Sunday, and a lead is received that day, that lead will be handled by the receiving Branch on Monday
    - The Manager will distribute leads as evenly as possible to the Agents working in the branch on the day of distribution
    - Agents are expected to work the leads within 24 hours. If leads are not updated (in Connect Suite or on the shared Google Sheet), Managers have the discretion to restrict or redistribute leads. There is no more “lead duty.”

8. **PTO/Unscheduled PTO**
    - PTO must be requested **in writing via email** to Manager and ABM at least 24 hours in advance, and be approved in writing by the Manager or ABM
    - Any notice less than 24 hours will be coded as UPTO (Unscheduled PTO)
    - Offices with zero to four Agents can approve one agent off at a time; offices with five or more Agents can have up to 50% of agents off at a time
    - For the remainder of 2023, managers will send out a calendar for August thru December with existing scheduled PTO listed. The most senior agent will choose any additional PTO, provided the maximum number of agents out of the office has not been met. Then the next most senior agent will choose their additional PTO, and that process will continue down the line.
    - If two people request the same day off simultaneously, and a Manager can only allow one agent to go based on business needs, the more senior agent who requested will be permitted to go.
    - For 2024, managers will send an annual calendar to the most senior agent who will choose their PTO for the year. After that is returned, the manager will continue down the seniority list. The annual calendar will be completed and shared prior to the start of 2024.
    - If an agent wants additional days beyond what is on the annual calendar, they can still request PTO during the year. This request will be considered by the Branch Manager if staffing allows. Note that no other agent will be bumped during the year as long as they have approved time on the annual schedule.

9. **Overtime**
    - **All overtime requests must be pre-approved,** with the following two exceptions:
        - If an agent is actively working with a Member to transact business, they can work overtime to complete that transaction. They will need to notify their manager in writing via email on the same day this occurs, outlining time worked and the details of the work performed.
        - If a Member contacts an agent outside of business hours, the agent may take the call, but must accurately log the time worked and advise their manager in writing via email on the occurrence date outlining time worked and the details of the work performed
    - All non-urgent service and sales work should be pushed to the next business day.
    - Overtime is intended only for **actual transactions taking place** (i.e. engaged in sales, service or processing of an insurance product). It is **not** to be used to catch up on paperwork.

10. **Branch Support**
    - Other Branch Team Members should not be listed on email signatures, out-of-office replies or voicemail recordings if an agent is unavailable and/or out of the office
    - The agent can provide the branch main phone number or other support phone numbers from appropriate partners (i.e. Claims, etc)
    - If the Manager or ABM needs an agent's support for insurance servicing because all other branch Team Members are busy, the Member will be sent to the next available Agent on counter.

11. **Compensation**
    - Group A agents will no longer receive commissions on renewal business as of February 1st, **2025**
    - Group B agents will receive a base rate of $35,700, starting today, August 1st
    - On February 1, 2025, Group A will receive the base rate of $35,700

12. **Group A Severance**
    - Group A agents have the option to request a severance package starting August 1st, 2023 through January 31st, 2025
    - If interested, agents must notify their Manager and complete an HR Google Form, and then HR will contact the agent

13. **Shop Stewards**
    - The union will name up to 30 people who will serve as Shop Stewards for the union
    - The list will be provided once it is available

14. **Grievance Procedure:**
    - The Company will implement a three-step Grievance Procedure. A grievance is a dispute between the agent or the union and the Company

15. **Health & Welfare:**
    - For the time being, agent's medical, dental, and vision benefits will remain unchanged

16. **Titles:**
    - Starting today, P&C Agents in California will now be called "Insurance Agents" and Life Agents in California will now be called "Life Insurance Specialists"

APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose a representative 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 interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT fail and refuse to bargain in good faith with International Brotherhood of Teamsters, Local 665 (the Union) as the exclusive collective-bargaining representative of our employees in the following appropriate bargaining unit:

> All full-time and regular part-time Commissioned Insurance Sales Employees employed by us at our Northern and Central California branch offices; excluding all other employees, managers, guards, and supervisors as defined in the Act.

WE WILL NOT prematurely declare impasse and unilaterally change your terms and conditions of employment, including by eliminating renewal commissions, without first bargaining in good faith with the Union to a valid impasse.

WE WILL NOT tell you that by choosing the Union as your representative you are no longer our employees, or otherwise denigrate your support for the Union.

WE WILL NOT misrepresent the Union's bargaining conduct or blame the Union for changes to, or the loss of, your benefits or for more onerous terms and conditions of employment.

WE WILL NOT threaten you that continuing to pursue collective bargaining will result in the union being decertified or you losing existing benefits.

WE WILL NOT offer you severance agreements that require you to give up your rights under Section 7 of the Act, including through overbroad confidentiality and release provisions.

WE WILL NOT force you to resign, or constructively discharge you, by requiring you to choose between resigning and working under terms and conditions of employment that we unlawfully imposed.

WE WILL NOT deny you your right to have a representative present during an investigatory interview you reasonably believe may result in discipline, direct your representative to remain silent during such an interview, or threaten you with consequences because of your representative's protected conduct.

WE WILL NOT discipline or otherwise discriminate against you because of your activities on behalf of the Union, because of your protected concerted activity, or because you have given testimony under the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on the Union's request, meet and bargain in good faith with the Union as the exclusive representative of the employees in the following bargaining unit concerning terms and conditions of employment and, if an understanding is reached, put the understanding in a signed agreement:

WE WILL, on the Union's request, rescind the changes to your terms and conditions of employment that we made on or about August 1, 2023, and restore the terms and conditions that existed before those changes, including your renewal commissions, and maintain them until we bargain in good faith with the Union to agreement or a valid impasse.

WE WILL make you whole for any loss of earnings and other benefits resulting from our unlawful unilateral changes and bad-faith bargaining, including any lost renewal commissions and other compensation, with interest, and **WE WILL** compensate you for any direct or foreseeable pecuniary harms you suffered, with interest.

WE WILL rescind the unlawful confidentiality and release provisions of the severance agreements we offered, and **WE WILL** notify in writing all employees to whom those agreements were offered that the unlawful provisions have been rescinded and will not be enforced.

WE WILL, within 14 days from the date of the Board's Order, offer Daniece Atencio and Hamid Ezzatyar 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, and **WE WILL** make them whole, with interest, for any loss of earnings and other benefits resulting from their unlawful constructive discharge.

WE WILL rescind the December 8, 2023 discipline issued to Carmen Vasquez, remove from our files any reference to that unlawful discipline, notify her in writing that we have done so and that it will not be used against her in any way, and make her whole, with interest, for any loss of earnings and other benefits.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and **WE WILL** file with the Regional Director for Region 32 a report allocating the backpay awards to the appropriate calendar years.

AMERICAN AUTOMOBILE
ASSOCIATION OF NORTHERN
CALIFORNIA, NEVADA & UTAH
(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.nlrb.gov

Ronald V. Dellums Federal Building
1301 Clay Street, Suite 1510N, Oakland, CA 94612-5224
(510) 637-3300, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/32-CA-321155 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

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, (510) 637-3034.

APPENDIX C

EXPLANATION OF RIGHTS
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

Employees covered by the National Labor Relations Act have the right to join together to improve their wages and working conditions, including by organizing a union and bargaining collectively with their employer, and also the right to choose not to do so.
This Explanation of Rights contains important information about your rights under this Federal law.

The National Labor Relations Board has ordered your employer, AMERICAN AUTOMOBILE ASSOCIATION OF NORTHERN CALIFORNIA, NEVADA & UTAH, to provide you with this Explanation of Rights to describe your rights and to provide examples of illegal behavior.

Under the National Labor Relations Act, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and working conditions.
- Support your union in negotiations.
- Discuss your wages, benefits, other terms and conditions of employment, and collective-bargaining negotiations with your coworkers or your union.
- Take action with one or more coworkers to improve your working conditions.
- Choose not to do any of these activities.

It is illegal for your employer to:

- Make unilateral changes in your terms and conditions of employment — such as eliminating renewal commissions or other compensation, or changing your work schedules, flexible work options, or other work rules — without first providing your union with notice of the proposed changes and affording the union an opportunity to bargain about the changes.
- Threaten you with job loss or loss of pay or benefits, if you support a union or act in support of collective bargaining.
- Offer you a severance agreement that requires you to give up the rights guaranteed to you by Section 7 of the Act (including those listed above).
- Deny your request to be represented by a union representative of your choice during an interview you reasonably believe may result in discipline.
- Improperly restrict your selected union representative's ability to provide you with assistance and counsel in such a meeting.
- Force you to resign by imposing unlawfully implemented reductions in pay or other terms and conditions of employment.
- Suspend or discipline you because you have supported the union or acted in support of collective bargaining. It is also illegal for your employer to threaten to do any of these things.

There are rules that govern your employer's conduct during collective bargaining with your union.

- Your employer must meet with your union at reasonable times to bargain in good faith about wages, hours, vacation time, insurance, safety practices, and other mandatory subjects.
- Your employer must participate actively in the negotiations with a sincere intent to reach an agreement.
- Upon a request by the union, your employer is required to provide information to the union that it needs to do its job as your representative.
- Your employer must not change existing working terms and conditions while bargaining continues.
- Your employer may not declare a bargaining impasse and impose new terms and conditions of employment unless it has first bargained in good faith to a lawful impasse.
- Your employer must honor any collective-bargaining agreement that it reaches with your union.
- Your employer cannot retaliate against you if you participate or assist your union in collective bargaining.

Illegal conduct will not be permitted. The National Labor Relations Board enforces the Act by prosecuting violations. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within 6 months of the unlawful activity. You may ask about a possible violation without your employer or anyone else being informed that you have done so. The NLRB will conduct an investigation of possible violations if a charge is filed. Charges may be filed by any person and need not be filed by the employee directly affected by the violation.

You can contact the NLRB's regional office, located at:

301 Clay Street, Ste. 1510N
Oakland, CA 94612-5211
Hours: 8:30 a.m. to 5:30 p.m.
(510) 637-3300

For more information about your rights and about the National Labor Relations Board and the Act, visit the Agency's Website: http://www.nlrb.gov.

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