JD(ATL)–18–15
Syracuse, NY

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

RICCELLI ENTERPRISES, INC.

and **Case 03-CA-130137**

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 158-C

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for the General Counsel.
Donald J. Vogel, Esq. (Scopelitis, Garvin, Light, Hanson & Feary, P.C.), for the Respondent.
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DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was heard in Syracuse, New York from April 20 to 23, 2015. The complaint alleged that Riccelli Enterprises, Inc. (REI or the Respondent) violated Section 8(a)(1), (3), (4) and (5) of the National Labor Relations Act (the Act).[1] On the entire record,[2] including my observation of the demeanor of the witnesses, and after thoroughly considering the parties' post-hearing briefs, I make the following

FINDINGS OF FACT[3]

I. JURISDICTION

At all material times, REI, a corporation with an office and place of business in Syracuse, New York, has been a stone and gravel supplier, and commercial hauler. Annually, it performs services valued in excess of $50,000 outside of New York. It, thus, admits, and I find, that it is an employer engaged in commerce, within the meaning of Section 2(2), (6) and (7) of the Act. It also admits, and I find, that the International Union of Operating Engineers, Local 158-C

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1 The General Counsel withdrew the allegations covering Donald Wallace's discharge. (Tr. 392-398).

2 Several discovery disputes delayed the closure of the record, which did not close until July 6, 2015.

3 Unless otherwise stated, factual findings arise from joint exhibits, stipulations and undisputed evidence.

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

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

This case involves REI's May 2014 acquisition of the Northern Group.[4] Its asset purchase resulted in it acquiring the Northern Group's mines, equipment, fleet, truck repair shop and offices in Fulton, New York (the Fulton facility),[5] customers and employees, including a unit of mechanics and operators represented by the Union at the Fulton facility (the unit).

The main issue in this case is the validity of REI's failure to recognize the Union as the unit's collective-bargaining representative. The answer to this issue, thus, hinges upon whether REI is a successor under *NLRB v. Burns Services Inc.*, 406 US 272, 280, 281 (1972).

B. The Northern Group

Before REI's takeover, Thomas Venezia ran the Northern Group, which was headquartered at the Fulton facility. The Northern Group mined sand, rocks and other materials, produced concrete and related products, and provided trucking and hauling services. Its mines and processing facilities were located in and around the Syracuse area. It, consequently, owned and maintained a large fleet of trucks for delivery and hauling, which were repaired by unit mechanics at the Fulton facility.

1. Mechanics

Unit mechanics performed automotive repairs and maintenance on trucks, vehicles and other equipment. They used hand tools, which were personally-owned, as well as company-owned equipment. They were paid an hourly wage ranging from $17.28 to $17.44 per hour, and received overtime after 40 hours per week. They worked an 8-hour shift from Monday to Friday, and received two 15-minute breaks and a 30-minute meal period. Although assigned to the Fulton facility, they were periodically dispatched to the field to make repairs.

2. Operators

Operators worked at mines and processing facilities located in central New York.[6] They ran bulldozers, pay loaders and other equipment. They also performed some light repairs, fabrication and maintenance. They worked day-shift hours on a seasonal basis from April to November. They worked from Monday to Friday with some Saturdays, were paid roughly $17 per hour, received overtime, and were placed on layoff over the winter.

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4 All dates herein refer to 2014, unless otherwise stated.

5 The Fulton facility is located at 32 Silk Road in Fulton, New York.

6 Mines were located in Fulton, Oswego, Phoenix, Cortland, Pulaksi, Rome and Panther Lake, New York.

3. Unit

The Union had a longstanding collective-bargaining relationship with the Northern Group in the unit, which covered the 18 operators and mechanics employed at the Fulton facility.[7] (GC Exh. 2). This recognition was embodied in successive contracts, with the most recent running from November 1, 2012 to October 31, 2015 (the CBA). This chart identifies the unit:

Position	Total	Employees				
Operators	10	*K. Crouch*	*B. Richardson*	*D. Samson*	*D. Noble*	*D. Wallace*
		T. Demperio	*W. Lewis*	*M. Osbourne*	*J. Phillips*	*R. Canale*
Mechanics	8	*D. Connor*	*W. Johnson*	*D. Melfi*	*J. Melfi*	*S. Reynolds*
		M. Ray	*D. Smith*	*C. Tyrell*		

(Tr. 1054–1055).

C. REI: Before the Asset Purchase

REI similarly hauled commodities and materials, and extracted rock and other materials from its surface mines. Although headquartered in Syracuse, where it performed the bulk of its operations, it also maintained facilities throughout upstate New York. Its fleet of roughly 300 trucks and trailers were repaired at shops in Syracuse, Geneva, and Rochester, New York and Mansfield, Pennsylvania. Richard Riccelli was its President, while Sam Chiodo was its Senior Vice President of Risk. It also had several affiliated enterprises, which operated surface mines. Syracuse Sand and Gravel (SSG), for example, ran approximately 40 surface mines, where rock, sand, gravel and other materials were extracted.[8] SSG was similarly run by Riccelli.

D. Events Leading Up To REI's Acquisition of the Northern Group

In late 2013, Venezia solicited Riccelli about possibly acquiring the Northern Group. His inquiry resulted in the parties executing a letter of intent.

1. February 7 – Letter of Intent Executed

Their letter of intent covered the purchase of the Northern Group's assets and began a 90-day due diligence period. (R. Exh. 9). During this period, REI evaluated the Northern Group's fleet of trucks, mines, acreage, plants and financial data. On February 20, by email, Riccelli and Chiodo discussed their due diligence goals, which included reviewing the CBA. (GC Exh. 33).[9]

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7 Operators working near the Fulton facility were included in the unit, while remote operators were not.

8 Chiodo testified that SSG and the Northern Group performed analogous work.

9 REI was told to review, "collective bargaining agreements, … with the Union." (GC Exh. 34); see also (GC Exh. 35; R. Exh. 18 (January 31 email citing need to review "labor contracts.")).

2. March – Due Diligence Activity

a. Initial Investigation of the Union and CBA

On March 6, Chiodo audited the Fulton shop and confirmed that it was a "Union Shop," with a "3 year Union contract [that] Expires [on] 10/31/2015," with "$28.50 per hour [in] average costs-labor & benefits." (GC Exh. 16). On the same date, the Northern Group forwarded the CBA to Chiodo, and explained that Riccelli was previously given detailed information about the unit. (GC Exh. 44, 44a).

b. March 14 Meeting

Union District Manager Theron Hogle and Business Agent Carl Button met with Venezia, Riccelli and Chiodo at the Fulton facility. There is a central dispute over this meeting.

i. General Counsel's and Union's Position

Hogle recollected this exchange at the meeting:

> [Venezia] said …. we're considering a sale…. [W]hat do we have to do[?] …. I said, … the first thing … is get a calculation on your unfunded liability ….
>
> And he said … that's not my problem …. I said … that's something that you certainly want to look into ….
>
> And I said … we've got a collective bargaining agreement that's good through the end of next year…. ***[T]hat's when Rich [Riccelli] said … when that agreement's up and we renegotiate it, there's going to be major changes***. And then he [said] … he … reviewed the documents from the Company, and some parts … were profitable [and] some parts were not….
>
> And then … he started … talking about positive changes that he wanted to make … including a possible night shift and an addition of … twenty employees.

(Tr. 52–53) (emphasis added). Hogle stated that REI never announced an intention to set initial terms and conditions of employment for the unit at this meeting.

ii. REI's Stance

Chiodo testified that only unfunded pension liability was discussed, and denied any discourse about the CBA. He averred that neither he nor Riccelli had even reviewed the CBA at that time, which made it impossible for them to pledge adoption of something yet unseen.[10] He claimed that Venezia arranged this meeting on an "impromptu" basis.[11] (Tr. 637). When asked whether REI could have placated the Union at this meeting with false pledges about the CBA's

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10 See (Tr. 632 ("I knew there was a unit. I didn't know if there was a collective bargaining agreement.")).

11 He added that "everyone just happened to be there at the same time." (Tr. 638).

adoption, in order to prevent possible sabotage, he denied such concerns.[12] (Tr. 639). His denial was, however, contradicted by his own email shortly thereafter to a security contractor, where he lamented about, "anticipate[d] retaliation – [and the] need [for] cameras … ASAP." (GC Exh. 23). Riccelli testified that, besides informal introductions, only unfunded pension liability was discussed. He similarly denied having reviewed the CBA at that point, or discussing its terms or adoption.

iii. Credibility Resolution

Given that Hogle stated that Riccelli told him that the CBA would be renegotiated after its expiration, and Riccelli and Chiodo denied this comment, a credibility resolution is needed. Chiodo's and Riccelli's denial essentially hinges on their claim that they had not yet seen the CBA and, thus, could not have discussed adopting a CBA yet unseen. Chiodo embellished this inductive argument by adding that he did not even know that there was a CBA at that point, which, as will be explained, is wholly incredible.

For several reasons, I credit Hogle. *First*, Chiodo's and Riccelli's joint claim that they had not seen the CBA before the meeting was contradicted by documents predating the meeting, which either: discuss their joint agenda to review the CBA (GC Exhs. 33–35; R. Exh. 18); concede its existence (GC Exh. 16); or enclose the CBA for their review (GC Exh. 44, 44a). Their joint claim of ignorance is, thus, untenable.[13] *Second*, Chiodo's testimony was marred by other inconsistencies and implausibility. Although he denied concern over Union retaliation (tr. 640), he contradictorily emailed otherwise. (GC Exh. 23). His characterization of the meeting as "impromptu" is also implausible (tr. 637–38),[14] given that REI was clearly too busy with due diligence and business operations for happenstance meet and greets .[15] *Third*, Chiodo was a glib witness, who appeared hostile, condescending and unreliable. Hogle, on the other hand, was forthright and cooperative. *Finally*, other portions of Riccelli's testimony were implausible. For instance, he remarkably stated that he did not even recall telling the Union that REI was considering an asset purchase, which would have rendered the meeting meaningless. (Tr. 1053).

3. April – Decision to Deny Union Recognition and Hire All Employees

On April 2, Riccelli emailed Chiodo and said that the Union has "move[d] … from [a] major issue … into a non-issue." (GC Exh. 33). On April 22, Chiodo emailed Riccelli that, "we [should] … contact the Union and tell them … no thanks." (GC Exh. 24). Chiodo related that REI decided to hire all of the Northern Group's employees in March or April. (Tr. 630).

4. May 1 Union Meeting

Hogle, Button, Riccelli and Venezia again met at the Fulton facility. Hogle recalled that:

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12 He said, "I never went … to the Stephen King scenario about the union … and them doing stuff." (Tr. 640).

13 Chiodo's audacious add-on that he was unaware of the CBA's existence furthers this credibility divide, given that he expressly cited the existence of the CBA following his March 6 audit. (GC Exh. 16).

14 He likely thought that calling it "impromptu" supported his claim that he never prepared and reviewed the CBA.

15 This claim is rendered dubious by Riccelli's declaration of an 80-hour workweek. (Tr. 1037).

> [T]hey received the unfunded liability calculation …. [Venezia] wanted to know if there was a way … to make this work without triggering this million dollars ….
>
> And I told them that …. [we] wanted to find a way to meet their needs ….

(Tr. 56–57).[16]

5. May 15 – Asset Purchase Finalized

The asset purchase agreement resulted in REI acquiring the Northern Group's Fulton facility, employees, mines, fleet, concrete and blacktop plants, and customers.[17] REI did not assume the CBA or recognize the Union as the unit's representative. Neither REI nor the Northern Group notified the Union about the transaction. (GC Exhs. 5-7). Unit employees were informed on May 14, via a bulletin board notice about the transaction, and asked to bring 2 forms of identification to work the next day.

E. REI's Acquisition of the Northern Group

1. May 15 – Hiring of the Unit and Meeting

a. Job Offers

When unit employees arrived at the Fulton facility, REI provided each with a hiring packet containing: a Northern Group termination letter effective May 14; a job offer from REI effective May 15;[18] notice of their pay rates; health insurance enrollment forms; and a drug testing waiver. (GC Exhs. 3, 9). These packets were distributed in a conference room. Scott Reynolds, a unit employee, testified that, when he asked an unidentified human resources official whether his pay and benefits would change, he was told that, "everything was going to stay the same." (Tr. 152). Unit mechanics were also administered tests, which gauged their mechanical acumen.[19] (R. Exh. 12). With the exception of Monroe Osbourne and Donald Wallace, who rejected their employment offers, REI hired and retained all unit employees.

b. Unit Operator Monroe Osbourne's Resignation

Osbourne, stated that Chiodo said that he would no longer be working under the CBA. He stated that, due to the absence of Union representation, and the substantial changes in his terms and conditions of employment, he rejected REI's job offer.[20]

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16 As of March 31, the Northern Group's withdrawal liability was $1,015,617. (GC Exh. 24; R. Exh. 5).

17 The asset purchase resulted in REI, which already employed roughly 475 workers, adding about 120 former Northern Group employees, who were mainly drivers, mechanics and operators.

18 This offer was subject to a reference check and completion of "pre-employment screening." (GC Exh. 3).

19 Although scores ran from 30 to 65 percent, all unit mechanics received job offers, without any loss in pay.

20 Melissa Gentile, Human Resources Representative, confirmed his account.

c. Chiodo Meeting

i. General Counsel's and Union's Position

Reynolds testified that unit mechanics were addressed by Chiodo and Gentile. He recalled Chiodo stating that, if they wanted a job, one was waiting for them. They were told, however, to now report to work at the REI's mechanical repair shop on Taft Road in Syracuse, New York (the Syracuse shop). He said that Chiodo stated that, "we're not taking the union with us." (Tr. 153); see also (Tr. 270). Dennis Samson, a unit member, confirmed that Chiodo stated that there would be no union. (Tr. 409). Joe Melfi, another unit member, stated that Chiodo announced that:

> [T]here w[ere] … positions available …. They would be non-union and … a decision [was] … made … not to go ahead with accepting the union.

(Tr. 350).

ii. REI's Stance

Chiodo testified that he solely related that REI was not a signatory to the CBA. He denied being asked whether REI would recognize the Union, or honor the CBA. He stated that "non-signatory" was his own vernacular, even though he admitted no prior labor relations experience. Gentile testified that Chiodo said that REI was a "non-signatory." (Tr. 496). She, surprisingly, added that employees did not ask anything further about this topic. (Tr. 507).

iii. Credibility Resolution

Inasmuch as Reynolds, Samson and Melfi testified that Chiodo said that there would be no union, whereas Chiodo and Gentile recalled him stating that REI was a "non-signatory," a credibility determination must be made. I credit Reynolds, Samson and Melfi. *First*, as noted, Chiodo was an incredible witness with a poor demeanor, whose testimony on other critical points was marred by inconsistency and implausibility. *Second*, Chiodo's testimony that he only said that REI was a "non-signatory" is implausible. It's highly unlikely that someone who professes a complete lack of labor relations expertise, who testified in a very plain-spoken manner, would use such legalistic jargon, when speaking to a blue collar audience. *Third*, it's highly probable that, if Chiodo had used the unique term, "non-signatory," one of the unit employee witnesses would have recalled such usage. *Finally*, Reynolds, Samson and Melfi were all reliable witnesses, with strong demeanors. Melfi and Samson have been afforded significant weight, inasmuch as they are current employees, who subjected themselves to potential risk by providing testimony against REI.

2. May 15 - Fulton Facility Closure and Transfers

Upon its takeover, REI temporarily shut down the garage at the Fulton facility for renovation. (R. Exh. 16). All unit mechanics were, consequently, transferred to the Syracuse shop. REI failed to notify the Union or bargain with it concerning this decision or its related

effects. Unit operators, however, continued to perform services at various mines and facilities in or about the Fulton and Syracuse region.

3. June and July Transfers[21]

In approximately June, REI unilaterally transferred certain unit operators to the following affiliates: SSG; Northern Asphalt, LLC (No. Asphalt); Northern Ready, LLC (No. Ready); and Northern Aggregates (No. Aggregates). At this time, certain unit mechanics were also transferred to SSG, although most remained employed by REI at its Syracuse shop.[22] In July, all No. Aggregates employees, who performed mining, were then transferred to SSG.[23] (Tr. 589). This merger effectively ceased No Aggregates' operations. (Tr. 603, 651). Regarding the interrelationship between REI and SSG, Chiodo explained that, "[SSG] was a part of R.E.I. [and] …. [u]nder Riccelli's umbrella performed mining and aggregate work." (Tr. 662-663). REI failed to notify to Union or bargain with it concerning these several transfer decisions or connected effects.

a. Resulting Unit Assignments

This chart describes where the unit was assigned following REI's restructuring:

Name	Title	Affiliate	Location	Prior Wage	New Wage	Supervisor
Canale	Operator	No. Asphalt	Fulton Facility	$16.94	$18.50	Riccelli
Demperio	Operator	No. Ready	Oswego, NY	$17.44	$17.44	M. McCraith
Lewis	Operator	No. Ready	Varies	$17.44	$17.44	M. McCraith
Samson	Operator	No. Ready[24]	Fulton Facility	$16.78	$16.78	T. Lund
Crouch	Operator	SSG	Fulton Facility	$17.28	$17.28	T. Harris
Noble	Operator	SSG	Fulton Facility	$17.28	$16.00	T. Lund
Phillips	Operator	SSG	Fulton Facility	$17.28	$17.28	T. Lund
Richardson	Operator	SSG	Fulton Facility	$17.28	$17.28	T. Lund
Ray	Mechanic	REI[25]	Syracuse Shop	$17.44	$17.44	J. Poquadeck
Reynolds	Mechanic	REI	Syracuse Shop [26]	$17.44	$17.44	Nipper
Smith	Mechanic	REI	Syracuse Shop	$17.44	$17.44	J. Poquadeck
Tyrell	Mechanic	REI	Syracuse Shop	$17.44	$17.44	J. Poquadeck
J. Melfi	Mechanic	SSG[27]	Syracuse Shop	$17.44	$17.44	T. Harris
D. Melfi	Mechanic	SSG	Syracuse Shop	$17.44	$17.44	T. Harris
Johnson	Mechanic	REI	Fulton Facility[28]	$17.44	$17.44	T. Lund
Connor	Mechanic	REI	Fulton Facility[29]	$17.44	$17.44	T. Lund

(GC Exhs. 21, 36; R. Exhs. 10, 21; tr. 1054-1055).

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21 J. Melfi estimated that this date occurred during the summer. (Tr. 358, 366).

22 Chiodo described SSG, as a separate legal entity, falling "under the banner" of REI. (Tr. 531, 556).

23 This resulted in 4 unit operators being transferred; i.e. Crouch, Noble, Phillips and Richardson. (Tr. 655).

24 R. Exh. 21 describes him as working for No. Ready, whereas GC Exh. 21 describes him working for SSG.

25 R Exh. 21 describes him as working for REI, whereas GC Exh. 21 describes him as working for SSG.

26 He initially started at the Syracuse shop, and then transferred to the Fulton facility, upon its reopening.

27 GC Exh. 21 describes him as working for REI, whereas R Exh. 10 describes him as working for SSG.

28 He initially started at the Syracuse shop, and then transferred to the Fulton facility, upon its reopening.

29 He initially started at the Syracuse shop, and then transferred to the Fulton facility, upon its reopening.

b. Unit Terms and Conditions of Employment

i. Mechanics

Reynolds, a unit employee, testified that he continuously used the same tools and equipment at his new REI position that had been used at the Northern Group to service a constant set of trucks and equipment on an unchanged shift over an identical workweek. He stated that, although some of the machinery and tools at REI was newer, he essentially performed the same truck repair job. He stated that his days of work remained constant. He stated that he worked alongside of mechanics, who had previously been employed by the Northern Group, and who performed the same work. He stated that his former supervisor was not retained. He added that his new supervisor at the Syracuse shop was Keith Spencer. Johnson, another unit employee, testified that mechanics performed the same type of work for REI. Melfi, another unit mechanic, stated that, "the only real thing that changed … was the name on my uniform." (Tr. 375). REI did not dispute at the hearing, or in its brief, that unit mechanics performed the same kind of work under comparable working conditions.

ii. Operators

Samson, a unit operator, stated that he performed the same position after REI took over at the Fulton facility, with the same machinery, equipment and tools. He continued to be supervised by Lund, a former Northern Group supervisor. Reynolds related that he worked alongside unit operators, who continued to perform the same work. REI did not dispute at the hearing, or in its brief, that unit operators performed the same work under analogous conditions.

iii. Health Benefits

Unit employees previously received health benefits under the Union's Welfare and Pension Fund. (GC Exh. 2). Following REI's takeover, they were placed into an Excellus Blue Cross Blue Shield plan. See (GC Exhs. 3, 9, 45). The Union was not notified about this decision, or afforded an opportunity to bargain over the change in insurance carriers.

4. Union's May 20 Letter Requesting Recognition and Information

On this date, the Union asked REI to recognize it as the unit's collective-bargaining representative, and sought bargaining. (GC Exh. 8). The Union warned REI that it, "is prohibited from altering the … unit employees' terms and conditions of employment … in the [CBA] … without bargaining." (Id.). The Union requested the following information: any unions REI has had agreements with over the last 5 years; a list of mechanics and operators, and their duties; a list of their terms and conditions of employment; a detailed explanation of how the unit's seniority will be applied; correspondence with the Northern Group regarding the unit; a list of each unit employee hired; and unit work locations. (Id.). REI never replied, or otherwise recognized the Union.[30]

[30] It is undisputed that REI received this letter and discussed its terms. (GC Exhs. 31–32).

5. June 23 –Fulton Facility's Mechanical Shop Reopens

On this date, the mechanical shop at the Fulton facility reopened. Supervisor James Nipper ran this facility, where most work involved repairing the Northern Group's former fleet. Johnson and Connor, two unit mechanics, were reassigned there. Connor worked with 2 non-unit mechanics on the first shift, while Johnson worked with 2 non-unit mechanics on the second shift. The non-unit mechanics had been transferred in from REI's Syracuse shop.

a. 2-to-1 Mechanic Ratio

Reynolds testified he was repeatedly told by Supervisor Spencer that, once the repair shop at the Fulton facility reopened, it was would be staffed with a ratio of 1 unit mechanic for every 2 non-unit mechanics. W. Johnson corroborated that Spencer told him that, "starting back it'd be two Riccellis for one Northern guy." (Tr. 309).

Chiodo related, however, that mechanics were reassigned to the Fulton facility on the basis of their skill set, as assessed by Cimilluca. He averred that ratios played no role in their assignments. Cimilluca testified that, although unit mechanics were poorly trained, they were retained because mechanics were in short supply. He related that he did not transfer all unit mechanics back to the Fulton facility because they lacked sufficient training. He said that he only transferred "A technicians." Spencer denied mentioning a staffing ratio. Nipper also denied the existence of a ratio, but, conceded that he has since hired outside mechanics to work at the Fulton facility, who were never previously employed by either REI or the Northern Group (i.e. Lucas Reynolds, Chris Stoker and Josh White), which undercut Cimilluca's contention that only highly experienced "A mechanics" were permitted to work at the Fulton facility.[31]

Inasmuch as Reynolds and Johnson testified that Spencer described a staffing ratio, and Spencer denied such commentary, a credibility finding must be made. Reynolds and Johnson have been credited. *First*, Reynolds and Johnson were consistent and credible witnesses, with stellar demeanors. Their testimony about a ratio was further supported by the actual existence of such a ratio. *Second*, Cimilluca's claim that the ratio coincidentally resulted from the unit's poor qualifications was undercut by the fact that the unit performed equally complex work at both the Syracuse shop and Fulton facility. This claim is also implausible, given that REI hired a newly-educated mechanic, Reynolds, who was unlikely an "A technician," for the Fulton facility.

b. Operations at the Fulton Facility's Mechanical Shop

The Fulton facility ran 2 shifts, day and evening, which were analogous to the shifts worked by the Northern Group's unit mechanics. Johnson stated that he performed his usual job and shift, once returning to the Fulton facility. Reynolds testified that he continued to perform the same position, under the same conditions at the Fulton facility.

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[31] Lucas Reynolds, a newly-minted technician, who had just graduated from technician school, was assigned to the Fulton facility.

F. Reynolds' Tenure

1. July – Transfer to the Fulton Facility

On July 14, Reynolds told Spencer that he was resigning for a better-paying job. Spencer told him to temporarily hold off, in order to permit REI to address his concerns. On July 16, Spencer informed Reynolds that, although he could not offer a raise, he would permit him to return to the Fulton facility, which was accepted. Reynolds testified that, on this date, Spencer relayed that Cimilluca told him that he could not address any pay issues, until after the "union business was over."[32] (Tr. 176). On July 28, Reynolds was transferred back to the Fulton facility.

Spencer said that he told Reynolds that he could not offer a raise because he was a new employee. He denied stating that his inability to provide a raise was connected to the Union.

Inasmuch as Reynolds testified that Spencer stated that he could not be granted a pay raise "until the Union business was over," and Spencer denied such commentary, I must make a credibility resolution. I credit Reynolds, who was a straightforward, candid and consistent witness, who was equally helpful on direct and cross. Spencer, on the other hand, appeared less than forthright.[33] Additionally, his denial regarding the ratio issue deeply undermined his credibility.

2. Unfair Labor Practice Charge Identifying Reynolds

On July 28, the Union filed a second amended charge against REI, which identified Reynolds witnessing Spencer's allegedly unlawful comments about pay raises not being issued because of the Union. (GC Exh. 1(e)). This charge was served upon Riccelli and counsel on the same date. Riccelli confirmed its receipt and dispatch to Chiodo.[34] (Tr. 1026, 1029). Chiodo acknowledged receipt before Reynolds' firing, but, denied telling Cimilluca or Nipper. Cimilluca and Nipper each denied knowing about the charge before his firing.

3. Reynolds' Termination

a. General Counsel's and Union's Position

i. Friday, August 8

Reynolds stated that, on August 8, before his scheduled shift, his brother-in-law appeared at the Fulton facility and sought help with a flat truck tire. He said that he asked Nipper whether he could buy a tire plug from REI for the repair, which he estimated to be worth $2. He related that Nipper gave him the part and told him that, "we'll figure out how to bill you later." He then helped his brother-in-law with the repair, and reported to work at his normal start time, without

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32 REI provided Spencer's time card, which demonstrated that he did not work on July 16. (R. Exh. 13).

33 Although Spencer was on leave on July 16, I find that Reynolds is confused about the date, but, not the comment itself, inasmuch as is undisputed that a conversation over his resignation took place.

34 On July 24, the Union sent Riccelli a copy of this charge. (GC Exh. 39).

consequence or connected discipline.

Later that day, Reynolds' brother-in-law pulled up again, and now asked him to help with a damaged hydraulic hose. Reynolds said that he clocked out, and searched for Nipper, who was not to be found. He said that he then went to the shop, repaired the hose, and recorded the part number for payment purposes. He then described this exchange with Nipper and Cimilluca:

> [They] came out. [Cimilluca] … told me to go home and call … on Monday. He told my brother-in-law that the garage was not for personal use…. I went inside and started cleaning up. I picked up my tools and … got changed. I walked into their office to … talk to him. My brother-in-law was in the office … trying to pay for the part. They made him leave [and] … told him that they didn't want him to pay … just to not come back. I walked in there to explain … why I thought it was okay … and [said that] I just bought a tire plug earlier that day [and] had the part number in my hand still. I tried giving it to him [but] … don't recall if he took it …. I told him that I felt like he was calling me a thief and that I didn't want to work for somebody who was accusing me of being a thief. [I said that] … if he was accusing me of being a thief I was going to put in my two weeks' notice, [and] that I didn't want to work for somebody who treated me that way.

(Tr. 186). He stated that he then departed. He related that, at the Northern Group, mechanics were allowed to purchase parts, and said this was a common industry practice. Osbourne credibly confirmed that he previously purchased a brake chamber from the Northern Group, without issue.

ii. Saturday, August 9 to Sunday, August 10

Reynolds telephoned Cimilluca and Nipper over the weekend, and left multiple messages seeking to discuss his employment, which were not returned. See (GC Exh. 10). Reynolds also telephoned Chiodo, explained what had transpired, stated that he never believed that he had resigned, and expressed sadness over being called a thief. He said that Chiodo replied that he wanted to investigate the matter further, but, never called back.

iii. Monday, August 11

Reynolds said that he was telephoned by Nipper in the morning, who told him to pick up his last check and tool box. He said that Nipper offered an employment reference for Penn Detroit, another garage. He stated that Nipper was not upset, and that he later received unemployment benefits, which were not challenged by REI. REI issued an *Employee Notice of Termination* that Nipper signed, which described his separation as "involuntary," and cited "theft of property." (R. Exh. 14). On August 13, REI issued a letter to Reynolds that, "confirm[ed] terminat[ion] effective August 11." (Id.).

b. REI's Position

Cimilluca prepared a statement, which stated as follows:

> On 8/8 … Nipper approached me [about] … Reynolds making a hose … using Riccelli parts. I questioned [Reynolds] … and he said he was "just making" a hose for his brother in law. I asked … who gave him permission …. He brought up that earlier [that day] he had [repaired] … a tire [without issue].... I said … I was not asking … about a tire …. [Reynolds] said that when he was with "Northern" he would do it …. I informed him that this was not Northern and that it was theft …. I told him to punch out … and I would contact him Monday…. When I went back into the parts room with [Nipper]…, [Reynolds] came in and gave his 2 week … notice ..... [He said] he didn't want anyone to think he was a thief. I responded[,] "exactly what do you call taking company parts?" …. I accepted his notice and said I would contact him Monday and tell him his fate. He … then left ….

(R. Exh. 14). He testified that Reynolds tried to call him over the weekend, but, explained that he did not reply because the matter was closed. He said that he directed Nipper to tell Reynolds on Monday that he was "all done." (Tr. 781). He added that, even if Reynolds did not resign and returned on Monday, he still would have likely fired him. (Tr. 783). He agreed, on cross, however, that Reynolds was a generally good employee, who lacked prior discipline. (Tr. 821).

Nipper testified about the incident that led to Reynolds' termination:

> And when [Cimilluca and I] … got back, … Scott was not working on … [his] job …. He had just come from … the parts room … and [had a] … hose and … fittings. And I asked … the job you're doing doesn't require that hose, what are you doing with that …[?] [A]nd [he said] … I'm making it for my brother-in-law, he needs one for his truck…. And I explained … we don't sell parts…. Everything … in this parts room is … for Riccelli …. I'm paying you to work on our vehicles, not make hoses for your brother-in-law.

(Tr. 864). He recalled a similar discussion with Reynolds earlier that day about a tire plug. He conceded that he permitted him to take the tire plug, without issue or warning. (Tr. 865). He said that he did not consider the tire plug theft, but thought that the hose was both theft of a part and stealing time. He said that, on this basis, Cimilluca told Reynolds to take the rest of the day off and call back on Monday. He said that Reynolds took offense and resigned, which was accepted. He said that he and Cimilluca had this dialogue regarding Reynolds on Monday:

> And that discussion was Monday, … when he calls, we'll talk to him, … we'll explain our situation .... [D]epending on his reaction … if he still wants to quit, then we'll … go from there. If he has a change of heart, … we'll go from there…..

(Tr. 869). He then recollected his conversation with Reynolds as follows:

> And on Monday, Scott called before he came to work, like he was told and the first question I asked Scott was are you still giving your two-weeks' notice, do you still want to quit. And he said yes. I go okay, then you still want to quit, we

don't need your employment for the next two weeks, you are terminated.

(Tr. 869); but see (R. Exh 14 (describing termination as involuntary)). On cross, however, he contrarily related that, on Monday, he still wanted Reynolds to work 2 more weeks. (Tr. 920). He agreed that he gave him an employment reference, and added he felt that the situation "could've have been resolved" on Monday, but, Reynolds opted to quit. (Tr. 872). Although he first said that Reynolds was on the clock when the incident occurred, he agreed that he never verified whether this was true.[35] (Tr. 896).

Chiodo confirmed receiving a call from Reynolds over the weekend. He said that he did not call him back because there was no need. He averred that REI handled theft with extreme prejudice and cited the prosecution of a former employee, who was required to pay restitution. (R. Exh. 17). He added that theft is a terminable offense, even if only a pencil were involved. (Tr. 625).

c. Findings

Although it is clear that Reynolds initially resigned on August 8, I find, for several reasons, that he subsequently rescinded his resignation. *First*, he left multiple voicemails for Nipper and Cimilluca over the weekend seeking to "talk … about the situation," "explain why … [he] thought it was okay to buy the part," and "even apologize for being wrong if [he] was wrong." (Tr. 193-195). *Second*, he successfully contacted Chiodo and explained that his resignation was "emotional" because he felt that he was being falsely accused of stealing. He said that Chiodo said that that "he wanted to get more information about the situation," and would call him back, which was never done. (Tr. 193). Chiodo did not dispute his account. *Third*, REI did not classify his actions as a resignation; it, instead, listed his removal as an "involuntary" firing for "theft." (R. Exh. 14). If REI truly considered his resignation to be unrescinded and effective, it would have identified his separation as a "voluntary" resignation in its records. Ironically, REI, which was flatly unwilling to accept Reynolds' resignation less than a month earlier, was now steadfast in its refusal to permit him to rescind this resignation and amicably resolve a matter that it primarily engineered. I find, on these bases,[36] that REI refused to accept Reynolds' rescinded resignation.[37]

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35 He insisted that it would have been stealing time, even if Reynolds was on break time (tr. 897), but then, after considerable leading by REI's counsel, agreed that it was not be stealing time under those circumstances. (Tr. 937).

36 The General Counsel submitted REI's disciplinary records, which demonstrated that certain employees have: resigned with 2 weeks' notice and were not discharged; received multiple warnings before being fired; and separated via mutual agreement. (GC Exh. 14). In other cases, however, REI did not accept a 2 week notice period, and fired workers immediately. (Id.). REI submitted disciplinary records from 2012 through 2015, which demonstrate terminations based upon attendance issues, negligence, failure to take a drug test, performance and other reasons, but, do not show any discipline for theft or using parts on a personal vehicle. (R. Exh. 21). Such records were not relied upon, pro or con, in making this finding.

37 I do not credit Nipper's testimony that he asked Reynolds on Monday whether he still wanted to quit and Reynolds restated his resignation. *First*, this testimony is wholly inconsistent with Reynolds several calls to Chiodo, Nipper and Cimilluca over the weekend, which sought to resolve the situation. If Reynolds truly wanted to resign, he would not have called repeatedly, and, if Nipper truly sought a resolution as stated, he and his colleagues would have replied. *Second*, Nipper's contention that he offered Reynolds a chance to rescind his resignation on Monday was flatly contradicted by Cimilluca, who said that he

III. Analysis

A. 8(a)(1) Allegations[38]

1. Chiodo's Comments

Chiodo's commentary that "we're not taking the union with us," there will be no union, and other similar statements was unlawful. Such statements unlawfully condition employment upon refraining from union activities. See, e.g., *Smoke House Restaurant*, 347 NLRB 192, 203 (2006) (stating company was non-union); *Eldorado Inc.*, 335 NLRB 952, 953 (2001) (announcing company was non-union); *Concrete Co.*, 336 NLRB 1311, 1316 (2001) (saying there would be no union, and "union is gone").

2. Spencer's Comments

Spencer's July comments to Reynolds that REI would not grant him a pay raise "until the Union business was over" was unlawful. Threatening lost benefits and less favorable treatment because of union activities is prohibited. *Wellstream Corp.*, 313 NLRB 698, 707 (1994); *More Truck Lines, Inc.*, 336 NLRB 772 (2001), enfd. 324 F.3d 735 (D.C. Cir. 2003)

B. 8(a)(5) Allegations[39]

1. REI as a Successor

a. Legal Framework

An employer becomes a successor, which must recognize a union that represented a unit in a predecessor's workforce, when these elements are satisfied: it employs a majority of predecessor employees in an appropriate unit at, or after, the time of the union's bargaining demand; and its business is a "substantial continuity" of the predecessor's operations. *Capital Steel*, 299 NLRB 484, 485 (1990); *Fall River Dyeing v. NLRB*, 482 U.S. 27, 41-43 (1987). The Board considers the totality of the circumstances, when assessing "substantial continuity." *Fall River*, supra, 482 U.S. at 43. The Board, as a result, evaluates these factors: whether the successor's and predecessor's businesses are alike; whether unit employees perform similar jobs, under comparable working conditions with unchanged supervision; and whether production processes, product lines and clientele are uniform. Id. Such factors are, generally, gauged from the perspective of the unit employees involved, with great deference being afforded to "whether the employees, who have been retained, will understandably view their job situation as essentially unaltered." Id.; see also *Nephi Rubber Products Corp*., 303 NLRB 151, 152 (1991).

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accepted the resignation and would have likely fired him in its absence, and Chiodo's testimony that all thefts are terminable offenses. *Third*, Nipper's testimony is contradicted by him recording this transaction as an "involuntary" firing. (R. Exh. 14).

38 These allegations are listed under complaint pars. 7 and 16.

39 These allegations are listed under complaint pars. 5, 10-15 and 19.

b. Analysis

i. Substantial Continuity

REI is a "substantial continuity" of the Northern Group's operations. Unit mechanics continue to repair trucks and other equipment in a garage, while using the same tools and machinery. Unit operators continue to run pay loaders, bulldozers and other machinery at their assigned mines and plants; they similarly use the same tools and equipment. All unit employees generate the same overall product, and complete the same steps in the production process. Unit employees also continue to: work analogous shifts; receive identical hourly wages; obtain overtime after 40 hours; and encounter seasonal ebbs and flows in their workload. REI retained the Northern Group's customers. Consequently, Samson, a unit operator, and Melfi and Reynolds, unit mechanics, all credibly testified that their jobs are unchanged. There was also no hiatus between the Northern Group's cessation of, and REI's commencement of, unit operations. *Nephi Rubber Products Corp.*, supra. REI's operations are, therefore, a "substantial continuity."

ii. Hiring a Majority of the Unit and Bargaining Demand

On May 15, REI retained 16 of 18 unit members. See (GC Exhs. 10, 28, 30, 36; R. Exhs. 10, 21; tr. 1054–55). On May 20, the Union requested recognition and sought bargaining. (GC Exh. 8). REI, thus, employed a majority of the unit following this bargaining demand.

iii. Appropriateness of the Resulting Unit

REI contends that its bargaining obligation must be excused because the unit is no longer appropriate. This contention is unpersuasive.

Regarding this matter, the Board has held as follows:

> Critical to a finding of successorship is a determination that the bargaining unit of the predecessor employer remains appropriate for the successor employer.… In *Burns*, … the Supreme Court found that the successor employer (Burns) was obligated to bargain with the union that represented the employees of the predecessor (Wackenhut). The Court observed however: "It would be a wholly different case if the Board had determined that because Burns' operational structures and practices differed from those of Wackenhut, the Lockheed bargaining unit was no longer an appropriate one." *Id*. at 280. The Board's longstanding policy is that "a mere change in ownership should not uproot bargaining units that have enjoyed a history of collective-bargaining unless the units no longer conform reasonably well to other standards of appropriateness." *Indianapolis Mack Sales & Service*, 288 NLRB 1123 fn. 5 (1988)…. [T]he Board has consistently held that long-established bargaining relationships will not be disturbed where they are not repugnant to the Act's policies… The Board places a heavy evidentiary burden on a party attempting to show that historical units are no longer appropriate. See *Columbia Broadcasting System*, 214 N LRB 637, 642-643 (1974) ("compelling circumstances" must be shown ….).

Banknote Corp. of America, 315 NLRB 1041, 1043 (1994).

REI has not sustained its heavy evidentiary burden of showing that the unit is no longer appropriate. *First*, the unit is the byproduct of a longstanding collective-bargaining relationship with the Northern Group, which is a factor that heavily supports the continued appropriateness of the unit. See *Banknote Corp.*, supra, 315 NLRB at 1043. *Second*, the Board generally deems a unit of operators and mechanics to be appropriate. See, e.g., *Kane Steel Co.*, 355 NLRB No. 49 (2010); *Hanson Aggregates BMC, Inc.*, 353 NLRB 287 (2008). *Third*, unit employees continue to perform the same duties at the same worksites. REI failed to adduce that unit mechanics or operators perform modified duties, or that there is significant interchange, which are circumstances that might show that the unit is no longer appropriate. Moreover, REI continues to operate the Syracuse shop and Fulton facility as stand-alone repair centers, without interchange. *Finally*, in arguing that the unit is no longer appropriate, REI essentially contends that the unit is not appropriate due to its unlawful unilateral restructuring, which created a conspicuously convenient scenario where the unit no longer enjoys majority status at any locale. REI is, however, precluded from relying upon evidence flowing from the derogation of its bargaining obligation. See *Banknote Corp.*, supra, 315 NLRB at 1043.[40] Accordingly, its unlawful structural changes, which will be analyzed shortly, were akin to "fruit of the poisonous tree," and are irrelevant to this analysis.

iv. Conclusion

REI is a successor to the Northern Group, and unlawfully refused to recognize and bargain with the Union as the exclusive collective bargaining representative of unit. REI employs a majority of unit employees in an appropriate unit, and its business remains a "substantial continuity" of the Northern Group's operations.

2. Forfeiture of Right to Make Unilateral Changes

a. Legal Framework

A successor is, generally, not bound by the substantive terms of the predecessor's collective bargaining agreement and is, ordinarily, free to set its own initial terms and conditions of employment. *Burns*, supra, 406 US at 281; *Love's Barbeque*, 245 NLRB 78, 82 (1979), enfd. in relevant part 640 F.2d 1094 (9th Cir. 1981); *Spruce Up*, 209 NLRB 194, 195 (1974). This right may, however, be forfeited in several ways, which are present herein. For example, it can be forfeited, when a successor informs employees that it intends to operate as a non-union enterprise. See, e.g., *Advanced Stretchforming International*, 323 NLRB 529, 530-531 (1997),

40 See also *Dodge of Naperville*, 357 NLRB No. 183, slip op. at 2 (2012) ("In determining whether an established bargaining unit retains its distinct identity, we do not consider the effects of the Respondent's unlawful, unilateral changes to the existing unit employees' terms and conditions of employment, as giving weight to such changes would reward the employer for its unlawful conduct."); *Comar, Inc*., 349 NLRB 342, 357-358 (2007); *Deaconess Medical Center*, 314 NLRB 677, 677 fn. 1 (1994); *Holly Farms Corp.*, 311 NLRB 273, 279 fn. 25 (1993) (same).

enfd. in relevant part. 233 F.3d 1176 (9th Cir. 2000).[41] This right may also be forfeited, when a successor misleads employees into believing that they would all be retained without changes in their employment conditions, or when a successor fails to clearly announce its intention to establish new employment conditions prior to inviting former employees to accept employment. See, e.g., *Spruce Up*, supra, 209 NLRB at 195; *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 980 (2007); *Elf Atochem North America, Inc*., 339 NLRB 796 (2003) (informing employees that successor will adopt predecessor's contract until such time as another contract is negotiated).

b. Analysis

REI forfeited its right to set initial terms and conditions of employment for the unit in two, independent, ways. *First*, Chiodo's comments that "we're not taking the union with us," there will be no union, and other similar statements resulted in the forfeiture of REI's right to set initial terms and conditions of employment under the *Advanced Stretchforming* doctrine. *Second*, REI actively mislead employees into believing that they would all be retained without any change in their terms and conditions of employment, when Riccelli told Hogle on March 14 that, "when that agreement's up and we renegotiate it, there's going to be major changes …. [and there were] positive changes that he wanted to make … including a possible night shift and an addition of … twenty employees." (Tr. 52–53). Riccelli's claim that there would be major changes, only after the contract expired, conveyed that REI would not make pre-expiration changes.[42] REI's further commitment to add new workers,[43] commentary about maintaining the status quo, and subsequent decision to extend employment offers to the entire unit, amounted to a blatant failure to announce an intention to establish a new set of conditions prior to inviting former employees to accept employment. The fact that Riccelli made this comment to Hogle, a Union representative, instead of directly to employees, does not detract from this conclusion. See *Elf Atochem North America, Inc.*, supra, 339 NLRB at 796, fn. 3 (in "perfectly clear" cases, union communications are considered employee communications); *Marriott Management Services, Inc.*, 318 NLRB RB 144 fn. 1 (1995).

REI's forfeiture of its right to set initial terms and conditions of employment has several broad implications in this case. Most notably, REI has been precluded from the onset of its employment relationship from making any changes in the unit's terms and conditions of employment, without affording the Union notice and an opportunity to bargain.

3. Unlawful Unilateral changes

Following its takeover, REI took several unilateral actions, which affected the unit's terms and conditions of employment. These unilateral changes included, inter alia: the

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41 Under this doctrine, it would be contrary to statutory policy to "confer *Burns* rights on an employer that has not conducted itself like a lawful *Burns* successor because it has unlawfully blocked the process by which the obligations and rights of such a successor are incurred." *State Distributing Co.,* 282 NLRB 1048, 1049 (1987).

42 If Riccelli meant otherwise, he would have clearly announced that major changes would be immediately implemented, as soon as REI took over the Northern Group's operations.

43 REI made the decision in late-March to hire all unit workers, and did so when it took over.

temporary shutdown of the Fulton facility for renovation; the transfer of unit operators and mechanics to and from the unit; the transfer of non-unit mechanics into the unit; and changing the unit's health insurance provider. REI failed to notify the Union about these changes, or engage in bargaining with the Union, prior to implementation.

a. Legal Framework

i. Unilateral Changes in General

Under 8(a)(5) and 8(d), it is unlawful for an employer to refuse to negotiate over mandatory bargaining topics. *Fibreboard Paper Products v. NLRB*, 379 U.S. 203, 209-210 (1964). It follows, accordingly, that unilateral changes in mandatory bargaining topics "is a circumvention of the duty to negotiate which frustrates the objectives of §8(a)(5) much as does a flat refusal [to bargain]." *NLRB v. Katz*, 369 U.S. 736, 743 (1962); see also *N.K. Parker Transport, Inc.*, 332 NLRB 547, 551 (2000). The duty of notice and bargaining requires bargaining *before implementation*, while a union still has leverage, absent an emergency situation not present herein. *Metropolitan Teletronics*, 279 NLRB 957 (1986); *Willamette Tug & Barge Co.*, 300 NLRB 282 (1990); *Chrissy Sportswear*, 304 NLRB 988 (1991).

ii. Subcontracting

Subcontracting of unit work is generally a mandatory bargaining subject, which cannot be unilaterally enacted without providing the union notice and a chance to bargain. *Fibreboard,* supra. This obligation exists whether such subcontracting is to another company (e.g. transfer of work from REI to SSG), as in *Fibreboard*, or whether the transfer is an in-house relocation of work from a represented bargaining unit to another group as in *Connecticut Color*, 288 NLRB 699 (1988) (e.g. transfer of work from REI's Fulton facility to its Syracuse shop). Such bargaining is mandatory because work allocation is a fundamental condition of employment. *Road Sprinkler Fitters Local 669 (A-1 Fire Protection Co.) v. NLRB*, 676 F.2d 826 (D.C. Cir. 1982).

The Board has, as a result, held that when an employer merely changes only the identity of the employees performing the former unit work, while maintaining substantially the same operations or production processes, this decision is not a change in the scope or direction of the enterprise, but, remains a mandatory subject of bargaining under *Fibreboard*. See, e.g., *Walt Disney World Co*., 359 NLRB No. 73, slip op. at 6 (2013) (eliminating banquet captain and bar captain positions and reassigning such duties outside of the unit, where the same work continued to be performed by others at the same locales with the same equipment); *Regal Cinemas, Inc.*, 334 NLRB 304 (2001) (transfer of unit work to managers or supervisors); *Geiger Ready Mix Co.*, 315 NLRB 1021 (1994), enfd. in relevant part 87 F.3d 1363 (D.C. Cir. 1996) (relocating unit work to non-unit employees employed by other affiliated entities); *Torrington Industries*, 307 NLRB 809 (1992) (laying off unit drivers and replacing them with non-unit employees at an affiliated enterprise and independent contractors, where the primary change solely involved the identity of the personnel performing the work); *United Technologies*, 296 NLRB 571, 572 (1989).

iii. Closure of Business Operations

The decision to close all or a part of a business (i.e. as opposed to subcontracting and continuing an entity's operations), and associated layoffs and transfers, may occur unilaterally, as long as labor costs are not a factor. *Dubuque Packing Co*., 303 NLRB 386 (1991). If labor costs are a factor, such decisions can remain unilateral, if the union is unable to offer cost concessions, which might alter the decision. Under the *Dubuque* test, the General Counsel has the initial burden of showing that the decision was a relocation of unit work "unaccompanied by a basic change in the … employer's operation." The burden then shifts to the employer to show that: the work performed at the new locale varies significantly from the former work; the work performed at the former plant is to be discontinued entirely and not relocated; or the decision involves a change in the scope and direction of the enterprise. Alternatively, in order to avoid an obligation to bargain about the decision, an employer can show that: labor costs were not a factor; or, even if such costs were a factor, the union could not have offered sufficient cost concessions. However, even when, under exceptional circumstances, a decision to close a plant and transfer unit work is excused from bargaining, an employer must still bargain over the effects of a transfer. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-682 (1981).

b. Workforce Restructuring[44]

i. Closure of the Repair Shop at Fulton Facility and Transfer of Unit Mechanics

Upon its takeover, the first unilateral change that REI implemented involved temporarily closing its Fulton facility for renovation, and transferring all unit mechanics to the non-unit Syracuse shop. This work relocation was temporary in nature and resulted in unit mechanics performing their normal duties under constant working conditions at a non-unit site. This temporary change did not represent an alteration of the scope of REI's business, inasmuch as it continued to repair trucks with in-house mechanics at its own garages, in furtherance of the same operations and customers. REI did not permanently dismantle the Fulton facility, or sell or relocate its assets. Under these circumstances, the Board has held that temporary relocations of unit work are mandatory bargaining subjects, which require bargaining over the decision itself and its connected effects. See, e.g., *Geiger Ready Mix Co.*, supra, 315 NLRB at 1022 (given that the company "intended that the plant's closure be temporary … [and did not] permanently relocate the plant's physical assets" this decision and its effects are a mandatory bargaining topic). Given that REI took such actions without notifying the Union about its decision or engaging in pre-implementation bargaining, its unilateral action was unlawful.

ii. Transfer of Non-Unit Mechanics at Syracuse Shop to the Repair Shop at the Fulton Facility, Transfer of Certain Unit Mechanics Back to the Repair Shop at the Fulton facility, and Transfer of Certain Unit Mechanics from REI to its SSG, its Affiliate

On June 23, when REI reopened the Fulton facility, it took several unilateral actions. It

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44 These allegations fall under complaint pars. 13 and 19, which broadly cover REI "restructur[ing] … by transferring the former Northern employees from their Fulton, New York work location to other locations and transferring non-unit employees to Fulton New York." (GC Exh. 1). The complaint alleges that REI's failure to bargain both over the decision, and related effects, were unlawful.

transferred 2 unit mechanics from the Syracuse shop back to the repair shop at the Fulton facility. It also transferred 4 non-unit mechanics from the Syracuse shop to the unit repair shop at the Fulton facility. It further transferred at least 1 and possibly 2 unit mechanics (i.e. D. Melfi and J. Melfi)[45] from the Syracuse shop to SSG, which remains outside the unit (see (GC Exhs. 21, 36; R. Exhs. 10, 21). The transfers of unit mechanics back into the unit, non-unit mechanics into the unit, and unit mechanics already working outside of the unit to another non-unit locale were unaccompanied by a change in the scope of REI's enterprise. Such mechanics continued to perform constant repair and maintenance duties on REI's, and its affiliates', fleet and equipment, and their transfers solely represented the substitution of one set of employees for another. As a result, the failure to bargain over such decisions, and their associated effects, was unlawful. See, e.g., *Geiger Ready Mix Co.*, supra (unilateral transfer of work out of unit); *Torrington Industries*, supra (unilateral transfer of work out of unit); *United Technologies*, supra (unilateral transfer of work out of unit); *Lexus of Concord, Inc.*, 343 NLRB 851 (2004) (unilateral transfer of non-unit employee into unit to perform unit work).

iii. Transfer of Unit Operators Outside the Unit to SSG and No. Aggregates

Following its takeover, REI, which initially hired all unit employees,[46] unilaterally transferred <u>*all*</u> unit operators outside the unit to the following affiliates: SSG, No. Asphalt, No. Ready, and No. Aggregates.[47] REI's transfer of unit operators did not result in a change in the scope of its business operations (i.e. result in REI's wholesale elimination of mining branch), inasmuch as REI's own records demonstrate that it continued to employ operators, who performed mining activities at its Panther Lake, New York mining operation. See (R. Exh. 10). REI's transfer of unit employees was tantamount to a subcontract, where the scope of its operations remained constant (i.e. it continued performing mining work at Panther Lake), although the identities of those workers performing mining tasks (i.e. non-unit operators versus unit operators) were changed.

REI's unilateral transfer of unit operators outside the unit, under these circumstances, was unlawful in two independent ways. *First*, by unilaterally removing and transferring unit operator work from REI's enterprise at the Fulton facility to its affiliated non-unit enterprises, REI subcontracted out unit work. Given that this subcontract did not represent a change in the scope of its operations, REI was required to engage in pre-implementation bargaining over its decision and associated effects. Its failure to do so was, accordingly, unlawful.[48] See, e.g., *Geiger Ready Mix Co.*, supra; *Torrington Industries*, supra. *Second*, REI's actions unilaterally removed the operator position from the unit (i.e. transferred all operators outside of the unit), which is unlawful. See., e.g., *Walt Disney World Co*., 359 NLRB No. 73, slip op. at 5 (2013) ("[O]nce a specific job has been included within the scope of a bargaining unit … , the employer

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45 This uncertainty is based on REI's conflicting records regarding these employees.

46 Unit employees received REI's offer letters and paperwork, and were hired by its officials. (GC Exh. 9, 11).

47 Beyond showing that REI initially hired these employees and transferred them shortly thereafter, the record otherwise fails to adduce the exact dates of the transfers.

48 This finding is valid, irrespective of whether REI's transfers of work to its affiliates are viewed as an in-house transfer of unit work to non-unit employees (see *Connecticut Color*, supra), or a transfer of unit work to a separate employer (see *Fibreboard*, supra).

cannot unilaterally remove or modify that position without first securing the consent of the union or the Board.") *O.G.S. Technologies, Inc.,* 356 NLRB No. 92 (2011) ("A successor employer …. [l]ike any other employer … may not remove job classifications from an existing bargaining unit absent reaching agreement with the unit employees' collective-bargaining representative or satisfying the conditions set by the Board.").

c. Consolidation of SSG and No. Aggregates[49]

Given that REI's unilateral elimination of operators from the unit and initial transfer of such employees outside the unit was already found to violate 8(a)(5), the finding that its failure to bargain with the Union over the effects of its decision to consolidate SSG and No. Aggregates and further transfer certain transfer of unit operators outside the unit also violated 8(a)(5) would be cumulative, and would not alter the overall remedy. It is, therefore, unnecessary to decide this connected issue. See, e.g., *Sygma Network Corp*., 317 NLRB 411 fn. 1 (1995); *Pennsylvania Energy Corp.,* 274 NLRB 1153 fn. 1 (1985).

d. Changes to the Unit's Health Insurance Coverage[50]

REI's unlawfully changed the unit's health insurance carrier from the Union's Welfare and Pension Fund in the CBA to Excellus Blue Cross Blue Shield. This changed was enacted unilaterally, without notice or bargaining. Health insurance coverage and related benefits are mandatory bargaining topics. *Larry Geweke Ford*, 344 NLRB 628 (2005). Generally, when an employer fails to provide a union with notice and a meaningful opportunity to bargain about a change in health insurance coverage, such unilateral action is unlawful. *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001); *Pioneer Press*, 297 NLRB 972, 976 (1990). REI, therefore, violated the Act by unilaterally changing the unit's health insurance coverage.

4. Information Requests[51]

a. Legal Framework

In general, an employer must provide requested information to a union representing its employees, whenever there is a probability that such information is necessary and relevant to its representational duties. See *NLRB v. Acme Industrial Co.,* 385 U.S. 432 (1967). This duty encompasses the obligation to provide relevant bargaining and grievance-processing materials. See *Postal Service,* 337 NLRB 820, 822 (2002). The standard for relevancy is a "liberal discovery-type standard," and the sought-after evidence should solely have a bearing upon the disputed issue. See *Pfizer, Inc.,* 268 NLRB 916 (1984). Information, which concerns unit terms and conditions of employment is, "so intrinsic to the core of the employer-employee relationship" that it is presumptively relevant. *York International Corp*., 290 NLRB 438 (1988).

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49 These allegations are listed under complaint pars. 14 and 19

50 These allegations are listed under complaint pars. 14 and 19.

51 These allegations are listed under complaint pars. 15 and 19.

b. Analysis

REI violated the Act by failing to respond to the Union's May 20 information request. This request sought, inter alia, information connected to the heart of the successor, work transfer and subcontracting matters at issue herein. This request also sought information, which described the unit's current terms and conditions of employment, seniority, duties and other representational issues. It was, as a result, necessary and relevant to the Union's representational duties, and straightforwardly met the Board's broad discovery standards.

C. 8(a)(3) and (4) Allegations

1. 8(a)(3) – Osbourne's Constructive Discharge[52]

REI violated the Act by constructively discharging Osbourne. The Board has held that:

> Employees who quit work as a consequence of an employer's unlawful withdrawal of recognition from their collective-bargaining representative and unilateral implementation of changes in their terms and conditions of employment have been constructively discharged in violation of Section 8(a)(3) and (1) …. The theory of this violation is that employees have the statutory right to union representation as well as the contractual benefits negotiated by their representative. They may not be forced to make the Hobson's choice of leaving their jobs or forfeiting their statutory rights in order to remain employed under the working conditions unlawfully set by their employer.

Goodless Electric Co., 321 NLRB 64, 67-68 (1996), enf. denied on other grounds, 124 F.3d 322 (1st Cir. 2002) (citations omitted).

Osbourne resigned, after being told that the Union had been ousted and that only his wages would remain constant. Given that the Union's ouster was unlawful, his connected resignation constituted an unlawful constructive discharge.

2. 8(a)(3) – Reynolds' Discharge[53]

REI unlawfully failed to permit Reynold's to rescind his resignation. The framework for analyzing alleged 8(a)(3) violations is provided under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must first demonstrate, by a preponderance of the evidence, that the worker's protected conduct was a motivating factor in the adverse action. The General Counsel satisfies this initial burden by showing: the individual's protected activity; employer knowledge of such activity; and animus. Terminations, which include the failure to permit an employee to rescind their resignations, are considered under the *Wright Line* framework. See *George Lee Memorial Hospital*, 348 NLRB 327, 331-332 (2006).

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52 This allegation is listed under complaint pars. 8 and 17.

53 This allegation is listed under complaint pars. 9 and 17.

If the General Counsel meets his initial burden, the burden shifts to the employer to prove that it would have taken the same adverse action, even absent the protected activity. *Mesker Door*, 357 NLRB No. 59, slip op. at 2 (2011). The employer cannot meet its burden, however, merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action, absent the protected conduct. *Bruce Packing Co*., 357 NLRB No. 93, slip op. at 3-4 (2011). If the employer's proffered reasons are pretextual (i.e., either false or not actually relied on), the employer fails by definition to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007). On the other hand, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in the employer's motivation, it would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

a. Prima Facie Case

The General Counsel made a prima facie showing that REI's failure to accept Reynolds' rescission of his resignation was unlawfully motivated. Reynolds engaged in protected activity, when he reported Spencer's unlawful threat to the Union, was listed in its unfair labor practice charge concerning this threat, and provided an accompanying affidavit to the Board. REI was aware of the charge identifying Reynolds, and his complicity with the Union; both Riccelli and Chiodo conceded knowledge of the charge. Finally, animus is demonstrated by Chiodo's unlawful comments that REI was non-union, Spencer's unlawful threats, and REI's wholesale refusal to recognize the Union as the unit's representative and connected unlawful activities. Animus can also be gleaned from the close timing between charge identifying Reynolds and his firing. *La Gloria Oil & Gas Co*., 337 NLRB 1120 (2002), enfd. 71 Fed. Appx. 441 (5th Cir. 2003).

b. Affirmative Defense

REI failed to demonstrate that it would not have accepted Reynolds' rescission of his resignation, in the absence of the protected conduct. *First*, REI completely failed to show that it had a non-discriminatory policy of not accepting rescinded resignations. See *George Lee Memorial Hospital*, 348 NLRB 327, 331-332 (2006) (company sustained its burden where it demonstrated that it had a uniform policy of not rehiring employees, who provided less than 2- week notice). *Second*, REI's handling of Reynolds situation was deeply suspect, given that it initiated the chain of events that led to his resignation by sending him home for allegedly stealing a part, under the same circumstances that were accepted as legitimate earlier the very same day. REI also conspicuously failed to explain why such relatively equivalent incidents were handled so differently. Reynolds was clearly laboring under the very reasonable impression that his actions were accepted practice, acted transparently, and offered to pay for the part at issue. REI's unwillingness to permit him to rescind his resignation under such circumstances, or engage in an open dialogue with an admittedly good employee smacks of invidious intent.[54]

[54] REI's handling of this matter becomes even more suspect, when one recognizes that less than a month earlier, it graciously permitted Reynolds to rescind his resignation and offered him a transfer, in order to retain his services.

Third, REI's claims regarding Reynolds resignation were deeply inconsistent. For example, although Nipper testified that he resigned, the resulting paperwork contrarily reported that he was fired for theft.[55] Moreover, if Reynolds had actually resigned, it is unlikely that REI would have permitted him to receive unemployment benefits. Under these circumstances, REI wholly failed to show that it would not have accepted Reynolds' rescinded resignation, absent his protected activity.

3. 8(a)(3) – Ratio of Non-Unit to Unit Mechanics at the Fulton Facility[56]

Given that REI's unilateral transfer of non-unit mechanics into the Fulton facility violated 8(a)(5), and given that its initial transfer of unit mechanics away from the Fulton facility was also found unlawful, the finding of an additional 8(a)(3) violation on the basis of a hiring ratio involving unit mechanics would be cumulative, and would not impact the remedy. It is, accordingly, unnecessary to decide whether this matter violated the Act. See, e.g., *Tri-Tech Services, Inc.,* 340 NLRB 894, 895-896 (2003); *Sygma Network Corp.,* supra.

4. 8(a)(4) – Reynolds' Discharge[57]

Given that REI's refusal to accept Reynolds' rescinded resignation violated 8(a)(3), the finding of an added 8(a)(4) violation would again be cumulative and would not impact the remedy. It is, thus, unnecessary. See *United Parcel Service,* 327 NLRB 317, 317 fn. 4 (1998).

Conclusions of Law

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

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

3. REI violated Section 8(a)(1) of the Act by telling employees that it intended to operate as a nonunion entity.

4. REI violated Section 8(a)(1) of the Act by telling employees that pay raises were not being granted because of the Union, and by pledging pay raises, once the Union was purged.

5. REI violated Section 8(a)(1) and (3) of the Act by constructively discharging Monroe Osbourne.

6. REI violated Section 8(a)(1) and (3) of the Act by refusing to permit Scott Reynolds to rescind his resignation.

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55 In addition, although Cimilluca said that he willingly accepted Reynolds' resignation, and would have likely fired him even if he did not resign, Nipper contradictorily testified that Cimilluca told him to permit Reynolds to rescind his resignation on August 11. Such actions are even further contradicted by Nipper's willingness to afford him an employment reference to an employee, who was allegedly a thief.

56 This allegation is listed under complaint pars. 13 and 17.

57 This allegation is listed under complaint pars. 9 and 18.

7. The Union has, since May 15, 2014, and at all times material herein, been and is the exclusive representative of the employees employed by REI for purposes of collective bargaining within the meaning of Section 9(a) of the Act in the following appropriate collective-bargaining unit:

> All full-time mechanics and operators, and excluding all other employees, clerical employees, managerial employees, guards and supervisors as defined in the National Labor Relations Act, employed at the Fulton, New York facility.

8. REI violated Section 8(a)(1) and (5) of the Act by refusing to recognize the Union as the exclusive representative of the unit and bargain with it following its May 20, 2014 demand.

9. REI forfeited its right to set initial terms and conditions of employment for the unit.

10. REI violated Section 8(a)(1) and (5) of the Act by unilaterally closing the repair shop at the Fulton Facility and by unilaterally transferring unit mechanics outside the unit to the Syracuse shop on May 15, 2014, without prior notice to the Union and without affording it an opportunity to bargain with respect to this decision and connected effects.

11. REI violated Section 8(a)(1) and (5) of the Act by unilaterally transferring non-unit mechanics at the Syracuse shop to the Fulton facility on June 23, 2014, unilaterally transferring certain unit mechanics at the Syracuse shop back to the Fulton facility on June 23, 2014, and unilaterally transferring certain unit mechanics at the Syracuse shop outside the unit to its affiliated enterprise, SSG, without prior notice to the Union and without affording it an opportunity to bargain with respect to these decisions and connected effects.

12. REI violated Section 8(a)(1) and (5) of the Act by unilaterally transferring unit operators to its affiliated enterprises, SSG, No. Asphalt, No. Ready and No. Aggregates, without prior notice to the Union and without affording it an opportunity to bargain with respect to these decisions and connected effects.

13. REI violated Section 8(a)(1) and (5) of the Act unilaterally removing the operator position from the unit, transferring such work outside the unit, and, thereby, altering the scope of the unit, without the Union's consent.

14. REI violated Section 8(a)(1) and (5) of the Act failing to supply to the Union the information sought in its May 20, 2014 letter.

15. REI violated Section 8(a)(1) and (5) of the Act by unilaterally changing the unit's health insurance plan and other terms and conditions of employment, without prior notice to the Union and without affording it an opportunity to bargain over this matter.

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

Remedy

Having found that REI committed unfair labor practices, it is ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

REI, having unlawfully discharged Monroe Osbourne and Scott Reynolds, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed on a quarterly basis from their discharges to proper offers of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). REI shall also expunge from its records any references to their discharges, provide written notice of such expunction, and inform them that its unlawful conduct will not be used against them as a basis for any future personnel related actions. REI will also compensate Monroe Osbourne and Scott Reynolds for the adverse tax consequences, if any, associated with receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters for each. *Don Chavas, LLC d/b/a/ Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

REI shall recognize the Union as the exclusive collective-bargaining representative of unit employees, and shall bargain collectively and in good faith with the Union concerning the unit's terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. REI shall rescind its unilateral transfers of non-unit employees into the unit, and transfers of unit employees outside of the unit, and, henceforth, bargain with the Union concerning any contemplated changes in the wages, hours, working conditions, and other terms and conditions of employment of unit employees and will restore the status quo ante existing prior to its takeover of the Northern Group's operations. REI shall also offer full and immediate reinstatement to all unit employees, who were displaced by virtue of its unilateral transfers, to their former or substantially equivalent positions, dismissing, if necessary, any temporary employees or employees hired subsequently, without prejudice to their seniority or other rights and privileges previously enjoyed. REI shall also, on request of the Union, rescind any departures from the terms of employment that existed before its takeover, retroactively restore preexisting terms and conditions of employment, including wage rates, health insurance carriers and coverage, and contributions to benefit funds, that would have been paid, absent its unlawful conduct, until it negotiates in good faith with the Union to agreement or to impasse. It shall also make employees whole for their losses resulting from such unlawful unilateral changes. See *New Concepts Solutions LLC*, 349 NLRB 1136, 1161 (2007); *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 988 (2007); *Planned Building Services*, 347 NLRB 670, 674 (2006); *Regal Cinemas, Inc.*, 334 NLRB 304 (2001). The make-whole remedy[58] for these non-discharge violations shall be computed in accordance with *Ogle*

[58] "The Board's traditional make-whole remedy runs from the date of the successor's unlawful refusal to bargain until the successor … reaches a new agreement or bargains to a lawful impasse…. However, in a compliance proceeding, the Respondent will be permitted to introduce evidence establishing that, had it lawfully bargained with the Union, it would not have agreed to the monetary provisions of the predecessor

Protection Service, 183 NLRB 602 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. REI shall also remit all payments owed to employee benefit funds in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979), and reimburse its employees for any expenses resulting from its failure to make such payments as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. REI shall supply to the Union the information sought by its May 20, 2014 letter.

REI shall distribute remedial notices electronically via email, intranet, internet, or other appropriate electronic means to its employees, in addition to the traditional physical posting of paper notices, if it customarily communicates with workers in this manner. *J Picini Flooring*, 356 NLRB No. 9 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[59]

ORDER

Riccelli Enterprises, Inc., Syracuse, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Telling employees that it intends to operate as a nonunion business.

b. Telling employees that pay raises are not being granted because of the Union, or promising them pay raises once the Union has been purged.

c. Constructively discharging, refusing to accept rescinded resignations, terminating or otherwise issuing other discipline to employees because they have engaged in union or protected concerted activities.

d. Failing and refusing to recognize, and bargain collectively with, the Union as the exclusive collective-bargaining representative of the unit.

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employer's collective-bargaining agreement, and further establishing either the date on which it would have bargained to agreement and the terms of the agreement that would have been negotiated, or the date on which it would have bargained to good-faith impasse and implemented its own monetary proposals." *Windsor Convalescent Center,* supra, 351 NLRB at 988.

59 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.

e. Setting initial terms and conditions of employment for the unit, after forfeiting its right to do so.

f. Failing and refusing to bargain collectively with the Union by:

i. unilaterally closing the repair shop at the Fulton Facility on a temporary basis and transferring unit mechanics outside the unit to the Syracuse Shop on May 15, 2014, without prior notice to the Union and without affording it an opportunity to bargain with respect to this decision and connected effects;

ii. unilaterally transferring non-unit mechanics at the Syracuse shop into the unit at the Fulton facility on June 23, 2014, unilaterally transferring certain unit mechanics at the Syracuse shop back to the unit at the Fulton facility on June 23, 2014, and unilaterally transferring certain unit mechanics at the Syracuse shop outside the unit to its affiliated enterprise, SSG, without prior notice to the Union and without affording it an opportunity to bargain over these decisions and connected effects;

iii. unilaterally transferring unit operators to its affiliated enterprises, SSG and No. Aggregates, without prior notice to the Union and without affording the Union an opportunity to bargain with respect to these decisions and connected effects;

iv. unilaterally removing the operator position from the unit, transferring such work outside the unit, and, thereby, altering the scope of the unit, without the Union's consent;

v. unilaterally changing the unit's health insurance plan and other terms and conditions of employment without first giving notice to, and bargaining with, the Union about these changes; and

vi. failing and refusing to furnish the Union with requested information described in its May 20, 2014 letter that is relevant and necessary its performance of its functions as the collective-bargaining representative of the unit.

g. In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.[60]

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

a. Within 14 days from the date of the Board's Order, offer Monroe Osbourne and Scott Reynolds their former jobs or, if their jobs no longer exist, offer them substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

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60 A broad order is warranted "when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." *Hickmott Foods*, 242 NLRB 1357, 1357 (1979).

b. Make Monroe Osbourne and Scott Reynolds whole for any loss of earnings and benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section above.

c. Within 14 days from the date of the Board's Order, remove from its files any reference to Monroe Osbourne's and Scott Reynolds' unlawful discharges, and within 3 days thereafter, notify them in writing that this has been done and that their discipline will not be used against them in any way.

d. Compensate Monroe Osbourne and Scott Reynolds for the adverse tax consequences, if any, associated with receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters for each.

e. 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 backpay amounts due under the terms of this Order.

f. Bargain with the Union as the exclusive collective-bargaining representative of the 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 full-time mechanics and operators, and excluding all other employees, clerical employees, managerial employees, guards and supervisors as defined in the National Labor Relations Act, employed at the Fulton, New York facility.

g. On request of the Union, rescind any departures from the terms and conditions of employment that existed immediately prior to the takeover of predecessor the Northern Group, including health insurance coverage and other terms and conditions of employment, until it first negotiates in good faith with the Union to agreement or to impasse.

h. Make whole the unit employees for losses caused by the failure to apply the terms and conditions of employment that existed immediately prior to the takeover of predecessor the Northern Group's operation, subject to demonstrating in a compliance hearing that, had it lawfully bargained with the Union, it would have, at some identifiable time, lawfully imposed less favorable terms than those that had existed under its predecessor.

i. On request of the Union, rescind its unilateral transfers of unit employees outside the unit, transfers of non-unit employees into the unit, and elimination of the operator position from the unit.

j. On request by the Union, bargain collectively in good faith concerning the decisions to transfer unit employees outside the unit, and non-unit employees, into the unit.

k. On request of the Union, offer immediate and full reinstatement to all unit employees who were permanently transferred outside the unit following REI's takeover to their former positions or, if such positions no longer exist, to substantially equivalent employment, without prejudice to their seniority or to other rights and privileges previously enjoyed by them.

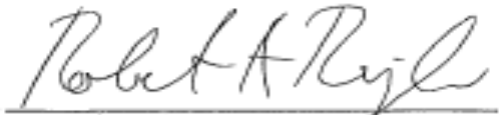
l. Make whole with interest all such displaced unit employees for any lost wages which they may have suffered as a result of the above described unlawful unilateral transfers in the manner set forth in the remedy section of the decision.

m. Furnish to the Union, to the extent that it has not already done so, the information sought by its May 20, 2014 letter.

n. Within 14 days after service by the Region, post at its Syracuse and Fulton, New York facilities copies of the attached notice marked "Appendix."[61] Copies of the notice, on forms provided by the Regional Director for Region 3, 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 an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former unit employees employed by the Respondent at any time since May 15, 2014.

o. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that it has taken to comply.

Dated Washington, D.C. September 21, 2015



Robert A. Ringler
Administrative Law Judge

61 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."

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT tell employees that we are a nonunion business.

WE WILL NOT tell employees that pay raises are not being granted because of the International Union of Operating Engineers, Local 158-C (the Union), or promise that such raises will be granted, once the Union is gone.

WE WILL NOT fire you, refuse accept your rescinded resignation, constructively discharge you, or otherwise discriminate against you because you support the Union or any other labor organization, or engage in other protected concerted activity.

WE WILL NOT fail and refuse to recognize and bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate bargaining unit (the unit):

> All full-time mechanics and operators, and excluding all other employees, clerical employees, managerial employees, guards and supervisors as defined in the National Labor Relations Act, employed at the Fulton, New York facility.

WE WILL NOT unilaterally set initial terms and conditions of employment for the unit, after forfeiting our right to do so.

WE WILL NOT fail and refuse to bargain collectively with the Union by unilaterally closing our repair shop at the Fulton Facility and transferring all unit mechanics to the Syracuse Shop, without giving prior notice to the Union and affording it an opportunity to bargain with us concerning this decision and its effects.

WE WILL NOT fail and refuse to bargain collectively with the Union by unilaterally transferring non-unit mechanics at the Syracuse shop into the unit at the Fulton facility, unilaterally transferring certain unit mechanics at the Syracuse shop back to the unit at the Fulton facility, and unilaterally transferring certain unit mechanics at the Syracuse shop outside the unit to our affiliated enterprise, SSG, without prior notice to the Union and without affording it an opportunity to bargain over these decisions and related effects.

WE WILL NOT unilaterally transfer unit operators to our affiliated enterprises, SSG and No. Aggregates, without prior notice to the Union and without affording it an opportunity to bargain with respect to these decisions and associated effects.

WE WILL NOT unilaterally remove the operator position from the unit, transfer such work outside the unit or alter the scope of the unit, without the Union's consent.

WE WILL NOT unilaterally change your health insurance coverage or other terms and conditions of employment without first giving notice to, and bargaining with, the Union about these changes.

WE WILL NOT fail and refuse to furnish the Union with requested information described in its May 20, 2014 letter, which is relevant and necessary to its performance of its functions as the collective-bargaining representative of the unit.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of this Order, offer Monroe Osbourne and Scott Reynolds full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Monroe Osbourne and Scott Reynolds whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Monroe Osbourne and Scott Reynolds, and we will, within 3 days thereafter, notify each of them in writing that this has been done and that their dismissals will not be used against them in any way.

WE WILL compensate Monroe Osbourne and Scott Reynolds for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each of them.

WE WILL recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, on request of the Union, rescind any departures from terms and conditions of employment that existed immediately prior to our takeover of the predecessor the Northern Group, including health insurance coverage and other terms and conditions of employment, until we first negotiate in good faith with the Union to agreement or to impasse.

WE WILL make whole the unit employees for losses caused by our failure to apply the terms and conditions of employment that existed immediately prior to our takeover of the Northern Group's operation, subject to demonstrating in a compliance hearing that, had we lawfully bargained with the Union, we would have, at some identifiable time, lawfully imposed less favorable terms than those that had existed under the Northern Group.

WE WILL, on request of the Union, rescind our unilateral transfers of unit employees outside the unit, transfers of non-unit employees into the unit and elimination of the operator position from the unit.

WE WILL, on request by the Union, bargain collectively in good faith concerning our decision to transfer unit employees outside the unit, and non-unit employees, into the unit.

WE WILL, on request by the Union, offer immediate and full reinstatement to all unit employees, who were permanently transferred outside the unit following our takeover to their former positions or, if such positions no longer exist, to substantially equivalent employment, without prejudice to their seniority or to other rights and privileges previously enjoyed by them.

WE WILL make whole, with interest, all displaced unit employees for any lost wages, which they may have suffered as a result of our unlawful unilateral transfers.

WE WILL furnish to the Union, to the extent that we have not already done so, the information sought by its May 20, 2014 letter.

RICCELLI ENTERPRISES, INC.
(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

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

Niagara Center Building, 130 South Elmwood Avenue, Suite 630 Buffalo, New York 14202
(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/03-CA-130137 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, (716) 551-4946.