Daycon Products Company, Inc. *and* Drivers, Chauffeurs and Helpers Local Union No. 639, Affiliated International Brotherhood of Teamsters. Cases 5–CA–35687, 5–CA–35738, 5–CA–35965, and 5–CA–35994

September 21, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

On February 15, 2011, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a brief in support of the exceptions. The General Counsel and the Charging Party filed briefs in opposition and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified[2] and set forth in full below.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below, and orders that the Respondent, Daycon Products Company, Inc., Upper Marlboro, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union as the exclusive bargaining representative for certain of its employees by unilaterally subcontracting bargaining unit work without first notifying the Union and affording it an opportunity to bargain about such subcontracting.

(b) Changing the terms and conditions of unit employees by unilaterally implementing its last offer based on a premature declaration of impasse in collective-bargaining negotiations.

(c) Refusing to reinstate employees who participated in an unfair labor practice strike after receiving an unconditional offer on their behalf to return to work.

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

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

(a) Within 14 days from the date of this Order, offer all unfair labor practice strikers not already reinstated full reinstatement to their former jobs, discharging, if neces-

[1] The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally subcontracting snow thrower repair work, we note that the Respondent did not contend that the subcontracting was de minimis. Nor did it present evidence that it had a past practice of subcontracting repair work—whether on snow throwers or on other equipment—based on "peak demand." Moreover, the timing of the subcontracting—including the Respondent's delay until March before subcontracting the repair of machines that had been in its shop throughout the winter—undermines its implicit reliance on its customers' urgent need for the timely return of their snow throwers. Finally, the contract expressly stated that subcontracting could not be used as a subterfuge to violate other provisions of the agreement, while another provision of the agreement stated that when repair work backed up, "the employer *shall* assign overtime as necessary . . . to complete the repairs" (emphasis added). By subcontracting this work rather than assigning mandatory overtime as the contract required (or first discussing the issue with the Union), the Respondent violated the subcontracting provision's no-subterfuge proviso. Thus, the Respondent cannot rely on the subcontracting provision to show that its action was not unilateral.

Member Hayes adopts the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally subcontracting the snow thrower repair work solely for the reasons stated in the judge's decision.

We deny as moot the Charging Party's motion to expedite decision dated August 12, 2011. We also deny the Respondent's motion to reopen the record. The Respondent failed to furnish an adequate explanation why the evidence it proffers was not submitted at the hearing or why the evidence would require a different result. See Sec. 102.48(d) of the Board's Rules and Regulations. We deny the Acting General Counsel's motion to strike the Respondent's motion. Finally, pursuant to the Respondent's August 26, 2011 letter to the Board, we have noted and reviewed the Board's recent decision in *California Pacific Medical Center*, 356 NLRB No. 159 (2011). Nothing in that case dictates a change in our decision.

[2] We shall modify the judge's recommended Order, and substitute a new notice, to reflect that the Respondent violated Sec. 8(a)(5) and (1) by its unilateral implementation of its last offer after prematurely declaring impasse, rather than merely by prematurely declaring impasse. We shall also modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), and to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

In addition, we modify the judge's remedy to provide that the unfair labor practice strikers shall be made whole for their losses, if any, from July 6, 2010, to the date they receive valid offers of reinstatement, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

sary, any employees currently in those positions, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed.

(b) Make all striking employees whole for any loss of earnings and other benefits suffered as a result of the refusal to reinstate them on July 6, 2010, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to its unlawful failure to reinstate the former strikers, and within 3 days thereafter notify in writing all unfair labor practice strikers that this has been done and that the failure to reinstate them will not be used against them in any way.

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

> All drivers, warehousemen, chemical compounders, utility employees, and repairmen of the Company employed at its 16001 Trade Zone Avenue, Upper Marlboro, MD 20774 location; but excluding office clerical employees, salesmen, professional employees, guards, supervisors, and all other employees.

(e) On request by the Union, rescind any or all of the changes in the terms and conditions of employment for its unit employees that were unilaterally implemented on April 23, 2010, when the company implemented its last bargaining offer.

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

(g) Within 14 days after service by the Region, post at its Upper Marlboro, Maryland facility copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 5, 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 employees and former employees employed by the Respondent at any time since March 1, 2010."

(h) Within 21 days after service by the Region, file with the Regional Director for Region 5 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 21, 2011

Mark Gaston Pearce,	Chairman
Craig Becker,	Member
Brian E. Hayes,	Member

(SEAL) 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

[3] 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."

WE WILL NOT refuse to bargain with Teamsters Local 639 as your exclusive bargaining representative by unilaterally subcontracting bargaining unit work without first notifying the Union and giving it an opportunity to bargain about such subcontracting.

WE WILL NOT unilaterally implement our final contract proposal based on a premature declaration of impasse in collective-bargaining negotiations.

WE WILL NOT refuse to reinstate our employees who went on strike in response to our unfair labor practices and who made an unconditional offer to return to work.

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

WE WILL offer reinstatement to all the unfair labor practice strikers who went on strike on April 26, 2010, and who have not already been reinstated

WE WILL make all of our striking employees whole for any losses that they suffered as a result of our refusal to reinstate them on July 6, 2010, less any interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful failure to reinstate the former strikers, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the failure to reinstate will not be used against them in any way.

WE WILL notify and, on request, bargain with the Union as your exclusive collective-bargaining representative before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees.

WE WILL**,** if requested by the Union, cancel any or all of the unilateral changes made when we implemented our final bargaining offer on April 23, 2010.

DAYCON PRODUCTS CO.

Daniel Heltzer, Esq., Sean Marshall, Esq., and *Crystal Carey, Esq.,* for the General Counsel.

Mark Trapp, Esq. and *Paul Rosenberg, Esq. (Epstein, Becker, & Green, P.C.),* for the Respondent.

John Mooney, Esq. (Mooney, Green, Saindon, Murphy, & Welch, P.C.), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on November 17, 18, 19, and 22, 2010,[1] in Washington, D.C. The consolidated complaint herein, which issued on September 28, 2010, was based upon unfair labor practice charges that were filed by Drivers, Chauffeurs and Helpers Local Union No. 639, affiliated with International Brotherhood of Teamsters (the Union), on April 2, 29, July 14, and 26. The consolidated complaint alleges that Daycon Products Company, Inc. (herein called the Respondent and/or the company), in about December 2009, unilaterally subcontracted snow-thrower repair work and, on about April 23, implemented its last bargaining offer without first bargaining with the Union to a good-faith impasse. The complaint further alleges that since about April 26 certain employees of the Respondent have engaged in a strike that was caused and prolonged by the above unfair labor practices engaged in by the Respondent and, although the Union on about July 2 made an unconditional offer on behalf of the employees to return to work, the Respondent refused to reinstate some of the employees to their former, or substantially equivalent positions of employment. By this conduct it is alleged that the Respondent violated Section 8(a)(1)(3) and (5) of the Act.

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE FACTS

The Respondent has been engaged in the business of manufacturing and distributing janitorial, maintenance, and hardware supplies at its office and place of business in Upper Marlboro, Maryland, and the Union has represented certain of its employees since about 1973. The most recent contract between the parties was effective for the period March 3, 2007, through January 31. The principal issue herein is whether there was an impasse in the negotiations between the parties thereby permitting the Respondent to unilaterally implement its last bargaining offer, as it did on April 23. However, there is the separate allegation that in about December 2009 the Respondent unilaterally subcontracted snow-thrower repair work, without prior notice to, or bargaining with, the Union, in violation of Section 8(a)(1) and (5) of the Act.

A. Subcontracting Allegation

In addition to the Respondent's drivers, warehousemen, and other unit employees, the Union represents the Respondent's repairmen at its facility in Upper Marlboro. Douglas Webber, the business agent for the Union and its chief negotiator, testified that he learned that on about March 16 the Respondent subcontracted snow thrower repair work that is normally performed by the Respondent's employees represented by the Union and the Respondent never informed the Union that the work was being subcontracted, nor did they attempt to bargain with the Union about the subcontracting. The contract, at article 1, section C, states:

> The Company may subcontract work where all regular full time employees are working and during periods of peak demand and/or in accordance with the employer's past practice, provided that subcontracting shall not be used as a subterfuge to violate the other provisions of this agreement.

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2010.

In addition, article 6B(3) states, inter alia:

> Shop- whenever there is an emergency, road service over 48 hours old, or if the que (total unrepaired equipment in the house) goes over seventy five (75), then overtime shall be required and the employer shall assign overtime as necessary to reduce the que below seventy five (75) and/or to complete the repairs as necessary.

Webber has been covering the Respondent on behalf of the Union for about 6 years. He testified that he is unaware of any previous situation where the Respondent has subcontracted repair work normally performed by its unit employees.

Dale Windsor has been employed as a technician in the Respondent's repair shop for 12 years, most recently as senior technician and shop foreman and is a member of the Union. During the Winter of 2009–2010 he and the three other three repair shop technicians performed work on snow thrower machines. As is typical for this work, these machines sometimes required replacement parts, which the Respondent purchased from a number of different vendors. One of these vendors is Tecumseh, an engine manufacturer, which Windsor understands is now out of business. Because of the large amount of snow during the Winter of 2009–2010 there was more repair work than usual on snow throwers and Windsor and the other repair technicians worked full time during this period and reported for work on a few weekends for mandatory overtime. In addition, due to the large number of snow throwers that were brought to the shop for repairs, some of them were stored outside while awaiting repairs. He told John Poole, Respondent's President, that the reason for the presence of all the snow throwers was the difficulty that Respondent was having obtaining carburetors, belts, and other parts for the machines. He testified that he was not aware, at the time, that the Respondent sent snow throwers to another company for repair work. Windsor testified further that there are two types of equipment on which the Respondent does not perform maintenance or repair work-pressure washers and propane, the former because of parts issues and the latter because of liability and certification issues.

Poole testified that repair work has been subcontracted continuously throughout the term of the contract and there has never been a grievance filed regarding this subcontracting. He testified that because of the harsh weather conditions during the Winter of 2009–2010, "we were up to our ears in snow blowers," the repair area was filled and they were out on the loading dock. One of the snow throwers that they sell and repair was manufactured by Tecumseh, which had gone out of business, and it was becoming difficult to obtain parts for these machines. He testified: "We actually don't look to subcontract work unless we have to. We had run out of snow blower parts. Marlboro Mower had carburetors for our machines, but they wouldn't sell them to us at this point because they were limited. They wanted the work." Some of these snow throwers had been sitting in the shop for about 3 months before being sent to Marlboro. Both before and after these machines were sent to Marlboro, everybody in shop was working full-time; in fact, the employees were working mandatory overtime.

Christopher Moore, the parts manager for Marlboro Mower, testified that they sell and service outdoor equipment. He testified that in the past, Marlboro sold the company parts and material. In about March, they repaired approximately 12 snow throwers for the company. Prior to that time, a woman who works in the office for the company, called Marlboro and asked if they could repair some snow throwers for them and they told the company to bring in six at a time. The primary problem with the machines was that they had not been used in a long time and they needed parts, cleaning, and repair. He testified that Marlboro did not refuse to sell the needed parts to the company, nor did they insist on performing the repair work. In fact, Marlboro would have preferred to simply sell the parts to the company and let them perform the repair work, because the machines take up a lot of space, and they get paid faster when they simply sell the parts. Most of the repair work on the snow throwers was completed by April.

B. Bargaining

As stated above, Webber was the chief negotiator for the Union and was often assisted by employees who were members of the union committee. He was also the chief negotiator for the Union during the negotiations that resulted in the 2007 to 2010 contract. The chief negotiator for the Respondent was attorney Jay Krupin, assisted by another attorney, Paul Rosenberg. Also present, at times, were Poole, Howard Cohen, Respondent's owner, Joe Giusto, the vice president of manufacturing, and Jodie Kendall, the HR director. Prior to the start of negotiations, Webber sent an information request to the Respondent to assist him in negotiations and, prior to the start of negotiations, he received a response from the Respondent: a seniority list containing the job classifications and rates of pay for the unit employees.

The first bargaining session took place on November 4, 2009. Poole began the meeting talking about the 36 year bargaining history and said that the Respondent wanted to try something different; that they were interested in a performance based package, tying wage increases to performance and productivity. Webber responded that they had always had an hourly rate of pay and he didn't know if he was interested in changing to a performance based system. The Respondent caucused and when they returned Poole said that the Respondent was not talking about taking anything back, but wanted to implement a performance based package, so if the company did well, the workers would also do well. If the company did not do well, there would be no increases, but no specifics were provided. Krupin then said that ". . . they can't commit to having a contract that looked like the last one." Webber understood him to be referring to wages. Webber then distributed the Union's noneconomic proposals consisting of fifteen proposals on the subjects of seniority, workweek, wages, vacations, temporary employees, and duration. Poole then proposed changing the way that negotiations have proceeded and setting up a "partnership" with incentive provisions, but the Union said that they had no interest in incentive pay based upon performance. In addition, at this meeting, Krupin said that he wanted to see the Union's economic proposal early enough so that he would be able to analyze it prior to the next bargaining session.

By letter to Webber dated November 16, 2009, Rosenberg enclosed a document setting forth the noneconomic issues that the parties had agreed upon on November 4, 2009, stating: ". . . the appropriate next step in the bargaining process is to begin discussing the core topics of wages, health insurance, and retirement investment vehicles." He also stated that "any decision related to the principal financial items must be carefully analyzed" and asked Webber to send his economic proposals to the Respondent by December 1, 2009. By email to Rosenberg dated November 16, 2009, Webber said that the Union was prepared to continue discussing the noneconomic issues, as well as the economic issues at the next meeting on December 9, 2009.

The second meeting took place on December 9, 2009. Webber stated that he wanted it to be clear that even if they discussed economic proposals, it was understood that unresolved noneconomic issues were still open, and he distributed the Union's economic proposals containing eighteen proposals on subjects such as workweek, holidays, wages, personal days, vacations, health and welfare, retirement, and duration. Union proposal number 9 included a new top wage scale (top rate) for each job classification, together with a catch up (progression) rate for those not at the top rate.[2] The proposed wage scale represented an increase of 75 cents an hour over the top rate existing in the prior agreement, and the progression rate provided that a new employee would be paid 85 percent of the top rate for the first year of employment, increasing to 90 percent on the first anniversary of employment, 95 percent on the second anniversary, and 100 percent of the top rate on the third anniversary of employment. The proposal also provided that all employees who were employed by the Respondent prior to February 1, 2008, would immediately go to the top rate. Webber was asked whether wage progression (also referred to as catch up) was a very important issue during negotiations, and he testified: "It was very important." After receiving the Union's proposal, the Respondent caucused, and when they returned they said that they would have to "cost it out" and the meeting ended. Poole testified that he calculated the Union's proposal as potentially costing the company more than 20 percent over the prior agreement.

The parties next met on December 15, 2009. Rosenberg opened the meeting by saying that they did a detailed analysis of the Union's proposal and estimated that it would cost $3 million, and felt that it was out of touch with the economics of the day and ". . . didn't believe it was prudent to give even . . . a counteroffer." He also said that, although they were not proposing reductions, any increases would be tied to efficiencies and improvements. Rosenberg then gave Webber a contract to serve as its proposal. This proposal had cross outs through the existing wages provision (from the 2007–2010 contract) and added a provision entitled "Economic Distress" stating: "If average revenue over the last 12 month rolling period decreases by 5% or more then the economic increases that shall be effective during the life of this Agreement will be postponed until revenue reverts to pre-distress levels."

The next meeting took place on January 5. During this meeting Krupin gave Webber a two paged document entitled: "Agenda for Negotiations" listing eight subjects-cleaning of building, discipline, health and welfare, wages, economic distress, scheduling, licensure requirements, and duration. Webber testified that this was not a series of proposals; rather it was a listing of subjects that the Respondent wanted to discuss and, in fact, the agenda for negotiations does not set forth any proposals, it simply lists the subjects. At this meeting the Union stated that it would not accept an economic distress clause. At the conclusion of the meeting Krupin said that he would like to narrow the scope of the negotiations and deal with wages and economic issues and wanted to limit the scope of future negotiations to four to six issues. Webber responded that he was not sure that he could agree to that at that time and the meeting ended.

The parties next met on January 19. At the beginning of the meeting Krupin gave Webber a three page document entitled Employer Proposals. It proposed wage increases of 1 percent on the date of ratification of the contract, and additional 1 percent increases 1year and 2 years from the date of ratification. In addition, employees would be eligible to receive "an annualized bonus payment of up to 3% of their base hourly earnings" if they reached or exceeded certain productivity criterion. Krupin said that the bonus standards were not yet finalized and were still being worked out. The Union caucused, and when they returned Webber said that they still wanted 3 years to the top rate, they wanted cents on the dollar increases rather than percentages so that employees at the lower rate and those at the higher rate would receive the same increase, they were not interested in productivity based compensation, they wanted to standardize the work week, and health and welfare was still on the table. Krupin responded that they were not interested in cents on the dollar increases without performance requirements, they wanted to eliminate the catch up provision present in the existing contract, and they could not agree to the Union's health and welfare proposal. Krupin submitted an economic distress proposal, which was almost identical to the proposal discussed on December 15, 2009, and the Union rejected this proposal.

The parties met again on January 29. In addition to the union committee, Tommy Ratliff, union president, and John Gibson, secretary treasurer, were present at this meeting for about 15 to 20 minutes. Krupin gave Webber a new Employer's Proposal, which provided for a 2 percent wage increase on the date of ratification, and 1 percent increases 1 and 2 years from that date for employees at the top rate. In addition, it provided for catch up as well: "However, employees who on the Effective Date of this Agreement are not at the top base wage rate in their respective classification shall receive the following increases until reaching the top base wage rate." It provided 3 perent on the date of ratification and 1.5 percent in each of the following 2 years. The proposal also contained the Economic Distress proposal, but the production-based incentive provision was gone. The Union then gave the Respondent a counterproposal to its Health and Welfare proposal deleting the second sentence stating: "During each year of this Agreement this contribution cost

[2] The 2007—2010 contract generally provided for 55 cents wage increases annually, plus an additional increase of 33, 35, and 40 cents for the 1st, 2nd, and 3rd year of the agreement for all employees hired after February 1, 2004, who were not at the top rate.

will not increase by more than $0.03 per hour for single coverage and $0.11 per hour for family coverage" and replaced it with "Any additional cost will be borne by the Company." Webber testified that Krupin said that the wages for current employees would not be reduced if their proposed rates of $20.92 for single and $85.99 for family were used and "our proposal basically says the same thing." Based upon what Krupin said, Webber felt that they had an agreement on health and welfare because under both proposals the rates and benefits would be frozen. The Union then repeated its objection to percentage increases, again saying that they wanted cents on the dollar increases. Poole responded that employees with longer job tenure deserved a larger increase and Webber said that employees with 3 years seniority were just as valuable as employees with 10 years seniority. During this meeting the Union gave the Respondent a new list of economic proposals in which they withdrew certain proposals regarding the work week, maintained the wage proposal of 75 cent increases each year, and modified the progression proposal to be 85 percent in the first year, 90 percent the first anniversary, 95 percent the second anniversary, and 100 percent the third anniversary of the date of hire. During that meeting, Gibson told Poole that the catch up provision was one of the Union's primary objectives in the negotiations.

Poole testified that at this meeting, Webber and Krupin stepped out of the room together and when they returned they said that health and welfare was resolved and that the company would take the bonus proposal off the table. He also testified that the company's economic distress proposal set the bar as a drop of 5 percent in company revenue, and in his 30 years with the company, that had never occurred, but the Union rejected this proposal. In addition, to make the proposed wage increases more palatable to the Union, the company translated the percentages into cents on the dollar—1 percent equals 17 cents, 2 percent equals 34 cents.

> By letter dated February 17, Krupin wrote to Webber:
>
> During the course of our negotiations over the terms of a new collective bargaining agreement at Daycon Products Company, Inc. ("the Company"), we have pared down the issues for discussion. Unfortunately, however, we have been unable to bridge an ideological divide on the core issue of wages.
>
> At our last session the Company presented a revised proposal designed to address the Union's concern regarding the wage differential between employees based on their seniority. This position would allow those individuals who are not at the top base wage rate within their respective classification to receive a greater wage increase during each year of a new contract than their more senior counterparts. To our surprise, you emphatically rejected this proposal by proclaiming the Union is "not interested in anything less than a three year wage progression." Furthermore, the Company proposed cents on the dollar increases equating to one and a half percent (1.5%) to three percent (3%) during an agreement's duration. In stark contrast, the Union has maintained its original position which if accepted amounts to approximately an eight percent (8%) wage increase during each year of a contract.
>
> The Union's viewpoints regarding wages suggest we are still very far apart from reaching a deal. In light of this, a recap of the parties' current positions is in order. Accordingly, we have prepared the enclosed chart setting forth the status of the open items. Within the chart we have included a blank column between our respective positions, which should be used utilized [sic] as a mechanism to determine how a resolution could be reached on these matters. Please let us know what movement the Union is willing to make such that we can fill in this blank column, and thereby move towards reaching an agreement.

The status of open items lists four subjects: wage increases for employees at top rate, wage increases for employees not at top rate, economic distress clause, and creation of helper classification.

The next meeting took place on February 18. Webber began the meeting by listing pending grievances and asked whether the Respondent would be interested in trying to resolve some of them. Krupin responded that this was not a grievance meeting and he wanted to move on with negotiations. Krupin then gave Webber two documents, the company's proposals dated February 18, and a list of tentative agreements stating, "Set forth below are the items that the parties tentatively agreed to on November 4, 2009." Krupin also said that the company had made substantial movement, but he didn't feel that the Union was doing the same, and he handed Webber another employer's proposal on wages. It provided that employees would receive a 40 cent hourly wage increase upon date of ratification of the contract, and another 20 cents 1 year from that date and 2 years from that date. The proposal also states: "However, employees who on the Effective Date of this Agreement are not at the top base wage rate in their respective classification shall receive the following increases until reaching the top base wage rate," 60 cents on the date of ratification, and 30 cents 1 year and 2 years from that date. Another change is contained in the Economic Distress proposal, which was changed to a 6 percent decrease in gross revenue (from 5 percent) before its restrictions kick in. The Union rejected these provisions as well as the duration provision contained in that proposal. During the course of the meeting the Union withdrew the following proposals: certain work week proposals, including guaranteed hours for weekend work and funeral leave, and wages (an increase in premium pay for night shift work); in addition, the Respondent rejected some of the Union's proposals relating to the work week and holidays, and Webber reduced the Union's wage increase demand from 75 cents to 65 cents. During this meeting Krupin asked Webber, "Is it absolute in your mind that you need a three year catch up?" and Webber answered yes. At about 4:45 that day Krupin gave Webber what he termed the Respondent's "Best Offer." Under this proposal, the hourly wage increase that employees would receive was 40 cents on the date of ratification and another 40 cents an hour 1 year and 2 years from that date. In addition, employees not at the top rate would "receive the following increases until reaching the top base wage rate." The increases were 60 cents on date of ratification and one year and two years from the date of ratification. Poole testified that prior to the beginning of negotiations, he surveyed the market and the company's situation, and he targeted between 3 and 4 per-

cent as an appropriate and fair wage increase. This "best" proposal presented at this meeting was very close to 3 percent. When Webber asked Krupin what he meant by "best offer," Krupin said that if they were going to agree to a deal, "it has to be something very close to this." Webber responded that it would be hard to get an agreement, and rejected this wage proposal, as well as the Economic Distress provision and the change in the date of ratification of the contract. Webber asked Krupin if that was the Respondent's last, best, and final offer or just its best offer and Krupin answered, "What difference does it make?" That ended the meeting. Poole testified that he didn't view the meeting as productive because while the company was moving, the Union only moved by 10 cents.

After this meeting Webber prepared a meeting notice for the Union to be held on February 27. The purpose of the meeting was stated as: "Contract Update and a Strike Vote Will be Taken," and the notice was posted on the bulletin board at the Respondent's facility. Approximately 30 employees attending the meeting and Webber informed them that the Respondent had just given them what it referred to as its best offer. He said that the four main open issues were pension, wages, catch up wages, and the economic distress provision and that the Union was going to ask a federal mediator to get involved in the negotiations, but that sometimes a strike vote works as a tool to get a company to bargain more seriously. He told the members, "It's a first step preparation. We don't want to strike . . . if we don't have to. We were using it as a tool to continue bargaining." The members voted to authorize the Union to strike.

The next bargaining session took place on March 17. In addition to the union committee and the Respondent's committee, federal mediator Gary Eder attended the meeting. At the commencement of the meeting Webber handed Krupin a document entitled: "Union Response to 'Company's Best Offer'" which stated that the Union rejected the Respondent's wage proposal submitted at the prior meeting and that the Union's position was the wage proposal that it presented at the prior meeting (65 cent increase), and that it rejected the Respondent's economic distress provision and the contract duration provision. As to the latter, the Respondent proposed that the contract would be effective from the date of ratification, while the Union wanted it effective from the date the prior contract expired, February 1. Webber then gave Krupin a listing of what he believed were the open noneconomic issues which related to supervisors performing bargaining unit work, seniority, weekend overtime work, and the contract duration provision. Webber also gave Krupin a listing of what the Union believed were the open economic issues, including premium pay for Sunday work, holiday pay, an increase in vacation days, retirement, the duration provision of the agreement, and wages and catch up wages, including the catch up provision that employees hired prior to February 1, 2007, shall go to the top rate of pay immediately. Webber told Krupin that he hoped that the Respondent would respond to these economic and noneconomic issues. Webber also told him that he had some question about health and welfare which he thought had been agreed to, and the timeliness of disciplinary actions, which was a new proposal. As to the former, he said that while the Union assumed that it had previously been agreed to, all the employees received letters from the Respondent stating that the company had agreed to maintain the current level of benefits as provided by the contract and had agreed to not increase "this year's employee health contribution." Webber told Krupin that he believed that they had previously agreed that that there would be no increase in the employees' contributions for the life of the agreement. The parties caucused and when they returned, ". . . basically, the company didn't have anything." Webber and Ratliff spoke and, "It doesn't appear that anything is going to happen today and we called it a day." Webber's notes for this meeting states: "Very far apart."

Poole testified that at this meeting the Union rejected all aspects of the company's best offer and stood by its wage offer of 65 cents an hour. After caucusing with the mediator and deciding to take one issue at a time, the company decided to discuss the top rate and progression first.[3] Poole began to discuss why the company was not agreeable to this proposal, when Ratliff stood up, told him that he had the Union's proposal and walked out of the mediation. That was the end of that meeting.

Ratliff testified that he received a telephone call from Krupin on March 26 asking if they could have an off-the-record meeting: "We were two level headed guys and he believed that we could get a contract." Webber, Ratliff, and Gibson felt that "it was a good sign" that the Respondent asked for the meeting. The parties met as scheduled at a restaurant, Webber, Ratliff, and Gibson for the Union, and Krupin, Rosenberg, and Poole for the Respondent. Webber did not take any notes of this meeting and, as far as he knows, nobody else did either. Ratliff opened the meeting by saying you called us here, let's see if we can get this thing moving. However, Webber testified, "Nothing really happened . . . there weren't any thoughts or ideas put on the table." The parties caucused and Webber, Ratliff, and Gibson decided that they had to do something "to move this forward" so, even though they did not like long term contracts, especially during a recession, they decided to propose a 4-year contract and a 4-year progression period to spread the progression over a 4-year period. Webber testified that while this four year term was "open for discussion," it was never, officially, a proposal. The Respondent's representatives caucused, and when they returned, Krupin said, "What if we created an artificial substandard top rate and have that be achievable during the life of the agreement?" As an example he said that the company could establish an artificial top rate, such as $18 rather than the real top rate that the lower paid employees would progress to. The Union side caucused and "were pretty optimistic." They decided to return and propose a 5-year contract together with a 5-year progression period, and that is what Webber proposed when they returned, saying that they felt that it was "a major concession" but one that they were willing to make in order to get a deal. Krupin said that they needed time to "crunch the numbers" and they would get back to them the following week, and the meeting ended.

[3] Poole testified that based upon yearly increases of 65 cents an hour, together with the progression proposal presented by the Union, newly hired warehouse employees would receive wage increases of almost 45 percent over 3 years.

Ratliff testified that he opened the meeting by saying, "You wanted an off-the-record meeting, so what do you have?" Krupin said, "Your proposal is a little too rich for us." After the Union caucused, Webber spoke about a 4 year contract and 4 year progression; the Respondent's people caucused and Krupin said, "What about a two tier or artificial rate?" He gave as an example from $18 to $20. The Union caucused and felt that the company was moving; although they never rejected the Respondent's "artificial" rate idea, they decided to propose a 5 year contract with 5 year progression and returned and spoke about it. Krupin said that the company would have to crunch numbers, and he would get back to them about April 6. Webber, Ratliff, and Gibson left this meeting feeling optimistic about the negotiations; however, nobody from the company contacted Webber or Ratliff on or about April 6. Gibson also testified that after Ratliff told him about the call from Krupin on March 26: "We were very optimistic about getting the ball rolling again." At the beginning of the meeting Krupin asked if the Union was "married" to the wage progression idea, and they said that they were. After caucusing, Webber "pitched" the 4 year wage and progression idea to the Respondent and they caucused. When they returned, Krupin proposed the concept of an artificial rate of approximately $18 an hour. The Union caucused and were optimistic about agreeing to a wage scale. He testified that ". . . since they were showing some movement," the Union decided to propose a five year wage and progression "to spread out the cost," which they did, but the Union never either accepted or rejected the company's two tier proposal. After some discussion, Krupin said that they had to crunch the numbers and he would get back to them.

Poole testified that at this meeting the Union presented an idea for a 4 year contract and progression, but "we had absolutely no interest" because "we were just chasing the number down." The company then proposed a "contract" rate (also referred to as an artificial rate). Under this proposal, the current hiring rate for warehousemen was $12 and the top rate was envisioned to be about $20: "What if we could agree on a contract rate of $18?" In other words, the employees receiving the top rate would continue to receive an annual increase. In addition, employees not at the top rate, rather than progressing from $12 to a $20 top rate, would progress to $18. But the Union "had no interest in it." There was another caucus and the Union returned with a 5 year contract and progression proposal, but the company had no interest in that proposal.

The next meeting took place on April 22. Webber, Ratliff, and the Union's bargaining committee were present, as were Krupin and Rosenberg, the Respondent's bargaining committee and the mediator. Ratliff opened the meeting by saying that on April 1 they were told that the company would crunch the numbers and that the Union would hear from them by April 6, but they never heard from the company. Webber said that they were there to negotiate a new contract, but that it's hard to do that when the company says that they will contact them, but never does. Krupin then said that the company was only interested in a 3 year contract and asked if the Union was "wedded" to progression, and Webber said that they were. Webber also testified that Krupin asked if the Union was still wedded to a 3 year agreement and he said that they weren't, as they had discussed a 4-or-5 year agreement and progression at the prior meeting. Krupin then said that the company was going to go down the hall to crunch numbers and the Union people waited for them to return. After a while, the mediator said that it may take some time and recommended that the Union representatives go to lunch. When they got to the parking lot they realized that all the cars belonging to the company representatives were gone. The mediator then confirmed that the company representatives had left and the union representatives left and returned to their office. Later that day, Webber received a letter from Krupin:

> It has become apparent that Teamsters Local 639 ("the Union") and Daycon Products Company, Inc. ("the Company") are unable to bridge their ideological divide on the core issue of wages. Unfortunately, since bargaining commenced in November 2009, while the Company has substantially revised its proposals on numerous occasions, the Union has adhered to the unrealistic stance that a deal is only attainable if all employees are paid at the same "top rate" at the end of the contract's term. The Union's immovability on this issue has precluded negotiations from advancing forward.
>
> The last two meetings in the presence of the federal mediator demonstrated the depth of the parties' divide. At both of these sessions because the Union reiterated that it was wed to the philosophy of all employees being paid at the top rate at the end of a contract's term no progress towards reaching an agreement was made.
>
> Based on the Union's intransigence, and the vast gap between the parties' positions, it is clear negotiations are deadlocked. Therefore, the parties are at an impasse in reaching a new agreement and the Company will proceed accordingly.

On the same day, Webber responded to Krupin's letter:

> Your latest letter is perhaps the best piece of fiction I have read in quite some time. As usual, it contains numerous inaccuracies and misstatements. You are very well aware that during the most recent discussions with the Federal Mediator, the Union made a reasonable and rational proposal to resolve the bargaining logjam. If you had agreed to that, there were numerous issues that would have allowed for movement by the Union. Instead, Daycon elected to keep the same proposal on the table that has been for the last three months so that we could not make progress.
>
> We make no apology for wanting our members to have a realistic chance to obtain the top contractual rate in the agreement. The Company's position basically establishes an illusory top rate, because it is almost impossible to attain. In other words, you want to keep moving the goal line.
>
> Finally, when we left the meeting earlier today, the Company said it needed to "crunch numbers" in order to respond to the comments that the Union made. We have not received any response at this point. Unless, of course, your self serving and inaccurate correspondence is intended to be the response. If that is the case, I think we can assume that you did not bother to do any financial analysis and simply decided to launch your correspondence.

> You can unilaterally declare whatever you want. We all know the actual facts

Ratliff testified that at the beginning of the April 22 meeting he asked Krupin, "Jay, what happened? We were promised that you were going to get back to us." Krupin responded: "I'm here now." Webber then summarized that the Union went to a 4 year contract and progression and to a 5 year contract and progression. He also said, "We had health on the table, we had pension on the table. We had wages on the table and we are prepared to move." Krupin said that he would need to crunch the numbers. After they left, Eder told them that it might be awhile before the company people return and they should go for lunch. When they got to the parking lot they realized that the company representatives had left. They told Eder, who was surprised, thanked him and they left. After seeing Krupin's letter of April 22, he instructed Webber to respond to it. On the following day, Webber told him that he had spoken to employees who said that the company held a meeting and told the employees that they were going to implement their last offer. Ratliff told Webber that since the company had already declared impasse and made unilateral changes in the employees' employment conditions, ". . . we have no other choice but to take a job action against the company." Eugene Brown, a member of the Union's bargaining committee, attended the April 22 meeting. He testified that the Union proposed a "five year deal" and Krupin said that they would take a look at it and they left the room. Webber, Ratliff, and the union committee decided to get something to eat and return to continue the negotiations and, when they got to the parking lot, they realized that the company representatives' cars were gone. They told Eder that the Company representatives had left, and they left.

Poole testified that Ratliff began this meeting with a statement that he felt that the April 1 meeting was positive and encouraging. Poole testified: "I'm thinking on the flip side. We both rejected each other's proposals. I didn't know what was so positive about it." Krupin reiterated the company's prior proposal about the "artificial" rate of $18, but "the Union had no interest in it." Webber then spoke about the Union's idea of a 4 or 5 year contract and progression discussed at the April 1 meeting, but nobody was interested in those ideas. Krupin asked Webber whether the Union was "wedded" to the concept of catch-up by the end of the contract for all existing employees, and Webber answered yes. The company then asked to caucus. Poole testified that it was at that point that he decided that there was an impasse in the negotiations:

> I was pretty well done. I didn't know where we would go. We . . . just had three consecutive meetings in a row, there was no movement, and the Union was married to their position, and I didn't think it was prudent for the Company to move forward . . . I felt that the parties were deadlocked and it provided an opportunity for the Employer to provide a wage [sic]. Our guys had waited three months without an increase . . . and I felt it was appropriate to give a wage increase.

He testified that both parties were in the same position that they had been for 2 months on the progression issue and this issue was relevant to the other issues and "was beyond what was prudent for the for the Company to provide, and they had other proposals out there that was going to make it even worse . . . " After making the decision that the parties were deadlocked, he decided to leave, and the company's representatives left without notifying the Union's representatives. He testified further that when the company's representatives left the meeting on that day to caucus, they never said that it needed to "crunch the numbers." Kendall testified that Webber brought up the 5 year agreement and said that it wasn't a proposal, that it was "exploratory and nobody was interested in it." Krupin then asked Webber if he was wedded to the top rate by the end of the contract, and Webber answered yes.

C. The Strike

Brown testified that he reported for work on April 23 at about 7 a.m. At about that time, he and the other drivers were told that there was to be a meeting of the company's drivers. In addition to seven or eight drivers, Poole, Kendall, and Cohen were present. Poole told the drivers ". . . that they were implementing the 40/60 as of right now." Poole asked if there were any questions, and Brown told the drivers, if you have any questions, do it now, but none of them asked any questions. When he got to his truck he called Webber and told him what was said at the meeting. Webber testified that Brown called him on the morning of April 23 and told him that the company held a meeting of drivers that morning and told them that they had declared an impasse in negotiations and that they were implementing the terms of their best offer. Shortly thereafter, Webber met with Ratliff and Gibson and decided that the company left them no alternative, but to put them on strike. He did this because the company ". . . had violated the law, they declared impasse improperly." Strike signs were printed stating: "ON STRIKE DAYCON. *UNFAIR* VIOLATES FEDERAL LABOR LAWS TEAMSTERS UNION LOCAL 639." The strike began on April 26. Webber got to the facility that morning at 5:30 a.m. in order to speak to the employees before they began work. He and Ratliff told the employees that the company had violated labor laws by declaring impasse and implementing the contract.

Krupin wrote to Webber on April 26 reiterating his position that while the company had made "numerous and significant concessions" the "Union has refused to budge from the wholly unrealistic position of requiring the Company to give approximately half the bargaining unit at least a 20% wage increase during the duration of a new contract." He also stated that the Union failed to respond to the company's "best" offer of February 18, and never wavered from its stance on the core issue of wages. Webber responded on April 29 with a 3 page letter defending its actions in negotiations as well as its insistence on a catch up provision. The letter ends by referring to the company's conduct as unwarranted, outrageous, and illegal.

> On July 2 Webber sent an e-mail to Krupin:
>
> On behalf of all the Daycon employees on strike, we hereby make an unconditional offer to return to work immediately. The employees will return for work on Tuesday, July 6, 2010.
>
> In addition, Local 639 requests that we continue negotiations for a new Collective Bargaining Agreement immediately. We

> are available Tuesday to meet with you and the employer's representatives.

Later that day Webber went to the Respondent's facility and read this email to the union members. On the following day he received a response from Krupin: "In receipt of your email below. We look forward to discussing the issues you raise in your email, but are unavailable on Tuesday. We are available to address these issue, including your unconditional offer and continued negotiations, on Wednesday, July 7 at 3 p.m. at our offices." There was a further exchange of emails between Krupin and Webber in which Krupin asserted that the strike was an economic strike, while Webber argued that it was an unfair labor practice strike. In addition, Krupin stated that upon receipt of the unconditional offer to return, the Respondent notified all those employees who had not been replaced that they were welcome to return and that all replaced employees were subject to recall as openings became available. In addition, a bargaining session was scheduled for July 13 at the FMCS offices.

Windsor testified that he reported for work, as usual, on Monday, April 26, and saw picket signs and learned that the Union had called a strike against the company, and he joined the strike. At the end of September he received a telephone call from Kendall saying that there was an increase in work in the repair shop and asked if he was interested in returning to work. He said that he was, and he reported for work the following morning. Robert Redman, who was employed by the Respondent as a driver, arrived for work at about 6 a.m. on April 26 and when he realized that the Union had called a strike, he joined the picket line. He received a letter dated June 21 from Kendall stating that because of his absence from work due to the "job action" against the company, he has been permanently replaced. By letter dated September 24, Kendall informed Redmond that a position for which he was qualified became available and "in light of the union's unconditional offer on your behalf to return to work, in accordance with applicable laws we are recalling you to work." He returned to work on September 29.

The parties met next on July 13 at the FMCS office in Washington. Webber, Ratliff, Gibson, and some committee members were present for the Union; Krupin, Rosenberg, Poole, and Kendall were present for the company. Eder, the mediator was also present. Krupin began the meeting by saying, "Do you want me to be direct or do you want me to bullshit you?" He also said that the company's position was that the strike was an economic strike and they were happy to adjudicate that issue for years. The Union caucused: "We decided that we were going to put some more things on the table, things that we probably could have done on April 22 . . ." When they returned, they proposed a 5-year contract with 5-year progression, they were going to "relax" their position on pensions and propose that the company need not join the Teamster pension plan until the 4th year of the agreement, and they would reduce the hourly wage increase to 55 cents. The company caucused for about 5 minutes and when they returned, Krupin said: "The last offer is still on the table, three year agreement, progression he will not agree to. The top won't happen in the contract. The pension plan is a no. And their hourly rate is in their last offer." Poole testified that after caucusing, the Union offered a 5-year progression and the pension proposal referred to above. He testified that over the past 30 years, the Union has been proposing that the company participate in the Teamsters pension plan and the company has never agreed to that, including at that meeting. As to whether he believed that this proposal moved the parties closer to an agreement, he testified: "I felt it was pushing us further apart." That was the end of the meeting, and there were no further meetings.

D. Replacement Workers

Poole testified that after the employees went on strike the company began hiring replacement employees at the hourly rates specified in the prior contract; for example, $12 an hour for warehouse employees. Kendall testified about the procedure employed by the company in hiring workers to replace those employees who went out on strike on April 26. All employees who went on strike and were replaced were sent a letter by the company stating: "In light of your absence from work due to the job action against Daycon Products Company, Inc., you have been permanently replaced by a new employee." On the other hand, after July 2, striking employees who were being offered reinstatement were sent the following letter:

> As I explained on the phone, a position for which you are qualified has become available. In light of your union's unconditional offer on your behalf to return to work, in accordance with the applicable laws we are recalling you to work.
>
> Pursuant to the governing terms and conditions of your employment, you have five days from today to report to work. If you fail to report to work within this timeframe, the available position will be offered to another qualified bargaining unit member who was replaced as a result of the economic strike against Daycon.

During the strike, each newly hired employee was sent the following letter by Kendall:

> We are pleased to invite you to join Daycon Products as a [job]. Your start date is [date]. The . . . work hours may change; your hours may vary depending upon department needs. This offer is contingent upon your signing this offer letter, successfully passing the pre-employment drug screen and favorable results from your background investigation and reference check. Your immediate supervisor will be . . . [He] is very excited about the opportunity to have you join his team. Your responsibilities will be those discussed during the interview process or as may be assigned.
>
> Your compensation package will include a salary of $12.00 per hour, which will be paid on a bi-weekly basis. In addition you will be eligible to participate in the Company Benefits Plan. Details regarding this plan are included in this packet of information. Should you accept this offer your medical and dental benefits will be effective thirty days after your initial start date.
>
> . . . on behalf of all the employees of Daycon Products, we welcome you aboard! Please indicate your acceptance of this

> offer by signing one copy of this letter and faxing it to me at . . . Please do not hesitate to contact me at . . . should you have additional questions or concerns regarding this offer packet.

Kendall testified that the replacement employees were "accidently" given the nonunion forms in which they acknowledged receiving and understanding the company's Employee Handbook. These forms state that they are "at-will employees" and that nothing shall restrict their right, or the company's right, to terminate their employment at any time or for any reason. These forms were signed between April and June. In October, these employees signed the same form, but with a different third paragraph replacing the "at-will" language:

> If the terms and conditions as outlined in this manual conflict with the terms and conditions as described in the collective bargaining agreement (CBA) with the International Brotherhood of Teamsters Local 639, then the CBA controls only for those particular unionized employees.

The replacement employees were also given an Employee Information Form to complete and all those employees who were hired during the strike checked Employment Status as "Reg. Full Time." All of the strike replacements were treated the same as any other employee, and as they were regular full-time employees they were eligible for health insurance, and other benefits.

III. ANALYSIS

The initial allegation is that the Respondent violated Section 8(a)(1)(5) of the Act by subcontracting the repair work of the snow throwers to Marlboro Mower without first notifying, or bargaining with the Union. Although it is not critical to my finding herein, I credit the testimony of Moore over that of Poole and find that Marlboro Mower did not insist on repairing the snow throwers rather than selling the replacement parts to the company. Although I generally viewed Poole to be a credible witness, Moore clearly had no reason to lie, and I therefore credit his testimony that Marlboro Mower was willing to sell the replacement parts to the company and, in fact, preferred to do so. All the elements of a 8(a)(5) violation are present here: the repair work was unit work and had always been performed by the company's employees and the company sent the work out to be performed by others without notifying or bargaining with the Union. Although the Respondent adduced some testimony that it had subcontracted work in the past, I credit the testimony of Webber that he was unaware of any prior situation where this work was subcontracted.

The law is clear that subcontracting is a mandatory subject of bargaining if it involves nothing more than the substitution of one group of workers for another to perform the same work and does not constitute a change in the scope, nature, and direction of the enterprise. *Torrington Industries,* 307 NLRB 809 (1992); *Acme Die Casting*, 315 NLRB 202 (1994); *Gaetano & Associates, Inc.*, 344 NLRB 531, 533 (2005). There was no change in the nature of the Respondent's business that caused it to subcontract the repair of the snow throwers; rather, the Respondent subcontracted these machines to Marlboro Mower because they were sitting in the repair shop, and it believed that Marlboro could repair the machines faster than its unit employees. While satisfying its customers and getting the machines back to them is a noble purpose, the Respondent could have accomplished the same purpose by first discussing the issue with the Union or assigning additional overtime work to its repairmen. By doing neither, and subcontracting the repair work to Marlboro Mower, work that had always been performed by its employees, the Respondent violated Section 8(a)(1)(5) of the Act.

The principle allegation herein is that the Respondent violated Section 8(a)(1)(5) of the Act by prematurely declaring impasse on April 22, and on the following day implementing its last bargaining offer, without first bargaining with the Union to a good-faith impasse. It is further alleged that the strike that the Union began on about April 26 was an unfair labor practice strike resulting from the Respondent's implementation of its last bargaining offer, and that the strikers were therefore unfair labor practice strikers who were entitled to immediate reinstatement upon offering to return to work. All of these allegations depend upon counsel for the General Counsel's (and counsel for the Charging Party's) contention that there was no bargaining impasse on April 22 and 23, when the Respondent declared impasse and implemented its last bargaining offer.

The parties were clearly involved in hard bargaining and as counsel for the Respondent argues in his brief, the most difficult issue was the Union's demand for progression, so that those employees who were hired at the lowest rate of $12 an hour could catch up to the higher rate within 3 years of employment. Of course, there is a big difference between hard bargaining and impasse. In determining whether there was an impasse in negotiations, we begin with the proposition that the burden of establishing an impasse rests on the party asserting it, in this situation the Respondent. *North Star Steel Co.*, 305 NLRB 45 (1991). A lead case on this issue, *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), stated:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

As regards the last of these factors, the "contemporaneous understanding of the parties as to the state of the negotiations," if either negotiating party remains willing to move further toward an agreement, this would support a finding of no impasse. In *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973), the Board stated: "A genuine impasse in negotiations is synonymous with a deadlock; the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position." In *AMF Bowling Co.,* 314 NLRB 969, 978 (1994), citing *Pillowtex Corp.,* 241 NLRB 40 (1979), and *PRC Recording Co.*, 280 NLRB 615 (1986), the Board stated that it has defined an impasse as the point in time during negotiations when the parties are warranted in assuming that further bargaining would be futile and when both parties believe "that they are at the end of their rope." In this regard, the Court, in *Detroit*

Newspaper, Local 13 v. NLRB, 598 F.2d 267, 273 (D.C. Cir. 1979) stated:

> The mere fact that the Union refuses to yield does not mean that it never will. Parties commonly change their position during the course of bargaining notwithstanding the adamancy with which they refuse to accede at the outset. Effective bargaining demands that each side seek out the strengths and weaknesses of the other's position. To this end, compromises are usually made cautiously and late in the process.

In *Powell Electrical Mfg. Co.,* 287 NLRB 969, 973 (1987), the administrative law judge stated:

> The Board does not lightly find an impasse. It requires that the parties must have reached "that point in negotiations when the parties are warranted in assuming that further bargaining would be futile." Futility is what must appear, not some lesser level of frustration, discouragement, or apparent gamesmanship.

Applying these cases to the negotiations between the Union and the Respondent I find that the Respondent has not sustained its burden of establishing that an impasse existed on April 22 or April 23, when it implemented its final proposal. Was the bargaining difficult? Yes. Was the Union's intransigence on the progression issue, at least, partially responsible for the slow progress of the negotiations? Yes. Could the Union have been more flexible on this issue? Yes. But, were both parties warranted in assuming on April 22 that further bargaining would be futile? I don't believe so. There were ten negotiating sessions, including the April 1 "off the record" meeting. Although movement was slow, especially on the issue of wages and progression, there was movement. In fact, at the meetings of April 1 and 22 the Union had modified its progression proposal (whether or not it was officially a proposal) to spread it out over a 4 or 5 year period. Even though Respondent did not consider it acceptable, and still considered it too expensive, it still represented some movement and flexibility on the part of the Union. In addition, at the April 1 meeting, the Respondent presented its "artificial substandard rate" for the first time. With this movement, the Respondent cannot establish that both parties believed that they were "at the end of their rope." The Union certainly didn't believe that and were optimistic about the bargaining prospects during and after the April 1 meeting. Nor can the Respondent establish that further bargaining would be futile. The Union showed some flexibility on April 1 and 22 and was awaiting a response from Respondents representatives on April 22 only to learn that they had departed without explanation. If Respondent had returned to the meeting and notified the Union that it was rejecting the 5 year proposal because it was too expensive, the Union might have proposed an alternative plan for progression. By leaving the meeting without notifying the Union or the mediator, the Respondent foreclosed any further movement in the negotiations. I therefore find that there was no impasse in the negotiations on April 22 and 23, and that by implementing its last bargaining offer on April 23, the Respondent violated Section 8(a)(1)(5) of the Act.

It is next alleged that the strike that the Union commenced on April 26 was an unfair labor practice strike, and there can be little doubt as to this allegation. In *RGC (USA) Mineral Sands, Inc.*, 332 NLRB 1633 (2001), the Board stated: "It is well settled that if a strike is caused in part by an employer's unfair labor practice, the strike is an unfair labor practice strike…An unfair labor practice strike occurs even when the employer's unfair labor practice is not the sole or major cause or aggravating factor; it need only be a contributing factor." A similar ruling was made by the Court in *General Drivers and Helpers Union, Local 662 v. NLRB,* 302 F.2d 908, 911 (D.C. Cir. 1962): "But if an unfair labor practice had anything to do with causing the strike, it was an unfair labor practice strike." In *Larand Leisurelies*, 213 NLRB 198 fn. 4 (1974), the Board stated that when it is reasonable to infer from the record as a whole that an employer's unlawful conduct played a part in the employees' decision to strike, the strike is an unfair labor practice strike. To establish that a strike was an unfair labor practice strike, counsel for the General Counsel (or the Charging Party) must establish a causal connection between the unfair labor practices and the strike, and this connection has clearly been established herein. Even though the employees authorized the Union to strike on February 27, there was no strike until the first work day after the Respondent unilaterally implemented its last bargaining offer, which I have found to have violated Section 8(a)(1)(5) of the Act. This timing, together with Webber's credible testimony about the strike, and the wording on the picket signs, leaves no doubt in my mind that it was caused by the Respondent's implementation of its last bargaining offer, and was therefore an unfair labor practice strike.

Workers participating in an unfair labor practice strike are entitled to full reinstatement upon making an unconditional offer to return to work, even if replacements have been hired. *Mastro Plastics Corp. v. NLRB,* 350 U.S. 270 (1956); *NLRB v. Cast Optics Corp.,* 458 F.2d 398, 407 (3d. Cir. 1972). On July 2 Webber wrote to Krupin: "On behalf of all the Daycon employees on strike, we hereby make an unconditional offer to return to work immediately. The employees will return for work on Tuesday, July 6, 2010." The next paragraph of the email states that "in addition, Local 639 requests" that the parties resume negotiations. Counsel for the Respondent, in his brief, alleges that this is not an unconditional offer to return because of the added request of continued negotiations. This argument is easily disposed of. The first paragraph of the July 2 letter clearly constitutes an unconditional offer to return to work. The objected to language is in a separate paragraph that begins "In addition" and "requests" bargaining. It does not demand bargaining, nor does it say, or imply, that the offer to return to work is conditioned on the resumption of bargaining. Further, I note that Krupin, in a letter to Webber, and Kendall, in a letter to Redmond, both referred to Webber's July 2 email as an unconditional offer to return to work. I therefore find that the Respondent violated Section 8(a)(1)(3) of the Act by refusing to reinstate the unfair labor practice strikers beginning on about July 6.

CONCLUSIONS OF LAW

1. The Respondent has been an employer engaged in com-

merce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. The Respondent violated Section 8(a)(1)(5) of the Act by subcontracting the repair work of snow throwers without notice to, or bargaining with, the Union.

4. The Respondent violated Section 8(a)(1)(5) of the Act by unilaterally implementing its last bargaining offer to the Union at a time when there was no impasse in its negotiations with the Union.

5. The Respondent violated Section 8(a)(1)(3) of the Act by refusing to reinstate the unfair labor practice strikers who offered to return to work unconditionally by letter dated July 2.

THE REMEDY

Having found that the Respondent has refused to offer reinstatement to some of the unfair labor practice strikers after receiving the Union's unconditional offer to return to work, I recommend that Respondent be ordered to offer reinstatement to all unfair labor practice strikers who have not already been offered reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions, and to make all the unfair labor practice strikers whole for the losses that they suffered, if any, from July 6, 2010 to the date of reinstatement, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), along with interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). I also recommend that the Respondent be ordered to rescind the changes in the terms and conditions of employment that it implemented on April 23, 2010; however, any unilateral changes that benefited the unit employees shall not be rescinded without a request from the Union to do so.

Upon the foregoing findings of fact, conclusions of law, and the entire record, I hereby issue the following recommended.[4]

ORDER

The Respondent, Daycon Products Co., Upper Marlboro, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Union as the exclusive bargaining representative for certain of its employees by unilaterally subcontracting bargaining unit work without first notifying the Union and affording it an opportunity to bargain about such subcontracting.

(b) Prematurely declaring an impasse in collective-bargaining negotiations.

(c) Refusing to reinstate unfair labor practice striking employees after receiving an offer on their behalf to return to work unconditionally.

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

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

(a) Within 14 days from the date of this Order, offer reinstatement to all unfair labor practice strikers not already reinstated. Reinstatement shall be to their former positions of employment or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and make all striking employees whole for any loss of earning that they suffered as a result of the refusal to reinstate them on July 6, 2010, in the manner set forth above in the remedy section of this Decision.

(b) Rescind the unilateral changes that were made on April 23, 2010, when the company implemented its last bargaining offer, but any changes that were made on that date that improved the terms and conditions of employment of the unit employees will be rescinded only upon the request of the Union.

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

(d) Within 14 days after service by the Region, post at its facility in Upper Marlboro, Maryland, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 5, 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 2010.

(e) 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 the Respondent has taken to comply.

Dated, Washington, D.C., February 15, 2011

[4] 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.

[5] 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 refuse to bargain with Teamsters Local 639 as the exclusive bargaining representative of certain of our employees by unilaterally subcontracting bargaining unit work without first notifying the Union and affording it an opportunity to bargain about such subcontracting.

WE WILL NOT prematurely declare impasse in collective-bargaining negotiations and WE WILL NOT refuse to reinstate our employees who went on strike in response to our unfair labor practices and who made an unconditional offer to return to work.

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

WE WILL offer reinstatement to all the unfair labor practice strikers who went on strike on April 26, 2010, and who have not already been reinstated, and WE WILL make all of our striking employees whole for any losses that they suffered as a result of our refusal to reinstate them on July 6, 2010, less any interim earnings, plus interest.

WE WILL cancel any unilateral changes instituted when we implemented our final bargaining offer on April 23, 2010, except to the extent that any such changes that benefited the unit employees shall not be rescinded unless specifically requested by the Union.

DAYCON PRODUCTS CO.