

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

TECNOCAP LLC,

and

Cases 06-CA-265111  
06-CA-268399  
06-CA-270171  
06-CA-270931  
06-CA-273334

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

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for the General Counsel.  
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for the Charging Party.  
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*Alexandra Farone, Esq.*  
for the Respondent.

**DECISION**

**STATEMENT OF THE CASE**

KIMBERLY R. SORG-GRAVES, Administrative Law Judge. Between August 2020 and February 2021, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO (Union) filed the charges in Cases 06-CA-265111, 06-CA-268399, 06-CA-270171, 06-CA-270931, and 06-CA-273334 with Region 6 (Region) of the National Labor Relations Board (Board). The charges, as amended, allege that Tecnocap LLC (Respondent): 1) violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act) by making changes to employees work shifts and healthcare benefits without giving the Union opportunity to bargain over these changes and without first bargaining with the Union to an overall good-faith impasse for a successor collective-bargaining agreement; 2) violated Section 8(a)(5) and (1) of the Act by refusing to provide requested information relevant to the Union's duty to bargain on behalf of bargaining unit employees; 3) violated Section 8(d)(3) of the Act by unilaterally implementing a proposed change in healthcare benefits without first providing notice to the State of West Virginia as required by Section 8(d)(3). After issuing earlier complaints, on September 14, 2021, the Region issued the amended

consolidated complaint in this matter.<sup>1</sup> On September 27, 2021, Respondent filed an answer to the amended consolidated complaint. (GC Exh. 1(a)-(dd).)<sup>2</sup>

I heard this matter on November 8 and 9, 2021, via Zoom government videoconference. The parties and witnesses participated via videoconference from various locations in Pennsylvania and West Virginia. I afforded all parties a full opportunity to appear, introduce evidence, examine, and cross-examine witnesses, and argue orally on the record. General Counsel, Charging Party, and Respondent filed posttrial briefs in support of their positions.

After carefully considering the entire record, including my observation of the demeanor of the witnesses and the parties' briefs, I make the following findings and conclusions.

## FINDINGS OF FACT

### I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent is a limited liability corporation with an office and a place of business in Glen Dale, West Virginia where it is engaged in the manufacture and nonretail sale of metal lids for glass containers. In conducting its operations, Respondent annually sales and ships from Respondent's facility goods valued in excess of \$50,000 directly to points outside the State of West Virginia. Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act. (GC Exh. 1(y) and (aa).) I find that this dispute affects commerce, and the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES FACTS AND ANALYSIS

#### A. Background

Respondent manufactures metal lids for food and other glass containers. (Tr. 128.) Respondent has a 30-year history of collective bargaining with the Union and its predecessor with regards to Respondent's production, maintenance, and warehouse employees (unit).<sup>3</sup> (Tr. 109–110.) The most recent collective-bargaining agreement (CBA) covering the unit was effective from March 21, 2018, to September 30, 2019. (Jt. Exh. 1.)

<sup>1</sup> The Counsel for General Counsel (General Counsel) gave notice of intent to amend the amended consolidated complaint and made an oral motion on the record to with the allegations in paragraph 18 and 21(b) and references thereto in paragraphs 20 and 22 and in the "wherefore" paragraph. There were no objections to the amendments, and I granted the motion. (Tr. 15–16.)

<sup>2</sup> Abbreviations used in this decision are as follows: "Tr." for the Transcript, "Jt. Exh." for joint exhibits, "GC Exh." for the General Counsel's exhibits, "GC Brief" for General Counsel's posthearing brief, "R. Exh." for Respondent's exhibits, and "R. Brief" for Respondent's posthearing brief. Specific citations to the transcript and exhibits are included where appropriate to aid review and are not necessarily exclusive or exhaustive. My findings and conclusions are not based solely on the record citations contained in this decision, but rather are based upon my consideration of the entire record for this case.

<sup>3</sup> All hourly rated production and maintenance employees, including warehousemen; excluding employees on jobs covered by contracts with other unions, salaried supervisors, office clerical and other employees excluded by law.

On June 10, 2019, Respondent notified the Union of its intent to bargain for a successor to the agreement scheduled to expire on September 30. (Jt. Exh. 1, p. 5; Jt. Exh. 27(a).) A long-term representative of the Union, Stephen Shane Carlin (Carlin) was the Union's lead negotiator in contract negotiations with Respondent until August 2020. Katherine Horigan (Horigan) works for the Union and specializes in negotiating healthcare benefits for various bargaining units. (Tr. 45.) Horigan assisted Carlin, in contract negotiations and then became the lead negotiator in August of 2020. (Tr. 46, 75.) Respondent's director of human resources, Darrick Doty (Doty), was its lead negotiator.

## ***B. Changes in Unit Employee Shifts***

### **1. Positions of the parties and background facts**

While contract negotiations were ongoing, Respondent implemented 11 and 12-hour shifts for unit employees. Such long shifts had never been implemented before. General Counsel and Charging Party contend that Respondent unlawfully implemented these shifts without first giving the Union notice and opportunity to bargain and without bargaining to a contract or an overall impasse in contract negotiations. Respondent contends that it was privileged to implement the shifts, because it was maintaining the status quo as is evidenced by language in the expired CBA and past practice.

Article 9, Section 1 of the expired CBA sets a normal workweek as 40 hours to be worked in three shifts: 7 a.m. to 3 p.m.; 3 p.m. to 11 p.m.; 11 p.m. to 7 a.m. A cursory review of Respondent's weekly work schedules illustrates that these shifts were frequently adjusted. Article 9, Section 1 also states that "Management may request with reasonable notification from time to time the working hour schedule be adjusted due to production requirements or facility conditions." The parties stipulated that the "reasonable notification" requirement in this provision is satisfied by Respondent's long-standing practice of posting schedules every Thursday setting out the next week's schedule. (Tr. 130; Jt. Exh. 57.)

The weekly schedules illustrate that Respondent most often ran first and second shifts of 8 hours. Yet, it frequently adjusted the shift schedule in various ways and announced these changes by posting the upcoming week's schedule the Thursday before. (Jt. Exhs. 2 and 3; Tr. 110–111, 127–128, 130.) For example, the start time for first shift was usually 7 a.m. but it fluctuated to 6 a.m. and 5 a.m. at various times. Sometimes the first shift ended at 3 p.m. but often it was extended 15 minutes to overlap with the second shift that started at 3 p.m. Less senior employees are often moved from one shift to another to cover for employees on leave. At other times, Respondent schedules 3 eight-hour shifts, and employees are assigned to cover all three shifts. On other occasions, Respondent operated 3 overlapping shifts of 8.25 or 8.5 hours. (Jt. Exhs. 2 and 3; Tr. 127–128.) Between October 2018 and August 2020,<sup>4</sup> before the allegedly unlawful shifts were implemented, Respondent operated shifts of 10 or 10.25 hours for a total of more than 31 weeks. These longer shifts were implemented for periods before and after the

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<sup>4</sup> The record contains shift schedules starting in October 2018. The record is unclear as to whether Respondent ever altered shift lengths prior to October 2018.

contract expired. The length of time that these alternate shifts were implement varied from a couple of days to 9 weeks of operating a 10.25-hour and a 10-hour shift in the spring of 2019.

In April 2020, Respondent met and bargained with the Union about COVID-19 protocols. Respondent recommended implementing two 12-hour shifts as a measure to prevent the spread of COVID-19, but the Union opposed the measure. Respondent posted a notice to employees explaining that it offered to implement 12-hour shifts as a COVID-19 preventative measure, but the Union did not agree to the change. (GC Exh. 4; Tr. 116.)

## 2. The alleged changes to unit employees' shifts

On Thursday, August 20, 2020, Respondent posted the schedule for the following week consisting of 2 mandatory 12-hour shifts for all employees without work hour restrictions. Respondent did not give the Union prior notice or opportunity to bargain about the implementation of 12-hour shifts.<sup>5</sup> (Jt. Exh. 3, p. 47; Tr. 113–114.) This was the first time that Respondent had posted mandatory 12-hour shifts. (Tr. 112–113.) After seeing the posted schedule, Union President Lisa Wilds (Wilds) requested that the shifts be adjusted to start 2 hours earlier. Wilds request was granted the next week. (Tr. 122–123, 186; R. Exh. 11.) At the August 25 bargaining meeting, Doty commented that they achieve higher production rates with 12-hour shifts. (Tr. 155.) The Union objected to the 12-hour shifts, requested to bargain the issue, and raised safety and health concerns for the employees. (Jt. Exhs. 14, 15, 16, 17.) Respondent referenced the need to increase production to meet customer demands in its responses to the Union's requests to shorten the shifts and committed to returning to shorter shifts "as soon as possible." (Jt. Exh. 14; Tr. 114.) The 12-hour shifts continued from August 24 through October 11, then Respondent operated three 10-hour shifts for a few weeks.

On October 27, Respondent posted a notice announcing that it would start two 11-hour shifts the following week to reduce the risk of exposure to COVID-19 between employees on the shifts due to a local spike in COVID-19 positivity rates. The notice solicited the employees' preference for the 5 a.m. to 4 p.m. shift or the 5 p.m. to 4 a.m. shift. (GC Exh. 3.) During contract negotiations, Doty told Horrigan that the 11-hour shifts were implemented to cover absences due to COVID-19 testing and quarantine requirements. (Tr. 74.) The 11-hour shifts started on November 2 and continued through November 29. Respondent returned to 3 shifts of 8.5 hours through the month of December. For the weeks starting January 4 and 11, 2021, Respondent again implemented 12-hour shifts due to "exceptional workload." (GC Exh. 6, p. 1.) Although not alleged as a violation in the complaint, Respondent again implemented 12-hour shifts from February 15 through April 4, 2021. (Tr. 74; Jt. Exh. 3.)

## 3. Analysis

An employer violates Section 8(a)(5) and (1) of the Act when it unilaterally makes a material, substantial, and significant change to the wages, hours, or other terms and conditions of

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<sup>5</sup> Charging Party witnesses raised the possibility that Respondent failed to abide by Article 9, Section 11 of the CBA which covers the selection of employees for overtime work but there is insufficient evidence in the record to support such a conclusion. I note that the complaint does not allege that the assignment of overtime or the assignment of employees to particular shifts constituted unilateral changes.

employment of bargaining unit employees without first providing the collective-bargaining representative with notice and a meaningful opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736 (1962); *Ivy Steel & Wire, Inc.*, 346 NLRB 404, 419 (2006). A violation of Section 8(a)(5) does not require a finding of bad faith. *Katz*, supra at 743 and 747. Subjects falling under the language of Section 8(d) are mandatory subjects of bargaining.<sup>15</sup> “Section 8(a)(5) ... read together with Section 8(d), requires an employer to bargain collectively with the representative of his employees ‘with respect to wages, hours, and other terms and conditions of employment.’” *Pepsi-Cola Bottling Co. of Fayetteville, Inc.*, 330 NLRB 900, 902 (2000), citing *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Therefore, changes to employees’ shifts are mandatory subjects of bargaining. *Hedison Mfg. Co.*, 260 NLRB 590, 592–594 (1982) (holding that a 5-minute change in employee starting time is a mandatory subject of bargaining).

Where, as in this case, the collective-bargaining agreement has expired, an employer has a statutory duty to maintain the status quo of mandatory subjects of bargaining until the parties reach a new agreement or a valid impasse in negotiations. See *Triple A Fire Protection*, 315 NLRB 409, 414 (1994), enf’d. 136 F.3d 727 (11th Cir. 1998), cert. denied 525 U.S. 1067 (1999). Failure by the employer to maintain the status quo constitutes a violation of Section 8(a)(5) and (1). To determine the status quo, the Board considers the substantive terms of the expired collective-bargaining agreement and any past practices that are “regular and long-standing, rather than random or intermittent” and do not vary in kind or degree from what has been customary in the past. *Sunoco, Inc.*, 349 NLRB 240, 244 (2007); *Wendt Corp.*, 369 NLRB No. 135, (2020); *Asociacion De Empleados Del Estado Libre Asociado De Puerto Rico*, 370 NLRB No. 71, slip op. at 3 (2021); *Nexstar Broadcasting, Inc. d/b/a KOIN-TV*, 369 NLRB No. 61, slip op. at 3 (2020); *PG Publishing Co., Inc. d/b/a Pittsburgh Post-Gazette*, 368 NLRB No. 41, slip op. at 3 (2019). The party asserting the existence of a past practice bears the burden of proving that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to reoccur on a consistent basis. *Sunoco*, supra, at 244; *Mikesell’s Potato Chip Company*, 368 NLRB No. 145, slip op. at 3 (2019).

Here, the expired CBA contains explicit language that granted Respondent the privilege to alter work shifts based upon production needs and conditions in the facility and the language contains no explicit limits on how Respondent may alter the shifts. Respondent frequently altered shift schedules during the term of the contract and after its expiration. Thus, the question here is whether the allegedly unlawful 11 and 12-hour shifts imposed by the Respondent varied in kind and degree enough from past practice to constitute a change. I find that nothing in the record contradicts Respondent’s stated reasons for the shift changes of production needs and its attempts to prevent the spread of COVID-19 for the benefit of its employees and for production purposes. Thus, I find that the reasons for changing the shifts align with past practice and the language of the expired CBA.

General Counsel and Charging Party point to the significant increase in the length of the shifts, to support their arguments that shift changes varied in degree from the status quo.<sup>6</sup> The

<sup>6</sup> General Counsel and Charging Party also argued that the long shifts heightened the possibility of injuries caused by fatigue. While I understand the Union’s desire to argue against the implementation of such long shifts, I do not find the safety and personal arguments relevant to whether Respondent was privileged to implement the shifts. I further note that there is no evidence in the record of increased safety issues caused by the longer shifts.

shifts were 45 minutes and 105 minutes longer than any prior shift. Charging Party relies upon *Raytheon Network Centric System*, 365 NLRB No. 161 (2017) and *Pepsi-Cola Bottling Co. of Fayetteville, Inc.*, 330 NLRB 900 (2000) to support its claim that the 11 and 12-hour shifts were unlawful material, substantial, and significant changes to past practice. In *Pepsi-Cola Bottling*, the Board found that a 15-minute change to the employees' start time was a material and substantial change to their working conditions. I do not find the Board's holding in *Pepsi-Cola Bottling* instructive here, because the employer, unlike in the instant case, did not have a past practice of altering employees' shifts or contract language relevant to the issue.

Here, Respondent frequently exercised broad leeway in establishing the number, length, and start and end times of shifts. Over the preceding 2 years, these changes in shifts varied significantly and often lasted for weeks. Respondent also apparently exercised leeway in assigning employees to the various shifts, especially when it operated 3 shifts. Even long-term employee witnesses noted checking the weekly shift assignments to verify their assigned shifts. I find no consistent pattern amongst Respondent's changes to the shifts before or after the expiration of the CBA. I also find no prior history of complaints about kind or degree of these changes that varied as much as 2 ¼ hours more than the regular shift and varied from 2 to 3 shifts per day.

I find that the facts of this case more closely aligned with cases in which the Board has determined whether an employers' subcontracting of work constituted a past practice. The standard for what constitutes a substantial change in subcontracting has vacillated over the years with the most recent standard set forth in *Raytheon* and clarified in *Mikesell's Potato Chip Company*, 368 NLRB No. 145 (2019) (noting that in *Raytheon*, the Board reaffirmed *Shell Oil Co.*, 149 NLRB 283 (1964) and *Westinghouse Electric Corp. (Mansfield Plant)*, 150 NLRB 1574 (1965)). In *Mikesell's Potato Chip*, the Board held that under *Raytheon*, it is not necessary to show mathematical consistency in the subcontracting of work to establish a past practice of subcontracting. The Board noted that the subcontracting of work is often based on the varying nature of workflow, and therefore, despite a frequent practice of subcontracting, it will likely not be mathematically consistent and require some discretion on the part of the employer. In *Mikesell's Potato Chip*, the Board found that the company's selling/contracting out of 51 driver routes over a 19-year period constituted a past practice, even though the yearly sales of such routes varied from 0 in many of those years to 30 in 1 year. Id.

Much like cases involving subcontracting of work, in the instant case, the expired CBA language allowed for changes in the regular shift in response to changes in workflow. The record established that over the last few years Respondent frequently, but on an inconsistent basis and in inconsistent ways, used its discretion to change employee shifts to meet production demands. I recognize that an 11 or 12-hour shift is significantly different to employees than an 8-hour or even a 10.25-hour shift and that such inconsistent changes most likely would have been found unlawful under Board holdings immediately preceding *Raytheon*. Yet, under current Board precedent as applied in *Mikesell's Potato Chip*, where the Board found lawful the sale of driver routes based upon a widely inconsistent past practice in the frequency and number of routes sold, I find that Respondent's implementation of the 11 and 12-hour shifts was a continuance of its past practice of altering shifts in widely varying ways to meet production needs.

#### 4. Conclusion

Accordingly, I find that the 11 and 12-hour shifts were a lawful continuation of Respondent's past practice of altering shifts to meet production demands, and therefore, the implementation of the 11 and 12-hour shifts did not violate Section 8(a)(5) and (1) of the Act.

#### *C. Requests for Information*

##### 1. The facts

On July 16, Carlin sent Doty an email requesting information. (Jt. Exh. 24(a).) Carlin's email stated that the "information is relevant and necessary in order for the Union to analyze the Company proposal(s), formulate our own proposals, and to otherwise bargain on an informed basis and to perform our function as the exclusive bargaining representative of bargaining unit employees." Doty noted in a July 27 email to Carlin that he was working on the information requests, but there are no further communications specifically in response to the July 16 email. (Tr. 36, 37, 76; Jt. Exh. 24(b).) Respondent's counsel questioned Carlin about whether he received answers to some of these requests at the bargaining table to which Carlin responded that he did not recall receiving the information. (Tr. 40.) Respondent provided no evidence to contradict this testimony.

For ease of reference, I have copied each of the requests from the July 16 email below. After each request, I note the date that the parties stipulated that the information was provided or that the request became moot because the related contract proposal had been withdrawn or modified. (Jt. Exh. 57, par.24.)

– Information Request:

1. List all "objective measurements" that presently exist and have been and/or may be applied to sustain discipline under the company's proposal relative to ARTICLE 5 -Hiring, Releasing, Quitting and Discharging.  
--Relevant proposal was withdrawn March 18, 2021.
2. Describe and define with specificity the meaning of "balancing shift skills" as set forth in the company's proposal relative to ARTICLE 8 - Seniority and describe how that language would practically operate.  
--Information provided on October 27, 2021.
3. Provide the total amount of savings that the company would experience in the first year of a new agreement, by paying employees \$10 for their lunch break(s) as proposed in the company's proposal relative to ARTICLE 9 - Work Hours and Overtime Premium Pay. Please include all calculations used. Additionally, please describe the need for this change, the resulting savings, and how/where any savings will be applied.  
--Relevant proposal was withdrawn March 18, 2021.
4. Provide the amount of overtime pay that is attributed to hours worked on Saturday(s), pursuant to ARTICLE 9 - Work Hours and Overtime Premium Pay,

Section 3 of the current agreement, that has been paid to bargaining unit employees over the past 24 months (include total hours worked and total hours paid. Additionally, please provide the projected savings to the company in the first year of a new agreement, if the Saturday overtime requirement were to be eliminated pursuant to the company's proposal relative to this article and section. Please provide an explanation of the necessity for this proposed change and how/where any savings would be applied.

--Information provided on October 27, 2021.

5. Provide the number of emergency vacation requests that the company has received over the last 24 months (include the number that were denied and the number that were approved as well as the reason for each approval and each denial).

--Information provided on October 27, 2021.

6. Explain the basis for proposing to provide payment of any unused vacation pay in the subsequent year rather than in the current year as is presently required. Additionally, please describe any tax consequences (to each the company and employees) that may be experienced as a result of the company's proposed change.

--Information provided on October 27, 2021.

7. Provide a list of all past practices that the company believes are presently in effect including but limited to the past practice described by the company at our recent bargaining session regarding the payment, by the company, of the employee's health insurance premium share while the employee is off from work due to sickness or disability.

--Relevant proposal was withdrawn May 20, 2021.

In a November 2 email, Doty told Horigan that he believed he had responded to the outstanding information requests except for one on which he was working and which is not at issue here. Doty went on to state, "If you will specify what information you believe we still owe you I will address it." (Jt. Exh. 26, p. 7.) On November 4, Horigan responded by email stating, "Contrary to your statements in the email below, the Company has not responded to any of the requests for information I made on September 24, and there are multiple other requests for information outstanding (including, for example, regarding temporary employees, mask warning letters, and employee health reimbursement account balances)." (Jt. Exh. 26, p. 7.)

After providing a significant amount of additional information on November 10, Doty again stated "that we are not aware of any request for information, many indeed, that is still pending. Should you need anything else, please do not hesitate to ask." (Jt. Exh. 26, p. 5.) Horigan and Doty emailed back and forth about information requests and other issues on November 10 and 11. Horigan never raised the issue of Carlin's July 16 request in response to Doty's inquiries as to whether he had provided all the requested information, and there were no further interactions about the July 16 request until the Respondent provided information after the charges in this matter were filed. (Tr.76.)

The Union's request for information about the administrative cost for Respondent to perform dues deductions and remittance to the Union, which is at issue here, was discussed in



this email chain. In a November 10 email from Doty to Horigan, he provided Respondent's calculation of its administrative cost in performing dues deductions and remittance to the Union. Respondent's calculation was based upon 15 minutes of administrative time per unit member per month. Horigan responded by requesting information about the specific tasks that required 15 minutes per employee per month. (Jt. Exh. 26, p. 4.) On November 11, Doty responded, I do not have to justify our position. The Company has an absolute right under NLRB precedent to discontinue dues checkoff and has determined to exercise that right." (Jt. Exh. 26, p. 3.) Horigan responded by email on November 11 that the Union wanted the specific information about the expenses in performing the dues deduction to make proposals that could possibly reduce the costs. This November 11 request was not discussed again until October 27, 2021, when Respondent made it clear that it simply did not want to make dues deduction and that costs was not the issue. (Tr. 77.)

## 2. Legal standards

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of its employees." 29 U.S.C. § 158(a)(5). An employer has a general duty to provide information needed by the bargaining representative in contract negotiations and administration. See *A-I Door & Building Solutions*, 356 NLRB 499, 500 (2011); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956). Typically, information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. See *Southern California Gas Co.*, 344 NLRB 231, 235 (2005). Information concerning non-unit employees is not presumptively relevant, requiring the union to provide an explanation as to how the information is relevant to its bargaining duty. *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994).

Where a showing of relevance is required because the request concerns non-unit matters, the burden is "not exceptionally heavy." *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), *enfd.* 715 F.2d 473 (9th Cir. 1983); *Shoppers Food Warehouse*, 315 NLRB at 259. "The Board uses a broad, discovery-type of standard in determining relevance in information requests." *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006); *NLRB v. Acme Industrial Co.*, *supra*, at 437. The issue is whether the Union's request for information is of "probable" or "potential" relevance. *Transport of New Jersey*, 233 NLRB 694, 694 (1977) (citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967)); *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1105 (1991) ("the information need not be dispositive of the issue between the parties but must merely have some bearing on it"). *W-L Moulding Co.*, 272 NLRB 1239, 1240 (1984), quoting *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 957 (6th Cir. 1969) and *Acme Industrial*, *supra* at 437. It is not the Board's role to pass on the merits of the Union's claim, "[t]he Board's only function in such situation is in 'acting upon the possibility that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'"

For information that is not presumptively relevant, the union must demonstrate that it had "a reasonable belief supported by objective evidence for requesting the information." *Shoppers Food Warehouse*, 315 NLRB at 259. "The union's explanation of relevance must be made with some precision; and a generalized, conclusory explanation is insufficient to trigger an obligation

to supply information.” *Disneyland Park*, 350 NLRB at 1258 fn. 5. Actual relevance is not required, but the union must demonstrate a probability that the data is useful for the purpose of bargaining intelligently. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *Brown Newspaper*, supra. To make this showing, “the General Counsel must present evidence either (1) that the union demonstrated relevance of the nonunit information, or (2) that the relevance of the information should have been apparent to the respondent under the circumstances.” *Murray American Energy, Inc.*, 370 NLRB No. 55 (2020) (*Murray II*), quoting *Murray American Energy, Inc.*, 366 NLRB No. 80 (2018) (*Murray I*), enfd. mem. 765 Fed.Appx. 443 (D.C. Cir. 2019).

Once the burden of showing the relevance of non-unit information is satisfied, the duty to provide the information is established. Information that is not presumptively relevant may have “an even more fundamental relevance than that considered presumptively relevant.” *Prudential Insurance Co. of America v. NLRB*, 412 F.2d 77, 84 (2d Cir.), cert. denied 396 U.S. 928 (1969). The refusal of an employer to provide information that is request by a union and relevant to its bargaining duties is a per se violation of [Section 8(a)(5) of] the Act” without regard to the employer’s subjective good or bad faith. *Brooklyn Union Gas Co.*, 220 NLRB 189, 191 (1975); *Procter & Gamble Mfg. Co.* 237 NLRB 747, 751 (1978), enfd. 603 F.2d 1310 (8th Cir. 1979).

The Board has also found that “[a]n unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all.” *Monmouth Care Center*, 354 NLRB 11, 41 (2009) (citations omitted), reaffirmed and incorporated by reference, 356 NLRB 152 (2010), enfd. 672 F.3d 1085 (D.C. Cir. 2012). “[I]t is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable, good faith effort to respond to the request as promptly as circumstances allow.” *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). “In evaluating the promptness of the employer’s response, ‘the Board will consider the complexity and extent of information sought, its availability, and the difficulty in retrieving the information.’” *West Penn Power Co.*, 339 NLRB 585, 587 (2003) (quoting *Samaritan Medical Center*, 319 NLRB 392, 398 (1995)), enfd. in relevant part 394 F.2d 233 (4th Cir. 2005).

### 3. Analysis

Not all of the requests at issue were for presumptively relevant information about employees’ terms and conditions of work, but the requests were prompted by bargaining proposals made by Respondent. I find that the relevance of the information requests should have been apparent to Respondent based upon the circumstances. Furthermore, the requests themselves noted that they were directly related to bargaining proposals advanced by Respondent. Therefore, I find that the Union met its burden of informing Respondent of the relevance of the requested information and triggered Respondent’s duty to provide the information promptly after the requests were made.

Ultimately, the requested information was provided or became moot due to changes in bargaining proposals. Therefore, the issue is whether the information was timely provided. Respondent does not dispute that Doty received Carlin’s July 16 request for information and in a July 27 email Doty acknowledges that he is working to provide information. Instead, Respondent

contends that it should be excused from failing to timely provide the information requested on July 16 because the Union did not renew this request in response to Doty's emails in early November inquiring about whether there was still outstanding information. The problem with this argument is that nearly 4 months had passed between when the request was made and Doty's November email. The parties were exchanging proposals and conducting bargaining sessions throughout this time. By November, Respondent already failed to timely provide the information. The record contains no evidence that would excuse the 4-month delay in responding to the request. Furthermore, the information requested in the July 16 email remained relevant to bargaining until Respondent changed its proposals or provided the relevant information months later. Thus, I find that Respondent's failure to timely provide the information requested in Carlin's July 16 email violated Section 8(a)(5) and (1) of the Act.

Regarding the Union's request for cost information about performing dues deductions, the Union was seeking the information in response to statements made by Respondent at the bargaining table about the administrative costs of deducting dues. Respondent provided an estimate of the costs to which the Union requested clarification on November 10. Instead of providing the information, on November 11 Doty responded that he did not have to justify Respondent's position and that Respondent had decided to exercise its right to stop dues deductions. On that same date, Horigan renewed the Union's request for the specific information about the expenses in performing the dues deduction to make proposals on that issue.

While I agree with Doty that Respondent did not have to justify its position on dues deduction and, absent an effective contract provision requiring otherwise, it could discontinue dues deduction, those are separate issues from Respondent's duty to provide information relevant to bargaining proposals. Doty's email did not provide the requested information and Horigan's response clarified that the Union was still seeking the information to be used in contract negotiations. It was not until October 27, 2021, that Respondent clarified that it simply did not want to make dues deduction and costs was not the issue. Such information was germane to contract negotiations, especially since Respondent contended that the Union's refusal to agree to exclude dues deduction from a subsequent collective-bargaining agreement was one of its justifications for declaring impasse.

#### **4. Conclusion**

Accordingly, I find that Respondent failed and refused to timely provide the information requested in Carlin's email on July 16 concerning bargaining proposals and the information requested in Horigan's email on November 11 concerning the tasks involved in deducting dues from employees' wages, in violation of Section 8(a)(5) and (1) of the Act.

#### ***D. Implementation of Changes to Unit Employees' Healthcare Benefits***

##### **1. The facts**

The parties started bargaining in the fall of 2019. Respondent made clear that it wanted to remove the arbitration procedure from any future collective-bargaining agreement. Over time, Respondent asserted 3 main objectives in bargaining: rid any future agreement of an arbitration clause; discontinue dues deductions; and negotiate a new healthcare benefit package.

As the end of 2019 approached, Respondent expressed its intent on implementing a new healthcare package in 2020. Respondent contends that the parties negotiated healthcare benefits separately in the past and should have done so at the ends of 2019 and 2020. The record establishes that there was a practice of notifying employees of premium increases and allowing employees to add, drop, or change type of coverage under the established benefit plan not a new benefit plan. These limited changes were contemplated by the prior collective-bargaining agreement and were discussed with union leadership each year before the information was provided to the employees. (Tr. 167–168; CP Exh. 1, Art. 16.) The yearly election forms provided to the employees noted at the bottom of the form that premium increases were divided 33 percent and 66 percent between the employees and the company per the existing contract. Other healthcare benefit changes are not reflected in these forms. (R. Exhs. 18 and 19.) Ultimately, the 2019 healthcare benefits were continued into 2020. (Tr. 49–51; Jt. Exh. 21(a).)

Negotiations continued into 2020 with Respondent presenting its first wage proposal on February 14. (Tr. 80; Jt. Exh. 35, p. 30.) At the March 13, 2020, bargaining session, Respondent presented a chart outlining 4 healthcare benefit options offered by the provider. (Tr. 51; Jt. Exh. 36.) Initially, the parties’ discussions centered around Option 3, which mostly dealt with healthcare cost increases by increasing premiums for the employer and the employees, and Option 6, which minimized premium increases by requiring higher Health Reimbursement Arrangement (HRA) contributions by the employer and out-of-pocket expenses by the employees.<sup>7</sup> (Tr. 53.)

During contract negotiations, Company representatives repeatedly noted that continuing the 2019 plan into 2020 without sharing the increased expenses with employees had already cost Respondent \$330,000 and that costs would continue to accrue if a new plan was not implemented. Respondent sought to regain these losses through concessions on the Union’s part in contract negotiations. (Tr. 49–51.)

As negotiations wore on, Respondent’s focus shifted from Option 3 to Option 6. Horigan testified that she understood Option 6, as set forth in the benefit plan chart, to contain a significant decrease in Respondent’s contribution to the HRA from the current benefit plan. Under the 2020 plan, Respondent was contributing \$4,750 to individual and \$9,500 family plans’ HRAs. Horigan read the Option 6 to show a reduction in those amounts to \$1,300 and \$2,600. (Tr. 54, 80.) Based upon the chart and the testimony of Doty, I find that the credible evidence does not support this claim.<sup>8</sup> (Tr. 157–160.) Her interpretation of the chart may have stemmed

<sup>7</sup> Option 3 included relatively modest increases in primary care, specialist care, and emergency room copays and would increase Respondent’s premiums by \$163,889<sup>7</sup> and employees’ premiums by 8.4 percent. Option 6 included the same copay increases as Option 3, decreases in percentages covered by the insurance benefits after deductibles are reached, resulting in increases in out-of-pocket spending for employees. Option 6 also requires additional employer funding for HRA of \$1300 for individual and \$2600 for family benefits. The net result in premium increases for Option 6 is \$44,327 for Respondent and 2.3 percent for employees. I assume that premium amounts for the employer are monthly versus yearly increases, but the record is not clear.

<sup>8</sup> Line 10 is labeled “Increase to Proposed HRA Funding” and in front of the figures for that line under Option 6 there is a “+” sign. Line 11 notes the “Maximum HRA Liability Increase” with a total \$240,500. Finally, line 49 “Estimated HRA Funding” notes an estimated increase in HRA funding costs from the 2020 plan of \$41,939. Therefore, I find that a full reading of the document illustrates that Option 6 required Respondent to increase its contributions to the HRA by \$1,300 for individual and \$2,600 for family plans, but that did not eliminate higher premiums and out-of-pocket expenses for unit employees.

from Respondent's insistence in negotiations on regaining the increased costs of health benefits that it was shouldering while contract negotiations continued even if that resulted in large financial losses for the employees. (Tr. 56, 94, 96.)

While I do not find that Option 6 of the chart reads as Horigan testified, it is clear that Respondent sought to share the rising cost of healthcare benefits with employees differently than it had in the past and that is reflected in the plan choices chart. Option 3 achieved that goal by increasing employee premiums. Option 6 achieved that goal by increasing HRA donations and premiums for Respondent and significantly increasing out-of-pocket expenses for employees and employee premiums. Under Option 6, employee out-of-pocket expenses would significantly increase because of increased co-pay costs and a decrease in the percentage of healthcare expenses the plan would cover in comparison to the policy in place in 2020. (Jt. Exh. 36.) As discussed more below, the parties continued to negotiate over how to share the increased costs of the healthcare benefit Option 6 and the split of those costs that were implemented on January 1, 2021, is not reflected in the benefit plans chart.

The Union's proposal dated August 25 specified that Option 3 would be offered. The Company's August 25 proposal also offered only Option 3 and contained proposed language on how to handle yearly premium changes during and after the proposed collective-bargaining agreement expired.<sup>9</sup> Horigan testified that despite the written proposals during the August 25, 2020, bargaining session, Respondent representatives stated that it was no longer offering Option 3 and that Option 6 was the only healthcare benefits option on the table. (Tr. 57; Jt. Exh. 40, 41 and 42.)

In response, the Union offered a packaged counterproposal on August 25, 2020, indicating that any offers made in the proposal required acceptance of the entire contract proposal. (Tr. 60–61; Tr. Jt. Exh. 42.) Respondent representatives asserted that its priority in contract negotiations at that time was healthcare benefits. The Union's counterproposal offered to agree to healthcare Option 6; all tentative agreements, base wage increases of \$1.00 on October 1, 2020, and \$1.05 on October 1, 2021; pension increase of \$0.10/hour; the company's proposed drug testing policy with some changes; and all other articles would revert to the expired CBA's language. This proposal by the Union was a shift to Respondent's desired healthcare benefits but left the arbitration procedure and the dues deduction provisions in place, which Respondent opposed.

On September 24, 2020, Respondent submitted a counterproposal again omitting the articles covering arbitration and dues deductions. (Jt. Exh. 43.) Respondent expressed throughout negotiations that it did not want to agree to a collective-bargaining agreement with an arbitration provision and did not want to deduct and remit union dues. (Tr. 100, 102.) The Union took differing positions on a grievance and arbitration provision based upon other things it offered in its various contract proposals. At their September 24, 2020 meeting, the Union indicated their willingness to negotiate a contract without an arbitration provision. (Tr. 101.) None of the Union's proposals acquiesced to all 3 of Respondent's demands for no arbitration clause, no dues deduction, and the implementation of healthcare benefits Option 6.

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<sup>9</sup> Respondent's proposal allowed it to change providers of such coverage, negotiate yearly premium increases for employees, contribute a limited amount towards employee deductibles, etc. (Tr. 58, Jt. Exh. 41.)

At the October 28, 2020 bargaining session, the parties discussed healthcare Option 6 as the Union was no longer insisting on Option 3. The parties discussed their positions on healthcare and other proposals during the morning bargaining session. (Tr. 61, 62; Jt. Exh. 44.)

5 The parties took a lunchbreak and when they met in the afternoon, Respondent presented the Union with a letter declaring impasse. (Jt. Exh. 30.) The letter states:

We have told you that we will not sign an agreement with an arbitration clause in it - it is the company's most important issue. We have asked directly whether the union would sign a contract without arbitration. Instead of providing an answer to that direct question the Union has stated that it is willing to negotiate. There is  
10 nothing to negotiate about, and if that is your position then we are at impasse.

Horigan questioned Doty as to whether he stood by the declaration of impasse and he stated that he did. (Tr. 64.) When discussing impasse, Respondent's representatives always mentioned Respondent's position on dues, arbitration, and healthcare, but the letter stated that  
15 the company was declaring impasse over the arbitration issue. (Tr. 79.) Horigan stated that the Union did not agree that they were at impasse and eventually asked if Respondent had an implementation date, but no date was set. Horigan requested another bargaining session before any implementation date to which Doty eventually agreed. (Tr. 64.)

In a November 11 email to Horigan, Doty explained Respondent's decision "that  
20 effective January 1, 2021, the USW members will be enrolled into option 6 plan that has been presented throughout negotiations and tentatively agreed by the union with HRA funding by the Company \$1,0000/\$2,000 with member contribution split 50/50 of the increase which is under calculation and will be presented at the table tomorrow."<sup>10</sup> Horigan responded by email denying such an agreement.

25 The parties met again on November 12 for bargaining and Doty admitted that the parties did not have a tentative agreement to implement option 6 healthcare as he had stated in his email. (Tr. 65.) Respondent presented a counter to the Union's October 28 proposal, and the Union presented a counterproposal. (Jt. Exh. 45 and 47.) At the table Doty, again complained about Respondent's ongoing healthcare expenses under the existing plan. Respondent provided the  
30 Union with 2021 healthcare benefit premium increases for carrying the 2019 plan forward and premium information for Option 6. (Tr. 66, 67; Jt. Exh. 46.)

On November 24, Respondent provided the Union with an outline of its counter to the Union's November 12 proposal and commented that: "Please also be aware the timing of health  
35 insurance and the fact that unless there is agreement sufficiently in advance of when changes need to be communicated to the carrier, the Company will implement its last proposal on health insurance." (Jt. Exh. 48 and 49.)

The Union provided a counterproposal on November 24. (Jt. Exh. 50.) On November 25, Doty emailed Horigan stating that he believed if the Union had not presented their proposal as a

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<sup>10</sup> The HRA contributions mentioned here and apparently implemented on January 1, 2021, are less than what was listed under Option 6 of the plan chart resulting in higher healthcare expenses for unit employees than the Option 6 list on the plan chart indicates.

package, they could have made progress on the Union's proposals for "Article 3 Labor-Management Committee, Article 9 Work Hours and Overtime Premium Pay, Article 15 Vacations, Article 18 Relief /Breaks, Article 26 No Strike or Lockout, and the deletion of Article 27 and Article 28 Grievance and Arbitration." Doty sent Horigan Respondent's latest proposal and questioned whether the Union wanted to meet on December 3. (Jt. Exh. 21(b).)

The parties recapped their positions taken at the December 3 negotiation meeting through emails. (Jt. Exh. 23.) Doty inquired as to whether the Union would agree to a Memorandum of Understanding (MOU) separating the issue of healthcare from overall contract negotiations and allowing for Option 6 to be implemented with premium increases split 50/50 and company contributions to HRA accounts of only \$1,000 for single and \$2,000 for family plans. While the Union did not oppose Option 6, it did oppose this split of the cost increases and Respondent ultimately did not present the Union with a proposed MOU on healthcare. (Tr. 69; Jt. Exh. 23, p. 1 and 2.) Doty declared in his December 3 email that they were at impasse over healthcare, since the healthcare insurance provider's deadline was the next day and they had not reached an agreement on the issue. (Jt. Exh. 23, p. 2.) By email, Horigan rejected Doty's claim of an impasse. (Jt. "Exh. 34.) A few hours after bargaining ended on December 3, the Union sent a revised proposal to the Respondent. (Tr. 70; Jt. Exhs. 23 and 51.) While the healthcare benefits continued to be the focus at the bargaining table, the Union's proposals and statements at the table expressed willingness to negotiate towards an agreement on arbitration clause and dues deduction issues as it had in its November 24 proposal. (Jt. Exh. 21(b) and 34.)

In his emails, Doty repeatedly speaks of resolving the healthcare issue by the carrier's deadline amidst ongoing negotiations. For example, in his December 5 email Doty stated, "We believe that is unlikely to achieve an overall bargaining agreement by the holidays and the purpose of my e-mail is to hear the decision of the Union on the possible options offered by the selected health care provider or please submit your proposals." (Jt. Exh. 21(a), p. 8.)

At some date before December 16, 2020, Respondent distributed a healthcare election form to unit employees. (Tr. 71, 72; Jt. Exh. 13.) The form instructed unit employees to indicate their selection of single, family, or no healthcare benefits on the form and return it by December 16. The election form was not for the continuation of the 2019 healthcare benefits but for the new healthcare plan outline in Option 6 and scheduled to start on January 1, 2021. The form noted that it was for "Option 6 (\$5,000/10,000 Deductible \$10 PPO & \$10/20/50 Rx" with Respondent paying HRA contributions to cover only \$1,000 of the \$5,000 deductible for the single plan and \$2,000 of the \$10,000 deductible for the family plan. (Jt. Exh. 13.) Respondent distributed the form without giving the Union prior notice and implemented the Option 6 healthcare benefits on January 1, 2021, midst ongoing contract negotiations that continued well into 2021. (Jt. Exh. 52-56.) Respondent did not implement a last, best, final overall contract proposal.

## 2. Were the parties at Impasse?

Section 8(a)(5) of the National Labor Relations Act requires an employer to provide its employees' representative with notice and an opportunity to bargain before instituting changes in any matter that constitutes a mandatory bargaining subject. *NLRB v. Katz*, 369 U.S. 736 (1962); *Toledo Blade Co.*, 343 NLRB 385 (2004). Pensions and insurance benefits of active

employees is a mandatory subject of bargaining. *Allied Chemicals*, 404 U.S. 157 (1971). A unilateral change in a mandatory subject of bargaining is unlawful only if it is a “material, substantial, and significant change.” *Alamo Cement Co.*, 281 NLRB 737, 738 (1986). During contract negotiations, an employer has the duty to maintain the status quo until a contract or a valid impasse in negotiations has been reached.

As discussed above, I find that the changes to the healthcare benefits were material, resulting in significant changes to employees’ out-of-pocket expenses, deductibles, and premiums. Indeed, Respondent urged the Union to negotiate concerning healthcare benefits because of the substantial increases in benefit costs and the variation in what expenses or percentage of expenses the offered benefit plans covered. Furthermore, the plans being offered contained substantial changes to the structure of the provided benefits that effected the out-of-pocket expenses for employees and/or the percent of expenses covered. Respondent argues that the parties always negotiated such changes separate from overall contract negotiations. To the contrary, the changes contained in the offered benefit options were substantially different than the changes in just the premiums under the same plan offered throughout the life of the CBA. On January 1, 2021, Respondent did not just implement new premiums, but it implemented a new benefit plan that substantially changed the expenditures covered and increased out-of-pocket expenses for unit employees. Because it was a substantial and material change to the employees’ healthcare benefits, Respondent was required to maintain the status quo until the parties negotiated a successor contract or bargained to an overall impasse in negotiations.

To determine whether a party has violated its statutory obligation to bargain in good faith to a valid impasse before implementing changes, the Board examines the totality of the party’s conduct, both at and away from the bargaining table. *CP Anchorage Hotel 2, LLC, d/b/a Hilton Anchorage*, 370 NLRB No. 83, slip op. at 2 (February 10, 2021); *Phillips 66*, 369 NLRB No. 13, slip op. 4 (2020). The Board considers a party’s conduct for evidence of good or bad faith in bargaining, including delay tactics, the nature of the bargaining demands, unilateral changes in mandatory subjects of bargaining, and efforts to bypass the union. *Atlanta Hilton & Tower*, supra at 1603. In addition, the Board has reiterated that in some instances, specific bargaining proposals “may become relevant in determining whether a party was making a sincere effort to reach an agreement.” *Phillips 66*, supra, slip op. at 4, fn. 9. In analyzing these factors, the Board looks at the totality of the circumstances and one or two factors alone, however, 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). A party claiming an impasse as the basis for its unilateral actions bears the burden of proving that an impasse in negotiations existed. *Tom Ryan Distributors, Inc.*, 314 NLRB 600, 604 (1994), *Wayneview Care Center*, 664 F.3d 341, 347 (D.C. Cir. 2011). Whether a bargaining impasse exists is “a matter of judgment.” *North Star Steel, Co.*, 305 NLRB 45, 45 (1991), enf’d. 974 F.2d 68 (8th Cir. 1992).

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



the pension issue resulted in impasse, and destroyed any opportunity for reaching an agreement); *In Re Richmond Elec. Servs., Inc.*, 348 NLRB 1001, 1002 (2006); *Cotter & Co.*, 331 NLRB 787, 787 (2000) (whether an impasse exists depends, among other things, on “the importance of the issue or issues as to which there is disagreement”). A party contending that an impasse on a single, critical issue justified its implementation of other bargaining proposals must demonstrate three things: (1) the actual existence of a good-faith bargaining impasse; (2) that the issue as to which the parties are at impasse is a critical issue; (3) that the impasse on this critical issue led to a breakdown in the overall negotiations—in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved. *Calmat Co.*, 331 NLRB 1084, 1097 (2000).

At different times Respondent asserted to the Union that they were at impasse with regards to eliminating the arbitration clause and dues deduction and then later with regards to healthcare benefits. Respondent contends that the Union’s failure to agree to these conditions resulted in an overall impasse that allowed it to implement the healthcare benefit changes. The totality of the circumstances does not support that Respondent met the first and third requirements under the test set forth in *Calmat*.

At the outset of bargaining, Respondent informed the Union that its most important goal was for the successor contract to not have an arbitration procedure. As bargaining wore on, Respondents expanded its non-negotiable goals to include the elimination of dues deductions and agreeing upon a new healthcare benefit program by the benefit provider’s December deadline. Respondent contends that the Union’s failure to agree to these demands resulted in an impasse that allowed it to implement the healthcare benefits on January 1, 2021.

On October 28, Respondent presented a letter to the Union declaring impasse because the Union had not agreed to a contract with no arbitration clause. I find that this declaration of impasse was premature. On that date, the Union’s request for information about the administrative tasks necessary to complete dues deductions that formed the basis for the cost information provided by Respondent was still outstanding. Respondent failed to inform the Union that it was not the administrative costs but simply Respondent’s opposition to performing dues deduction that was the basis for its position until a year later. Without this information, the Union’s ability to make proposals on this issue was hindered. Furthermore, as the November emails between the parties reflect a significant amount of other information having a similar negative effect on the progress of bargaining. Such circumstances do not support a finding that a valid impasse could have existed.

As December approached, the parties had made some progress in negotiating healthcare benefits. The Union’s August 25 proposal agreed to Respondent’s Option 6 healthcare proposal. From there forward, the Union expressed its willingness to agree to Option 6 with continued negotiation on costs sharing as part of an overall contract. Respondent voiced its intent on meeting the healthcare benefit provider’s deadline regardless of the status of contract negotiations. The Union responded that did not preclude the possibility of reaching a separate agreement on healthcare benefits, but it did not agree that Respondent could implement the changes without reaching a MOU on healthcare, an overall contract, or an overall negotiations impasse. To support its claim that negotiations were at impasse, Respondent points to the Union’s proposals in which it agreed to some but never agreed to all three of Respondent’s bargaining goals. Respondent contends that the Union knew that its failure to agree to its three

main demands was a poisonous pill that would not advance negotiations. While negotiations certainly would have moved faster if the Union agreed with Respondent's three demands, that does not equate to no forward progress. Proposals where a party gives on an important issue and seeks clarification on whether the other party will adjust its demands on other issues, like the Union did by packaging its agreement with Option 6 healthcare benefits without agreeing to eliminating the arbitration clause or dues deduction, is an expected tactic in the give and take of bargaining. During this time, the Union continued to seek information to bargain about dues deduction and offered to consider alternatives or even the exclusion of an arbitration clause depending upon reaching agreement on other proposals. Such stances do not indicate an impasse in bargaining.

More importantly, Doty's emails to Horigan in December reflect that the Respondent knew the parties were not at a valid impasse. Doty expressed his concern about whether negotiations can be completed in time to implement new healthcare benefits on January 1, 2021. Doty offered to settle the healthcare benefits separately because he viewed it as unlikely that they would be able to complete overall contract negotiations by the deadline imposed by the benefit provider. Despite Doty's inconsistent claims about impasse, the parties continued to meet and bargain well into 2021.

Accordingly, I find that Respondent failed to establish the actual existence of a good faith bargaining impasse or that the impasse on the issue of arbitration clause or dues deduction had led to a breakdown in the overall negotiations preventing progress on any aspect of the negotiations until the impasse relating to those critical issues was resolved.

### 3. Did exigent circumstances exist?

Respondent further contends that even if it was not privileged to implement the healthcare benefits due to an impasse in bargaining, then the insurance deadline imposed by the benefits provider resulted in exigent circumstances that allowed it to implement the healthcare benefits. The Board recognizes an exception to the duty to give prior notice and opportunity to bargain or in this case to bargain to overall impasse where the employer can establish a "compelling business justification," for the action taken. *Winn-Dixie Stores, Inc.*, 243 NLRB 972, 974 fn. 9 (1979), or where "economic exigencies compelled prompt action." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). The Board recognizes as "compelling economic considerations" only those "extraordinary events" which are "an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action." *Angelica Healthcare Services*, 284 NLRB at 852–853; *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995). The employer carries a heavy burden of demonstrating that this particular action had to be implemented promptly, that the exigency was caused by external events beyond its control, or that it was not reasonably foreseen. *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 82 (1995); *Triple A Fire Protection, Inc.*, 315 NLRB 409, 414 (1994), *enfd.* 136 F.3d 727 (11th Cir. 1998); *Our Lady of Lourdes Health Center*, 306 NLRB 337, 340 fn. 6 (1992).

Here, the renewal of healthcare benefits arose in 2019 and was an ongoing issue throughout 2020, and therefore, is not only a foreseeable but an expected event. The Board has found that the increase in healthcare benefit costs and associated deadlines for electing new healthcare benefit plans to evade such costs does not constitute exigent circumstances absent some showing that the increased costs would place the employer in straitened financial

circumstances. See *Connecticut Institute for the Blind, Inc., d/b/a Oak Hill*, 360 NLRB 359, fn. 1 (2014) (Board affirming administrative law judge finding of no exigent circumstances arising from increased healthcare costs during negotiations that would allow unilateral implementation absent overall impasse); *Maple Grove Care Center*, 330 NLRB 775, 779 (2000) (the Board found increased premiums in health coverage not an economic exigency, in which time was of the essence and which demands prompt action, and concluded that it is highly unlikely that respondent would have been placed in straitened financial circumstances had it paid the entire premium increase until overall impasse had been reached). In the instant case, Respondent presented evidence of increased healthcare cost, but the record contains no evidence that the increased costs placed Respondent in straitened financial circumstances.

Accordingly, I find that Respondent failed to establish that exigent circumstances existed allowing for its unilateral implementation of changes to the unit employees' healthcare benefits in the absence of an overall impasse in contract negotiations.

#### 4. Conclusion

Based upon the forgoing, I find that on about January 1, 2021, Respondent unilaterally implemented changes to the unit employees' healthcare benefits in violation of Section 8(a)(5) and (1).

#### *E. Duty under Section 8(d)(3) of the Act*

On June 10, 2019, Respondent notified the Union of its intent to bargain for a successor to the agreement scheduled to expire on September 30. (Jt. Exh. 1, p. 5; Jt. Exh. 27(a).) Respondent stipulated that it did not give notice to the State of West Virginia's Division of Labor that it sought termination and modification of the collective-bargaining agreement as is required by Section 8(d)(3) of the Act. As discussed above, in January of 2021, Respondent made a modification by changing the healthcare benefits available to unit employees. (Jt. Exh. 57, par. 27(b).)

Respondent presented evidence that the West Virginia Division of Labor office receives a handful of notices of bargaining disputes per month but does not budget for or have a practice of engaging in mediation. (Tr. 151, 152.) In presenting this evidence, Respondent makes a no harm, no foul argument that since the West Virginia Division of Labor office does not make a practice of engaging in mediation, its failure to give notice does not constitute a violation of the Act. Respondent relies upon the Ninth Circuit's refusal to enforce the Board's finding of a Section 8(d)(3) violation in *Brotherhood of Locomotive Firemen and Enginemen v. NLRB*, 302 F.2d 198 (9th Cir. 1962).

I find that argument carries no weight. Despite the Ninth Circuit's holding in *Brotherhood of Locomotive Firemen and Enginemen*, the Board has consistently held that the "statute provides a clear mandate that we are obligated to respect and enforce. These notice requirements are part of the overall statutory scheme intended to encourage the peaceful resolution of labor disputes. While the statute may in some instances yield severe consequences,

it is the Congress that made that determination, and it is our obligation to obey this legislative demand.” “Section 8(d) contains no exceptions and provides no mitigating circumstances justifying a failure to comply.” *Boghosian Raisin Packing Co.*, 342 NLRB 383, 385 (2004).

- 5           Accordingly, I find that Respondent violated Section 8(d)(3) of the Act by failing to give notice to the State of West Virginia that it sought termination and modification of the collective-bargaining agreement as is required by Section 8(d)(3) of the Act.

#### CONCLUSIONS OF LAW

- 10           1. Techocap LLC (Respondent) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO (Union) is a labor organization within the meaning of Section 2(5) of the Act.
- 15           3. At all times since at least March 2018, the Union has been the exclusive collective-bargaining representative of the following unit of employees at Respondent’s Glen Dale, West Virginia facility, which unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:
- All hourly rated production and maintenance employees, including
- 20                     warehousemen; excluding employees on jobs covered by contracts with other unions, salaried supervisors, office clerical and other employees excluded by law.
4. Since about August 1, 2020, Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Union as the collective-bargaining representative of the units’ employees.
- 25           5. Since about August 1, 2020, Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing in a timely manner to furnish the Union with the information requested by Stephen Shane Carlin his July 16, 2020, email to Darrick Doty.
6. Since about November 18, 2020, Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing in a timely manner to furnish the Union with the information
- 30                     requested by Katherine Horigan by email on November 11, 2020, about the administrative tasks that Respondent performed to deduct dues from unit employees pay and remit it to the Union.
7. Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms and conditions of employment for the unit employees by implementing a new healthcare
- 35                     benefits plan on about January 1, 2021.
8. Respondent violated Section 8(d)(3) of the Act by failing to give notice to the State of West Virginia that it sought termination and modification of the collective-bargaining agreement as is required by that Section and subsequently unilaterally modified the unit employees’ healthcare benefits in violation of Section 8(a)(5) and (1) of the Act.
- 40           9. The aforementioned unfair labor practices by the Respondent affected commerce within the meaning of Section 2(6) and (7) of the Act.
10. Respondent has not violated the Act except as set forth above.

## REMEDY

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

Specifically, having found that the Respondent violated Section 8(a)(5) and (1) by failing to provide the Union in a timely manner with requested relevant information, to the extent it has not already done so, Respondent shall furnish to the Union in a timely manner the requested information, as listed above. Having found that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing terms and conditions of employment of unit employees, Respondent shall notify and, on request, bargain with the Union to a subsequent agreement to the collective-bargaining agreement that expired on September 30, 2019, or bargain to a valid overall impasse before implementing any further changes in wages, hours, or other terms and conditions of employment of unit employees. Having found that the Respondent violated Section 8(a)(5) and (1) by changing unit employees healthcare benefits starting on January 1, 2021, Respondent shall restore the status quo ante. Having found that the Respondent violated Section 8(d)(3) by failing to give notice to the State of West Virginia that it sought termination and modification of the collective-bargaining agreement as is required by that Section of the Act and subsequently changing unit employees' healthcare benefits starting on January 1, 2021, Respondent shall restore the status quo ante.

The Respondent shall make whole its employees for any loss of earnings, expenses, and other benefits suffered as a result of the unlawful changes to the healthcare benefits. Backpay owed, as a result of changes to the healthcare benefit plan, shall be computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Additionally, Respondent shall compensate affected unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), and file with the Regional Director for Region 6, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each affected employee in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). In addition to the backpay-allocation report, I find that Respondent must be ordered to file with the Regional Director for Region 6 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award. *Cascades Containerboard Packaging*, 370 NLRB No. 76 (2021).

Moreover, Respondent shall bargain in good faith with the Union as the exclusive collective-bargaining representative of the units' employees to a successor agreement or a valid impasse before implementing any changes in their wages, hours, or other terms and conditions of employment.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>11</sup>

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### ORDER

The National Labor Relations Board orders that the Respondent, Tecnocap LLC, Glen Dale, West Virginia, its officers, agents, successors, and assigns, shall:

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1. Cease and desist from

(a) Failing and refusing to furnish, or unreasonably delaying in furnishing, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO (Union) with requested information that is relevant and necessary to the Union's role as collective-bargaining representative.

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(b) Unilaterally changing the terms and conditions of employment of its unit employees by implementing bargaining proposals at a time when it has not reached a valid overall impasse in negotiations with the Union for a new collective-bargaining agreement.

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(c) Failing and refusing to bargain in good faith with the Union by unilaterally implementing changes in the terms of the unit employees' healthcare benefit plan on January 1, 2021, without complying with the requirements set forth in Section 8(d)(3) of the Act.

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

(e) failing and refusing to bargain collectively with the Union as the bargaining representative for the unit employees.

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

(a) On request, bargain in good faith with the Union for a successor to the collective-bargaining agreement that expired on September 30, 2019, as the exclusive collective-bargaining representative of the employees in the following appropriate unit, and if an understanding is reached, embody the understanding in a signed agreement:

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All hourly rated production and maintenance employees, including warehousemen; excluding employees on jobs covered by contracts with other unions, salaried supervisors, office clerical and other employees excluded by law.

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(b) To the extent not already done, furnish to the Union in a timely manner the information requested in Stephen Shane Carlin's July 16, 2020 email to Darrick Doty and the information requested in Katherine Horigan's November 11, 2020 email to Darrick Doty, as discussed herein.

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(c) On request by the Union, rescind the changes in the terms and conditions of employment for its unit employees, specifically changes to their healthcare benefit plan, that were unilaterally implemented on about January 1, 2021. Nothing in this Order is to be construed as requiring the Respondent to rescind any changes that benefited the unit employees unless the Union requests it to do so.

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(d) Make whole all unit employees for losses suffered as a result of Respondent's unlawful changes in the terms of the healthcare benefit plan that occurred on January 1, 2021, in the manner set forth in the remedy section of the decision.

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<sup>11</sup> If no exceptions are filed as provided by Sec. 102.48 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.

(e) Compensate each backpay recipient for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 6, 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 recipient.

(f) File with the Regional Director for Region 6, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 forms reflecting the backpay award.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, personnel records and reports, all records reflecting healthcare premiums withheld from unit employees' pay, 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.

(h) Post at its Glen Dale, West Virginia facility copies of the attached notice marked "Appendix."<sup>12</sup> Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since August 1, 2020.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 6 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.

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

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<sup>12</sup> If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if 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."

Dated, Washington, D.C. August 30, 2022

*Kimberly Sorg-Graves*

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Kimberly Sorg-Graves  
Administrative Law Judge



APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT fail and refuse to bargain in good faith with United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO (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 to abide by the notice requirements set forth in Section 8(d)(3) of the National Labor Relations Act.

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

All hourly rated production and maintenance employees, including warehousemen; excluding employees on jobs covered by contracts with other unions, salaried supervisors, office clerical and other employees excluded by law.

WE WILL, on request by the Union, rescind the changes in the terms and conditions of employment for our unit employees, specifically changes to their healthcare benefit plans, that were unilaterally implemented on about January 1, 2020, but WE WILL NOT rescind any changes that benefited our unit employees unless the Union asks us to do so.

WE WILL make our unit employees whole, with interest, for any loss of earnings, healthcare expenses, and other benefits suffered as a result of the changes in their terms and conditions of employment that were unilaterally implemented on about January 1, 2020.

WE WILL compensate each backpay recipient for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 6, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each recipient.

WE WILL file with the Regional Director for Region 6, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 forms reflecting the backpay award.

TECNOCAP, LLC

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_

By \_\_\_\_\_

\_\_\_\_\_  
(Representative)

\_\_\_\_\_  
(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov)

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/06-CA-265111](http://www.nlr.gov/case/06-CA-265111) 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 (813) 228-2641.