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

OXARC, INC.	
and	**Cases 19-CA-230472**
TEAMSTERS LOCAL 839	**19-CA-237336**
and	**19-CA-237499**
	19-CA-238503
TEAMSTERS LOCAL 690	
and	**19-CA-248391**
INTERNATIONAL BROTHERHOOD OF TEAMSTERS	
and	**19-CA-232728**
JARED FOSTER, an Individual	

Adam D. Morrison, Esq., Sarah McBride, Esq.
Devon Blevins, Esq. for the General Counsel.

Rick Grimaldi, Esq., Samantha Sherwood Bononno, Esq.,
and *Kelsey E. Beerer, Esq. (Fisher & Phillips LLP)*
for the Respondent, Oxarc Inc.

Matthew Harris, Staff Attorney,
for the International Brotherhood of Teamsters.

DECISION

STATEMENT OF THE CASE

Ariel L. Sotolongo, Administrative Law Judge. At issue in this case is whether Respondent Oxarc, Inc. (Respondent or the Employer) violated Section 8(a)(1) of the Act by interrogating its employees regarding Respondent's bargaining proposals; whether it violated Section8(a)(1) & (3) of the Act by discharging its employee Jared Foster (Foster); whether it

violated Section 8(a)(1) & (5) of the Act by prematurely declaring an impasse during collective-bargaining negotiations for a successor agreement with Teamster Locals 690, 760, and 839 (collectively called the Union(s)), by implementing an agreement that was inconsistent with its last, best, final offer, and by refusing to meet for additional bargaining; by implementing a new policy regarding boots and logos on hats; and whether it violated Section 8(a)(1) of the Act by issuing a trial subpoena to Foster and the International Brotherhood of Teamsters seeking disclosure of Foster's and other employees' protected Section 7 activity.

I. PROCEDURAL BACKGROUND

Pursuant to multiple charges filed by the Union(s) or Foster, the initial consolidated complaint in these case(s) issued on February 28, 2019, followed by a second consolidated complaint issued on June 27, 2019, followed by a third consolidated complaint on December 6, 2019. By mutual agreement of the parties, in light of the Covid-19 pandemic that struck in March 2020, the initial hearing in this matter was scheduled to be held via the Zoom video platform ("Zoom") on August 3, 2020. Shortly before the hearing opened, however, Respondent filed a motion objecting to a video hearing, arguing that such a hearing would deprive Respondent of its right to examine and cross-examine witnesses in person. The record opened as scheduled via Zoom on August 3, 2020, and I ruled that under the circumstances a video hearing was appropriate, and denied Respondents motion to hold an in-person hearing. Respondent informed that it wished to file an interim appeal with the Board on this issue, and I therefore recessed the hearing in order to afford Respondent the opportunity to file its appeal with the Board. Respondent filed its interim appeal shortly thereafter, and on September 23, 2020, the Board ruled that I had not abused my discretion in ordering a video hearing. On September 29, 2020, the parties filed a joint motion requesting that the continuation of the hearing be postponed until the weeks of June 14, 21, or 28, 2021. On September 30, 2020, I granted the joint motion, and ordered that the hearing resume on June 28, 2021. Pursuant to my order, the record re-opened and the hearing resumed via Zoom on June 28, 2021, and continued thereafter through July 2, 2021.

II. JURISDICTION

The complaint alleges, and Respondent admits, that at all material times Respondent has been a State of Washington corporation with an office and place of business in Pasco, Washington, engaged in providing welding and industrial supplies, safety products and training, as well as industrial, medical, and specialty gases. The complaint further alleges, and Respondent admits, that in conducting its above-described operations during the previous 12 months, a representative period, it has derived gross revenues in excess of $500,000 and has, during the same time period, purchased and received goods valued in excess of $50,000 directly from points located outside the State of Washington. Accordingly, I find that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I find, that at all material times, the International Brotherhood of Teamsters, and Teamster Local(s) 839, 690, and 760, which are affiliated with the International Brotherhood of Teamsters, are (each) labor organizations within the meaning of Section 2(5) of the Act.

III. FINDINGS OF FACTS

A. Background facts

Respondent is a privately owned, family-run company in business since 1968, with an office and principal place of business in Pasco, Washington, and additional offices throughout Washington, Oregon, and Idaho. As briefly described above, it supplies compressed medical and industrial gasses, welding equipment and fire suppression systems to its customers. It employs approximately 370 employees dispersed between its locations in 3 states. Since the 1970s, Respondent has had a collective-bargaining relationship with the Unions, which represent approximately 23 drivers in the bargaining unit, with the drivers based primarily in Pasco, Spokane and Colville, Washington, as well as Coeur d'Alene and Lewiston, Idaho.[1] This collective-bargaining relationship, which by all descriptions was stable, even amicable, and relatively free of disputes, had been embodied in a series of collective-bargaining agreements, the last one which was in effect by its terms from June 1, 2012, to May 31, 2017.[2]

Collective-bargaining negotiations for a new agreement commenced in April 2017. By this time, however, a "new generation" of family owner-managers had taken over the day-to-day management and operation of the company. This new generation of managers included Jenna Fitzgerald, Respondent's Operations Manager, Fleet Director and Secretary Treasurer of its Board of Directors, who is the granddaughter of founder Jerry Wamsley and daughter of Jana Nelson, Respondent's President. Prior to 2017, a local attorney, Tom McLane, had represented Respondent in collective-bargaining negotiations, which had always been amicable and of relatively short duration, with the prior expiring contract essentially being renewed with a few revisions, primarily involving wage or pension changes, or "tweaks" of the language as needed. Indeed, by all accounts the 2012 negotiations lasted about two hours altogether, and based on this experience the Unions chose an inexperienced negotiator, Austin DePaolo, as their lead negotiator in 2017. Respondent, however, intended to take the 2017 negotiations in a completely different direction, as more thoroughly discussed below. To this end, Fitzgerald hired Jud Grubbs, a San Diego-based labor consultant, as Respondent's lead negotiator and spokesperson, although Fitzgerald also attended and participated in all of the bargaining sessions. As described below, these negotiations ended in February 2019 when Respondent declared an impasse, after 34 bargaining sessions.

Additionally, I note the parties stipulated to the following facts:[3]

1. Respondent Oxarc and the Union met to collectively bargain on the following dates:

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[1] The bargaining unit is described as follows: All drivers employed by [Respondent] at its various facilities throughout Washington, Idaho and Oregon within the jurisdictions of Teamster Locals 690, 760, and 839 ("the Unions"); but excluding all other employees, and guards and supervisors as defined by the Act. Not all of Respondent's drivers are in the bargaining unit, however. Indeed, Respondent employs drivers in 14 other locations that are not geographically located within the jurisdiction of the three above-named local Unions.
The drivers in the bargaining unit maintain a Class A Commercial Driver License ("CDL") with a hazardous materials endorsement.

[2] Joint Exhibit 6 ("Jt. Exh. 6"). Hereafter, the General Counsel exhibits will be referred to as "GC Exh., followed by its number; Respondent's exhibits will be "R Exh.," followed by its number; and joint exhibits, as described above, shall be referred to as Jt. Exh., followed by its number.

[3] Jt/ Exh. 15.

2017
April 25, 2017
April 26, 2017
May 1, 2017
May 15, 2017
May 16, 2017
June 7, 2017
June 19, 2017
August 7, 2017
September 26, 2017
September 27, 2017
October 24, 2017
October 25, 2017
November 28, 2017
November 29, 2017
December 19, 2017

2018
January 23, 2018
February 21, 2018
February 22, 2018
April 25, 2018
April 26, 2018
May 30, 2018
June 22, 2018
August 23, 2018
August 24, 2018
September 17, 2018
September18, 2018
October 22, 2018
October 23, 2018
December 17, 2018
December18, 2018

2019
January 15, 2019
January 16, 2019
February 27, 2019
February 28, 2019

2. In total, Respondent Oxarc and the Union met 34 times.

3. Six (6) of the thirty-four (34) bargaining sessions involved the use of a federal mediator: August 23, 2018; August 24, 2018; September 17, 2018; September 18, 2018; October 22, 2018; and October 23, 2018.

4. At all bargaining sessions, Jud Grubbs was the lead spokesperson for Respondent Oxarc.

5. Through May 16, 2017, Austin DePaolo was lead spokesperson for the Union. On June 7, 2017, David Jacobsen took over as the Union's lead spokesperson through the remainder of the bargaining sessions.

6. Respondent Oxarc and the Union came to ten (10) Tentative Agreements ("TAs") on complete Articles:

   a. Article IX Subsistence (1/24/18 and 2/21/18)
   b. Article X Road Blockades, Mechanical Failure, Etc. (2/22/18)
   c. Article XVI Death in the Immediate Family (6/22/18)
   d. Article XVII Jury Duty (7/11/18)
   e. Article XX Unsafe Equipment (8/24/18)
   f. Article XXI National Emergency (1/24/18)
   g. No Strike/No lock-out/No job actions (4/25/18)
   h. Article XXII Compensation Claims (10/23/18)

7. During the thirty-fourth (34th) bargaining session on February 28, 2019, Oxarc provided the Union with its last, best, and final offer ("LBFO").

8. Jared Foster ("Foster") was previously employed by Oxarc as a Driver. Foster was employed by Oxarc from August 25, 2003 through June 14, 2018.

9. In March 2019, approximately three unit employees reported to work wearing a hat with union insignia at the Springfield location.

10. On March 7, 2019, Respondent, through Plant Manager James Paradis, issued a memorandum regarding Respondent's Dress Code policy (the "Memo").

11. A true and correct copy of the Memo is Joint Exhibit 13.

12. No unit employees were disciplined for wearing non-Oxarc branded hats or headwear during this timeframe, nor have any unit employees been disciplined for wearing Union insignia on their hats or on any other articles of clothing to date.

B. The Collective-bargaining Negotiations

As described above in the stipulated facts, the negotiations between Respondent and the Unions lasted from April 25, 2017, until February 28, 2019, at which time Respondent declared an impasse in negotiations. The parties first met on April 25–26, 2017, a little over a month prior to the expiration of the collective-bargaining agreement then in effect. The Unions were represented at this meeting by Austin DePaolo, their chief negotiator and spokesperson, and Larry Kroetch, a business representative for Local 890, and Respondent was represented by Jud Grubbs, its chief negotiator and spokesperson, and by Jana

Fitzgerald.[4] The parties initially agreed on a set of negotiation "Ground Rules" proposed by Respondent, containing 18 specific rules that the parties agreed to abide by during negotiations (Jt. Exh. 14).[5] Kroetch testified that based on prior negotiations, particularly the last one, the Unions expected that negotiations would be routine, with the Unions only having 14 minor proposals to offer, mostly the "standard wage, pension and health care increases." What Respondent proposed, on the other hand, shocked the Union, as Kroetch testified. Respondent proposed no fewer than 102 non–economic proposals alone, many of them representing a substantial departure from the existing contract.[6] Among these were proposals abrogating the union-security clause, eliminating seniority and bidding rights, eliminating the right to refuse to cross a picket line in some instances, and doing away with the "just" in the "just cause" provision for disciplinary actions.[7] As Kroetch put it, everything was under attack; these proposals "gutted" the contract, stripping away 50 years' worth of rights achieved in prior bargaining. When the Unions questioned the reasons for such substantial changes, Grubbs replied that Respondent needed to be able to "run the business as they see fit." This response surprised Kroetch, as Respondent had never complained to the Unions that the contract had been an impediment of any kind. After caucusing, the Unions submitted a counterproposal in handwriting, which was unusual as counterproposals are usually typewritten.[8] The Unions, however, believed Respondent's proposal(s) was not "serious," and wanted to respond right away. As would be expected, except for a few minor language changes that were tentatively agreed to ("T/A"), the Unions rejected Respondent's proposals. At this point, Grubbs said "at this point it looks like we are at impasse on non- economic issues, so we can move on to economics." (Tr. 89). The Unions responded that they were not at impasse, that if Respondent were truly serious about the changes they were proposing, the Unions would have to discuss and review these issues with the membership. The Unions also indicated that they were willing to consider changes to the grievance/arbitration procedures, which they considered to be the "least toxic" among

[4] Others were also present for both the Unions and Respondent at this and other sessions, but their participation was either very limited or of no particular relevance, and their identities are therefore not discussed. The only important exception to this was the replacement of DePaolo as Union chief negotiator by David Jacobsen in June 2017, as discussed below. I would also note that neither DePaolo nor Grubbs testified, as will be discussed later.

[5] Among these rules, for example, was that only Chief Spokespersons ("CS") were to speak directly to each another, that only one person was to speak at a time, and that all proposals by either side should be in writing, with any verbal proposals reduced to writing before a response was submitted (JT. EXH. 14).

[6] The parties agreed to negotiate non-economic issues first. I note that this appears to have been at Respondent's suggestion, because as Fitzgerald admitted, the "sheer amount" of (non-economic) changes being proposed by Respondent "was going to be overwhelming." (Tr. 779)

[7] JT. EXH. 1(a). According to Kroetch, Respondent's proposal was not only a radical departure from the past in its substance, but atypical in its format as well. Thus, the proposal was a free-flowing typewritten document that made multiple references to the contractual sections it sought to change, without showing the original language, which made it extremely difficult to follow. When the Unions asked if Respondent could submit its proposal(s) in a "Word" (for Windows) format, using the original contract as a reference point, so that proposed changes could be easily tracked, Grubbs refused, stating that he did not want to do the Unions' "administrative" work for them. Nonetheless, months thereafter Respondent apparently agreed to the Unions' suggestion regarding the format, as proposals starting with JT. EXH. 1(6) followed this format. Other proposed changes were symbolic. For example, Respondent wanted to remove the Teamsters logo, which had been featured on the cover page of the contract since the 1970s, because Respondent did not want to give the Teamsters "free advertising." (Tr. 89)

[8] JT. EXH. 1(b).

the changes proposed by Respondent, inasmuch they had not had many grievances over the years and none that had reached arbitration.

The parties met again on May 1, 15, and 16, 2017, exchanging proposals, but making little, if any, headway, except for minor language tentative agreements.[9] By this time, Kroetch testified, the Unions realized that Respondent was serious about their proposals and concluded that their inexperienced chief negotiator, DePaolo, was in over his head, and they requested the Joint Council of Teamsters to send in a more experienced negotiator. Pursuant to this request, the Unions named David Jacobsen, an official with the Western Region Tankhaul Division of the International Brotherhood of Teamsters, as their new chief negotiator and spokesman. Because of Jacobsen was not available until June, a few bargaining sessions had to be rescheduled, and the parties met again on June 7, 2017. Prior to the June 7 meeting, Jacobsen notified Respondent (Grubbs) via email of his status as the new chief negotiator for the Unions, and requested Grubbs to provide him with a copy of all of Respondent's proposals, so that he would not miss anything. Jacobsen also made an information request, and Grubbs replied that he should ask DePaolo for these things, suggesting he was not going to be doing the Union's administrative work for them.[10]

Jacobsen described the negotiations when he took over as chief negotiator for the Unions as "tense," the result of the seismic changes that Respondent was proposing for the new contract. He testified that there were four "core" issues or areas where the Unions had little flexibility or room for ceding significant ground: (1) the "just cause" provision for disciplinary action in the grievance/arbitration article; (2) Health/Welfare and Pension plans; (3) the union-security clause; (4) seniority (and bidding) rights.[11] Respondent and the Union "locked horns" throughout the negotiations on three of these issues (Union security being the exception), Jacobsen admitted, as well as on two other areas, the "Management Rights" clause, and the right to refuse to cross a picket line clause. Below is a description of the pre-existing language in the 2012–2017 contract (which the Unions sought to retain, with minor tentative agreements), immediately followed with the Last Best Final Offer (LBFO) proposals by Respondent in the 4 noneconomic areas or issues where the parties remained far apart at the end of the negotiations when Respondent declared an impasse:

Article II -Discharge or Suspension (Contract) .[12]

Section 1 The Employer may discharge or suspend an employee for just cause, but no employee shall be discharged or suspended unless a written notice shall previously have been given to such

[9] All of Respondent's proposals throughout the negotiations are included in the record as Jt. Exhs. 1(a) through 1(hh), whereas all of the Unions' proposals are included as Jt. Exh. 2(a) through 2(nn). On these particular dates in May 2017 Respondent made the proposals contained on Jt. Exhs. 1(d), 1(e), 1(f); the Unions made the proposals contained in Jt. Exh/. 2(c) and 2(d).

[10] Jacobsen testified that throughout the negotiations, Respondent was very slow in responding to information requests, sometimes taking weeks or months to provide the requested information. I note, however, that this conduct is not specifically alleged in the complaint as a violation of the Act, and therefore I will not address this testimony. This does not apply to the last information request made by the Union on February 27, 2019, which is relevant to the issue of whether an impasse existed, as will be discussed below.

[11] Bargaining on economic issues did not begin until May 2018, including the Health/Welfare and Pension plans, as discussed below, but nonetheless there is no dispute that at the end of the negotiations this was one of the areas where the parties remained far apart.

[12] Jt. Exh. 6

employee of a complaint against him concerning his work or conduct, except that no such prior warning notice shall be necessary if the cause for discharge or suspension is dishonesty, drinking related to his employment, recklessness, carrying unauthorized passengers, or failure to obey Company rules. Company rules to be mutually agreed by Employer and Union.

Section 2 The complaint specified in such prior warning notice must concern the same type of misconduct as the cause for discharge or suspension. No such warning notice shall remain in effect for a period of more than twelve (12) months, at which time the warning notice will be removed from the employee's personnel file. A copy of such warning notice shall be mailed to the Local Union involved.

Section 3 Right to Protest Warning Notice or Discharge: An employee may request an investigation of his discharge or suspension or any warning notice, and the Union shall have the right to protest any such discharge, suspension or warning notice. Any such protest shall be presented to the Employer in writing within five seven (7) calendar days after the discharge, suspension or receipt or refusal of receipt of such warning notice sent to employee's last known address, and if the protest is not presented within such period, the right of protest shall be waived.

Section 4 Written Notice of Termination: The Employer shall give to a discharged employee a written notice of termination with a copy to the Local Union involved.

Section 5 No Discrimination: No employee shall be discharged or discriminated against for Union activities, or for upholding Union principles

Article II -Discharge or Suspension (Respondent's LBFO) (*emphasis provided*)[13]

Section 1 The Employer may discharge or suspend an employee *for cause*, but no employee shall be discharged or suspended unless a written notice shall previously have been given to such employee of a complaint against him concerning his work or conduct, except that no such prior warning notice shall be necessary if the cause for discharge or suspension is dishonesty, drinking related to his employment, recklessness, carrying unauthorized passengers, theft, insubordination *and other offenses as reasonably determined by the Company failure to[sic] obey Company rules*.[14]

Section 2 No such warning notice shall remain in effect for a period of more than twelve (12) months, at which time the warning notice will be removed from the employee's personnel file. However, *if an employee commits an offense of a similar nature* beyond the twelve (12) months, previous disciplinary actions may be considered in the determination of discipline, *if a pattern exists, in the discretion of the Company*. A copy of such warning notice shall be provided, via traceable means to the Local Union involved. "Traceable means" includes overnight courier, USPS with delivery receipt, fax and email.

[13] Jt. Exh. 1(gg). I have copied Respondent's LBFO, as opposed to its initial offer(s) with regard to these articles because the substantive differences between Respondent's initial and final offers were not significant, particularly when compared to their difference with the expiring contract, which is what the Unions were seeking to maintain, with minor concessions, as discussed below. The portions of Respondent's LBFO emphasized in *italics* represent the most significant substantive differences between Respondent's proposal(s) and those proposed by the Unions.

[14] In the contract Respondent implemented after it declared an impasse, it inserted the word "as" between "Company" and "failure," so it now read *…by the Company as failure to obey*…(Jt. Exh. 5(d/38)).

Section 3 Right to grieve any Warning Notice or Discharge: An employee may request an investigation of his discharge or suspension or any warning notice, and the Union shall have the right to grieve any such discharge, suspension or warning notice. Any such grievance shall be presented to the Employer in writing within fourteen (14) calendar days after the discharge, suspension or receipt or refusal of receipt of such warning notice sent to employee's last known address, and if the grievance is not presented within such period, the right of grievance shall be waived.

Section 4 Written Notice of Termination: The Employer shall give to a discharged employee a written notice of termination with a copy to the Local Union involved.

Section 5 No Discrimination: No employee shall be discharged or discriminated against for Union activities, or for upholding Union principles.

Article VI -Seniority (Contract)

Section 1 To qualify for seniority an employee must work thirty (30) days and average three (3) days per week. At the close of this qualifying period the employee for all intent and purpose shall be considered a regular employee. Seniority shall only be broken by discharge, voluntary quit, or more than one (1) year layoff. In case of advancement, layoff and/or rehire, the senior man shall have preference, provided the senior man is qualified to perform such duties. The Company shall grant the employee a reasonable period in which to qualify if a dispute arises as to whether an employee is qualified to perform such duties.

Section 2 All extra work on an employee's regularly scheduled day off or holidays shall be according to seniority standing, if the employee is qualified. Extra employees shall not work on an overtime shift when regular men are available. Employees called to work under the provisions of this Section 2 must respond to the Employer's call within thirty (30) minutes in order to claim entitlement to this work.

Section 3 In the event a junior employee has worked when an employee with more seniority is available and has indicated his willingness to work, then the senior employee shall receive pay equal to the junior employee who did the work. Employees called to work under the provisions of this Section 3 must respond to the Employer's call within thirty (30) minutes in order to claim entitlement to this work.

Section 4 No employee who has acquired seniority shall lose his seniority by reason of sickness or injury, not to exceed one (1) year, unless further extended by mutual agreement. In calling employees back for regular work, the employee shall be given seven (7) calendar days' notice of recall to his last known address, but in the event he receives the notice he must notify the Company of his intentions within three (3) days of receipt of that notice. In the event the employee fails to report back to work within seven (7) days, he shall lose all seniority rights.

Section 5 When a route becomes vacant, or a new route is added, it shall go out for bid starting with the most senior driver, provided the senior employee has the competency and ability to perform the available work. If more than one employee seeks an opening or route, the opening or route shall be granted to the senior employee provided the senior employee has the competency and ability to perform the available work. A route is a delivery schedule of either five (5) consecutive days (8-1/2 hours a day with a one half (1/2) hour mandatory unpaid lunch break) or four (4) consecutive days (10-1/2 hours a day with a one-half (1/2) hour mandatory unpaid lunch break). A change in a route is any schedule change of three (3) or more days for

either a 5-8 or a 4-10 route. When and if a route is bid on by a driver with a route, his/her route will then go to the bid list. This will continue until all routes are filled. If no employee bids on an available route, the route will be assigned to the least senior driver who has the competency and ability to perform the job.

Section 6 For the purpose of preserving work and job opportunities for employees covered by this Agreement, the Employer agrees that no work or services presently performed or hereafter assigned to the collective bargaining unit will be subcontracted, transferred, leased, or assigned, except for a sale of a portion of the business, to any other plant, or person.

Section 7 The Union and the Company hereby agree that the Company reserves the right to hire part-timers with the understanding that they shall not be used to displace a route person on a regular basis, but run the route person's route during vacations, sickness or other times that a regular route person is not available to run their route. These part time employees shall be paid the applicable Route Driver rate of pay for all hours performing the above duties. These part-timers are not entitled to any benefits other than pension contributions while performing the above duties.

Article VI -Seniority (Respondent's LBFO) (*emphasis provided*)

Section 1 To qualify for seniority an employee must work eighty (80) calendar days. At the close of this qualifying period the employee for all intent and purpose shall be considered a regular employee. Seniority shall only be broken by discharge, voluntary quit, or more than twelve (12) months layoff. *In case of advancement, layoff and/or rehire, the most qualified, productive, and punctual employee shall have preference, provided the employee is qualified to perform such duties in the sole discretion of the Company.*

Section 2 All extra work on an employee's regularly scheduled day off or holidays shall be according to *the most qualified, productive, and punctual employee*. Extra employees shall not work on an overtime shift when regular men are available. Employees called to work under the provisions of this Section 2 must answer the Employer's call in order to claim entitlement to this work.

Section 3 No employee who has acquired seniority shall lose his seniority by reason of sickness or injury, not to exceed twelve (12) months, unless further extended by mutual agreement. In calling employees back for regular work, the employee shall be given three (3) calendar days notice of recall to his last address provided by the employee to the Company, but in the event he receives the notice he must notify the Company of his intentions within three (3) days of receipt of that notice. In the event the employee fails to report back to work within three (3) days, he shall lose all seniority rights.

Section 4 When a route becomes vacant, or a new route is added, it shall go out for bid starting with *the most qualified, productive, punctual employee, provided said employee has the competency and ability to perform the available work in the sole discretion of the Company*. If more than one employee seeks an opening or route, the opening or route shall be granted to the senior employee provided the senior employee has the competency and ability to perform the available work. The route will be placed out to bid, *based upon most qualified, productive, and punctual employee in the sole discretion of the Company*. A route is a delivery schedule of either five (5) consecutive days or four (4) consecutive days. A change in a route is any schedule change of three (3) or more days for either a 5-8 or a 4-10 route. When and if a route is bid on by a driver with a route, his route will then go to the bid list. This will continue until all routes are filled. If

no employee bids on an available route, the route will be assigned to the driver as solely designated by the Company, based on objective performance standards who has the competency and ability to perform the job (Attachment "A").

Section 5 For the purpose of preserving work and job opportunities for employees covered by this Agreement, the Employer agrees that no work or services presently performed or hereafter assigned to the collective bargaining unit will be subcontracted, transferred, leased, or assigned, except for a sale of a portion of the business, to any other plant, or person.

Section 6 The Union and the Company hereby agree that the Company reserves the right to hire part timers with the understanding that they shall not be used to displace a route person on a regular basis, but run the route person's route during vacations, sickness or other times that a regular route person is not available to run their route. These part time employees shall be paid the applicable Route Driver rate of pay for all hours performing the above duties. These part-timers are not entitled to any benefits while performing the above duties.

Section 7 The Employer will post a voluntary signup sheet weekly for overtime work. The Employer will post starting, Monday morning and remove the list on Thursday evening. *This provision will only be applicable. at the Pasco facility.

Article XII -Picket Lines (Contract)

It shall not be a violation of this Agreement for employees covered hereunder to refuse to cross a picket line which has been approved and sanctioned by Teamsters Union Local 690, 839 or 760. **Exception:** When a Medical facility is enduring a strike situation outside of a twenty-five (25) mile radius of the Pasco terminal, the driver(s) of liquid oxygen bulk transport trailers will be allowed to deliver bulk liquid oxygen such product is the only product to be delivered to the medical facility enduring a strike by Bargaining Unit members.

Article XII --Picket Lines (Respondent's LBFO) (*emphasis provided*)

It shall not be a violation of this Agreement for employees covered hereunder to refuse to cross a picket line which has been approved and sanctioned by Teamsters Union Local 690, 839 or 760. Exception: *When a Medical facility is enduring a strike, critical care gases as designated by the Company will continue to said medical facility. Any union member refusing to deliver critical care gases pursuant to this Article is subject to discipline, up to and including termination.*

Article XXIV -Management Rights (Contract)

Section 1 Subject only to limitations stated in this Agreement, the Union recognizes that the Company retains the exclusive right to manage its business, including, but not limited to, the right to determine the methods and means by which its operation are to be carried on, to select, hire, promote, discharge or discipline employees for just cause, and to direct the work force and to conduct its operations in a safe and effective manner, provided such action is not in conflict with this Agreement.

Article XXIV -Management Rights (Respondent's LBFO) (*emphasis provided*)

The Union acknowledges that the Employer has the responsibility to successfully execute its portion of the Collective Bargaining Agreement and agrees that except as expressly limited by specific language in this Agreement, *all statutory and inherent management rights, prerogatives,*

and functions are retained and vested exclusively in the Employer, including, but not limited to, the rights in accordance with its sole and exclusive judgment and discretion: to reprimand, suspend, discipline and discharge employee(s) for cause; to determine the number of employees to be employed, to hire employees, determine their qualifications and assign and direct their work: to promote, demote, lay off and recall to work or terminate or otherwise relieve employees from duty for lack of work or other reasons: to make temporary or permanent transfers; assign and schedule work or shifts, determine the number of hours per day or per week services or operations will be performed, including, determining the need for overtime, when it will be worked and requiring employees to perform overtime work; determine and from time to time re-determine the number, location and type of its operation and the methods, materials, equipment processes and facilities to be employed; to introduce and use new technology, equipment, machinery, tools, processes, practices or labor saving devices or methods of performing work; to issue, amend, and revise policies, rules, regulations, practices, and procedures; and to take whatever action is either necessary or advisable to determine, manage, and fulfill the mission of the Employer, and to direct the Employer's employees; discontinue services or operations or to discontinue the performance of such services of operations by employees of the Employer; to utilize suppliers and subcontractors and otherwise to take such measures as the Employer may determine to be necessary for the orderly and efficient operation of the business.

As described above, Jacobsen testified that the parties made little progress on the above-described 4 noneconomic issues throughout the negotiations. Respondent's proposals with regard to these issues, both Jacobsen and Kroetch testified, in essence "gutted" the contract and rendered it "null and void," stripping away "50 years' worth of collective bargaining."[15] From the Unions' viewpoint, Jacobsen testified, Respondent's proposals in their totality, including the Management Rights clause, gave Respondent "carte blanche" discretion in all areas covered by the contract, something they could not agree to.[16] Nonetheless, Jacobsen testified that the Unions sought an explanation from Respondent as to why it wanted to alter the contract in such fundamental ways, so that the Unions could try to address Respondent's concerns and formulate counter-proposals. The only explanation Respondent proffered, however, was that it wanted discretion and flexibility "to run its business as it saw fit."

In this regard, Jenna Fitzgerald, Respondent's Operations Manager, testified that the 2012–2017 contract was full of "antiquated language" that did not "help us run the business as efficiently," based upon the "new business world."[17] According to Fitzgerald, management's

[15] I note that Fitzgerald admitted that the Unions were shocked at Respondent's initial proposals, and that she could understand how the Unions could feel that the contract was being "shredded," although that is not how she saw it. (Tr. 780.)

[16] According to Jacobsen, Respondent's proposals essentially eliminated seniority rights because it made such rights dependent on Respondent's pre-condition that the employee in question be "qualified" for the shift, job or position sought, and under its proposals, Respondent had sole discretion in deciding who was qualified. Additionally, according to Jacobsen, the proposals gave Respondent unfettered discretion on disciplinary matters, on subcontracting, and shutting down operations, while eliminating "effects" bargaining. The proposals also did away with employee rights to refuse to cross picket lines, and even to engage in informational picketing or hand billing. As discussed later, I conclude that Jacobsen's assessment regarding the nature and impact of Respondent's proposals was correct.

[17] Fitzgerald, who along with her brother is part of Respondent's "Executive Committee," was the senior member of Respondent's management team at the bargaining table, which also included Jason Kirby and Kelly Bladow. She

goal in negotiations was to obtain "flexibility" in conducting its business and operations, and to "equalize" the "disparity" between their unionized and nonunionized employees.[18] In explaining what she meant by "antiquated" language, Fitzgerald cited several examples. Thus, she testified that under the old collective-bargaining agreement (CBA), employees received automatic raises, but that this was "not the way we run our business," because Respondent is a "pay for performance" company—and under the CBA, Respondent could not reward drivers who went "above and beyond." Likewise, the seniority system was antiquated in that it did not permit Respondent to reward the "most punctual, productive and qualified" driver, regardless of seniority. The same antiquated language applied to the "Management Rights" clause, which under the CBA "tied our hands," according to Fitzgerald. Respondent, she said, needed the ability to "react quickly" in "today's business world," whereas the CBA required much "process and procedures."[19] The same held true for the language in the CBA regarding crossing picket lines, which allowed bargaining unit employees to refuse to cross picket lines inside a 25-mile zone from the Pasco facility. Fitzgerald testified that Respondent's business had grown over the years and now had new medical facility clients outside the 25 mile "exclusion zone," and needed to have the ability to force divers to deliver life-saving gases across picket lines—otherwise "people would die."[20]

As noted earlier, non-economic issues were discussed and negotiated first, in view of what Respondent admitted was going to be an "overwhelming" amount of changes it proposed.[21] It is undisputed that the parties made little progress on these issues after a year of bargaining, with only minor tentative agreements on 6 non-critical or non-core articles or issues. Accordingly, the parties agreed to discuss economic proposals, and Respondent submitted its first comprehensive economic package on May 30, 2018.[22] The main components of this proposal were as follows: With regard to wages (Article VII), Respondent would maintain them at $27.45 per hour, which was the last wage raise in 2016 under the expired CBA, for the duration of the contract. The proposal provided, however, that individual employees eligible for wage raises, at Respondent's discretion, based on their "Performance (quantity of work), Punctuality, Attendance, Safety, DOT Inspections, and Discipline." With regard to Health & Welfare (Article XIV), Respondent proposed placing the bargaining unit employees under the same health plan provided to other non-union employees, with costs split between Respondent and the employees on a 70/30 percent basis.[23] With regard to the Pension plan (Article XV),

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hired Grubbs to represent Respondent in the negotiations and convey what upper management (which consisted of her mother Jana Nelson, Fitzgerald, and Kirby) wanted in a new contract (Tr. 748–751;).

[18] Tr. 762–766; 820. In this regard, Fitzgerald identified 4 areas that Respondent considered as its goal in changing n a new contract: Pay for performance; the ability to force drivers to cross picket lines in order to deliver "critical gases" (to medical facilities); seniority (that is, doing away with is as a critical component of assigning work or shifts); and management rights (Tr.755–756). As Fitzgerald admitted and will be discussed below, Respondent's proposals and position on these issues never changed.

[19] Tr. 755–756. Fitzgerald never elaborated—perhaps because she was not asked to—about what exactly "today's (or new) business world" consisted of.

[20] 757–759. Fitzgerald admitted, however, than under to CBA, non-bargaining unit employees could deliver such deliveries in an emergency, after exhausting all options, but that it would be "very difficult."

[21] Tr. 779; 785

[22] Jt. Exh. 1(s)

[23] Thus, Respondent would pay 70 percent of the health care premium, and employees 30 percent. Under the Union plan, Respondent had paid 100 percent of the premium. As discussed above, Fitzgerald testified that Respondent's purpose was to "equalize the disparity" between union and nonunion employees (Tr. 766)

Respondent proposed to replace the Unions' pension plan with its own 401(k) plan provided to their non-union employees, although no details of that plan were provided at the time. Not surprisingly, the Unions rejected Respondent's economic proposals, countering with proposals that essentially continued the status quo, with periodic increases in wages and corresponding contributions to the existing health and welfare as well as pension plan.[24] Respondent also rejected the Unions proposal(s), again proposing an economic package along the same lines as previously described.

At Respondent's suggestion, the parties agreed to use the services of a federal mediator, and had a total of six (6) bargaining session with him from August 23 through October 23, 2018, as described above in the stipulated facts. During the bargaining sessions with the mediator, the parties reached additional tentative agreements ("TA") on four (4) Articles in the contract: Article XVI (Death in Immediate Family); Article XVII (Jury Duty); Article XX ((Unsafe Equipment); and Article XXII (Compensation Claims). None of these TAs, were on the "core" or "critical" issues described by the parties as central to their goals or aims, where the parties remained at odds.[25] Although the Unions wished to continue the services of the mediator, Respondent disagreed, expressing its view that his efforts were not "fruitful," and thus the parties no longer met with him after October 23, 2018[26] (Tr. 204; 838).

By December 2018 the parties were still far apart on the "core" issues, with the parties having made only small changes in these issues/articles, which remained virtually the same as in their original proposals. One notable change, however, was that on the Health & Welfare proposal (Article XII), beginning with its December 17 proposal (Jt. Exh. 1(a)(a)), Respondent was now proposing that employees could choose between the Union or Company plans, albeit with the 70/30 premium split previously proposed (as described above). At some point thereafter —the exact date, which is not clear, but before February 28 meeting—the Unions advised Respondent that such choice was not legally viable under the bylaws of the Union's plan—all bargaining employees had to be included under its plan.[27] It was also during the month of December that Respondent, through Grubbs, warned the Unions that Respondent's current

[24] Jt. Exh. 2(x). The Unions presented Respondent's package to its membership, which not only rejected it, but authorized the Unions to strike. Following the strike vote, Respondent held a meeting with the bargaining unit drivers on June 4, 2018. This meeting is the subject of separate unfair labor practice allegations by the General Counsel, which will be discussed below.

[25] At the August 24, 2018, session with the mediator, Respondent offered a variation of its earlier wage proposal, which added a chart containing criteria to be used by management in determining whether a driver would receive a "merit" wage increase (Jt. Exh. 1(v) Article VII, Attachment "A"). The criteria on the chart included categories such as "Attendance," "Punctuality," "Quantity of Work," "Quality of Work," and "Team Contributor." The proposal did not include a timeline as when or how often such evaluations would occur, however. The Union rejected this proposal, because it allowed management too much subjective discretion in determining wage increases.

[26] During the sessions with the mediator, the Unions employed a new bargaining tactic in an attempt at creating some movement is some of the core issues where the parties had made no progress. This involved the use of hypothetical offers called "supposals" because of the phraseology used to make them, such as in "suppose we offer to make *this* concession, would you be willing to make *that* concession…" This proved to be of limited success, although it may have helped achieve some of the tentative agreements in other issues.

[27] Fitzgerald appears to have admitted this during cross-examination (Tr. 849–850). Moreover, as discussed below, in its message to bargaining unit employees informing them of the newly implemented LBFO on March 27, 2019, Respondent plainly admits that the Union had informed them that they could not choose between 2 health plans (Jt. Exh. 5(d)).

proposals were "as good as it's going to get," meaning that it would not change its proposals in any meaningful way.[28]

There was no significant movement by either side on the "core" issues during their 2 bargaining sessions on January 15 and 16, 2019. By the time the parties next met on February 27, 2019, they were "miles apart" on the core issues, as Jacobsen conceded.[29] Respondent and the Unions exchanged proposals that day, neither of which contained any significant differences from the prior proposals in January.[30] Neither party made any movement with regard to the other's proposals, with each side rejecting the other's proposals. On this date the Unions also presented Respondent with written information request regarding its 401(k) plan it had been proposing "in order to fully consider" such plan.[31] Specifically, it requested that Respondent provide a "Summary Plan Description (SPD)," of its 401(k) plan by March 6, 2019.[32] Jacobsen testified that the Joint Council (of Teamsters) has under certain circumstances agreed to collective-bargaining agreements with a 401(k) plan rather than a pension, and the Unions wanted to make an informed comparison between the plans in order to formulate new proposals.[33]

On February 28, 2019, the parties met again. On this date, the Unions had invited one of the Administrators of Western Conference of Teamsters Pension fund, Mike Sanders, to speak about their pension plan, make comparisons with Respondent's proposed 401(k) plan, and answer any questions Respondent may have. Grubbs informed that Unions that Respondent was not interested in what Sanders had to say, and Sanders left without speaking. It was at this meeting that Respondent presented the Union with what it deemed its "Last, Best, Final, Offer" (LBFO), which Respondent indicated (on the document itself) would be implemented on March 11, 2019.[34] The parties discussed the proposal, and according to the testimony of Fitzgerald, the Unions did not have any questions about any of the proposals contained in the

[28] While true for the most part, this warning was not entirely accurate. For example, in its January 15, 2019, proposal (Jt. Exh. 1(c)(c)), Respondent raised its wage offer (Art. VII) to $29 per hour, compared to the previously offered $27.45. Everything else remained the same, however, including Respondent's absolute discretion as to wage increases (or even decreases), as reflected in the criteria contained in "Attachment A" to its wage schedule. Jacobsen testified that it was this "pay for performance" discretion that the Unions objected to, as well as the fact that when considering the increased out-of-pocket costs in Respondent's Health & Welfare proposal (i.e., the 70/30 premium split), the wage "increase" amounted to an over-all increase of only one cent per hour, according to the Unions' calculations—which amounted to a "wage freeze," in the Unions' view.

[29] Tr. 215–216

[30] Jt. Exh. 1(ff); Jt. Exh. 2(jj). The Unions on this date also presented Respondent with a summary of Respondent's economic proposals, comparing them to the existing economic package, which the Unions intended to present to its members (Jt. Exh. 2(kk)). According to Jacobsen, Respondent had no objections regarding its accuracy. (Tr. 218.)

[31] Jt. Exh. 4(dd). It is not clear if the Unions presented this information request to Respondent across the table, or send it via email to Respondent on that date, since there was no testimony in this regard.

[32] At the time, the parties had scheduled bargaining dates in March, and the Unions wanted this information provided. I also note that the Unions had previously requested certain information about the 401(K) plan, although not the SPD specifically. Some of this information had been provided, although it appears that some had not yet been provided by February 27, pending further clarification from the Unions regarding its request (see, Jt. Exhs. 4(v); 4(w); 4(bb); 4(cc))

[33] Tr. 221

[34] Jt. Exh. 1(gg).

LBFO.[35] Respondent asked the Unions to present its LBFO to its members for approval, but the Unions refused, indicating that the membership would never approve a contract that was so regressive and took many of their rights. At this point Respondent (Grubbs) announced that the parties were at an impasse. The Unions disagreed that there was an impasse, and asked Respondent whether it intended to keep the bargaining dates in March that the parties had previously agreed upon. Grubbs replied that he would have to get back to them about that. The parties never met again for bargaining.

C. The Post-Bargaining Communications and Implementation of the LBFO

On March 5, 2019, the Union sent Respondent a letter reiterating its position that there was no impasse, and stating its desire to continue to meet and bargain, and a second letter on the same date requesting some information.[36] Respondent appears to reply to the second March 5 letter from the Union by letter dated March 13, re-asserting its position that an impasse was reached on February 28 after months of the Union rejecting its proposals, and stating in no uncertain terms that it would not change any of its proposals or overall "package."[37] Thereafter, a series of "back-and-forth" letters between the Union and Respondent followed, through September12, 2019, in which the parties reiterate their positions regarding the existence (or lack thereof) of an impasse, and regarding their duty (or lack thereof) to continue to bargain in these circumstances.[38]

As described earlier, Respondent's LBFO on February 28 indicated that it would be implemented on March 11, 2019. There is no evidence in the record that Respondent ever directly, or formally, notified the Union that its LBFO had indeed been implemented on that date.[39] Nonetheless, on March 27, 2019, Respondent notified the bargaining unit drivers that its

[35] Then again, this proposal was identical in all significant respects to the one submitted by Respondent (and rejected by the Unions) the day before, and nearly identical in most significant ways to the same proposals Respondent had made for months—indeed from the very beginning of negotiations.

[36] Jt. Exh. 5(a); Jt. Exh. 4(ee).

[37] Jt. Exh. 5(b). I state it "appears to reply" to the Union's second March 5 letter because it makes no reference to the first letter, nor addresses the Union's request to continue to meet for bargaining contained in the first letter. In that regard, General Counsel's assertion, in its brief (P.21), that Respondent in this particular letter pre-conditioned additional bargaining sessions on the Union's submission of proposals first, is simply inaccurate and misstates the record. Such pre-condition appears to be added later, when Respondent inquires if the Union had changed its mind as to any of Respondent's proposals (see, Jt. Exhs. 5(k); 5(m)). Additionally, a letter by Respondent dated March 20 again mentions the March 5 letter by the Union, but addresses issues (such as a possible Union strike) only raised by the Union's second March 5 letter. (Jt. Exh. 5(c)). Thus, there appears to be no answer by Respondent to the first March 5 letter sent by the Union.

[38] See Jt. Exhs. 5(e); 5(f); 5(g); 5(h). I see no need to discuss the particulars of these communications, because they speak for themselves, but more importantly because they are ultimately not relevant to the crucial issue of whether an impasse existed on February 28, 2019. It is the answer to that question, as discussed later, which ultimately determines whether Respondent's post-February 28 conduct was unlawful. What is clear from these communications, however, is that Respondent was not willing to meet with the Union post February 28 unless the Union signaled a willingness to change its position on at least some of Respondent's proposals, because it believed those meetings would otherwise be futile.

[39] On its March 20, 2019 letter to the Union addressing other matters, however, Respondent states that if the Union were to strike, such strike would be "illegal under the *newly implemented* collective bargaining agreement…" (emphasis provided) (Jt. Exh. 5(c)).

LBFO of February 28, 2019, had been implemented on March 11.[40] This letter contained a summary of the implemented features; a synopsis of the most pertinent changes to the previous contract; an authorization for payroll deduction (for Medical and Dental insurance); a Summary Plan Description (SPD) of Respondent's 401(k) profit sharing plan;[41] and a copy of the newly-implemented CBA for the term March 11, 2019, to March 10, 2024.[42]

A careful comparison between Respondent's February 28 LBFO and the "CBA" that Respondent implemented on or about March 11, 2019 (as summarized by Respondent in its above-described communication to the bargaining unit employees), reveal two notable differences. First, in the LBFO, under Article XIII (Health and Welfare), Section 1, employees have the choice of selecting the Union's Health and Welfare plan or Respondent's (i.e., "the Company") plan, while paying 30 percent of the premium for either plan. On their March 27, 2019 letter to bargaining unit employees informing them of the details of the implemented LBFO, however, Respondent states that employees have been placed under the Union's Health and Welfare plan, because "[d]uring negotiations, the union had stated they would not allow drivers to choose between a union H&W plan and the Oxarc H&W plan."[43] Secondly, Respondent's March 27 message to the bargaining employees informs them that under the 401(k) plan being implemented pursuant to the LBFO (Article XIV), they have a 3 percent contribution rate into the plan, with the option to change the contribution rate or opt out of the plan altogether. Nowhere in the February 28 LBFO is there any mention of a contribution rate for employees, nor mention of options to change the contribution rate or of opting out of the plan. Nor is there evidence that these features or options were ever discussed during negotiations. Consistently, since economic proposals were first introduced in May 2018, through its LBFO on February 28, Respondent's proposals regarding Article XIV were identical: employees were to be placed under Respondent's 401(k) plan, no other details or features included.[44]

Finally, the implemented LBFO, by its terms, contains several clauses that the General Counsel contends are unlawful to implement in the absence consent or agreement by the Unions, even if there was a lawful impasse, as will be further discussed below: a fixed term; a no-strike clause; a grievance-arbitration agreement; an over-broad management rights clause; and a zipper clause.[45]

D. The June 4, 2018, Meeting

It is undisputed that on June 4, 2018, Respondent held a meeting with its Pasco-based drivers at that facility. The meeting was announced by a posting by the dispatcher's office, according to the testimony of driver Jared Foster, who also said the meeting was mandatory.[46]

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[40] Jt. Exh. 5(d).

[41] This appears to be exactly what the Union had asked to be provided with in its information request dated February 27, 2019, which Respondent never provided.

[42] Jt. Exh. 1(hh)

[43] Jt. Exh. 5(d), p. 1

[44] This contrasts with Respondent's proposals in the Health & Welfare article, where a 30% contribution on employees' part was consistently part of the proposal.

[45] The above-described clauses are pursuant to the General Counsel's post-hearing brief, which appears to be somewhat different than as alleged in paragraph 8(i) of the complaint.

[46] Jason Kirby, Respondent's vice president and general manager, testified that the meeting was not mandatory. I find no need to resolve this conflicting testimony, because whether the meeting was mandatory or not is ultimately

The meeting was held by Jena Fitzgerald and Jason Kirby, and was attended by most of the Pasco-based drivers, approximately about a dozen. This meeting was held shortly after the bargaining unit drivers had voted to authorize a strike in the wake of Respondent's first economic proposal during the collective-bargaining negotiations being held at that time. Foster testified that he audio-recorded the meeting on his cell phone, on 3 separate segments due to the fact that unbeknownst to him the recoding kept shutting off automatically, so he had to turn it on again on 2 separate occasions.[47] The meeting lasted between 45 minutes and an hour, and much was discussed during its course, both in regard to the collective-bargaining negotiations as well as other issues that were brought up, in many instances by the employees themselves. There is no need to provide a detailed, minute-by-minute account of everything that was said during the meeting, because only a specific question—or set of questions—is alleged by the General Counsel as an unlawful interrogation, as discussed in its post-hearing brief, which will be described below. Nonetheless, it is important to note that after the initial presentation by respondent's managers regarding its bargaining proposals, the meeting soon turned into a spirited, arguably "free-wheeling" one, with employees complaining about not only some of the proposals discussed, but about other matters that had occurred in the past, such as disciplinary actions taken against employees (or former employees). For example, Foster testified, and the recording shows, that he brought up complaints regarding sick pay as well as disciplinary actions taken against employees Jamie Leslie and Steven Henn a year or two earlier. Another employee identified as Ed Rivas also voiced complaints, in a tone that suggested frustration or even anger.[48] Several other employees also spoke up to raise concerns or complaints, although it is not possible to identify these employees by someone unfamiliar with their voices.[49]

Regarding the alleged unlawful interrogation, as identified by the General Counsel (in its post-hearing brief), the recording shows that at one point during the meeting, after describing in detail Respondent's wage proposals, Fitzgerald asks: "Do you guys have any other questions about what we proposed? Any concerns about what we proposed?"[50]

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irrelevant to the issue of whether an unlawful interrogation of employees took place therein, as alleged in the complaint. Likewise, Kirby testified that two of the drivers, Tyler Klages and PJ Burkley, had requested this meeting, something that was not contradicted by any testimony—but ultimately, whether the meeting was held pursuant to such request is not relevant to the issue at hand.

[47] There is no dispute about the authenticity or accuracy of the 3 segments recorded by Foster, admitted in the record via "flash-drives" marked as GC Exh. 21(a), (b), and (c). Indeed, both the GC and Respondent cite portions of the recording in support of their arguments. It should be noted that the GC had planned to introduce a transcript it had prepared based on these recordings, which it had marked as GC Exh. 22 (a),(b), and (c), but never introduced it, apparently because Respondent objected to its accuracy, and I informed the parties during an on-the-record discussion that in light of Respondent's objections I would not admit said transcript.

[48] Kirby testified that Rivas was upset, even agitated (Tr. 734) which appears to be supported by the recording.

[49] For example, an employee asked "why do you want to take our Union provided benefits? Our health and welfare benefits?" (GC Exh. 21(b) 7:37). Fitzgerald replies "The Union doesn't provide those, we provide those for you." (Id, 7:50). Indeed, the only person whose voice is clearly identifiable in the recording(s), other than through testimony, is Fitzgerald's, because she was the only woman in the meeting.

[50] See, GC Exh. 21(b) 7:32-7:37. These are the only questions specifically identified and singled out by the General Counsel in its post-hearing brief as an unlawful interrogation. I note, however, that during the course of the meeting either Fitzgerald or Kirby asked other questions of a similar nature, such as "But do you guys know what was in the proposal?" (Fitzgerald, GC Exh. 21(a), 9:38-9:41); "Is that unreasonable?" (Kirby, GC Exh.21(a) 10:50-10;54); "Did you look at the changes, though?" (Kirby, GC Exh. 21(b), 14:30-14:32). Since the General Counsel has not argued or alleged that these questions constituted unlawful interrogations, I will not address them.

E. The Discharge of Jared Foster

Foster worked for Respondent as a driver based in Pasco from 2003 until June 14, 2018, when he was terminated. Foster testified that he was an active supporter of the Union, attending all Union meetings, and that he started wearing a Union pin about a month before he was terminated. He also testified that he frequently voiced complaints to management about the treatment of a couple of fellow drivers whom Foster believed had been unfairly treated or disciplined, as well as raised complaints about other matters, as described below. For example, Foster testified that Kirby accompanied him on his daily routes on two consecutive days about a month prior to his termination.[51] During the course of Kirby's "ride-along," Foster brought up the discharge of driver Steven Henn a year earlier, expressing his opinion that it had not been fair. According to Foster, Kirby replied that he (Foster) didn't know all the facts, and that he should mind his own business. Foster also testified that he had complained to Kirby, as well as Calvin (Kelly) Bladow (then Regional Operations Manager) on several other occasions about this matter, as well as complained to them both about a change that had occurred in the way accrued sick leave was computed—a change that had apparently diminished the drivers' accrued sick leave and had made them "furious."[52] According to Foster, Kirby simply told him that this issue was one outside of his control. Kirby, on his part, confirmed that Foster had brought up the subject of Henn's termination during their "ride-along," which surprised him because Henn had been discharged a year earlier and then re-instated a few days later. Kirby told Foster that he didn't have all the facts, and that it was a "non-issue," given that Henn had been reinstated and was still working for Respondent as a driver.[53] Kirby also confirmed that Foster had discussed the issue of the change to accrued sick leave, and that he explained that the change had occurred because a change in Washington State law.[54]

The record shows that over the course of his employment as a driver with Respondent, Foster had been involved in 5 accidents for which he had received disciplinary actions. Thus, he was involved in road accidents (while making deliveries) in November 2010; November 2016; March 2017; and June 2018, the last one which triggered his termination on June 14, 2018. The disciplinary warnings were dated June 19, 2010 (Jt. Exh. 8); November 29, 2016 (Jt. Exh. 9); March 17, 2017 (a 3-day suspension, later changed to 2 days, Jt. Exh. 10); and the termination letter dated June 14, 2018, signed by Bladow, Respondent's Regional Operations Manager at the time (Jt. Exh. 11).[55]

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[51] When a manager accompanies a driver on his route, it is referred to as a "ride-along," which occurs periodically when managements want to ascertain what problems, if any, may be encountered on a certain route.

[52] Foster could not recall exactly when or where these conversations had taken place, except to say that they had occurred about "five times" each with Kirby as well as Bladow over the course of several months. For this reason, while I credit Foster that he brought up Henn's termination with Kirby as well as Bladow, I do not credit the fact that he brought up the subject multiple times—for the reasons described below.

[53] I credit Kirby in this regard, because his account is far more plausible. Thus, I do not credit Foster's testimony that Kirby said it was "none of his business," because it doesn't make sense in the context in which this occurred. In this regard, it is difficult to understand why Foster would be so concerned about something that had occurred a year earlier and which had been immediately resolved—in other words, as Kirby put it, it was a "non-issue," so Kirby's natural response would one of puzzlement rather than annoyance.

[54] It is not clear what this change was all about—it is not alleged in the complaint, and there is little in the record about it other than what is described above.

[55] Additionally, Foster had a received disciplinary warning on August 2, 2014, for an accident that occurred at Respondent's facility, which took place while he was backing up his truck. (Jt. Exh. 7)

With regard to the June 7, 2018, accident that led to Foster's termination on June 14, the record shows that Foster, while backing up his truck during the course of making a delivery, hit the awning at a client's facility, causing significant damage to the smokestacks of the truck as well as the awning.[56] Foster admitted as much, testifying that he miscalculated the height of the awning with respect to the height of the truck's smokestacks. He also admitted that this accident had been preventable, and that the March 2017 accident, which led to a 3-day suspension, was more significant than the prior one, and that the June 2018 accident was more significant than the prior two.[57] Bladow testified that he made the decision to terminate Foster because in his view the pattern of repeated accidents, all of which occurred while Foster was backing up his truck, displayed recklessness on Foster's part.[58] According to Bladow, the June 2018 incident was Foster's third consecutive preventable accident, with each one getting progressively worse. Bladow indicated that the collective-bargaining agreement with the Union did not require progressive discipline for "reckless" driving.[59] Bladow additionally testified that other drivers had been terminated for repeated preventable accidents which similarly showed recklessness on their part.[60]

F. The Boot Policy

Article XIX (Unsafe Equipment), Section 2, of the 2012–2017 collective-bargaining agreement (Jt. Exh. 6) contains the following language:

> Boot Allowance: The Employer will make two types of metatarsal steel toe type of boots available to employees. If an employee chooses one of the two options, the boots will be paid for at 100%. Boots will be replaced as needed. Any repairs, including resoles will be paid at 100% as needed. If an employee chooses to purchase boots other than the Employer option boots they must meet the requirements of the employer. Furthermore the Employer will pay up to $135.00 per calendar year and the employee will pay the remainder of the cost. Boots are to be purchased as needed.

Brian Bledsoe worked for Respondent as a driver based in Springfield (Spokane) from 1994 to 2019. He testified that he ordered a new pair of boots every Fall, and did so again in December 2018. The model or brand that he ordered, which he said was one of the company-provided options, which he had typically ordered every year, was the Hytest with the external

[56] The damage to the client's awning, which Respondent had to pay for, cost $10,000. (Tr. 597). The record does not show the cost of the truck's repair.
[57] Tr. 502–508.
[58] Tr. 598–599; 639–642. In that regard, Bladow testified that Foster had repeatedly failed to follow the "GOAL" (which stands for "get out and look") method of preventing accidents while backing up, which is part of the training drivers receive (Tr. 585; 588; R. Exh. 1)
[59] Tr. 599. In that regard, I would note that under Section 2 of Article II of the CBA (Jt. Exh. 6) (Discharge or Suspension), all warning notices expired after 12 months, but such notices were not required for, inter alia, "recklessness" under Sec. 1 of that Art.. I also note that the CBA had expired a year earlier, in May 2017, at the time of Foster's termination on June 14, 2018.
[60] These were drivers Troy Willis and Easton Burns. (Tr. 600-605; R. Exh. 6).

metatarsal steel toe.[61] He informed his supervisor, Jeff Broyles, that he needed the new boots and placed the order through him. At some point shortly thereafter, Broyles informed Bledsoe that the price of the boots he had ordered had gone up, and that he would have to pay the $24 dollar difference, something that was later confirmed by James Paradis, a new manager. Accordingly, Bledsoe gave the company a check for $24 dollars.[62]

Jenna Fitzgerald, on the other hand, testified that the boots that Bledsoe had been ordering were not the company-provided ones, and that in years past the cost of those boots had been under $135, the limit on the contract, so Bledsoe had not been charged with any cost. In 2108 the price of the model Bledsoe had ordered had gone up, according to Fitzgerald, and the purchase order introduced in the record shows that the model (or item) number of the boot was K23300 (apparently not the company-provided model) and the price, excluding taxes, was $158.25.[63] James Paradis, the Spokane plant manager, testified that Bledsoe did not order one of the 2 specific style of boots provided by the company (pursuant to the contract). Rather, he went to BC Sales, the supplier with whom the company had an account, and ordered a boot that was not the "standard issue," but a different, more expensive (slimmer) model, which the company was then billed for—as shown by the purchase order. Bledsoe was then billed for the difference between the $135 contract limit and the cost of the boots he ordered, and he gave the company a check for $24.[64]

G. The Revised Attire Policy

Donald Haskins worked for Respondent from January 2008 to September 2019, the last 6 years as a driver, at the Spokane location. He testified that he often wore hats or caps to work with different logos, such as "NRA" hats, cowboy hats, "Gas Monkey Garage" hats, as well as hats with Teamster logos. He wore these hats or caps openly, he testified, often in the view of managers or supervisors, and was never told he could not do so. In early March 2019, shortly after Respondent had declared an impasse in negotiations, the Union asked its members to wear hats with Union (Teamster) logos on them to work. On March 6, 2019, Haskins as well as other drivers started wearing the Teamster hats to work. On March 7, 2019, when Haskins arrived at work, he found a memo on his desk from James Paradis, the plant manager, stating that only Oxarc-branded clothing of hats would be permitted at work.[65] He then went into see Paradis in his office, and asked him why the memo had been issued. Paradis replied that he was following instructions.[66]

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[61] Bledsoe admitted during cross examination, however, that he did not know if the item number(s) of the boots he had ordered, and didn't know whether those item numbers started with a "K" or a "C," nor had any reason to dispute that the company-provided boots bore item numbers K23110 or CA5501. (Tr. 871–873).

[62] Tr. 531–538; 859–865; GC Exh. 20)

[63] Tr. 891–906; R. Exh. 7.

[64] Tr. 652–653. I note that Bledsoe never specifically contradicted Fitzgerald's and Paradis' testimony that the model of boots he ordered was not one of the ones provided by the company, although he testified that he had always believed they were. Nor did he deny that the model he ordered was the one reflected in the purchase order.

[65] Tr. 554–561. The memo is in the record as Jt. Exh. 13.

[66] Brian Bledsoe, who was shop steward at the Spokane facility at the time, corroborated Haskins' testimony. He testified that about 5–6 drivers wore the Teamster hats on March 6, and confirmed receiving Paradis' memo the next day. He also confirmed that in the past drivers were allowed to wear hats with different logos, and reported that employees complained to him that they were forced to take off their Teamster hats following the memo. (Tr. 539–543)

Paradis testified that he issued the March 7 memo, which he handed to drivers individually, in response to the drivers wearing union hats. A driver, Don Haskins, complained to him, saying he could not issue such directive, and would complain to the Union. Paradis phoned Fitzgerald shortly thereafter (within 24 hours), and she directed him to rescind the memo, because it was not "right." Paradis testified that he then went to each of the drivers and told them that the memo was null and void, that they could wear what they wanted, but that he would prefer that they wear Oxarc-logo hats with a Union pin attached. He admitted did not issue a written memo rescinding the earlier one.[67]

H. Respondent's Subpoena[68]

The record shows that the subpoena duces tecum dated July 15, 2020, issued by Respondent to Jared Foster contains the following items:

> (Item 7) "Any and all Documents and/or Communications that reflect, relate to, or refer to any alleged union and/or protected concerted activities that you engaged in during your employment with Respondent."
>
> (Item 10) "Any and all Communications between you and the Union concerning the allegations contained in the Complaint."[69]

Additionally, the record show also shows that the subpoenas duces tecum dated July 15, 2020, served on Teamsters Local 839 as well as on the International Brotherhood of Teamsters directed that they produce:

> (Item 9) "Any and all Documents and/or Communications that reflect, relate to, or refer to any alleged union and/or protected concerted activities engaged in by Jared Foster during his employment with Respondent."[70]

[67] Tr. 648–651; 657–662; Jt. Exh. 13. I note than in its brief the General Counsel argues that the employees did not "corroborate" Paradis' testimony that he orally rescinded the memo the next day. This is disingenuous. It was not their role to "corroborate" his testimony, but rather to *rebut* it if it was not true. The GC did not recall them to the stand to do this, so Paradis' testimony stands unrebutted. I therefore find that Paradis orally rescinded the memo as he testified.

[68] As previously noted, at the hearing the General Counsel orally amended the complaint during the hearing to allege than on or about July 15, 2020, Respondent had issued a subpoena (duces tecum) served on both Foster and the Union(s), which sought to compel disclosure of Fosters' and other employees' Sec. 7 activities. The amended complaint was admitted as GC Exh. 16.

[69] GC Exh. 18

[70] GC Exh. 17, 19

IV. ANALYSIS

A. The Allegation Regarding the Absence of an Impasse on February 28, 2019 and the Unlawful Implementation of the Last, Best, Final Offer

As briefly described in the prologue, the General Counsel has alleged in the complaint that Respondent acted unlawfully when it prematurely declared an impasse on February 28, 2018, and then implemented its "last, best, final offer" (LBFO) shortly thereafter. The General Counsel primarily argues, in its post-hearing brief, that that no valid impasse existed because Respondent had not bargained in good faith, intending to frustrate the bargaining process from the beginning by proffering unreasonable, regressive proposals that it knew the Union would never accept—proposals that Respondent never wavered or deviated from. In essence, it argues that Respondent engaged in unlawful surface bargaining.[71] Respondent avers that it engaged in hard but lawful bargaining during the course of 34 bargaining sessions that lasted almost 2 years, and that the parties were hopelessly deadlocked on all of the "core" issues at the time it declared an impasse on February 28, 2018. The General Counsel additionally argues that even assuming that Respondent bargained in good faith, the declaration of impasse was premature and thus unlawful because Respondent had failed to provide the Union with information it had requested prior to the declaration of impasse. I will address these issues below.

Under Section 8(a)(5) and 8(d) of the National Labor Relations Act, employers and unions have an obligation to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation do[ ] not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. S.158(d). See generally *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952).

An impasse can be declared by a party when the collective-bargaining process has been exhausted and, "despite the parties' best efforts to reach an agreement, neither party is willing to

[71] Notably, the General Counsel never specifically plead in the complaint that Respondent engaged in surface bargaining, an allegation which the Pleading Manual suggests (or directs) be described in a particular fashion, i.e., describing in detail the particular conduct, both on and away from the bargaining table, which supports the theory of unlawful intent. Indeed, some two (2) and a half years after the initial complaint issued in February 2019, the first mention of surface bargaining was during the General Counsel's opening statement during the trial on July 1, 2021—and only because I directly asked Counsel for the General Counsel if this is what he was alleging, based on the nature of his opening remarks (Tr. 58). Due process, and the Board rules, requires specificity in the pleadings, not only because it allows the Respondent to prepare a defense, but because it also serves as a road map to the General Counsel regarding the evidence that will be required to support its case, and serves as a signal to the adjudicator as to what the relevant issues and evidence will be. Despite its opening remarks, despite devoting a substantial portion of its post-hearing brief to this issue, and despite (orally) amending the complaint to allege other conduct, the General Counsel never amended its complaint to specifically allege surface bargaining. I find this baffling—it suggests the General Counsel's theory of a violation, after almost 4 years of investigation and trial preparation, was still evolving during the trial. Nonetheless, although this type of omission could prove fatal in many circumstances, it is not in this instance. In that regard, I note, first of all, that the complaint (in par.8(h)) alleges that impasse was declared "without first bargaining. . . to a good faith impasse." Secondly, as discussed below, good faith bargaining is a condition precedent to a valid impasse, that is, it cannot be lawfully reached in the absence of good-faith bargaining—so that issue is always front and center in determining whether a proper impasse was reached. Finally, all the underlying facts were litigated in this case, inasmuch detailed evidence was introduced regarding what the parties said and proposed during negotiations, and the reasons therefor.

move from its position." *Excavation-Construction, Inc.*, 248 NLRB 649, 650 (1980). In other words, the parties must be at a deadlock or standstill in negotiations. *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973), enfd. denied on other grounds 500 F.2d 181 (5th Cir. 1974). The burden to prove impasse is on the party that declares impasse, who must prove that "no realistic possibility that continuation of discussions. . . would [be] 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 an impasse has been reached is a case-specific inquiry. *Dallas General Drivers, Warehousemen & Helpers Local 745 v. NLRB*, 355 F.2d 842, 845 (D.C. Cir. 1966). The Board has outlined five factors it considers when conducting their inquiry: (1) the parties' bargaining history, (2) the good faith of the parties in negotiations, (3) the length of the negotiations, (4) the importance of the issues in dispute, and (5) the parties contemporaneous understanding of the state of negotiations. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), review denied sub nom. *American Federation of Television & Radio Artists, AFL–CIO v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). The Board analyzes these factors by looking at the totality of the circumstances. However, one or two factors alone may be sufficient to demonstrate the absence of impasse. See *Monmouth Care Center v. NLRB*, 672 F.3d 1085 (D.C. Cir. 2012); *American Security Programs, Inc.*, 368 NLRB No. 151 (2019). In *AMF Bowling Co.*, 314 NLRB 969 (1994), enfd. denied on other grounds, 63 F.3d 1293, 1299 (4th Cir. 1995),) the Board stressed that bargaining in good faith is a critical element in determining the existence of impasse. Indeed, it may be said that this factor is perhaps the most critical, because in the absence of good faith all others become irrelevant, as the inquiry stops right there—there can be no lawful impasse.

It would be no exaggeration to state that determining whether there has been good faith during bargaining is one of the most complex issues in labor law, often requiring a painstaking analysis of not only the conduct, statements and proposals at the bargaining table, but of conduct away from the table as well. This complexity is primarily the result of the inevitable tension between Section 8(a)(5) of the Act, which creates the obligation to bargain in good faith, and Section 8(d), which frees the parties from the obligation to agree to proposals or make concessions, as summarized above. As stated above, the duty to bargain in good faith is critical to establishing a good faith impasse, because impasse cannot exist in its absence . In further defining the Board's role in judging the course of bargaining, the Bard had held that "[I]t is not the Board's role to sit in judgement of the substantive terms of bargaining, but rather to oversee the process to ascertain that the parties are making a sincere effort to reach agreement." *Phillips 66,* 369 NLRB No. 13 (2020). Nonetheless, while the Board does not normally judge individual proposals, the Board "recognize[s] that the content of a specific bargaining proposal may become relevant in determining whether a party was making a sincere effort to reach an agreement or whether it was intent on frustrating the very possibility of reaching an agreement. *Id* at fn. 9; See, *Reichhold Chemicals*, 288 NLRB 69, 69 (1988). Indeed, in *Reichhold,* the Board pointed out that while individual proposals that may be undesirable or unacceptable are not indicia of bad faith, the Board will measure whether the cumulative nature ("entire spectrum") of the employer's proposals are consistently and predictably unpalatable, thus indicating a lack of good faith, citing *NLRB v. Mar-Len Cabinets*, 659 F.2d 995 (1991). This is particularly the case where the employer's proposals effectively nullifies the union's ability to act as the employees'

collective-bargaining representative. See, *A-1 King Size Sandwiches*, 265 NLRB 850 (1982), affd. 732 F.2d 872 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984).

In *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003), the Board held that proposals that give "unilateral control over virtually all significant terms and conditions of employment" are evidence of bad faith bargaining. Likewise, demands that leave a union worse off than having no contract at all indicate bad faith bargaining. *Id; Santa Barbara News-Press*, 358 NLRB 1415 (2012), affd., 362 NLRB 252 (2015); *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992, enfd. 987 F.2d 1376 (8th Cir. 1993); *Altura Communication Solutions*, 369 NLRB No. 85 (2020)

Examining the cumulative nature and total spectrum of Respondent's proposals, including its unyielding adherence to the vast majority of its proposals from the very beginning to the time it declared an impasse, and considering the justifications expressed for these proposals, I conclude that Respondent did not bargain in good faith. A brief summary of the highlights of these proposals, described in more detail in the Facts section, shows as follows:

With regard to Article II (Discharge or Suspension) of its proposal, Respondent proposed to eliminate the word "just" from the existing "just cause" provision, significantly expanding the categories of offenses, at the complete discretion of Respondent, for which employees could be discharged or suspended without prior warnings. Additionally, it gave Respondent complete discretion to determine which offenses were of a "similar nature," or constituted a "pattern," which would allow Respondent to consider other past offenses, beyond the previously established period of 12 months, to determine the nature of the discipline to be imposed.

With regard to Article VI (Seniority) of its proposal, Respondent proposed giving itself sole discretion to determine advancement, layoffs, or rehires, by determining which employees were (again, at its sole discretion) the most "qualified, productive and punctual." This unlimited discretion to select the most "qualified, productive, and punctual" employees continued across all categories were seniority previously played a role, such as awarding extra work (section 2), and awarding vacant or new routes. In other words, seniority was rendered null and void, since Respondent would have sole discretion as to who was the most qualified, productive and punctual" employee to reward.

With regard to Article XII (Picket Lines) of its proposal, Respondent proposed to eliminate employee rights to refuse to cross a sanctioned picket line involving a medical facility requiring deliveries of critical gases, as designated by Respondent. Any employee who refused to cross a picket line in these circumstances would be subject to discipline, up to and including termination.[72]

With regard to Article XXIV (Management Rights) of its proposal, Respondent proposed to vastly expand its capacity to act pursuant to its "sole and exclusive judgment" in almost every area, including, inter alia, reprimanding, suspending, disciplining and discharging employees for "cause;" hiring; determining qualifications; assigning and directing work; making temporary of permanent transfers; requiring employees to work overtime; issuing, amending, and revising

[72] As described above, under Article II Respondent had proposed giving itself virtually unlimited discretion to determine which offenses qualified for discharge or suspension.

rules, regulations, practices and procedures; discontinuing services or operations; utilizing subcontractors—and many more.

Like the noneconomic proposals described above, Respondent's economic proposals also contained language and features giving Respondent virtually unlimited discretion in deciding whether bargaining unit employees would receive any wage increases—or even decreases—depending on subjective criteria at the sole discretion of Respondent. Thus, under "Attachment A" to the wage schedule of Respondent's proposal (Article VII), Respondent proposed several criteria, including "attendance," "punctuality," "quantity of work," "quality of work," and "team contributor," which would be used to determine if the employee would receive a wage increase—or potentially be subjected to a decrease. With the exception of "attendance," which could arguably be measured with objective data (i.e., time and attendance records), and perhaps "quantity of work," all other criteria were entirely subjective and dependent on Respondent's sole discretion.[73]

With regard to the Health and Welfare (Article XII) and Pension (Article XV), there was no language giving Respondent unlimited discretion to change or render judgment with regards to these items, but the proposed changes nonetheless represented a tectonic shift from the past. Under Health and Welfare, Respondent initially insisted on switching employees to the Company medical plan, eventually adding the Union plan as an "either/or" alternative—one which as described earlier was not legally permissible under the Union trust rules. More importantly, for the first time it required employees to pay for 30 percent of the premiums. With regard to the Pension, Respondent proposed switching the employees, who had been under a traditional pension plan for 50 years, to the company 401(k) plan. Although at first glance there is nothing in the substance of these 2 economic proposals that displays inherent bad faith, the reasons given by Respondent for proposing them does reveal possible unlawful intent or motivation, as discussed below.

What were the justifications for these "overwhelming" (in Fitzgerald's own words) proposals? According to Fitzgerald, the contract was "full of antiquated language," that did not "help us to run the business as efficiently" based upon the "new business world." Notably, she never explained what exactly this "new business world" was all about, but testified that the contract was full of "process and procedures" which "tied our hands," denying Respondent the ability to "react quickly" in "today's business world."[74] The antiquated language and lack of flexibility theme was a recurring one, often repeated by Fitzgerald throughout her testimony. Left unsaid, but implied, is the message that Respondent wanted the "freedom" and "flexibility"

[73] Additionally, as described in the Facts section, although in its proposal Respondent offered a slight raise in wages ($29 per hour), the corresponding increase in contributions by employees to their medical plan (30 percent of the premium) in Respondent's proposal completely offset this increase, so that in the Union's view this offer amounted to a wage freeze.

[74] At no time during the life of the prior contracts, had Respondent ever notified the Union that it was having difficulties conducting its business as a result of language in the contract or the "process and procedures" resulting from such, nor sought modifications to address such difficulties. To the contrary, the relationship between Respondent and the Union—until the start of the 2017 negotiations—had been one remarkably free of friction.

to operate in its business *as if there were no Union*.[75] Indeed, Fitzgerald's testimony leaves the unmistakable impression that it was not only the language of the contract that was antiquated, but the Union itself, and collective bargaining, that was an anachronistic relic of a bygone era, a dinosaur in a new (business) world currently inhabited by speedy mammals. In this regard, for example, it is notable that the justification proffered by Respondent for insisting on moving the bargaining unit employees to the Company's medical and 401(k) plans, as well as its reasons for insisting on a "pay for performance" proposal (leaving the Union without any say with regard to wage increases), was that it wanted to equalize the "disparity" between their unionized and non-unionized employees—apparently, by bringing the unionized employees down from their lofty perch.[76] The existential problem with such intent, in the absence of justifying financial stressors not present in this case, is that it clearly signals to employees that being represented by a union will do them no good, because they will never obtain better wages or benefits, safeguards or protections, or more rights, than non-union employees.[77] In other words, it unmistakably conveys the message that choosing to be represented by a union is a futile act on their part.

In sum, Respondent's proposals granted it unilateral control over virtually all significant terms and conditions of employment, leaving the Union worse off than having no contract at all. Respondent would be the final arbiter and sole authority on all matters related to the employment of its employees, in the name of "flexibility" and not having its hands "tied." Indeed, under Respondent's proposals, it is difficult to conceive of any grievance the Union could successfully prevail in, or for that matter visualize any significant or beneficial role it could play in anything related to its members' wages, hours or working conditions. The Union is in effect completely side-lined, reduced to being little more than a spectator, if not a potted plant. This case accordingly fits squarely in the mold of *Public Service Co. of Oklahoma*; *Santa Barbara News-Press*; and *Radisson Plaza Minneapolis*, supra. It is also this feature that in my view distinguishes the present case from *Coastal Electric Cooperative*, 311 NLRB 1126 (1993), where the Board stressed that regressive proposals, such as a broad management rights clause, and failure to make concessions regarding these, did not signal an intent to frustrate an agreement. In *Coastal Electric*, the Board pointed to certain conduct by the employer indicating a lack of animus or bad faith, such as not insisting on the union waiving its right to strike, making significant concessions, and conducting negotiations in an amicable manner. *Id* at 1132. In the instant case, not only was waiving the right to strike paramount among Respondent's proposals, but it also insisted that the Union waive its members' right to refuse to cross picket lines and

[75] Notably, both Kroetch and Jacobsen testified that Respondent's lead negotiator, Grubs, made statements during negotiations that clearly implied as much, stating that Respondent wanted the ability to run its business "as [they] saw fit" (Tr. 85; 293). I credit their testimony, noting that Grubs did not testify and that Fitzgerald never denied that Grubs said so.

[76] Fitzgerald plainly admitted that "equalizing" all employees was one of their principal goals going into negotiations (Tr. 764; 766). This justification is thus different from the ones proffered by financially or competitively stressed employers for their regressive proposals. See, *Goldsmith Motors Corp.*, 310 NLRB 1279, 1284 (1993); *Logemann Bros. Co.*, 298 NLRB 1018 (1990). There is no evidence that Respondent was financially stressed or at a competitive disadvantage. To the contrary, Fitzgerald testified that Respondent had been geographically expanding its business operations.

[77] The simple reality is, however, that union-represented employees, as a matter of law, have more rights that unrepresented employees. The prime example is an employer's inability to unilaterally change their wages, hours or working conditions without first bargaining with their collective-bargaining representative, which employers can do, whenever they wish, regarding unrepresented employees. It was this "inequality," among others, that Respondent was apparently seeking to remove through its proposals.

even to conduct informational leafletting.[78] Moreover, the negotiations in this case could not be described as amicable by any stretch of the imagination, particularly in contrast to the relationship that had existed between the parties for the 50 years preceding the 2017 negotiations. From day one, Respondent's lead negotiator, Grubs, displayed an uncooperative, even disdainful—if not hostile—attitude toward the Union and the collective-bargaining process. For example, he initially refused the Union's request to submit proposals in a format that would make it easy for the parties to track proposals, changes and agreements, stating that his difficult to follow format was "*his* format," and adding that he did not want to perform the Union's "administrative" work for them;[79] he refused new union negotiator Jacobsen's request for a complete set of Respondent's past proposals, stating that he should get them from the prior Union negotiator;[80] he declared on the first day, after the Union expressed shock at the magnitude and scope of Respondent's proposed noneconomic changes, that the parties had reached "impasse" on noneconomic issues, and should therefore move on to economic issues; he insisted (and proposed) that the Union's logo, which had been displayed in the collective-bargaining agreement for 50 years, be removed, because he didn't want to provide the Union with "free advertising." While separately these statements might be considered just petulant (because they were. . .), and not indicative of animus or unlawful intent, altogether, and in combination with the "overwhelming" nature of Respondent's proposals, they display the distinctive attitude of a party that is intent on torpedoing an existing and successful relationship and having its way, come hell over high water.[81] Likewise, unlike in *Coastal Electric*, there were no significant concessions by Respondent herein.[82] Indeed, Fitzgerald testified, repeatedly, that Respondent did not intend to make any movement or concessions on those issues it considered "critical:" its management rights language; its "pay for performance" language; its "picket line crossing" proposal; its "seniority" language (doing away with it as a factor); its 401(k) plan; its proposal that employees pay part (30 percent) of their medical premiums; and,

[78] Respondent's justification for its insistence that the Union waive its members' right to refuse to cross picket lines at health care facilities—that lives could be lost unless its drivers were forced to deliver life-saving gases—is disingenuous, and unpersuasive, and signals that this was just part of Respondent's power play. First, strikes in health care facilities do not occur suddenly, by surprise, as Sec. 8(g) of the Act requires that notice of not less than 10 days be given for conducting strikes or picketing activities. This allows such facilities to "stock up" in anticipation of supply interruptions due to strikes, supplies which Respondent admitted are automatically and constantly monitored by telemetry at its facility. Thus, it is highly unlikely that the statutorily protected right to refuse to cross a picket line—something sacrosanct to unions—would result in life-threatening shortages in these circumstances. Indeed, this right had existed in prior contracts and there is no evidence that this had ever led to life-threatening shortages. Secondly, as Fitzgerald admitted, under the expired contract, deliveries by non-bargaining unit members were allowed in certain situations, such as emergencies—which a life-threatening situation would certainly qualify for.

[79] Although Grubs eventually relented to use a Word format, it took several months.

[80] Jacobsen explained to Grubs that he wanted to make sure he wasn't missing anything, an explanation that fell on deaf ears.

[81] On the other hand, the General Counsel points out that Fitzgerald referred to the Union as "stupid" in her bargaining notes, which Fitzgerald admitted, and argues that it reflects Respondent's animus toward the Union. I do not agree, in this particular instance. This was written in the context of bargaining sessions having to be cancelled and re-scheduled because the Union was bringing in a new lead negotiator (Jacobsen), and in my view reflects frustration and perhaps impatience, rather than animus.

[82] I would note that after initially proposing to do away with the existing union-security clause, Respondent relented soon thereafter and agreed to keep the union-security clause as it existed. I do not consider this to be a significant concession, inasmuch the reason proffered by Respondent for its initial proposal—that some of the bargaining unit members worked in Idaho, a right-to-work state—was already addressed by existing language in the contract, that allowed for such exception.

over-all, its intent to "equalize" all union and non-union employees. In sum, Respondent did not intend to compromise, and never did, on all the proposals that would allow it to run its business "as it saw fit," *as if there were no Union*.

Accordingly, and for these reasons, I conclude that Respondent did not bargain in good faith, because in seeking to give itself unilateral control over virtually all significant terms and conditions of employment, it knew or should have known that these were terms that the Union could never accept. I would note that in addition to the above, the General Counsel argues that there is additional evidence of Respondent's conduct away from the bargaining table which additionally supports the conclusion that it was acting in bad faith. In this regard, General Counsel argues that Respondent's discharge of Foster, its interrogation of employees on June 4, 2018, its unilateral change in the boot allowance policy, and its unilateral change regarding employees' wearing union-logo hats, indicate both animus and bad faith. As discussed further below, however, except for the conduct regarding the hat policy, I have found no merit to these allegations. Nonetheless, as discussed above, I conclude that even in the absence of additional evidence of bad faith or animus separate from what occurred at the bargaining table, Respondent's overall conduct is sufficient to conclude that it did not bargain in good faith.[83]

Accordingly, I conclude, in light of the lack of good faith bargaining by Respondent, that no lawful impasse existed on February 28, 2019, and that Respondent's implementation of its last, best, final offer (LBFO) thereafter was unlawful. Moreover, there is an additional reason why no lawful impasse existed as of that date. As discussed in the Facts section, on February 27, the Union made an information request of Respondent, requesting (by letter) that Respondent provide the Union, by March 6, a "Summary Plan Description" of its 401(k) plan, one of Respondent's "critical" proposals on which it had refused to compromise on make any concessions.[84] Respondent never responded to the Union's information request, indeed completely ignored it, declared an impasse the next day, and a few days later implemented its

[83] Additionally, I note that the General Counsel avers that during the course of bargaining in 2017 and early 2018, the Union filed several charges alleging unlawful conduct by Respondent (GC Exh. 2, 4, 7, 8, 9), resulting in the Regional Director issuing a complaints (GC Exh. 3, 5, 6, 11), which were all eventually settled by way of informal settlement agreements (containing a non-admission clause) (GC Exh. 12). The General Counsel suggests the conduct alleged in these charges and complaint(s) negatively impacted the negotiations and reflect on Respondent's bad faith and/or animus. I conclude, however, that it would be improper for me to draw any inferences based on allegations that were settled informally. To do so would violate due process, as there has been no adjudication regarding the merit of these charges—there have been no findings of fact nor conclusions of law regarding these allegations, and I cannot therefore infer that this conduct in fact occurred or that it was unlawful. See *Electrolux fHome Products, Inc.*, 368 NLRB No. 34 n. 12 (2019), and cases cited therein. If the General Counsel believed that Respondent's conduct as alleged in those charges or complaint(s) was relevant to the issues in the present case, it had the option to rescind the approval of the settlement agreement(s) and add those allegations to the instant case—but chose not to do so. Alternatively, the General Counsel could have offered testimony regarding such prior conduct by Respondent, and if Respondent had objected, the General Counsel could have averred that such evidence was being introduced not to obtain a finding of a violation, but solely as evidence of animus. Or, as a final alternative, if the General Counsel believed that Respondent's repeated conduct was recidivist, it could have insisted on a formal settlement agreement, where Respondent admitted having engaged in the conduct alleged, allowing me to draw whatever inferences might have been appropriate under the circumstances. None of those option were exercised herein, however, and I cannot therefore make any inferences under these circumstances.

[84] Jacobsen testified, credibly, that the Joint Council of Teamsters had in the past accepted employer's 401(k) plans in lieu of the Union's pension plan, and that the Union wanted to make an informed decision before proceeding further. Jacobsen also testified that the Union gave Respondent until March 6 to provide the information in light of the fact that the parties had scheduled bargaining sessions later in March.

LBFO which included the 401(k) plan. The Board has held that "[A] finding of a valid impasse is precluded where the employer has failed to supply requested information *relevant to the core issues separating the parties.*" *Caldwell Mfg. Co.*, 346 NLRB 1159, 1170 (2006) (emphasis supplied). See, also, *Wilshire Plaza Hotel*, 353 NLRB 304, 305 (2008); *Prime Healthcare Centinela, LLC*, 363 NLRB 411, 410 (2015).[85] There is no question that this issue was one of the core or critical issues separating the parties at the time of Respondent's declaration of impasse, although one that at least the Union was open to further discuss and explore—provided it had a full picture of what Respondent's proposal entailed. In light of the above, I conclude that no lawful impasse existed as of February 28, 2019, the date Respondent declared an impasse, and that the implementation of Respondent's LBFO thereafter was itself unlawful.

There are additional reasons, however, why the LBFO was unlawfully implemented. As described in the Facts section, the implemented instrument was not consistent with the LBFO. Thus, under the LBFO, employees could choose between the Union's health and welfare plan and Respondent's medical plan. As describer earlier, the Union had advised Respondent that such choice was not legally viable under the Union's Trust Fund bylaws.[86] At implementation, Respondent chose to go with the Union's Health and Welfare plan. Likewise, when Respondent implemented its 401(k) plan, for the first time it informed that employees had to contribute 3%, and had options to either increase that amount or opt out altogether. This was never part of the LBFO. Employers may not implement unilateral changes that are substantially different from the terms of its prior offers. *Church Square Supermarket*, 356 NLRB 1357, 1360 (2011), citing *Atlas Tack Corp*, 226 NLRB 222, 227 (1976), enfd. 559 F.2d 1201 (1st Cir. 1977).

Even more pointedly, however, Respondent implemented several features which it cannot unilaterally implement in the absence of an agreement with the union, because they involve the waiver of statutory rights—which can only be waived voluntarily by the collective-bargaining representative of the employees. Thus, Respondent implemented, inter alia, a fixed term for the agreement; a no-strike clause; a grievance-arbitration provision; an overbroad management rights clause that allows management to implement changes unilaterally; and a zipper clause. The unilateral implementation of these provisions, which are contractually bound, was unlawful. *Roosevelt Memorial Medical Ctr.*, 348 NLRB 1016, 1016–1017 (2006), citing *McClatchy Newspapers*, 321 NLRB 1386, 1390 (1996); *Indiana & Michigan Electric Co.*, 284 NLRB 53, 57–58 (1987); *KSM Industries*, 336 NLRB 133 (2001); *California Offset Printers, Inc.*, 349 NLRB 732, 736 (2007); *Angelus Block Co.*, 250 NLRB 868 (1980). Simply put, the law is clear on this subject—an employer may implement provisions of a proposal that implicate the waiver of statutory rights only with the explicit agreement of the employees' collective-bargaining representative.

[85] I note that in these cases the employers' failure to provide the requested information was alleged as a separate violation of Sec. 8(a)(5) & (1) of the Act, something not alleged in the instant case. In any event, I do not consider the failure to allege this conduct as a separate unfair labor practice to be fatal to the issue at hand, since it is ultimately the failure to provide information crucial to a critical issue holding the parties apart that is the sin here—not the existence of a separate unfair labor practice.

[86] Indeed, I find this fact to be another reason why there could be no lawful impasse as of February 28, 2019—Respondent had made a proposal that the Union could not lawfully agree to or accept.

Accordingly, I conclude that even if there was a lawful impasse as of February 28, 2019, Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing the above-described provisions.

B. The Alleged Interrogation of Employees on June 4, 2018

As discussed earlier, Respondent called a meeting of is drivers on June 4, 2018, at its Pasco facility, attended by about a dozen drivers, and by Fitzgerald and Kirby for Respondent, who conducted the meeting.[87] The meeting was called in order for Respondent to explain its bargaining proposals, which it had made to the Union during negotiations, to the drivers. After describing Respondent's proposals, Fitzgerald asked the drivers "Do you guys have any other questions about what we proposed? Any concerns about what we proposed?" The General Counsel alleges this to have been an unlawful interrogation, in violation of Section 8(a)(1) of the Act.[88] In determining whether an unlawful interrogation has occurred, the Board looks at whether under all the circumstances, the interrogation reasonably tends to restrain, coerce or interfere with the rights guaranteed by the Act. Relevant factors in that determination include: the nature of the information sought; the identity of the questioner; the place and method of the questioning; and the truthfulness of the employee's reply to the questioning. *Rossmore House*, 269 NLRB 1176, 1177–1178 (1984), citing *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964); *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985); *Medcare Associates, Inc.*, 330 NLRB 935, 939 (2000).

Applying the above criteria to the facts herein, I conclude that no unlawful interrogation took place in this instance. In examining the circumstances and context surrounding the events at hand, I note first of all, that this was not a one-on-one (or worse, two-on-one) questioning of an isolated employee by supervisor(s) in the private (and threatening) confines of a supervisor's office. Rather, it was in a group setting, where the number of employees vastly outnumbered the 2 managers present. Moreover, the employees were not shy or untruthful in responding to the questions asked; rather, they gave the 2 managers an earful, complaining about a number of things and raising issues about other matters not even brought up by management. As the recordings reveal, the complaints the employees raised were at times expressed in a frustrated, even angry, manner; voices were raised, and frustration vented. These employees were not shrinking-violet types, but rather unabashed union supporters who clearly had no problem giving management a "piece of their minds." Indeed, it would be fair to say that Fitzgerald and Kirby got more than they had bargained for, so to speak.[89] Moreover, the nature and manner of the

[87] As note earlier, Foster testified that the meeting was mandatory, whereas Kirby testified that it wasn't—and no other evidence was proffered in that regard. There is no way to resolve this conflict, which I find unnecessary to resolve, because I conclude it is ultimately not relevant to the issue at hand. Inasmuch the General Counsel bears the burden of proof, however, if need be, I would find that the General Counsel failed to meet its burden in this instance.

[88] These 2 questions are the only ones specifically singled out by the General Counsel as being unlawful in its post-hearing brief, even though other questions of a similar nature, as well as other questions, were asked during the course of the 45-minute meeting. Accordingly, I will only address these 2 questions, as it is the General Counsel's obligation to specify exactly what conduct it is alleging to be unlawful.

[89] Ironically, I believe that if a possible, theoretical, violation might exit at all in these circumstances, it would be an attempt to by-pass the Union to bargain with the employees directly, in violation of Sec. 8(a)(5) & (1)—not an unlawful interrogation in violation of Sec. 8(a)(1). This is not what the General Counsel alleged, however, nor what was litigated, so it would be improper for me to make any findings in that regard.

questions asked was not threatening or coercive, nor sought to reveal employees' confidential or secret protected activity. In these circumstances, I do not agree with the General Counsel that this was a coercive, and thus unlawful, interrogation. Indeed, it appears that the General Counsel is applying the *Rossmore House* test in a very mechanical, rigid manner, as in: (1) the employer asked a question of its employees; and (2) that question might bear, directly or even indirectly, on protected activity; hence, it is unlawful. Quite simply, that is not the test, nor the law on the subject.

Accordingly, I recommend that this allegation be dismissed.

C. The Discharge of Jared Foster

The General Counsel alleges that Foster was unlawfully discharged by Respondent on June 14, 2008, because he was a known supporter of the Union, who often voiced his opinion to Respondent's managers in opposition to its policies or conduct, and further avers that the reason provided by Respondent for his termination was pretextual. Respondent, on the other hand, argues that Foster was discharged because he was involved in a series of avoidable accidents while driving his truck, and that this conduct, which it deemed reckless, was the only reason for his termination.

As both the General Counsel and Respondent correctly point out, the above-described allegation(s) must be reviewed under the *Wright Line* analytical framework.[90] Under this framework, the General Counsel has the initial burden to prove, by preponderance of the evidence, that Foster engaged in protected activity, that Respondent knew about it, that Respondent harbored animus based on such protected activity, and that it took an adverse employment action against Foster, motivated, at least in part, by such animus. If the General Counsel is able to make such a showing, the burden of persuasion shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089; see also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must persuade, by a preponderance of the evidence, that the action would have taken place absent the protected activity. *Dentech Corp.,* 294 NLRB 924, 956 (1989).

For the following reasons, I conclude that the General Counsel did not meet its initial burden under *Wright Line*, and even if it did, Respondent met its burden to show it would have taken the same action even in the absence of protected activity by Foster. In that regard, I note that there is no question that Foster was a vocal supporter of the Union, and that on various, and perhaps numerous, occasions (some of which he could not exactly pinpoint) he voiced complaints to management about various issues that impacted him and his co-workers. Indeed, Kirby admitted discussing some of these topics with Foster while riding with him on Foster's routes during their "ride-alongs." Foster was also one of several employees who voiced complaints during the June 4, 2018 meeting held by Fitzgerald and Kirby.[91] Accordingly, there

[90] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F2d 899 (1st Cir. 1981). Cert. denied 455 U.S. 989 (1982).
[91] There are several employees who voiced complaints during that meeting and some of them, however, appeared to have been louder and angrier that Foster.

is little doubt that the protected activity and knowledge of the protected activity prongs under the *Wright Line* analysis have been satisfied. It is the next factor, however, animus with regard to that protected activity, where the General Counsel's evidence is deficient. Thus, there are no statements in the record allegedly made by Respondent's supervisors or managers to Foster or any other employee that shows union (or protected activity) animus in general, much less any statement that shows animus toward Foster for engaging in such activity.

The General Counsel, in its post hearing brief, instead points at very diffuse evidence of Respondent's unhappiness with the Union—such as Fitzgerald, on her bargaining notes, calling the Union "stupid," which I have already characterized, for the reasons discussed previously, as innocuous-- as evidence of animus, and also points at a statement by Fitzgerald during the June 4, meeting that the contract "sucked" in support of such contention.[92] Even assuming, however, that these statements established general animus toward the Union, more is needed to establish a nexus between that alleged animus and the action taken by Respondent against Foster. Thus, in *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (2019), the Board explained that *Wright Line* is inherently a causation test and that the General Counsel therefore does not invariably sustain its burden by producing—in addition to evidence of the employee's protected activity and the employer's knowledge thereof—*any* evidence of the employer's animus or hostility toward union or other protected activity. Instead, the General Counsel must establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee. In this instance, there has simply been no such nexus established. [93] Additionally, the General Counsel points at conduct alleged in prior complaints, settled via informal settlement agreements containing nonadmissions clauses, as additional evidence of animus. But reliance on such informal settlement agreements to establish animus is misplaced; See, *Electrolux Home Products, Inc.*, 368 NLRB No. 34 fn. 12 (2019), and cases cited therein. Indeed, in my view, as previously discussed, such reliance would likely violate due process, as there has been no adjudication of these allegations and corresponding findings that this conduct actually took place and was unlawful or signaled animus.[94] Accordingly, I conclude that the General Counsel has failed to establish a nexus between Respondent's alleged union animus and its adverse action against Foster.

Nonetheless, even assuming that the General Counsel had met such burden, I conclude that Respondent has shown that it would have discharged Foster even in the absence of any protected activity on his part. In that regard the record shows that Foster had been involved in a series of preventable accidents, which Foster admitted was each progressively worse than the prior one. The last in a series of such accidents occurred on June 7, 2018, which caused over $10,000 in damage to a client's property, following a similar pattern of prior accidents that occurred while Foster was backing up his truck—and which had led to his suspension the prior time. This pattern led Respondent to conclude that Foster's conduct was "reckless" within the meaning of the collective-bargaining agreement, allowing Respondent to consider prior warnings

[92] The General Counsel also points at Fitzgerald's alleged "interrogation" of employees during the June 4 meeting as evidence of animus, but I have found no merit to such allegation.

[93] The General Counsel may argue that the close proximity of Foster's June 14 discharge to the June 4 meeting, where Foster voiced pro Union sentiments, circumstantially establishes such nexus. I disagree. In that regard, I note than an intervening event on June 7, a preventable accident, was the "final straw" and proximate cause that triggered Foster's termination on June 14, as discussed below.

[94] See, fn. 83, above.

even though they occurred more than 12 months earlier. The General Counsel argues that Foster's conduct was not "reckless," but fails to cite the basis for the General Counsel's expertise or authority to make such pronouncement.[95] General Counsel also argues that reason proffered by Respondent for Foster's termination was pretextual, without offering evidence to support such contention. For example, the General Counsel did not produce evidence of disparate treatment, which arguably could have supported a conclusion of pretext. To the contrary, Respondent introduced evidence that 2 other drivers, Willis and Burns, has been discharged for similar patterns of accidents (R. Exh. 6). The General Counsel's arguments thus lack merit.

In light of the above, I conclude that the General Counsel did not meet its burden under *Wright Line,* and even assuming it did Respondent established that Foster would have been discharged regardless of his protected activity. Accordingly, I conclude that Foster's discharge did not violate Section 8(a)(3) & (1) of the Act as alleged, and recommend that this allegation be dismissed.

D. The Boot Policy

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) by unilaterally changing its boot allowance policy. In support of this allegation, the General Counsel proffered the testimony of Brian Bledsoe, who testified that in the past he had always ordered a certain type of boot, which he believed was the model provided by the employer, which came at no cost to the employee. In December 2018, after he ordered a new pair of the (same) boots, he was charged $24 by Respondent. Jenna Fitzgerald, on the other hand, testified that the boots ordered by Bledsoe were <u>not</u> the type provided by Respondent, but a fancier model that in the past had cost under the $135 limit set by the contract, but which had gone up in price in 2018, resulting in the $24 charge.[96]

I conclude that the General Counsel did not prove its allegation by the preponderance of the evidence. Thus, I find that there is really no objective way to make a credibility finding in these circumstances and with these facts, and hence the General Counsel, who has the burden of proof, fails in that quest. That said, I find Respondent's version of facts makes the most sense, and most likely explains what occurred here—Bledsoe had been ordering a fancier model of boots all along, and had never been charged before, because those boots cost less than the $135 contractual threshold, until the price went up in 2018. In that regard, I note that there is no evidence that this has occurred to any other employee or is recurring situation, and hence there is no evidence that there has been a unilateral change in the policy.

Accordingly, in these circumstances, I conclude that this allegation has no merit, and recommend that it be dismissed.

[95] Nor does Respondent's failure to use the term "recklessness" in prior warnings, contrary to the General Counsel's argument, establishes its absence. Recklessness is defined by behavior, not by a paper trail of prior mentions.
[96] As previously noted, Respondent proffered evidence that the model ordered by Bledsoe was not the type kept in stock by Respondent, and cost more than $135, as reflected in the purchase order.

E. The Revised Attire Policy

The General Counsel alleges that in March 2019 Respondent issued a memo that changed its policy, for the first time prohibiting employees wearing hats with logos other that company logos, and in doing so unilaterally changed conditions, in violation of Section 8(a)(5) & (1) of the Act. The evidence shows that in the past, employees wore hats (or caps) with different logos, including Union logos, without any interference from Respondent. The evidence also shows that on March 7, 2019, Plant Manager James Paradis issued a memo, which he personally delivered to each driver, prohibiting employees from wearing hats with logos other than the company logos—and that he did so in response to seeing the drivers wearing hats (or pins) with Union logos. The following day, after being directed by Fitzgerald to do so, Paradis rescinded that directive—but did so orally, not in writing, telling drivers that the memo was no longer in effect. There is no evidence that the policy prohibiting employees from wearing hats with logos other than company logos, as reflected in Paradis' March 7, 2019 memo, has been implemented, stayed in place, or been enforced.

Inasmuch there is no evidence that this policy was implemented or stayed in place, I conclude that Respondent did not unilaterally change working conditions, and therefore find that Respondent did not violate Section 8(a)(5) &(1) of the Act, as alleged.[97] In that regard, I conclude that Respondent effectively rescinded, or repudiated, the March 7 memo, by meeting the criteria set by the Board in *Passavant Memorial Area Hospital*, 237 NLRB 138, 138–139 (1978), in that such repudiation was "timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct." Accordingly, I find that this allegation has no merit, and recommend that this allegation be dismissed.

Nonetheless, although I have concluded that Respondent's memo was not implemented and thus no unilateral change occurred in violation of Section 8(a)(5), I find that its message was coercive because it prohibited employees from wearing union insignia, and thus violated Section 8(a)(1) of the Act.[98] In that regard, I conclude that orally rescinding the anti-union directive the next day did not cure the coercive effect of the written memo, because any such repudiation or disavowal of coercive conduct should give assurances to employees that in the future the employer will not interfere with the exercise of their Section 7 rights. *Lily Transportation Corp.*, 362 NLRB 406, 413 (2015), citing *Fashion Fair, Inc.*, 159 NLRB 1435, 1444 (1966); and *Harrah's Club,* 150 NLRB 1702, 1717 (1965). The repudiation did not contain such assurances, and was not in writing as the original memo, and therefore I conclude it was ineffective in curing the coercive effect of the original directive.

Accordingly, I conclude that Respondent violated Section 8(a)(1) of the Act by issuing the memo prohibiting the wearing on union logos on March 7, 2019.[99]

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[97] General Counsel argues that there is no evidence that Respondent rescinded the policy, but I have found to the contrary—Paradis testified that he did, and such testimony was not rebutted by the General Counsel.

[98] I note that Paradis admitted that he wrote the memo because he saw employees wearing hats or caps with Union logos.

[99] Where all the facts have been fully litigated, such as in this case, I am permitted to find a violation on a different theory than explicitly plead or advanced by the General Counsel. *Hawaiian Dredging Construction Co.*, 362 NLRB 81 fn. 6 (2015), and cases cited therein; *Noel Canning*, 364 NLRB 503, 507 (2016).

F. The Subpoena Issued to Foster and the Union by Respondent

The General Counsel alleges that items contained in the subpoena duces tecum issued and served by Respondent on Foster and the Union (Local 839 and the International Brotherhood of Teamsters) in July 2020, as part of the underlying litigation herein, violate Section 8(a)(1) of the Act because it seeks disclosure of Foster's or other employees' protected activity.[100] In support of these allegations, the General Counsel cites *Wright Elec., Inc.*, 327 NLRB 1194, 1195 (1999), enfd. 200 F. 3d 1162 (8th Cir. 2000), and other similar cases.

I will first address the subpoena served on the Union(s). All of the cases cited by the General Counsel involve situations where subpoenas were served on current, statutory employees working for the employers who issued the subpoenas, and the rationale of the Board for finding a violation in these cases was the coercive impact that revealing the information sought would have on such employees. Here the subpoena was served on the Union(s), whose agents are not statutory employees, and who cannot thus be coerced, as a matter of law, by the employer's conduct. Nor can the argument be reasonably made that the employees whom the Union(s) represent (and who work for Respondent) were coerced by the subpoena served on the Union(s). Such an argument would be completely dependent on the premise that such employees were notified or otherwise learned of the subpoena and its contents—and such evidence is missing in this case.[101] Moreover, dissemination of the contents of the subpoena cannot be presumed—the General Counsel still bears that burden, and that burden was not met. To rule otherwise would turn the burden of proof protocols on their head. Accordingly, I conclude this allegation lacks merit.

The subpoena served on Foster presents a different issue, since Foster, even as a former employee, is still deemed as a statutory employee by the Board. See, *Little Rock Crate & Basket*, 227 NLRB 1406 (1977). In this situation, as in any other involving an allegation of coercion, the applicable standard is an objective one, whether under all the circumstances, the conduct can reasonably be found to have a coercive impact on the recipient. This begs the question—can an employee who has already been subjected to the most severe form of punishment or retaliation by the employer (short of physical violence), termination, be further coerced or intimidated?[102] I believe the objective answer is no. What can such a former employee objectively fear? That he is going to be reprimanded, or disciplined? Given more onerous work assignments? Doubly fired? Although an argument could be made that other employees whose protected activity could be subject to disclosure through the subpoena on Foster might be coerced, again this issue is totally dependent on whether or not they ever learned of the subpoena. As in the case of the subpoena on the Union(s), there is no evidence of dissemination, as such dissemination cannot be presumed.

[100] This allegation was orally amended on the record during the hearing, and later reduced to writing (GC Exh. 16; 17)

[101] Thus, this issue presents the classic question—if a threatening or coercive statement is made in the middle of a forest, and nobody hears it, is there a violation of the Act? Unlike the answer to the more famous question about the tree falling in the middle of the forest making a sound, the answer here is no. A statement that is not heard by, or disseminated to, a statutory employee cannot legally have a coercive impact.

[102] In attempting to answer this question objectively, care should be exercised not to turn this into a theoretical "angels in the head of a pin" exercise, since objective reasoning requires that the answers be tethered to reality.

Moreover, I must note that the information at issue sought by Respondent in its subpoenas to the Union(s) and Foster, never came to light prior to Foster's testimony, as I partially granted both the General Counsel's and Union(s)' motion to revoke those portions of the subpoena. I note that Respondents in Board cases are already limited by a lack of pre-trial discovery unknown in any other federal or state forums, the result of the Board's understandable policy of guarding against disclosure of employees' protected activity, which could subject them to retaliation. While the Board has traditionally been zealous in this endeavor, this policy should not be applied in a mechanical, knee-jerk, manner by seeking to make any attempt at discovery unlawful. Rather, recognizing that Respondent has due process rights to cross examine General Counsel's witnesses and obtain information regarding the basis—and validity—of their testimony, a balancing of interests is called for. In the current case, there was little, if any, realistic chance that the subpoena on Foster could have exposed confidential information regarding his protected activities in concert with other employees, since there were none. Rather, as his testimony revealed, Foster's protected activities consisted of his solo complaints to management about wages, hours and working conditions that were governed by the collective-bargaining agreement. Thus, objectively, there is no valid basis for the proposition that Foster, or potentially any other employee, was "coerced" by Respondent's subpoenas on Foster or the Union.

Accordingly, I conclude that these allegations lack merit and should accordingly be dismissed.

CONCLUSIONS OF LAW

1. Respondent, Oxarc, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union(s), the International Brotherhood of Teamsters, Local 690, Local 760, and Local 839, are labor organizations within the meaning of Section 2(5) of the Act.

3. The Union(s) are, and, at all material times, were the exclusive collective-bargaining representatives of the following appropriate units at Respondent's facilities throughout Washington, Idaho, and Oregon:

> All drivers employed by the employer within the jurisdiction of Teamsters Locals 690, 760, and 839; but excluding all other employees, guards, and supervisors as defined by the Act.

4. Respondent failed to bargain in good faith with the Union during collective-bargaining negotiations held between May 2017 and February 2019.

5. By unilaterally implementing the terms of its last, best, and final collective-bargaining agreement offer on March 11, 2019, without bargaining with the Union(s) to a good-faith impasse, the Respondent violated Section 8(a)(1) and (5) of the Act.

6. By failing and refusing to resume bargaining collectively towards a new collective bargaining agreement after its declaration of impasse on February 28, 2019, the Respondent violated Section 8(a)(1) and (5) of the Act.

7. By issuing a memo to employees on or about March 9, 2019, directing them not to wear any hats (or caps) displaying anything other than company logos, including Union logos, Respondent violated Section 8(a)(1) of the Act.

8. Respondent has not violated the Act in any other manner.

REMEDY

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

Specifically, I shall order Respondent, upon the request of the Union, to rescind the unlawful unilateral changes contained in its last, best and final offer and unlawfully implemented/made on about March 11, 2019, regarding the unit employees' terms and conditions of employment, and to restore the status quo ante that existed prior to the changes until such time as Respondent begins to bargain with the Union in good faith to a collective-bargaining agreement or good-faith impasse. This obligation also includes that Respondent immediately begin to bargain in good faith with the Union to a new collective-bargaining agreement or bona fide impasse.

The Respondent shall be ordered to make whole any unit employees affected by the unlawful unilateral changes. This includes reimbursing the employees for any loss of earnings or benefits resulting from the changes. The make-whole remedy shall be computed in accordance with *Ogle Protective Service*, 183 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). It also includes making any benefit contributions on behalf of eligible unit employees that have not been made since the date of the unlawful changes, plus reimbursement of any expenses incurred as a result of the Respondent's failure to make the required contributions to their health and welfare fund accounts, such amounts to be computed in the same manner as backpay described above.

The Respondent shall be ordered to pay any other amounts due to the health and welfare funds, less any amounts that the fund would have paid out for covered claims but did not pay out as a result of the Respondent's unlawful implementation of its final offer in the absence of a valid impasse.

The Respondent shall be ordered to compensate unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

Finally, the Respondent shall be ordered to not prohibit employees from wearing Union-logoed apparel while working.

Accordingly, based on the foregoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended[103]

ORDER

The Respondent, Oxarc, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain good faith with the International Brotherhood of Teamsters, and Teamster Local(s) 839, 690, and 760 ("the Union"), as the exclusive collective bargaining of the employees in the bargaining unit.

(b) Making unilateral changes in unit employees' terms and conditions of employment by unilaterally implementing its last, best, and final offer at a time when it had not reached a valid impasse in bargaining with the Union for a collective-bargaining agreement.

(c) Making unilateral changes in unit employees' terms and conditions of employment including implementing a no-strike clause, a fixed term of the agreement, a grievance and arbitration provision, a provision barring requests for increases in health benefits, a merit wage system, and versions of the 401(k) and health plans which were not collectively bargained for.

(d) Directing employees not to wear any hats (or caps) displaying anything other than company logos, including Union logos.

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

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

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

> All drivers employed by the employer within the jurisdiction of Teamsters Locals 690, 760, and 839; but excluding all other employees, guards, and supervisors as defined by the Act.

(b) Upon the request of the Union, rescind the changes in the terms and conditions of employment for its unit employees that were unilaterally implemented on or about March 11, 2019.

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

(c) Before implementing any further 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.

(d) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral implementation of its final offer in the manner set for in the remedy section above.

(e) Compensate unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

(f) Make all delinquent contributions to the applicable benefit funds on behalf of unit employees that have not been paid since March 11, 2019, including any additional amounts due the funds, in the manner set forth in the remedy section above.

(g) Make unit employees whole for any expenses ensuing from the failure to make the required contributions to the applicable benefit funds, with interest, in the manner set forth in the remedy section above.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its Washington, Idaho, and Oregon facilities copies of the attached notice marked "Appendix." [104] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own

[104] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 25, 2017.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington D.C. November 4, 2022

Ariel L. Sotolongo
Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union;
Choose representatives to bargain with us on your behalf;
Act together with other employees for your benefit and protection;
Choose not to engage in any of these protected activities.

In recognition of these rights, we hereby notify employees that:

WE WILL NOT fail and refuse to bargain in good faith with the International Brotherhood of Teamsters, Local 690, Local 760, and Local 839 (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT unilaterally change the terms and conditions of employment of our unit employees by implementing bargaining proposals at a time when we have not reached a valid overall impasse in negotiations with the Union for a new collective-bargaining agreement.

WE WILL NOT fail and refuse to bargain on request with the Union as the exclusive collective-bargaining representative of all drivers employed at our facilities throughout Washington, Idaho, and Oregon, within the jurisdictions of Teamsters Locals 690, 760, and 839, but excluding all other employees, guards, and supervisors as defined by the Act (the Unit).

WE WILL NOT inform our employees that they may not wear and hats or caps bearing logos other than the company's, including Union logos.

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

WE WILL, upon the request of the Union, rescind the changes in your terms and conditions of employment that were unilaterally implemented on about March 11, 2019.

WE WILL make whole all bargaining unit employees for any loss of earnings and other benefits resulting from our unlawful unilateral implementation of terms and conditions of employment on about March 11, 2019, plus interest.

WE WILL make all contractually required contributions to the Union's health and welfare funds on behalf of all eligible unit employees that we have failed to make since about March 11, 2019,

if any, with interest, plus any amounts due the health and welfare funds, less any amounts that the fund would have paid out for covered claims but did not pay out as a result of the Respondent's unlawful implementation of its final offer in the absence of a valid impasse.

WE WILL file with the Regional Director of Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the Unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

OXARC, INC.
(Employer)

Dated _____ By _____

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.

915 2nd Avenue, Room 2948, Seattle, WA 98174-1078
(206) 220-6300, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/19-CA-230472 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, (206) 220-6284.