StaffCo of Brooklyn, LLC *and* New York State Nurses Association. Case 29–CA–134148

August 26, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On May 21, 2015, Administrative Law Judge Kenneth W. Chu issued the attached decision. The Charging Party filed a brief supporting the judge's decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party each filed answering briefs. The Respondent also filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

We adopt the judge's finding that the Respondent unlawfully ceased its contributions to the pension fund on behalf of unit employees upon the expiration of the parties' collective-bargaining agreement. Contrary to our dissenting colleague, we find that the judge correctly rejected the Respondent's affirmative defense that certain language within the pension plan document constituted a waiver by the Union of its right to bargain about the continuation of pension benefits following the contract expiration.

A. Background

The Respondent is a registered New York State Professional Employer Organization. The State University of New York (SUNY) operates SUNY Downstate Medical Center (SUNY Downstate), which is an academic medical center. In May 2011, SUNY acquired Long Island College Hospital (LICH). In connection with its acquisition of LICH, SUNY Downstate contracted with the Respondent to hire and employ the nonphysician staff at the LICH facilities. The Respondent recognized the Union as the collective-bargaining representative for a bargaining unit of registered nurses and nurse practitioners who worked at LICH and in LICH clinics at area schools.

The Respondent and the Union negotiated an initial collective-bargaining agreement, effective May 29, 2011, through May 28, 2012, in which the Respondent agreed to participate in the New York State Nurses Association Pension Plan (Pension Plan). Section 9.02 of the collective-bargaining agreement required the Respondent to complete an acknowledgement form and to become bound by the terms and provisions of the Pension Plan's Agreement and Declaration of Trust, which included the Pension Plan's "Policy for Continuation of Coverage Upon Expiration of a Collective Bargaining Agreement" (Policy). The Policy essentially provided that the Respondent could continue to participate in the Pension Plan after the expiration of the collective-bargaining agreement if the employer continued to make contributions to the plan and submitted a new collective-bargaining agreement, contract extension, or interim agreement. The Policy stated:

> Upon expiration or termination of a collective bargaining agreement, if (i) the employer has not submitted to the Plan Office a new collective bargaining agreement which satisfies the requirements of (A) above and has not complied with the provisions of (B)(1) above, or (ii) the employer owes contributions to the Fund for more than two months (without regard to when such contributions are payable), the employer's participation in and status as an Employer under the Fund shall forthwith terminate, the service of such employer's employees shall no longer be credited under the Plan, the employer and the Associations shall be notified in writing, and the employees of the employer shall be notified in writing five business days thereafter, that the employer is no longer maintaining the Plan and that the covered employment of the employees of the employer terminated on the expiration/termination date of the collective bargaining agreement.[4]

Following the expiration of the initial collective-bargaining agreement on May 28, 2012, the parties agreed to three contract extensions and two interim

[1] We deny the Respondent's request for oral argument, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has 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.

[3] We shall modify the judge's remedy and recommended Order to conform to our findings and to the Board's standard remedial language. We shall also substitute a new notice to conform to the Order as modified.

[4] Cross-referenced sec. (A) of the Policy sets forth the provisions that a new collective-bargaining agreement must contain in order to serve as a basis for continuation of participation. Sec. (B)(1) provides for continuation of participation based on an interim agreement.

agreements to continue pension coverage.[5] The parties agreed that May 22, 2014,[6] would be the expiration date for their third contract extension agreement because they anticipated that LICH would be closed after that date and that the Respondent would no longer employ bargaining unit employees. On May 20, the parties held a meeting regarding the layoff of unit employees. The Union informed the Respondent's representatives that the Respondent needed to execute a fourth contract extension in order to remain current on its pension contributions for the unit employees who would not be laid off on May 22. The Respondent, however, declined the Union's requests to sign another extension agreement.

On May 22, the third contract extension agreement expired without another agreement between the parties in place. After May 22, the Respondent continued to employ approximately 39 unit employees. The Respondent ceased its pension contributions for these employees but maintained all of the other terms and conditions of employment under the expired collective-bargaining agreement.[7]

B. The Judge's Decision

The judge found that the Respondent violated Section 8(a)(5) and (1) when it ceased contributing to the Pension Plan on May 22. The judge rejected the Respondent's argument that language in the Policy was an explicit waiver by the Union of the Respondent's obligation to continue providing pension fund payments upon the expiration of the contract. The judge found that both *Cauthorne Trucking,* 256 NLRB 721 (1981), enf. granted in part, denied in part 691 F.2d 1023 (D.C. Cir. 1982), and *Oak Harbor Freight Lines*, 358 NLRB 328 (2012), reaffirmed and incorporated by reference, 361 NLRB No. 82 (2014), relied on by the Respondent, were distinguishable because the pension plan in each case contained language expressly addressing the respective employer's statutory postexpiration obligations. As set forth below, we agree with the judge that the language in the Policy in this case did not constitute a waiver by the Union of its right to bargain over the Respondent's obligation to continue making pension contributions once the collective-bargaining agreement expired.

C. Discussion

Following the expiration of a collective-bargaining agreement, an employer must maintain the status quo on all mandatory subjects of bargaining until the parties either agree on a new contract or reach a good-faith impasse in negotiations. *Triple A Fire Protection, Inc.,* 315 NLRB 409, 414 (1994), enfd. 136 F.3d 727 (11th Cir. 1998), cert. denied 525 U.S. 1067 (1999). An employer's obligation to maintain the status quo includes "making contributions to fringe benefit funds as specified in the expired collective-bargaining agreement." *N. D. Peters & Co.,* 321 NLRB 927, 928 (1996). Pension plan contributions that are required by an expired collective-bargaining agreement are terms and conditions of employment that survive contract expiration, and such contributions may not be unilaterally discontinued or otherwise altered absent impasse or waiver. *KBMS, Inc*., 278 NLRB 826, 849 (1986). A union may waive its right to maintenance of the status quo as to a particular term or condition so long as the waiver, like the waiver of any statutory right, is "clear and unmistakable." *Provena St. Joseph Medical Center*, 350 NLRB 808, 810–812 (2007). A clear and unmistakable waiver requires "bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." Id. at 811.

In *Cauthorne,* the Board found that the union had waived its right to bargain over postexpiration cessation of pension contributions by agreeing to a provision of a pension fund trust agreement that provided:

> IT IS UNDERSTOOD AND AGREED that at the expiration of any particular collective bargaining agreement by and between the Union and any Company's [sic] obligation under this Pension Trust Agreement shall terminate unless, in a new collective bargaining agreement, such obligation shall be continued.

256 NLRB at 722. The Board held that this provision constituted a waiver because it expressed a clear intent to relieve the employer of any obligation to make payments after contract expiration. Id.

The Board has applied *Cauthorne* narrowly. In a series of cases, the Board has distinguished *Cauthorne* and established that a clear and unmistakable waiver of the

[5] Specifically, the parties entered into (1) a contract extension from May 29 through December 31, 2012; (2) an interim agreement from January 1 through June 30, 2013; (3) an interim agreement from July 1 through December 31, 2013; (4) a contract extension from January 1, 2013 to March 31, 2014; and (5) a contract extension from April 1 to May 22, 2014.

[6] All dates are in 2014, unless otherwise noted.

[7] On July 9, the parties had a labor-management meeting. At this time, under the Policy, the Respondent could still "cure" its termination as a plan participant by executing another extension agreement and paying the pension contributions owed for the remaining unit members. However, when the Union again requested that the Respondent sign a new extension agreement, it declined to do so because it was concerned about its ultimate withdrawal liability under the Pension Plan. The Union continued to ask the Respondent to resume its contributions to the Plan, including a request on July 28, but the Respondent did not change its position.

obligation to continue providing fringe benefits after expiration of the collective-bargaining agreement requires explicit contract language authorizing an employer to terminate its obligation to contribute to the funds. See *Schmidt-Tiago Construction Co*., 286 NLRB 342, at 343 fn. 7, 365–366 (1987) (adopting the judge's finding that there was no contractual waiver because, unlike in *Cauthorne*, language in pension trust document did not specifically state that the employer's obligation to contribute to the pension trust funds ended with the expiration of the agreement; moreover, purported waiver language appears to reflect the intent to comply with the requirements of Section 302 of the Act, rather than circumscribing the union's statutory right to bargain over the pension fund payments upon contract expiration); *KBMS, Inc*., 278 NLRB at 849–850 (no waiver where, unlike in *Cauthorne*, pension trust language did not "deal with the termination of the employer's obligation to contribute to the funds").[8] On the other hand, in *Oak Harbor*, supra, 358 NLRB at 328 fn. 2, the Board found a waiver where the union "agreed to and signed" language providing that the employer could cancel its pension obligations upon the expiration of the collective-bargaining agreement by written notification to the union and the fund. Notably, the Board in *Oak Harbor* affirmed in relevant part the judge's analysis, which clarified that "[s]ubsequent cases distinguishing *Cauthorne* confirm that the Board will only find a clear and unmistakable waiver of the obligation to continue providing trust payments *where there is explicit contract language authorizing an employer to terminate its obligations*." Id. at 340 (emphasis added).

Here, the language in the Policy, in contrast to the pension plan language in *Cauthorne* and *Oak Harbor*, does not state that the Respondent's obligation to make pension fund contributions end with the expiration of the current collective-bargaining agreement.[9] Indeed, the Policy does not address the Respondent's postexpiration pension contribution obligations in any way. Unlike in *Oak Harbor*, the policy does not provide that the Respondent may cancel its pension obligations when the collective-bargaining agreement expires by notifying the Union. Rather, like the controlling documents in *KBMS, Schmidt-Tiago, AlliedSignal,* and *General Tire,* in which the Board found no waiver, the Policy contains no express authorization of unilateral action by the Respondent.

Our dissenting colleague acknowledges that the Policy does not explicitly state that the Respondent's statutory obligation to continue contributions ceases. Rather, she argues that the Union clearly and unmistakably waived its right to bargain based on the Policy's language that "the employer's participation in and status as an Employer under the Fund shall forthwith terminate" and that the "service of [the Respondent's] employees shall no longer be credited under the Plan." Obviously, this language does not explicitly address the Respondent's contribution obligation as required by the Board's precedents. Although we agree with our colleague that a union's waiver need not be stated with "lawyerly perfection," it must explicitly authorize an employer to terminate its *obligation* to continue providing benefits. There is no such explicit authorization, lawyerly or otherwise, in the Policy or in the precedent that our colleague attempts to distinguish. The Policy simply sets forth the Plan's rules with respect to the Respondent's status as an Employer within the definition of the Pension Plan. It does not show that the Union agreed that the Respondent has no postexpiration obligations pertaining to pension benefits. That the Respondent was no longer a participating employer under the Pension Plan after May 22, did not relieve it of its statutory obligation as a party to an expired collective-bargaining agreement to maintain the status quo.

In the absence of waiver language, the dissent argues that there is no "plain alternative explanation" for the participation termination provision other than that the parties intended it as an implicit waiver of this statutory obligation. We disagree. The provision likely serves the evident, and altogether different purpose of protecting the Plan by limiting its liability under the Employee Retirement Income Security Act of 1974 (ERISA)[10] to employee participants for benefits based on service for which it does not receive employer contributions. Thus,

[8] See also *AlliedSignal Aerospace,* 330 NLRB 1216, 1216, 1228–1229 (2000) (no waiver found where language in expired contract did not address the employer's postexpiration obligation to provide severance benefits), review denied sub nom. *Honeywell International v. NLRB*, 253 F.3d 125 (D.C. Cir. 2001); and *General Tire & Rubber Co*., 274 NLRB 591, 593 (1985) (no clear and unmistakable waiver because the language in the agreement providing for pension and other benefits did not address the employer's statutory obligation to pay the benefits after the contractual period ended), enfd. 795 F.2d 585 (6th Cir. 1986); cf. *Finley Hospital*, 362 NLRB No. 102, slip op. at 4 fn. 6 (2015), reversed in part __ F.3d __, 2016 WL 3511487 (8th Cir. 2016), (emphasizing that *Cauthorne* has been applied narrowly, the Board found that the employer unlawfully discontinued pay raises provided for in the parties' collective-bargaining agreement upon the expiration of the agreement where the contract language, in contrast with that in *Cauthorne*, did not address any postexpiration conduct or obligations of the employer).

[9] We do not rely on the judge's statement distinguishing *Cauthorne* on the basis that the Board, in that case, "point[ed] specifically to the [phrase] 'IT IS UNDERSTOOD AND AGREED'" to find a waiver.

[10] Pub. L. 93–406, 88 Stat. 832,

once an employer has failed to pay contributions or to agree to continue to contribute following contract expiration, the plan provision effectively caps the Plan's unfunded liability for benefits at a maximum of 2 months of service credit.[11]

Our colleague further maintains that the parties' course of conduct confirms that the Policy language constituted a waiver. We find that the record shows otherwise. The evidence establishes that the parties understood and agreed that the language in the Policy required them to have a current bargaining agreement or an extension of the agreement in order to continue the pension coverage. The record does not establish, however, that the parties understood that the expiration of the parties' collective-bargaining agreement would trigger the end of the Respondent's pension obligations. Indeed, following the expiration of the initial collective-bargaining agreement on May 28, 2012, the parties executed five extension/interim agreements in order to continue employees' pension coverage. It seems clear that the Union's understanding was that the Respondent would sign a contract extension or interim agreement to maintain the employees' pension coverage as it had done in the past; when the Union realized that there would still be unit employees working after May 22, it repeatedly asked the Respondent to execute another contract extension agreement to remain current on its pension contributions for those remaining employees.[12] We agree with the judge's assessment that the "understanding that the parties must have a current collective-bargaining agreement for the continuation of coverage of the pension plan is . . . not the same as the parties agreeing that the Union waived its . . . statutory right to continuance of the status quo as to terms and conditions after the expiration of the bargaining agreement."[13]

Accordingly, we find that the language within the Policy did not constitute a clear and unmistakable waiver of the Respondent's pension contribution obligation upon expiration of the contract extension agreement on May 22.

[11] Under ERISA, employees' minimum benefit accrual is calculated based on their years of service for a participating employer. See ERISA § 204(b)(1), 29 U.S.C. § 1054(b)(1); 29 C.F.R. § 2530.210(a). All service for a participating employer in a job classification covered by the plan must be counted for purposes of benefit accrual. 29 C.F.R. § 2530.210(c). Neither the statute nor the regulations provide an exception to this requirement for a participating employer's failure to remit plan contributions for a period of service. Indeed, the plan is required to count the unfunded service for accrual purposes if it wishes to retain its tax-advantaged status. See Rev. Rul. 85-130 (1985); Dept. of Labor Opinion No. 76–89 (1976). However, if the employer's participation in the plan is terminated, the employees' subsequent service is not for a participating employer and is not required to be counted for accrual purposes.

This apparent purpose, to limit the Plan's unfunded liability, is highlighted by the Policy's statement, conjoined with the participation termination provision, that "the service of such employer's employees shall no longer be credited under the Plan." The dissent reads this clause as operating independently to halt employees' benefit accrual. For the reasons explained above, however, such language cannot lawfully prevent employees' covered service for a participating employer from being counted for benefit accrual purposes. Thus, the Internal Revenue Service has ruled that a plan provision denying service credit for periods for which a participating employer did not remit contributions failed to comply with the ERISA-related provisions of the tax code. Rev. Rul. 85–130. Or as the Department of Labor put it in Opinion No. 76–89, such a provision would be "unlawful and unenforceable." There is no basis to assume, as the dissent does, that the Policy language concerning employer participation is intended to limit the Plan's liability solely in circumstances of *lawful* termination of payments upon contract expiration.

The dissent also argues that the Policy lacks a "mechanism" for the Respondent to pay contributions after contract expiration. It does not say what sort of payment "mechanism" it expected to see or why such a "mechanism" would be needed—there is no apparent reason that the contributions could not be remitted in the same way as before expiration. The dissent appears to assume that the Plan would have refused to accept postexpiration contributions. However, the judge correctly found that the Respondent failed to prove that the Plan would not accept contributions in the absence of an unexpired agreement. Indeed, the record is devoid of evidence that the Plan had ever rejected a tendered contribution for that or any other reason. Moreover, neither the dissent nor the Respondent has identified a provision of the Policy or other relevant documents that would prohibit the Plan from receiving postexpiration contributions. In fact, the trust agreement expressly contemplates the admission "as a contributing Employer" of a "reentering Employer" pursuant to a resolution of the Plan trustees. The absence from the Policy of some kind of "mechanism" provision falls far short of a clear and unmistakable waiver of the statutory contribution obligation.

[12] We find it unnecessary to pass on the judge's discussion as to whether the parties reached impasse during the two bargaining sessions in September and November, because the Respondent violated the Act when, without providing the Union with notice and an opportunity to bargain, it ceased its contributions to the Pension Plan months earlier, on May 22.

[13] The dissent points to a sentence in sec. 9.02 (Pension Plan) of the collective-bargaining agreement as further evidence that the parties clearly and unmistakably agreed to terminate the Respondent's statutory contribution obligation upon termination of participation. But the sentence merely states, "Such payments [contributions to the Plan] shall be used by the Trustees of the . . . Plan for the purposes of providing pension benefits for employees as the Trustees may from time to time determine." In other words, the sentence in which the dissent discerns a waiver of a statutory right simply incorporates, and complies with, the requirement of Sec. 302 of the Labor Management Relations Act, 1947, that employer payments to a jointly trusteed pension fund be "made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities." 29 U.S.C. § 186(c)(5)(B). Plainly, it does not address the Respondent's postexpiration obligations, and for understandable reason. Rather than establishing a knowing waiver of a contractually established obligation to fund pension contributions, the statutory duty to bargain supports the expectation (absent clear proof to the contrary) that the contractually-established obligation will continue if a successor agreement is not reached. Like the other benefits and employment terms the Respondent continued to fund after contract expiration, it had the obligation to continue to fund the pension benefit.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) of the Act by discontinuing its contributions to the NYSNA Pension Plan on May 22, 2014, we shall order the Respondent to make whole its unit employees covered by the pension plan by making all required contributions to the plan that have not been made, including any additional amounts due the plan, in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). If the NYSNA Pension Plan will not accept such contributions, the Respondent shall deposit an amount equal to the required contributions in an escrow account and negotiate with the Union over how the moneys will be distributed to make the unit employees whole.[14] Further, the Respondent shall be required to reimburse its unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Such amounts should be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).[15]

ORDER

The National Labor Relations Board orders that the Respondent, StaffCo of Brooklyn, LLC, Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with New York State Nurses Association (the Union), as the exclusive representative of employees in the following appropriate unit by unilaterally discontinuing its contributions to the NYSNA Pension Plan:

> All full-time, regular part-time and per diem registered professional nurses, temporary employees, as defined in Section 4.04 of the collective bargaining agreement, and persons authorized by permit to practice as registered professional nurses, including staff nurses, assistant nursing care coordinators, case managers, and community health coordinators, and Nurse Practitioners and Nurse Midwives employed by the Employer at the SUNY Downstate at Long Island College Hospital, and excluding supervisory, confidential, executive and managerial employees, and all other employees, guards and supervisors within the meaning of the National Labor Relations Act.

(b) 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) Before implementing any changes in wages, hours, or other terms and conditions of employment, notify and, on request, bargain collectively and in good faith with the Union as the exclusive representative of its employees in the appropriate unit.

(b) Upon the request of the Union, make all required contributions to the NYSNA Pension Plan on behalf of the above bargaining unit employees that have not been made since May 22, 2014, including any additional amounts owed to the fund, in the manner set forth in the amended remedy section of this decision, and continue such payments until an agreement has been reached with the Union or a lawful impasse in negotiations occurs. If the NYSNA Pension Plan will not accept such contributions, deposit an amount equal to the required contributions in an escrow account and negotiate with the Union over how the monies will be distributed to make the unit employees whole.

(c) Make unit employees whole for any expenses ensuing from its failure to make the required pension contributions, with interest, in the manner set forth in the amended remedy section of this decision.

(d) 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 payments records, timecards, personnel records and reports, and all other records, including an elec-

[14] Absent a negotiated agreement, the distribution issue will be resolved in compliance proceedings. We also leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the benefit fund in order to satisfy our "make whole" remedy and any unresolved matters pertaining to the distribution of funds from an escrow account. *Merryweather Optical*, 240 NLRB at 1216 fn. 7.

Contrary to the dissent, this contingent make-whole remedy for the Respondent's unlawful cessation of pension fund contributions does not in any way support the view that the Union clearly and unmistakably waived the right to bargain about the continuation of pension fund benefits if the Plan would not accept them. Rather, it provides an alternative means, crafted within the Board's broad remedial discretion, for making employees whole in the event the Pension Plan refuses to accept contributions.

[15] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute an offset to the amount that the Respondent otherwise owes the fund.

tronic copy of such records if stored in electronic form, necessary to analyze the amount of monetary benefits due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 May 22, 2014.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 29, 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. August 26, 2016

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Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

Contrary to my colleagues, I read the relevant contractual language here to plainly authorize the Respondent's unilateral discontinuation of its pension fund contributions once the collective-bargaining agreement expired, and thus to waive the Union's right to bargain over the postexpiration termination of those contributions.

The Pension Plan's Policy for Continuation of Coverage, which was adopted by the parties, provides that "[u]pon expiration or termination of a collective bargaining agreement," the Respondent's "participation in and status as an Employer under the Fund shall forthwith terminate" and that the "service of [the Respondent's] employees shall no longer be credited under the Plan." In turn, employees shall be notified in writing "that the [Respondent] is no longer maintaining the Plan" and that their "covered employment . . . terminated on the expiration/termination date of the collective bargaining agreement."

The determinative question is whether the parties, in adopting the Policy's continuation of coverage language, clearly and unmistakably agreed that the Respondent could discontinue pension fund contributions when their collective-bargaining agreement expired. My colleagues concede that the Policy's language clearly establishes that—in the absence of a collective-bargaining agreement—the Respondent ceases to be an "Employer" in connection with the pension plan. But they see no connection between this change in status and the Respondent's statutory obligation to continue making pension fund contributions. My colleagues emphasize that the Policy does not expressly state that the Respondent's statutory obligation to continue contributions ceases. By definition, however, terminating the Respondent's pension "participation" necessarily means the cessation of an ongoing relationship to the pension plan, including any duty to make contributions to it. See *Cauthorne Trucking*, 256 NLRB 721, 722 (1981) (pension plan language simply providing that, as of the expiration of the collective bargaining agreement, the employer's "obligation under this [pension plan] shall terminate" unless continued in a new agreement, found to "expressly waive[]" the union's right to bargain over employer's cessation of pension contribution).

My colleagues maintain that *Cauthorne* permits a finding of waiver only where explicit contract language authorizes an employer to terminate its "obligation" to continue benefit-fund contributions after expiration of the agreement. But Board law requires only that the parties' intent to waive a right be clear and unmistakable, not that the waiver be stated with lawyerly perfection. See *Silver State Disposal Service*, , 326 NLRB 84, 86 (1998) ("The 'clear and unmistakable' standard for finding waiver of a statutory right, however, does not '[require] more elaborate evidentiary support than simply placing an objective construction on a contract.'. . . . In short, the parties' actual intent governs. . .") (quoting *Electrical Workers*

[16] 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."

IBEW Local 1395 v. NLRB, 797 F.2d 1027, 1031 (D.C. Cir. 1986)). As explained, the parties' agreement to permit the Respondent to end its "participation" in the plan makes sufficiently clear that the Respondent necessarily also was authorized to stop contributing to the plan.

Moreover, none of the post-*Cauthorne* cases cited by my colleagues involved comparable language affirmatively providing for the postexpiration termination of an employer's "participation" in a plan, or any other language clearly signaling that the employer would no longer be contributing to the plan. In *Allied Signal, Inc.*, 330 NLRB 1216 (2000), for example, the language relied on by the employer to justify its postexpiration cessation of severance benefits was no more than a "Duration Clause," which merely specified the term of the parties' agreement. That clause did not speak at all to the postexpiration status of those benefits. Likewise, in *KBMS, Inc.*, 278 NLRB 826 (1986), and *General Tire & Rubber Co.*, 274 NLRB 591 (1985), the respective employers' waiver arguments were based only on similar "duration" language that did not address the employers' postexpiration relationships to the relevant funds or otherwise indicate the fate of contributions to those funds. Finally, in *Schmidt-Tiago Construction Co.*, 286 NLRB 342 (1987), the employer's waiver argument was based on "pension certification and declaration of trust" language that conditioned the employer's remittance and the pension fund's acceptance of contributions on the existence of a written agreement requiring those contributions. The Board found no waiver based on that language because, as found by the judge, the language was ambiguous with respect to postexpiration contributions and, further, the language appeared to have been drafted to address compliance with Section 302 of the Labor-Management Relations Act, not the parties' respective postexpiration rights. For the reasons given, there is no such ambiguity in, or plain alternative explanation for, the relevant language in the present case.[1]

Furthermore, my colleagues' interpretation of the contractual language leads to an anomalous result. If the parties did *not* intend to permit the Respondent to discontinue its pension contributions, then they surely would have prescribed where or by what mechanism such contributions would be made after the agreement expired—but they did not, and no such mechanism is self-evident. Nor is it apparent by what measure such contributions would lead to the accrual of benefits for employees, particularly given the parties' express acknowledgement that employees would "no longer . . . [be] credited" for their service.

Relatedly, the remedy my colleagues order provides that the Respondent may establish an escrow account to receive contributions. But the need to create this alternative arrangement (of the majority's own making) only highlights that the parties simply did not expect continued contributions by the Respondent in the absence of a successor or interim collective-bargaining agreement. This conclusion is further confirmed by other language in the parties' agreement plainly indicating that contributions would be made only to the Plan, or not at all. Thus, section 9.02 of the collective-bargaining agreement specified that "Such payments [by the Employer] *shall be used by the Trustees of New York State Nurses Association Pension Plan* for the purpose of providing pension benefits for employees as the Trustees may from time to time determine." (Emphasis added.) This language demonstrates that the parties contemplated that the Respondent's contributions would be remitted to and used exclusively by the pension plan, and thus indicates that the end of the Respondent's participation in the plan would also mean the end of the Respondent's contributions.[2]

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[1] My colleagues suggest that the Policy language here is not intended to affect the Respondent's postcontract obligation to make pension contributions, but rather to protect the Plan from unfunded liability if employees were to continue to accrue service credit toward their pension benefits. Under ERISA, they observe, a pension plan incurs liability for service credit of employees in a participating employer regardless of employer contributions; hence, the Policy language here terminates Employer participation and advises employees they will no longer accrue credit.

But even were one to assume the relevance of avoiding unfunded ERISA liability, such a purpose would actually reinforce the reading of the Policy language as terminating Plan contributions. The reason for including Policy language that provides for the termination of the Employer's Plan participation, which cuts off liability for service-credit under ERISA, is that such benefit accrual would be unfunded, i.e., *the employer would no longer be contributing toward the Plan*. In other words, only if the Employer's contributions would cease once the parties' contract expired would there be a reason to protect the Plan against unfunded liability.

[2] My colleagues argue that the lack of a mechanism for Employer contributions is not evidence of waiver, pointing to the absence of evidence that the Plan itself would not accept contributions after the expiration of a collective-bargaining agreement. That the Plan might simply accept a tendered contribution from a nonparticipating employer does not alter the fact that ending "participation" in a plan necessarily includes the termination of previously *required* financial contributions. Regardless whether there the Plan might hypothetically be able to accept contributions from a non-participating entity, it strains belief to think that the parties, after providing for the termination of Employer participation, would have never discussed or contemplated how pension contributions might be made in the absence of plan participation.

Here, the language of sec. 9.02 of the parties' contract states that the purpose of contributions to the Plan is to "provid[e] pension benefits for employees." In turn, the Policy language plainly reflects the parties' understanding that employees would no longer accrue benefits under the Plan after contract expiration. If the purpose of contributions to the Plan is to fund employee benefits, but employee benefits have

The parties' course of conduct, in turn, confirms the plain import of the Policy language. The parties were aware of the need to have an agreement in place to maintain pension coverage, and accordingly they negotiated several succeeding interim agreements and extensions. Notably, in an October 2012 email, a Union representative wrote: "We need to send a signed . . . Interim Agreement back to the fund . . . to continue the pension benefit in the event we do not reach an agreement." My colleagues argue that this course of conduct merely suggests that the parties understood that an agreement or extension was necessary for pension coverage, but not for continuation of pension contributions. But this argument again assumes that the parties, implausibly, considered continuing such contributions to be an obligation that was somehow separate and apart from the maintenance of a "pension benefit." Moreover, it is unclear what the purpose would be of making contributions, in escrow or otherwise, if the parties understood that any "benefit" to employees would require a contract extension. Indeed, a Union bargaining official testified that the Union sought contract extensions "[p]rimarily because we wanted to make sure that the Pension Fund contributions would continue from—that the Pension Fund would accept contributions from the Employer," thus implying her understanding that contributions were synonymous with the "pension benefit." Another Union bargaining representative testified that the Union typically would seek a successor agreement or an extension and "we would execute a document based on our discussion of the desire to continue *pension contributions*." (Emphasis added.)

For these reasons, I believe that the Policy clearly and unmistakably reflects the parties' intent to end the Respondent's postexpiration contribution obligation. The bar for establishing waiver of a statutory right is high. But it can be surmounted if the parties' agreement plainly evidences an intent to waive the right. Because the language adopted by the parties, when examined in light of the ordinary meaning of the words the parties consented to, demonstrates the clear intent to permit the Employer to cease its contributions upon expiration of the parties' agreement, I would find such a waiver here. Accordingly, I would find no violation in the Respondent's unilateral termination of pension contributions and would dismiss the complaint.

Dated, Washington, D.C. August 26, 2016

ceased to accrue when the parties' contract expires, it is difficult to see how the parties could have intended anything other than the Employer's postexpiration cessation of Plan contributions, in the absence of any mechanism or purpose for the plan to make use of them.

Lauren McFerran, Member

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 fail and refuse to bargain collectively and in good faith with New York State Nurses Association (the Union), as the exclusive representative of our employees in the following appropriate unit by unilaterally discontinuing our contributions to the NYSNA Pension Plan:

> All full-time, regular part-time and per diem registered professional nurses, temporary employees, as defined in Section 4.04 of the collective bargaining agreement, and persons authorized by permit to practice as registered professional nurses, including staff nurses, assistant nursing care coordinators, case managers, and community health coordinators, and Nurse Practitioners and Nurse Midwives employed by the Employer at the SUNY Downstate at Long Island College Hospital, and excluding supervisory, confidential, executive and managerial employees, and all other employees, guards and supervisors within the meaning of the National Labor Relations Act.

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

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

WE WILL, upon the request of the Union, make all required contributions to the NYSNA Pension Plan on behalf of the bargaining unit employees that have not been made since May 22, 2014, including any additional amounts owed to the fund,, and we will continue such payments until an agreement has been reached with the Union or a lawful impasse in negotiations occurs. If the NYSNA Pension Plan will not accept such contributions and credit employees for such contributions, WE WILL deposit an amount equal to the required contributions to an escrow account and negotiate with the Union over how the moneys will be distributed to make the unit employees whole.

WE WILL make unit employees whole for any expenses ensuing from our failure to make the required pension contributions, with interest.

STAFFCO OF BROOKLYN, LLC

The Board's decision can be found at www.nlrb.gov/case/29–CA–134148 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 SE, Washington, D.C. 20570, or by calling (202) 273-1940.

Kimberly Walters, Esq., for the General Counsel.
Nicholas M. Reiter, Esq. (VENABLE, LLP), for the Respondent.
Kate M. Swearengen, Esq.(Cohen Weiss and Simon, LLP), for the Charging Party.

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried in Brooklyn, New York, on February 10, 2015. The charge was filed on August 5, 2014,[1] and the complaint was issued by the National Labor Relations Board (Board or NLRB) for Region 29 on October 31, 2014.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

[1] All dates are in 2014 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION AND UNION STATUS

The Respondent, a corporation, is engaged as a professional employer organization at its facility in Brooklyn, New York,[2] where it annually provides services valued in excess of $50,000 to the State University of New York (SUNY), downstate medical center, a governmental entity which directly engages in interstate commerce. The Respondent 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. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that StaffCo of Brooklyn, LLC (Respondent or StaffCo) violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act) when since about May 22, the Respondent unilaterally modified the terms and conditions of employment of the bargaining unit as set forth in the expired collective-bargaining agreement and the contract extension agreements by failing and refusing to make contributions to the pension fund on behalf of unit employees without first bargaining with the Union to an overall good-faith impasse for a successor agreement (GC Exh.1 at C).[3] The Respondent filed a timely answer denying the material allegations in the complaint (GC Exh. 1 at E).

III. RELEVANT STIPULATED FACTS

The parties stipulated to a number of facts which not all are relevant to this determination (Jt. Exh. Y; Tr. 8). The highlighted stipulated facts are as follow

1. StaffCo is a registered New York State Professional Employer Organization.

2. The State University of New York (SUNY) operates SUNY Downstate Medical

Center (SUNY Downstate), which is an academic medical center comprising of colleges, graduate schools, hospitals, and other health care facilities.

3. On May 29, 2011, SUNY acquired Long Island College Hospital (LICH) in Brooklyn, New York.

4. SUNY Downstate operated LICH from approximately May 29, 2011, until on or about October 31, 2014.

5. In connection with its acquisition of LICH, SUNY Downstate contracted with StaffCo to hire and employ the nonphysician staff at the LICH facilities.

6. On May 29, 2011, StaffCo hired substantially all of the non-physician staff at the LICH facilities.

7. StaffCo recognized NYSNA (Union) as the collective-bargaining representative for a bargaining unit of registered

[2] The Respondent avers that its principal place of business is at 112 Pacific Street, Brooklyn, New York, 11201 and not as stated in the complaint.

[3] The exhibits for the General Counsel are identified as "GC Exh." The exhibits for the Respondent and Charging Party are identified as "R. Exh." and "CP Exh." respectively. Joint exhibits are identified as "Jt. Exh." The hearing transcript is referenced as "Tr." and closing briefs are identified as "GC Br.," "CP Br." and "R. Br."

nurses and Nurse practitioners.[4]

8. After recognition, StaffCo and NYSNA negotiated and executed a collective-bargaining agreement (CBA) effective May 29, 2011, through May 28, 2012 (Jt. Exh. A).

9. Pursuant to the CBA, StaffCo agreed to participate in the NYSNA Pension Plan and, accordingly, make contributions to the NYSNA Pension Plan. Section 9.02 of the CBA required StaffCo to complete an acknowledgement form and become bound by the terms and provisions of the "Agreement and Declaration of Trust."

10. The NYSNA Pension Plan includes in its "Requirements for Admission" that, in order for StaffCo to participate as a contributing employer to the NYSNA Pension Plan, StaffCo needed to execute an acknowledgement of trust agreement and a collective-bargaining agreement between StaffCo and NYSNA that included certain information set forth in the "Requirements for Admission" (Jt. Exh C).

11. The NYSNA Pension Plan's "Requirements of Admission" also required that nothing in the CBA be inconsistent with "the provisions of the trust agreement and the Plan."

12. Pursuant to article 15 of the (Second Restated) NYSNA Pension Plan, the method for calculating a participating employer's withdrawal liability is dependent upon the length of participation in the NYSNA Pension Plan. In the event an employer participates for less than 3 years, its withdrawal liability is determined based upon the assets and liabilities in the NYSNA Pension Plan attributable to the employer on the actual date of withdrawal instead of the employer's pro rata share of the NYSNA Pension Plan's total unfunded vested benefits (Jt. Exh. D at 96).

13. Shortly after executing the CBA with NYSNA, StaffCo completed and executed an Acknowledgment of Trust Agreement for the NYSNA Pension Plan pursuant to which it became bound to the terms and provisions of the "Agreement and Declaration of Trust" establishing the NYSNA Pension Plan (on Jan. 13, 2012) (Jt. Exh. B).

14. Prior to the CBA, the trustees of the NYSNA Pension Plan also adopted a "Policy for Continuation of Coverage Upon Expiration of a Collective Bargaining Agreement," which set forth, inter alia, the conditions upon which NYSNA Pension Plan coverage would continue in the event of an expiration of a collective bargaining agreement or an interim agreement between NYSNA and an employer (Jt. Exh. F).[5]

15. On August 22, 2012, StaffCo and NYSNA executed a contract extension agreement pursuant to which the terms and conditions of the collective-bargaining agreement were extended effective May 29 through December 31, 2012 (Jt. Exh. G)

16. On September 6, 2012, the NYSNA Pension Plan sent StaffCo and NYSNA a letter notifying the recipients that StaffCo's participation in the NYSNA Pension Plan would terminate if the NYSNA Pension Plan did not receive a new fully executed collective-bargaining agreement or interim agreement between NYSNA and StaffCo on or before the expiration of the contract extension agreement on December 31, 2012. Enclosed within the NYSNA Pension Plan's September 6, 2012 letter to StaffCo and NYSNA was: (1) the NYSNA Pension Plan's "Policy tor Continuation of Coverage upon Expiration of a Collective Bargaining Agreement," (2) a form interim agreement, and the NYSNA Pension Plan's "Agreement and Declaration of Trust" (Jt. Exh. H).

17. On December 3, 2012, StaffCo and NYSNA executed an interim agreement effective January 1, 2013, through June 30, 2013 (Jt. Exh. I).

18. In February 2013, the SUNY Board of Trustees approved the closure of LICH to address SUNY Downstate Medical Center's budget deficit and on February 20, 2013, SUNY Downstate submitted its closure plan for LICH to the New York State Department of Health.

19. On February 20, 2013, NYSNA (among other petitioners) commenced a lawsuit to enjoin SUNY Downstate's closure of the LICH facilities.

20. On February 20, 2013, through the NYSNA lawsuit, NYSNA obtained a temporary restraining order enjoining SUNY Downstate's closure of the LICH facilities. The NYSNA lawsuit delayed the LICH closure date several times throughout 2013 and 2014.

21. On March 19, 2013, StaffCo notified its employees, including NYSNA's members, in writing regarding the imminent closure of the LICH facilities and associated layoffs pursuant to the Worker Adjustment and Retraining Notification Act ("WARN").

22. StaffCo issued revised WARN notices to its employees on several occasions throughout 2013 and 2014 due to delays of the LICH closure date associated with SUNY Downstate's negotiation for a sale to potential bidders and applications for injunctive relief in connection with the NYSNA lawsuit.

23. On April 30, 2013, the NYSNA Pension Plan sent StaffCo and NYSNA a letter notifying the recipients that StaffCo's participation in the NYSNA Pension Plan would terminate if the NYSNA Pension Plan did not receive a new fully executed collective-bargaining agreement or interim agreement on or before the expiration of the interim agreement on June 30, 2013. Enclosed within the NYSNA Pension Plan's April 30, 2013 letter to StaffCo and NYSNA was, among other things, the NYSNA Pension Plan's "Policy for Continuation of Coverage upon Expiration of a Collective Bargaining Agreement" and a form second interim agreement (Jt. Exh. J).

24. On May 30, 2013, StaffCo and NYSNA executed a second interim agreement effective July I December 31, 2013, in order to permit StaffCo's continued participation in the NYSNA Pension Plan pursuant to the NYSNA Pension Plan's "Re-

[4] The Respondent admits to the composition of the unit as "All full-time, regular part-time and per diem registered professional nurses, temporary employees, as defined in Section 4.04 of the collective bargaining agreement, and persons authorized by permit to practice as registered professional nurses, including staff nurses, assistant nursing care coordinators, case managers, and community health coordinators, and nurse practitioners and Nurse Midwives employed by the Employer at the SUNY Downstate at Long Island College Hospital, and excluding supervisory, confidential, executive and managerial employees, and all other employees, guards and supervisors within the meaning of the National Labor Relations Act."

[5] The policy for continuation of coverage essentially states that the Respondent may continue to participate in the NYSNA Pension Plan after the expiration of the collective-bargaining agreement if the employer continues to make contributions to the plan and submits a new agreement, contract extension, or an interim agreement.

quirements for Admission" and "Policy for Continuation of Coverage upon Expiration of a Collective Bargaining Agreement" (Jt. Exh. K).

25. On December 1, 2013, the NYSNA Pension Plan sent a letter to StaffCo and NYSNA notifying the recipients that StaffCo's participation in the NYSNA Pension Plan would terminate if the NYSNA Pension Plan did not receive a new fully executed collective-bargaining agreement or interim agreement on or before the expiration of the second interim agreement on December 31, 2013 (Jt. Exh. L).

26. Also on December 1, 2013, the NYSNA Pension Plan sent a memorandum to NYSNA's members employed at StaffCo notifying them that their coverage under the NYSNA Pension Plan would terminate if the NYSNA Pension Plan did not receive a new fully executed collective-bargaining agreement or interim agreement on or before the expiration of the second interim agreement on December 31, 2013 (Jt. Exh. M).

27. On December 27, 2013, StaffCo and NYSNA executed a Contract Extension Agreement pursuant to which the terms and conditions of the CBA were extended effective January 1, 2013 through March 31, 2014 (Jt. Exh. N).

28. On February 21, 2014, the parties to the NYSNA lawsuit reached a settlement agreement pursuant to which SUNY and SUNY Downstate agreed to keep the LICH facilities open until at least May 22, 2014.

29. On March 13, 2014, StaffCo and NYSNA executed a contract extension agreement pursuant to which the terms and conditions of the CBA were extended effective April 1 through May 22, 2014. The contract extension agreement executed on March 13, 2014, provided that nothing in the collective-barganing agreement or in the interpretation thereof shall be deemed to be inconsistent with the provisions of the NYSNA Pension Plan Trust Agreement and the NYSNA Pension Plan (Jt. Exh. O).

30. On April 22, 2014, the NYSNA Pension Plan sent StaffCo and NYSNA a letter notifying the recipients that StaffCo's participation in the NYSNA Pension Plan would terminate if the NYSNA Pension Plan did not receive a new fully executed collective-bargaining agreement or interim agreement on or before the expiration of the most recent contract extension agreement on May 22, 2014 (Jt. Exh. P).

31. Also on April 22, 2014, the NYSNA Pension Plan sent a memorandum to NYSNA's members employed at StaffCo notifying them that their coverage under the NYSNA Pension Plan would terminate if the NYSNA Pension Plan did not receive a new fully executed collective-bargaining agreement or interim agreement on or before the expiration of the most recent contract extension agreement on May 22, 2014 (Jt. Exh. Q).

32. On May 22, 2014, the NYSNA Pension Plan sent a letter to StaffCo and NYSNA notifying the recipients that, pursuant to the NYSNA Pension Plan's "Policy for Continuation of Coverage Upon the Expiration of a Collective Bargaining Agreement," StaffCo's participation in the NYSNA Pension Plan had terminated as a result of the expiration of the contract extension agreement between StaffCo and NYSNA on May 22, 2014, without the submission of a new fully executed collective-bargaining agreement or interim agreement. The same May 22, 2014 letter further notified StaffCo and NYSNA that StaffCo could rejoin the NYSNA Pension Plan without any interruption of pension benefits in the event the parties submitted a new collective-bargaining agreement within 60 days of the date of the letter (Jt. Exh. R).

33. The 60-day period for submission of a new collective-bargaining agreement to the NYSNA Pension Plan following the expiration of the contract extension agreement on May 22, 2014, ended on July 21, 2014.

34. On May 30, 2014, the NYSNA Pension Plan sent a memorandum to NYSNA's members employed at StaffCo notifying them that their coverage under the NYSNA Pension Plan terminated effective May 22, 2014, because of the expiration of the contract extension agreement between StaffCo and NYSNA on May 22, 2014, without the submission of a new fully executed collective-bargaining agreement or interim agreement (Jt. Exh. S)

35. On July 28, NYSNA and StaffCo attended a labor management committee meeting at StaffCo's offices.

36. On July 31, 2014, NYSNA sent StaffCo a letter requesting information in order to prepare for negotiations regarding a successor agreement to the -argaining agreement that expired on May 22, 2014 (Jt. Exh. Y).

37. On September 3, 2014, NYSNA and StaffCo attended a labor management committee meeting and on September 22, 2014, NYSNA and StaffCo participated in a collective-bargaining session. At the September 22 session, NYSNA proposed that, on or before September 31, 2014, StaffCo resume making payments into the NYSNA Pension Plan retroactive to May 22, 2014.

38. On October 28, 2014, the New York State Attorney General and Comptroller provided the requisite approvals for SUNY Downstate's sale of the LICH facilities.

39. As of October 31, 2014, StaffCo no longer employed any of NYSNA's members at the LICH facilities. StaffCo continued to employ, pursuant to its staffing contract with SUNY Downstate, four NYSNA members as nurse practitioners at StaffCo's "school-based" programs.

40. From October 31, 2014 through the date of this stipulation, StaffCo employs four NYSNA members as nurse practitioners, all of whom are employed at StaffCo's "school-based" programs pursuant to StaffCo's staffing contract with SUNY Downstate. All four of the NYSNA members described in this paragraph fall within the bargaining unit described in Section 1 of the NYSNA-StaffCo collective-bargaining agreement effective May 29, 2011—May 28, 2012.

41. On November 11, 2014, NYSNA and StaffCo participated in a collective-bargaining session. At that session, the parties discussed health and retirement benefits and the pension plan and StaffCo proposed that NYSNA members participate in its 403(b) retirement plan.

42. Following continued negotiations between November 11 and December 22, 2014, NYSNA and StaffCo reached an agreement regarding health insurance benefits for NYSNA's members.

IV. POSITIONS OF THE PARTIES

The General Counsel contends that the Respondent violated Section 8(a)(5) and (1) of the Act when it refused to maintain

the status quo with respect to the terms and conditions of employment by failing to contribute to the NYSNA Pension Plan after the expiration of the collective-bargaining agreement. The General Counsel further contends that the Union never clearly and unmistakenly waived its right to bargain over the pension contribution and the parties never came to lawful impasse during negotiations on a successor agreement when the Respondent unilaterally modified the terms and conditions of the expired contract since May 22.

The Respondent argues that the NYSNA pension plan requires that NYSNA and the employer have either a collective-bargaining agreement or an interim agreement in effect for the employer to continue contributing to the pension plan. The Respondent contends that StaffCo was not obligated or permitted to contribute to the plan after the expiration of the agreement without an extension or an interim agreement. The Respondent further contends that NYSNA waived its right to bargain over this subject matter because it had received notice of the pending termination of the pension contributions by the pension fund prior to May 22 due to the expiration of the CBA and the Union did nothing to begin bargaining over the terms of a new agreement or seek an interim agreement.

V. TESTIMONY OF WITNESSES

Eric Smith (Smith) testified that he was and is the lead program representative for NYSNA and was intimately involved with representing the bargaining unit since July 2013 in all matters such as negotiations for contracts, grievances, arbitrations and union organizing. He assisted in the negotiations for the three contract extensions to the agreement. He testified that the meetings with StaffCo representatives were more frequent in 2014 when the closure of LICH became imminent. Smith stated that the first major layoff occurred on April 12 and 55 percent of the bargaining unit employees were let go. He testified to a meeting with the Respondent on May 20 regarding the additional layoff of 42 unit employees by May 22.[6] Smith indicated that David Pappalardo (Pappalardo), Francesca Tinti (Tinti) and Barbara Maffai were in attendance for the Respndent [7](Tr. 26–30).

While the parties' focus was on coordinating the layoff of 42 employees, Smith remarked to the StaffCo representatives that the employer needs to remain current on its pension contributions and to execute another extension by May 22, which was the expiration date of the contract extension. At that time, the contract extension was from April 1 through May 22 (Jt. Exh. O).[8] Smith testified that on previous contract extensions with StaffCo, he would request of the Respondent to get an extension signed and a contract extension would be executed at a later date (Tr. 54).

Smith testified that StaffCo representatives never stated at the May 20 meeting that the Respondent would refuse to sign an extension agreement. Smith further testified that the Respondent never stated that it would cease its contribution to the pension fund. Smith repined that Pappalardo refused to state whether StaffCo would continue the pension contributions or execute a new agreement and referred him to Brian Clark (Clark), the counsel for the Respondent at the time (Tr. 30–32). Smith testified that he informed Michelle Green (Green)[9], who was the intermediary for the Union and StaffCo, to contact Clark (Tr. 55–57).

As stipulated, four unit school-based nurse practitioners remained after the May 22 deadline. Smith testified that the Union and StaffCo met on July 9 to discuss the aftermath of the layoffs regarding such items as terminal benefits payouts, proper payout amounts and the staffing of the emergency room, which had remained open after the closure. Smith testified that the employer continued to maintain the terms and conditions of employment under the expired contract for the four employees except for the contribution to the pension fund. Smith said that he raised this issue at the July 9 meeting and was told that the withdrawal liability was a major concern for StaffCo and the employer "weren't going to get current" with its contribution to the pension fund[10] (Tr. 34, 35).

Smith recalled requesting that StaffCo sign an extension agreement on July 9. Smith maintained that he had previously made the same request to the Respondent during the May 20 meeting[11] (Tr. 44).

Smith testified that neither he nor anyone from the Union to his knowledge had made a written request to the Respondent to bargain over a new contract. Smith believed there may have been some discussions between Green and Clark on an extension, but he is not personally aware of those discussions. During this time, the pension fund informed the NYSNA members, Union and StaffCo on May 22 that the pension had terminated upon the expiration of the contract on May 22 (Jt. Exh. R and S; Tr. 58–62). The Union made a written request to StaffCo to bargain over a new agreement on July 31(Jt. Exh. T).[12]

Michelle Green (Green) testified that she was the associate director for special projects in 2014. Green is responsible for

[6] Smith testified that there was no point in negotiating a new agreement and the parties had agreed to limit the third extension from April 1 through May 22 because the parties anticipated that May 22 would be a major layoff date with the LICH facility closing on that date (Tr. 32, 33).

[7] At the time, Pappalardo was the executive vice president and Tinti was and is the assistant HR vice president.

[8] The Union, employer and NYSNA members were informed on April 22 by the NYSNA pension fund that a new agreement or a contract extension was required before the May 22 expiration date of the CBA (Jt. Exh. P). Smith said that the Union waited until the May 20 meeting before requesting the employer for a contract extension (Tr. 53).

[9] Green held various positions with the Union and was the associate director of special projects during the 2013-2014 timeframe (Tr. 78, 79).

[10] Smith did not identify the StaffCo representative that had provided this response.

[11] The parties stipulated that the Union and StaffCo had convened a labor management committee meeting on July 28. Tinti testified that the labor management meetings were more frequent after May 22 and involved discussing operational issues with the Union over layoffs, benefits, and payments to the nurses. The labor management meetings were not bargaining sessions (Tr. 118, 119).

[12] In order to prepare for the negotiations, the Union requested certain information in the July 31 letter that it believe necessary and relevant in preparation for the bargaining. The information was provided by the Respondent to the Union by letter dated August 7(Jt. Exh. U).

negotiating contracts and worked on the pension and benefit team. She was not involved in the bargaining negotiations with the Respondent for the CBA in effect from May 29, 2011, to May 28, 2012, but had supervised the bargaining team (Tr. 78–80).

Green stated that pending the expiration of the CBA on May 28, 2012, the parties had met about 10 times to negotiate an extension to the CBA. Green denied that the Union agreed to a cessation of the employer's contributions to the pension fund. Green also stated that StaffCo made no alternative proposals on the pension fund during the negotiations for an extension to the contract. The parties would always reach an extension to the 2012 CBA, but no changes were ever made on the Respondent's contributions to the pension plan (Tr. 80, Jt. Exh. G).[13]

Green testified that she spoke to Clark about six times in 2014 regarding the Union's request for a 6-month extension to the collective-bargaining agreement due to expire on May 22. According to Green, Clark responded that StaffCo was concerned over the withdrawal liability if the employer continues to pay into the pension fund and did not agree to an extension. Green stated that after May 22, the Respondent continued to maintain all the terms and conditions of the expired agreement but ceased its contribution to the pension fund. Nevertheless, Green stated that she continued to ask Clark for the Respondent to resume its contributions to the pension fund as late as July 28 because the pension fund provided a 60-day grace period that permits an employer to return to the pension by paying the contribution arrears (Tr. 80–84).

As testified by Smith, Green confirmed that the Union did not request to bargain with StaffCo between May 22 and July 31 (Tr. 103). As noted above, the Union sent a written request to bargain on July 31. Green testified that she sent another letter on August 13 for the Respondent to resume negotiations for a new contract (GC Exh. 2). Green stated that negotiations had stopped under the mistaken belief by the Respondent that there would be no unit employees after August 31 (Tr. 86). Green said that the Union made a third written request on September 4 to bargain and informed the Respondent that approximately 38 unit nurse practitioners remained in the employ of the Respondent (GC Exh. 3, Tr. 87). Green said there were two sessions after the September 4 request to bargain (Tr. 87).

As stipulated, the parties met on September 22 to discuss the July 31 request to bargain over a new contract. Relevant to this meeting, Clark, Pappalardo, and Tinti were at the meeting for StaffCo. Smith testified that the Union presented several proposals to the Respondent at the September 22 session, including a proposal on the pension. Smith testified that the union proposal on the pension was for the Respondent ". . . get current on their obligations . . . missed from May 22 onward and continue in the NYSNA Pensions Funds with appropriate rates" (Tr. 36, 37). Smith said that StaffCo responded by saying that the withdrawal liability was a major issue and that the employer was not willing to remit the arrears on the pension contribution. The meeting concluded without a resolution to the pension issue (Tr. 37).

Smith testified that the next bargaining session was on November 11. He said that Clark, Pappalardo, and Tinti were again at this meeting. At the November 11 meeting, the Respondent presented two economic proposals dealing with health benefits and the pension plan. Smith said that the Respondent, for the first time, proposed an alternative to the pension plan, which was rejected by the Union. Smith also testified that the Union never agreed to the Respondent ceasing its contribution to the pension fund. According to Smith, despite the Respondent not agreeing to make current contributions to the pension fund and the Union rejecting the employer pension proposal, neither party claimed that the negotiations were at impasse on November 11 (Tr. 38, 71–72, 75–77). Green confirmed that the parties never reached impasse on the negotiations and that the Union never agreed to the employer's proposal to cease the pension contributions with an alternative retirement plan (Tr. 88). The parties did not bargain over the pension plan after November 11 but did reached a side agreement on health benefits (Tr. 73, 74).

Francesca Tinti (Tinti) testified that, as the assistant HR vice president, she is responsible for hiring and training new employees, discipline, day-to-day operations, and bargaining with the Union. Tinti stated that the Respondent only has one client, which is SUNY, and empowered to hire, train, discipline, and interact with the Union on behalf of SUNY with all nonphysician staff at the LICH. In her role as labor representative for the Respondent, Tinti testified that she has participated in labor management committee meetings with NYSNA and is familiar with the CBA between the Union and the Respondent (Tr. 105–108). Tinti testified that she was aware of the pension fund requirement for a current agreement in order to participate in the pension plan. Tinti stated that she is aware of this policy through the NYSNA pension fund and notices received from the fund warning of the pension termination without an extension or interim agreement. Tinti testified that the Respondent and the Union would agree to short (usually 6 months) extensions or interim agreements because the closure date for LICH kept being delayed (Tr. 105–108, 113–117).

Tinti testified that she was aware that there was a projected budget shortage with LICH in early 20013[14] that potentially may affect StaffCo's contractual relationship with LICH.[15] Tinti testified that StaffCo and the Union negotiated layoffs in connection with the potential closure of LICH and the Respondent issued the appropriate WARN notices to the unit employees. Tinti thought that LICH was due to close in June 2013, but lamented to a number of delays with the closure (until May 2014) which affected the Respondent's participation in the pension plan (Tr. 110–112). Tinti explained that under the pension fund policy, the Respondent was permitted to participate in the pension plan for 4 years but may withdraw at the end of the third year without incurring a withdrawal penalty (or liability) (Jt. Exh. W). Tinti stated that, however, after the third

[13] As stipulated, nothing changed in the subsequent extensions and interim agreements to the CBA with regard to the Respondent's contributions to the pension plan until May 22, when the Respondent ceased its contribution to the plan.

[14] The parties stipulated that there was a claimed $200 million deficit but not to the veracity of this claim (Tr. 109).

[15] It is stipulated that LICH was the only client of StaffCo.

year, StaffCo's liability for withdrawing from the pension fund would be over $2 million (Tr. 112,113).

Tinti testified that the parties negotiated the last extension to expire on May 22 because that was the anticipated closure date for LICH. In addition, Tinti stated StaffCo was not willing to go beyond May 22 because the Respondent would then exceed the 3-year period on the pension plan and incur a withdrawal liability. Tinti believed that Clark informed the Union that the Respondent would not go beyond May 22 on the contract extension (Tr. 117, 118).

Tinti testified that the Union never requested to bargain for a successor agreement or for another contract extension of pension benefits from March 13 (the signing of the last contract extension) through May 22 (expiration date of the last extension). The pension plan also provides for a 60-day cure period that permits an employer to return to the plan after the expiration date. Here, as stipulated by the parties, the 60-day cure period would have ended on July 21. Tinti testified that no one from the Union requested to bargain or proposed written terms for a successor agreement from May 22 to July 21 (Tr. 120–122).

Tinti further testified that when the Union did request information to bargain on July 31, Clark responded on August 7 with the information requested but did not anticipate resuming bargaining with the Union under the mistaken belief at that time that StaffCo would not be hiring or retaining any unit employees (Jt. Exh. U). Tinti said there was an additional delay in the closure date of the hospital to October 31. Tinti further said that once the Respondent became aware of the new closure date and that there would still be unit employees working after the October 31 closure date, the parties arranged to bargain on September 22 for a successor agreement. Tinti testified that it was at the September 22 session that the Respondent proposed an alternate pension plan. Tinti said she could not recall StaffCo's response to the union proposal to retain the pension plan (Tr. 123–126).

Clark stated that he was and is the legal counsel to StaffCo and was involved in the negotiations of the CBA and for the subsequent extensions and interim agreements to the contract. Clark described the procedure the parties followed in reaching an extension. Clark stated that Green would send him an email request to extend the contract with a draft extension. According to Clark, he would make changes in the draft; briefly speak to Green over the proposed language of the draft; and the parties would routinely renew the extension of the contract (Tr. 129–131; Jt. Exh. H).

Clark believed the Union understood that an extension or an interim agreement to the CBA was necessary in order for the parties to participate in the pension plan. Clark denied that the Union sought to negotiate a new contract at any time prior to July 31 when he discussed the extensions with Green (Tr. 131–133). He stated that after the expiration of the CBA on May 28, 2012, the parties engaged in some discussion on a successor agreement in August 2012. Clark stated that this occurred before the parties learned of the $200 million shortfall in the budget of LICH later that summer. Clark testified that once they became aware of the shortfall, the parties agreed to remain in "status quo" with extensions and interim agreements executed to the expired CBA in order to maintain the pension fund requirement that the parties must have a current agreement. Clark said that a longer extension was not possible because the pension plan only allowed for 6-month extensions to the CBA (Tr. 133–136).

Clark further testified that in late February 2013, StaffCo and the Union became aware that LICH was closing. The parties began discussing WARN notices to the employees, layoff requirements, and other contractual obligations. Clark said that StaffCo also looked into its withdrawal liability during the spring and summer of 2013. According to Clark, it was his belief that there would be no withdrawal liability for the Respondent because the employer was in the pension plan for less than 3 years. Clark explained that StaffCo would have no withdrawal liability if Staffco withdraw during the 3-year period because the pension fund only considers the employer's vested benefits, which was fully funded with the employer's contributions. Clark said that after 3 years, StaffCo would be liable for $2.2 million in withdrawal liability because the pension fund would look at StaffCo's unfunded vested benefits and the liability would continue to increase over time (Tr. 137–141; Jt. Exh. W and V).

With regard to extending the contract after the May 20 labor management meeting, Clark denied that anyone from the Union contacted him on May 20 or shortly thereafter regarding the pension fund (Tr. 142). With regard to the 60-day cure period for the employer to return to the pension fund, Clark also denied that anyone from the Union contacted him on or about July 20 about the pension fund. Clark reiterated that the Union did not propose to negotiate a successor agreement until its July 31 letter (Tr. 142, 143, Jt. Exh. T).

Clark said it was unclear whether StaffCo would have any employees after July 31 except for the four school-based nurse practitioners. Clark did not see the point of negotiating a new contract when the parties met on September 22. At this session, Clark testified that the Union requested that StaffCo returned to the pension fund. Clark responded that StaffCo could not due to its withdrawal liability. Clark maintained that the Union was well aware since the second to the last extension that the employer would have withdrawal liability after May 30/31. Clark stated that Green and others in the Union were well aware that StaffCo could not continue with the pension plan after 3 years.

In October, the sale of LICH was approved, and that StaffCo would retain four unit employees.[16] The Respondent and the Union participated in another bargaining session on November 11. At the November 11, the employer proposed a retirement plan as an alternate to the pension plan, which was rejected by the Union. Also at this session, the employer was willing to accept the union health benefits plan for its four unit employees. There has not been another bargaining session after November 11 (Tr. 144–152).

Discussion and Analysis

The sole issue in this complaint is whether the Respondent violated Section 8(a)(5) and (1) of the Act when it ceased contributing to the pension fund. Here, it is undisputed that the

[16] Stipulations #47, 48, and 49 at Jt. Exh. Y.

Respondent maintained the status quo with respect to all the terms and conditions of the expired contract except for terminating the contributions to the pension fund.

The Respondent asserts three defenses for ceasing contributions to the pension plan. The Respondent argues that (1) it was no longer obligated to participate in the pension plan upon the expiration of the contract on May 22; (2) it was barred in whole or in part because of the doctrine of impossibility; and (3) it had in fact bargained with the Union regarding the pension benefits (See, R Br. and Respondent's answer to the complaint).

a. Credibility

The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, and the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, above.

b. Mandatory subject of bargaining

The general rule is that when parties are engaged in negotiations for a new agreement, an employer's obligation to refrain from unilateral changes encompasses a duty to refrain from implementation unless and until an overall impasse has been reached on bargaining for the agreement as a whole. *Pleasantview Nursing Home,* 335 NLRB 96 (2001), citing *Bottom Line Enterprises*, 302 NLRB 373 (1991). It is clear that contributions to a pension fund, like health insurance, is a mandatory subject of bargaining. *Hen House Market No. 3*, 175 NLRB 596 (1969) ("The pension, health, and welfare plans provided for by the expired contract constituted an aspect of employee wages and a term and condition of employment which survived the expiration of the contract and could not be altered without bargaining."); *S. Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1356 (D.C. Cir. 2008) (explaining that the Supreme Court has ". . . made clear that retirement benefits for current employees are mandatory bargaining subjects."); also, *Wire Products Mfg. Corp*., 329 NLRB 155 (1999); *Dynatron/Bondo* Corp., 323 NLRB 1263 (1997).

c. The Respondent's waiver defense

The Respondent concedes that Section 8(a)(5) creates a statutory obligation of the employer to maintain the same terms and conditions of employment that exists prior to the expiration of the contract. However, the Respondent maintains that the Union clearly and unmistakably waived the employer's obligation to continue making pension fund contributions upon the expiration of the contract on May 22 (See Respondent's answer to the complaint at par. 5 and R. Br. at 24). The Respondent maintains that the terms of the contract, as agreed to by the Union, also negated StaffCo's statutory duty to maintain the status quo by continuing to contribute to the pension fund.

An employer violates Section 8(a)(5) and (1) of the Act if it change the wages, hours, or terms and conditions of employment of represented employees without providing the Union with prior notice and an opportunity to bargain over such changes. See *NLRB v. Katz*, 369 U.S. 736, 743–747 (1962). The rationale for this rule is that if the employer is free to alter the very terms and conditions subject to negotiations, bargaining would become difficult. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991). An employer may escape liability for a unilateral change if it proves that a union has expressed or implied a "clear and unmistakable waiver" of its right to bargain. *American Broadcasting Co.*, 290 NLRB 86, 88 (1988); *California Pacific Medical Center*, 337 NLRB 910 (2002). A waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain about a term and condition of employment and cedes full discretion to the employer on such a matter. However, the Board narrowly construes waivers and has been hesitant to imply waivers not explicitly mentioned in the parties' collective-bargaining agreements. *Mississippi Power Co*., 332 NLRB 530 (2000), enfd. in part 284 F.3d 605 (5th Cir. 2002) (rejecting employer's waiver argument that the unions incorporated the benefit plans' reservation of rights clauses into the contract based on a "course of conduct" of copies of the benefit plans provided to the unions and incorporated into the collective-bargaining agreements); see also Dept. of the *Navy Marine Corps Logistics Base v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992) (construing waiver narrowly); and Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983) (holding that a union may waive its protected rights to bargain over a mandatory subject, but the waiver must be clear and unmistakable). Such a waiver, like any waiver of a statutory right, must be "clear and unmistakable." *Provena St. Joseph Medical Center*, 350 NLRB 808, 810–812 (2007). "The clear and unmistakable waiver standard . . . requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Provena,* above at 811. The burden is on the party asserting the waiver to establish the existence of the waiver. *Pertec Computer*, 284 NLRB 810 fn. 2 (1987).

The Board has relied on several factors in assessing whether a clear and unmistakable waiver exists: (1) language in the collective-bargaining agreement, (2) the parties' past dealings, (3) relevant bargaining history; and (4) other bilateral changes that may shed on the parties' intent. *Southwest Ambulance*, 360 NLRB No. 109, slip op. at 11 (2014); also, *Johnson-Bateman*, 295 NLRB 180, 184–187 (1989); *American Diamond Tool*, 306 NLRB 570 (1992).

Upon my review, I find that there was no expressed or implied waiver in the collective-bargaining agreements, in any of the extensions and interim agreements, or in the pension plan policy for continuation of coverage upon expiration of a collective-bargaining agreement. I also find that the Union never waived its right to bargain over the pension plan contribution.

The record shows, and as stipulated by the parties, there was a collective-bargaining agreement effective from May 29, 2011, through May 28, 2012. It is not seriously disputed that the Union and the Respondent were fully aware that in order to continue with the pension fund, StaffCo was required to sign an "Acknowledgment of Trust Agreement" and to submit the agreement to the pension fund and to continue remitting its contributions to the plan. It is also not seriously disputed that the NYSNA Pension Plan required that StaffCo and the Union to have a current bargaining agreement or an extension of the agreement in order to continue the pension coverage. StaffCo and the Union were aware of this requirement and from the time the collective-bargaining agreement had expired on May 28, 2012, the parties agreed to maintain an agreement with either an extension or with an interim agreement. As stipulated the parties entered into (1) a contract extension from May 29 through December 31, 2012; (2) a contract extension from January 1, 2013 to March 31, 2014; (3) an interim agreement from January 1 through June 30, 2013; (4) an interim agreement from July 1 through December 31, 2013; and (5) a contract extension from April 1 to May 22, 2014.

The understanding that the parties must have a current collective-bargaining agreement for the continuation of coverage of the pension plan is, however, not the same as the parties agreeing that the Union waived its right to statutory right to continuance of the status quo as to terms and conditions after the expiration of the bargaining agreement. Rather, the law is clear that such a waiver must be explicit to overcome the settled Board policy favoring fundamental statutory rights of employees. *Lear Sigeler, Inc.*, 293 NLRB 446 (1989) (The Board found, contrary to the judge, that the union did not explicitly waived its right to strike). It is clear that the pension plan benefits ". . . are a term and condition that survive the expiration of the collective-bargaining agreement and are a mandatory subject of bargaining that an employer cannot alter without providing the union an opportunity to bargain*." Jim Walter Resources*, 289 NLRB 1441 (1988). "A waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain about a matter. . . . [W]hen a union *waives* its right to bargain about a particular matter, it surrenders the opportunity to create a set of contractual rules that bind the employer, and instead cedes full discretion to the employer on that matter. For that reason, the courts require 'clear and unmistakable' evidence of waiver and have tended to construe waivers narrowly." *Dept. of the Navy, Marine Corps Logistics Base,* above, at 57. "[C]lear and unmistakable waivers have been inferred from the structure of collective bargaining agreements and from bargaining history showing that the parties have 'consciously explored' or 'fully discussed the matter on which the union has 'consciously yielded' its rights." *Gannett Rochester Newspapers v. NLRB,* 988 F.2d 198, 203 fn. 2 (D.C.Cir.1993) (citations omitted).

The Board has recognized implied waivers. See Mt. Clemons General Hospital, 344 NLRB 450 (2005) (an employer lawfully made unilateral changes to a tax shelter annuity program, shrinking it from five providers to one based upon the employer's 20-year record of making similar unilateral changes without requesting that the Union bargain over them); see also *Litton Microwave Cooking Products v. NLRB*, 868 F.2d 854, 858 (6th Cir. 1989) (finding an implied waiver when the management-rights clause was included in a contract explicitly referring to layoffs along with a history of uncontested work relocation and layoffs); California Pacific Medical Center, 337 NLRB 910, 914 (2002) (finding an implied waiver based on a management rights clause providing the employer with the right to lay off employees whenever necessary, coupled with a longstanding practice of uncontested actions and absent requests to bargain).

I find no such implied waiver has been established from the parties' prior bargaining history, past dealings, or other unilateral changes in the CBA. The Union, in agreeing to a contractual obligation, did not also agree to waive its statutory right to continuance of the status quo after the contract expiration. Upon a review of the language of the CBA under section 9.02 of the Pension Plan, I find no reference to an implied or expressed waiver of the Union's statutory right to continue with the status quo after the contract expiration (Jt.1 Exh. A at 30). The CBA merely requires the Respondent to complete an Acknowledgement and Trust Agreement with the Requirements for the Admission to the Pension Plan. The contract extensions merely require that the extensions and the collective-bargaining agreement shall be consistent with the provisions of the NYSNA Pension Plan and Trust Agreement (Jt. Exh. O). The relevant bargaining history and past dealings as consistently testified by the witnesses could be summarized as preparing a draft interim agreement or an extension by Green that was delivered to the Respondent by email or mail, some tweaking of the draft language by Clark and a subsequent signed document. The witnesses did not testify to any language in the extensions or interim agreements that would constitute a waiver to the employer's statutory obligation to maintain the terms and conditions of employment postexpiration of the agreement. The fact that the Union and Respondent agreed on extending the collective-bargaining agreement did not mean that the Union agreed to a waiver. The extensions and interim agreements only reinforce the obligations of the parties to extend all the terms of conditions of the collective-bargaining agreement retroactive to May 29, 2012. The provision in the extension to include the employer's obligation to make contributions to the pension plan merely reflects the amount to be paid to each employee and which employees were covered.[17] Consequently, the focus turns on the language of the NYSNA Pension Plan.

The Respondent argues that language in the pension plan agreement clearly and unmistakably set forth the understanding of the parties that the employer's obligation to continue making pension fund contributions ceases upon the expiration of the contract. As such, the Respondent maintains that the understanding and agreement by the Union with this language was an explicit waiver by the Union of the obligation of the employer

[17] Similarly, I find that the Union never understood that the last extension expiring on May 22 was for the Respondent to avoid withdrawal liability and therefore, a clear and unmistakable waiver by the Union. I credit Smith's testimony that May 22 was established as the expiration date for the last extension because it was anticipated that LICH would be closed after that date and StaffCo would cease having bargaining unit employees and not as waiver of the pension plan contributions postexpiration of the contract.

to continue providing pension fund payments. The language referenced by the Respondent is in section D "Policy for Continuation of Coverage upon Expiration of a Collective Bargaining Agreement" (Jt. Exh. F) and states:

> Upon expiration or termination of a collective-bargaining agreement, if (i) the employer has not submitted to the Plan Office a new collective bargaining agreement which satisfies the requirements of (A) above and has not complied with the provisions of (B)(1) above, or (ii) the employer owes contributions to the Fund for more than two months (without regard to when such contributions are payable), the employer's participation in and status as an Employer under the Fund shall forthwith terminate, the service of such employer's employees shall no longer be credited under the Plan, the employer and the Associations shall be notified in writing, and the employees of the employer shall be notified in writing five business days thereafter, that the employer is no longer maintaining the Plan and that the covered employment of the employees of the employer terminated on the expiration/termination date of the collective bargaining agreement.

The Respondent finds support in *Cauthorne Trucking*, 256 NLRB 721 (1981), and *Oak Harbor Freight Lines, Inc*., 358 NLRB 328 (2012), for the proposition that an employer's obligation to continue with its pension fund contributions does not survive postexpiration of the contract because the agreement clearly and unmistakenly set forth the understanding of the parties authorizing the employer to terminate its pension fund contributions.

In *Cauthorne*, the Board held that health and welfare and pension fund plans which are part of an expired contract constitute an aspect of employee wages and a term and condition of employment which survives the expiration of the contract. C*authorne*, 256 NLRB at 721. As here, the employer in *Cauthorne* asserted that the obligation to make payments into the funds depends upon the existence of a current contract between the employer and the union. The Board found that contrary to *Cauthorne's* assertions, the trust fund agreements merely referred to the collective-bargaining agreement for the purpose of setting the amount to be paid into the fund and any references are insufficient to relieve an employer of its obligation to bargain regarding changes in the employees' terms and conditions of employment. The Board noted that the fund trust agreements contain no other language which might limit an employer's obligation to bargain regarding cessation of payments into the fund. However, with regard to the pension fund in Cauthorne, the Board found that the language in the pension fund trust agreement contained the following additional language that was critical to the Board's determination in finding a waiver

> It is understood and agreed that at the expiration of any particular collective bargaining agreement by and between the Union and any Company's obligation under this Pension Trust Agreement shall terminate unless, in a new collective bargaining agreement, such obligation shall be continued.

In *Oak Harbor Freight*, above, like here, the employer's collective-bargaining agreement required the employer to be bound by the pension fund agreement. The judge in *Oak Harbor* specifically found that the obligations under the trust agreements pursuant to the expired bargaining agreement will continue until one party notifies the other of its intent to cancel such obligation and that this contract language expresses a clear intent to relieve the Respondent of its obligation to make payments after contract expiration. *Oak Harbor*, above, slip op. at 14. The Board agreed and found in *Oak Harbor* that the pension fund agreement explicitly stated that the employer could cancel its obligation to contribute to the fund upon the expiration of the collective-bargaining agreement by notifying the other party in writing with a copy to the trust fund of its intent to cancel such obligation was a waiver to continue making contributions to the pension fund.[18]

I find that the waivers in *Cauthorne* and *Oak Harbor* are clearly distinguishable from this situation. In *Cauthorne*, the Board points specifically to the language of "IT IS UNDERSTOOD AND AGREED" to find a waiver and only as it pertains to the pension fund. The same language was not in the employer's other trust funds and the Board declined to find a waiver in those situations. I find no such language evident in the NYSNA Pension Plan. Here, such language is absent from the NYSNA Pension Plan and the Union never understood and agreed that the expiration of the collective-bargaining agreement would also terminate the employer's obligation to the pension fund. In *Oak Harbor Freight*, the union agreed to the pension fund agreement that the employer's cancellation upon written notification to the other party and to the fund. Here, the parties never contractually agreed that the Respondent could cancel the pension obligations by notifying the other party. Rather, this situation squarely falls with the line of cases that found no waiver in the absence of explicit language. In *Provena*, above, the Board held that a unilaterally implemented salary incentive policy by the employer violated Section 8(a)(5) of the Act because there was no express substantive provision in the contract regarding incentive pay and moreover, there was no evidence that incentive pay was consciously explored in bargaining or that the Union intentionally relinquished its right to bargain over the topic. In *AlliedSignal Aerospace*, 330 NLRB 1216 (2000), the Board found no waiver in the collective-bargaining agreement clause referring to "bonuses or other benefits" simply ". . . specifies the contractually enforceable rights to payments of benefits accruing during the term of the contract. It does not give the Respondent the right to terminate unilaterally the contractually-established practice of paying them." In *Schmidt-Tigo Construction Co*., 286 NLRB 342 (1987), the Board adopted the judge's analysis in finding no contractual waiver. The judge distinguished *Cauthorne,* "This language does not on its face, as in *Cauthorne Trucking*, specif-

[18] The Board considered *Oak Harbor* de novo after it was vacated by *Noel Canning*, 134 S.Ct. 2550 (2014), and adopted the judge's rulings, findings, and conclusions and the judge's remedy and recommended Order. *Oak Harbor Freight*, 361 NLRB No. 82 (2014).

ically states that Respondent's obligation to contribute to the pension trust fund ends with the expiration of the current collective-bargaining contract," 286 NLRB at 366. In *Parsons Electric*, 361 NLRB No. 20 (2014), the Board agreed with the Judge finding that there was no expressed or implied waiver when the employer changed the break policy in its employee handbook without prior notice to the Union and affording the Union an opportunity to bargain with the Company.[19]

The counsel for the General Counsel cites to *Cofire Paving Corp.*, 359 NLRB 180 (2012),[20] where the Board held that an employer violates Section 8(a)(5) and (1) of the Act when it unilaterally ceased making benefit contributions to the old fund after it was no longer accepting contributions. I find it unnecessary to analysis the instant situation under *Cofire*. The Board has held in *Katz*, above, that an employer is required to maintain the status quo until it fulfilled its bargaining obligation. I find the Respondent was also required to provide the Union with notice and an opportunity to bargain over the manner in which the contributions would be preserved.[21]

Likewise, I reject the argument that the Union waived its right to bargain over the termination of the employer's contributions to the pension fund when the Union failed to diligently request to bargain or to demand arbitration over the pension plan subject matter.

With regard to the allegation that the Union failed to timely request to bargain, I find credible the testimony of Smith and Green that the Union was seeking an extension to the contract since May 20 and repeatedly requested that the Respondent continue with its pension contributions. When it became clear to the Union by July that the Respondent would not continue its pension contributions, the Union then sought to bargain over a new contract. I did not find the Union's actions as a failure to diligently pursue bargaining. With regard to the allegation that the Union failed to pursue arbitration over the pension contributions, Section 9.02 of the collective-bargaining agreement states, in part, that if the employer fails to make timely contributions (to the pension plan), the matter will be submitted to arbitration (Jt. Exh. A). I find that the Union correctly argued that inasmuch as the grievance on the pension plan issue would involve facts and occurrences postexpiration of the contract, the arbitration clause would not have survived on such as postexpiration dispute. See CP Br. at 22, 23. The Respondent repines that the Union, instead of bargaining or demanding arbitration, filed the NLRB charge in this complaint just 6 days after its request to bargain on July 31 (R. Br. at 35, 36). Again, the Respondent mistakes the statutory right of the Union to enforce the employer's contributions to the pension plan and the Respondent's statutory obligation to maintain the status quo of the expired contract as opposed to a contractual obligation to use the collective-bargaining agreement arbitration procedures.

Consistent with *Katz*, I find it was the obligation of the Respondent to provide notice to the Union of the unilateral change in status quo of a term and condition of employment and an opportunity to the Union to bargain over this change and not to fault the Union for filing a charge or not to pursue arbitration.

d. The Respondent's other defenses

The Respondent makes two additional affirmative defenses. The Respondent argues that it was impossible to continue making contributions to the pension plan unless the parties have current bargaining agreement and the Respondent had in fact complied with all the bargaining obligations it may have with the Union.

First, the Respondent maintains that it is excused from making contributions after the expiration contract because the NYSNA Pension Plan would not accept the contributions without a current agreement. The Respondent did not actually establish that the contributions would not be possible and it would be pure speculation on the part of the Respondent that its contributions would not be accepted by the pension plan. The NYSNA Pension Plan provides for a "cure period" of 60 days after the termination of the employer's participation in the fund to permit the employer's return to the pension fund (Jt. Exh. F at 7) as some indication that contributions would be accepted from employer even without a current agreement. In any event, impossibility does not excuse the Respondent from unilaterally cease contributions. Thus, even assuming NYSNA Pension Fund would no longer accept the Respondent's contributions, I find that the Respondent was required to continue calculating the pension contributions according to the established formulas and to set the contributions aside for the benefit of the employees until the parties reached a new agreement on the subject or bargained to an impasse.

Second, the Respondent maintains that it had and continues to comply with its bargaining obligation with the Union. Contrary to the Respondent's contentions, I find that the Respondent violated Section 8(a)(5) when it failed to bargain with the Union to impasse on the issue of the pension fund contributions. The Union argues that the Respondent is barred from raising impasse as a defense it was not pled in the answer to the complaint (See, CP Br. at 25). I note that the Respondent did not specifically argue impasse as a defense in its closing brief. Nevertheless, in addressing the contention that the Respondent

[19] The counsel to the General Counsel, in her closing brief, urges the Board to adopt *Finley Hospital*, 359 NLRB 156 (2012), rationale as soundly reasoned, although the case was vacated by the D.C. Circuit under *Noel Canning*, 134 S.Ct. 2550 (2014). See GC Br. at 15. I find that *Finley Hospital* rationale is legally persuasive, but my determination that the Union did not make a "clear and unmistakable" waiver is based upon precedents prior to *Finley Hospital*. See also *Honeywell International v. NLRB*, 253 F.3d 125 (D.C. Cir. 2001) (there is no basis for finding the union waived its statutory right to continuance of the status quo as to the terms and conditions after contract expiration); *General Tire & Rubber Co.*, 274 NLRB 591 (1985) (The Board found the contract did not address employer's statutory obligation to pay benefits postexpiration of a contractual benefit and therefore did not constitute a waiver by the union); and *KBMS, Inc*., 278 NLRB 826 (1986) (no waiver to right to pension where the relevant language is "ambiguous" rather than "clear and unmistakable").

[20] The decision in *Cofire Paving Corp*. was vacated under *Noel Canning*. The General Counsel again urges the Board to adopt the rationale in *Cofire*.

[21] The Respondent also maintains that the amount of its withdrawal liability of over $2 million would impose a financial hardship. Assuming that the estimated dollar amount was correct, inconvenience and hardships are not a defense to the unfair labor practice. StaffCo could have set aside the contributions, preserve the contributions in an escrow account, and begin negotiations with the Union for a new contract.

is barred from raising impasse as a defense, the record reveals that witnesses Green and Smith were examined by the parties on the issue of impasse at the trial. Therefore, if impasse as an affirmative defense must be pled, the situation cited by the Union in *Harco Trucking, LLC,* 344 NLRB 478, 479 (2005), would not apply since the parties had an opportunity to litigate and examine witnesses regarding the issue of impasse.

To the extent that impasse was argued by the Respondent as a defense, it is clear that the Board does not lightly find an impasse. In *A.M.F. Bowling Co.*, 314 NLRB 969 (1994), enf. denied 63 F.3d 1293 (4th Cir. 1995), the Board defined impasse as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile and where both parties believe that they are "at the end of their rope." The Board considers negotiations to be in progress, and thus will find no genuine impasse to exist, until the parties are warranted in assuming that further bargaining would be futile or that there is "no realistic possibility that continuation of discussion . . . would be fruitful." *Saint-Gobain Abrasives, Inc.,* 343 NLRB 542, 556 (2004). I fully credit the testimony of Green and Smith in finding that the parties were not at the end of their rope. The parties stipulated that there were two bargaining sessions (Sept. 22 and Nov. 11) over a new contract. The Respondent proposed an alternative to the pension plan, which the Union rejected. However, the Respondent never met its obligation to specifically bargain over the unilateral change and on preserving the pension plan contributions. I credit the testimony of Green and Smith when they stated to Clark that the Respondent must "get current" and continue its contributions to the pension plan and Clark responded that StaffCo would not resume its contributions due to the withdrawal liability facing the Respondent. However, Clark never provided the Union with an opportunity to bargain with the Respondent over this unilateral change. At this point, once the Respondent had noticed the Union of its unilateral change in the pension plan subject matter, the Respondent was obligated to bargain over this change and to preserve the level of contributions until the parties bargained to a new agreement or to impasse. Instead, the Respondent simply refused to bargain over this unilateral change. As discussed above, since the Respondent never provided the Union an opportunity to bargain over preserving the contribution levels, I find that impasse was never reached by the parties.

Accordingly, I find that the Respondent violated Section 8(a)(5) and (1) of the Act when it stopped making contributions to the NYSNA Pension Fund.

CONCLUSIONS OF LAW

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

2. The Union, New York State Nurses Association, is a labor organization within the meaning of Section 2(5) of the Act and is the exclusive bargaining representative for

> All full-time, regular part-time and per diem registered professional nurses, temporary employees, as defined in Section 4.04 of the collective bargaining agreement, and persons authorized by permit to practice as registered professional nurses, including staff nurses, assistant nursing care coordinators, case managers, and community health coordinators, and Nurse Practitioners and Nurse Midwives employed by the Employer at the SUNY Downstate at Long Island College Hospital, and excluding supervisory, confidential, executive and managerial employees, and all other employees, guards and supervisors within the meaning of the National Labor Relations Act.

3. The Respondent violated Section 8(a)(5) and (1) of the Act by failing to give notice and an opportunity to bargain with the Union prior to unilaterally terminating its contributions to the NYSNA Pension Plan on May 22, 2014.

4. The Respondent's above described unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section (a)(5) and (1) of the Act, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent shall be required to make whole its bargaining unit employees for any losses they suffered or expenses they incurred, including benefits to their pension plan, which resulted from the Respondent's unlawful termination of its contribution to the pension plan on May 22, 2014.

On these findings of fact and conclusion of law and on the entire record, I issue the following recommend[22]

ORDER

The Respondent, StaffCo of Brooklyn, LLC, Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and Desist from

(a) Unilaterally terminating its contribution to the bargaining unit employees' pension plan without first notifying the Union and affording it an opportunity to bargain over the pension plan.

(b) Failing and refusing to bargain in good faith with the Union as the exclusive representative of employees in the appropriate unit set forth above by unilaterally modifying the terms and conditions of employment of the unit by failing and refusing to make contributions to the pension plan without having reached a valid impasse.

(c) 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 purposes and policies of the Act.

(a) Upon request by the Union, bargain collectively in good faith with the Union as the exclusive representative of the employees in the bargaining unit set forth above, and embody any understanding reached in a signed agreement.

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[22] 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.

(b) Upon request by the Union, restore employment terms and conditions of the bargaining unit set forth above prior to May 22, 2014, including the restoration of the contributions to the NYSNA Pension Plan that was terminated on or about that date.

(c) Upon the request of the Union, make pension contributions to the NYSNA Pension Plan on behalf of the above bargaining unit employees from May 22, 2014 onward at the rates established in the last signed agreement, if the plan accept such contributions and that its delinquent contributions be subjected to an interest of no less than 1.5 percent per month consistent with the plan. If the NYSNA Pension Plan will not accept such contributions, make pension contributions at an interest rate at no less than 1.5 percent from May 22, 2014, onward to an escrow account as negotiated with the Union.

(d) 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 payments 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 monetary benefits due under the terms of this Order.

(e) Within 14 days, post at the Respondent's Brooklyn, New York facility a copy of the attached notice marked "Appendix."[1723] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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 addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, or sold the business or the facilities involved herein, 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 May 22, 2014.

(f) Notify the Regional Director in writing within 21 days from the date of this Order.

Dated: Washington, D.C. May 21, 2015

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 the National Labor Relations Act and has ordered us to post and abide by 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 benefits and protection

Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain collectively with the Union (New York State Nurses Association) as your exclusive representative of the employees in the following unit:

> All full-time, regular part-time and per diem registered professional nurses, temporary employees, as defined in Section 4.04 of the collective bargaining agreement, and persons authorized by permit to practice as registered professional nurses, including staff nurses, assistant nursing care coordinators, case managers, and community health coordinators, and Nurse Practitioners and Nurse Midwives employed by the Employer at the SUNY Downstate at Long Island College Hospital, and excluding supervisory, confidential, executive and managerial employees, and all other employees, guards and supervisors within the meaning of the National Labor Relations Act.

WE WILL NOT unilaterally discontinue the pension plan contributions of the employees in the unit described above without bargaining to an overall lawful bargaining impasse.

WE WILL NOT notify the New York State Nurses Association (the Union), after the fact, of our decision to cease making contributions to the NYSNA Pension Plan when we have not given the Union notice and an opportunity to bargain.

WE WILL NOT otherwise make changes to the terms and conditions of employment our employees without first bargaining to good-faith impasse with your Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the rights guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL restore the pension plan contribution levels, with interest, to the NYSNA Pension Plan and resume participation in the pension plan coverage of all employees employed in the unit described above at the time the contributions were terminated.

WE WILL upon request by the Union rescind any or all changes in the terms and conditions of employment that we made without bargaining with the Union to an overall good-faith impasse.

WE WILL upon request by the Union, meet and bargain collectively in good faith with the Union as the exclusive representative of the employees in the bargaining unit described above until an agreement has been reached with the Union or a lawful impasse in negotiations occurs.

STAFFCO OF BROOKLYN, LLC

[23] 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."

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29–CA–134148 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.