JD(ATL)–40–06
Bay City, MI

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

NEWCOR BAY CITY
DIVISION OF NEWCOR, INC.

and **CASE 7–CA–48339**

LOCAL 496, INTERNATIONAL UNION,
UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW), AFL–CIO

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BENCH DECISION AND CERTIFICATION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge: I heard this case on September 14 and 15, 2006 and October 10, 2006 in Bay City, Michigan. After the parties rested, I heard oral argument, and on October 19, 2006, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1] The Conclusions of Law and Order are set forth below.

CONCLUSIONS OF LAW

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

2. The Charging Party, Local 496, International Union, United Automobile, Aerospace

[1] The bench decision appears in uncorrected form at pages 649 through 680 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as "Appendix A" to this Certification.

and Agricultural Implement Workers of America (UAW), AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate any provision of the Act alleged in the Complaint.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[2]

ORDER

The Complaint is dismissed.

Dated at Washington, D.C.

Keltner W. Locke
Administrative Law Judge

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

APPENDIX A

Bench Decision

This bench decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. Concluding that the credited evidence does not establish any of the violations alleged in the Complaint, I recommend that the Board dismiss it.

Procedural History

This case began on February 14, 2005, when the Charging Party, Local 496, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO, which I will call the "Charging Party" or the "Union," filed its initial unfair labor practice charge in this proceeding. The Union amended this charge on February 22, 2005 and again on April 1, 2005.

On July 31, 2006, after investigation of the charge, the Regional Director for Region 7 of the National Labor Relations Board issued a Complaint and Notice of Hearing, which I will call the "Complaint." In issuing this complaint, the Regional Director acted on behalf of the General Counsel of the Board, whom I will refer to as the "General Counsel" or as the "government."

On September 14, 2006, a hearing opened before me in Bay City, Michigan. The parties presented evidence on that date, on September 15, 2006, and on October 10, 2006. On October 16, 2006, counsel presented oral argument. Although not required to do so, counsel for the General Counsel and Respondent also submitted briefs. Today, October 19, 2006, I am issuing this bench decision.

During the hearing, I granted General Counsel's motions to amend the Complaint caption to state the correct name of Respondent, Newcor Bay City Division of Newcor, Inc., and to amend paragraph 6 to allege that Kenneth DeRoche's job title is general assembly supervisor, rather than plant manager. Additionally, upon General Counsel's motion, I amended the Complaint to allege that Ronald D. Conklin was Respondent's agent within the meaning of Section 2(13) of the National Labor Relations Act, which I will refer to as the "Act."

Admitted Allegations

Based on admissions in Respondent's Answer and on stipulations received during the hearing, I make the following findings. The Charging Party filed and served the charge and its amendments as alleged in Complaint paragraphs 1(a), 1(b) and 1(c).

At all material times, Respondent has been a corporation with an office and place of business in Bay City, Michigan, and has been engaged in the manufacture, nonretail sale, distribution and service of welding and fabricating machines, as alleged in Complaint paragraph 2. It satisfies the Board's standards for assertion of jurisdiction, as alleged in Complaint paragraph 4, and is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, as alleged in Complaint paragraph 5.

At all material times, Respondent's general manager, James Nicoson, and its general assembly supervisor, Kenneth DeRoche, have been supervisors within the meaning of Section 2(11) of the Act and Respondent's agents within the meaning of Section 2(13) of the Act, as alleged in Complaint paragraph 6. Based on the parties' stipulation, I further find that at all material times, Ronald D. Conklin has been Respondent's agent within the meaning of Section 2(13) of the Act.

The following employees of Respondent constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act, as alleged in Complaint paragraph 7:

> All full–time and regular part–time hourly employees employed by Respondent; but excluding salaried employees, Receiving Department employees, Plant Protection, foremen, and supervisors as defined in the Act.

Since at least 1981, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, has been the exclusive bargaining representative of the employees in the unit described above, and has been so recognized by Respondent as alleged in Complaint paragraph 8. This recognition has been embodied in successive collective–bargaining agreements, the most recent of which was effective for the period June 11, 2001 to June 10, 2004. At all times since 1981, based on Section 9(a) of the Act, the International Union has been the exclusive collective–bargaining representative of the employees in the unit described above, as alleged in Complaint paragraph 9.

At all material times, the International Union has assigned to its Local 496, the Charging Party, its responsibilities concerning the representation of the employees in the unit described above, as alleged in Complaint paragraph 10.

Contested Allegations

The Complaint alleges two distinct violations of the Act. Complaint paragraphs 11, 12 and 16 allege that Respondent violated Sections 8(a)(4) and (1) of the Act by subcontracting bargaining unit work in retaliation for the Union's filing of an unfair labor practice charge in Case 7–CA–47590. Complaint paragraphs 13, 14, 15 and 17 allege that Respondent made a unilateral change in working conditions without first notifying and bargaining with the Union, in violation of Sections 8(a)(5) and (1) of the Act. The change, which allegedly took place about January 1, 2005, concerned the assignment of mail delivery to employees outside the bargaining unit.

The 8(a)(4) Allegation

Many Board cases concerning the subcontracting of bargaining unit work involve allegations that the subcontracting constituted a failure to bargain in good faith, and therefore violated Section 8(a)(5) of the Act. The present case does not. Instead, the present Complaint alleges, in effect, that Respondent subcontracted unit work to discriminate against employees because their Union had filed a previous unfair labor practice charge.

The wording of the Complaint warrants examination. Complaint paragraph 9 states, in its entirety, as follows: "Beginning about October 2004, Respondent subcontracted certain unit work."

Neither in this paragraph nor elsewhere does the Complaint allege that the alleged subcontracting had an adverse employment impact on a particular employee or employees.

Even if the Complaint had alleged that Respondent had violated Section 8(a)(5) by subcontracting without first notifying and bargaining with the Union, the evidence must establish that an employer's unilateral action had a material, significant and substantial effect on the terms and conditions of employment. So even in that context, which focuses on an employer's duty to bargain with a union, the allegedly unlawful action's impact on employees must be examined.

Here, where the Complaint alleges that Respondent's action violated Section 8(a)(4) and not Section 8(a)(5), the General Counsel must prove unlawful discrimination against an individual, which, of course, is different from proving a breach of the duty to bargain in good faith. More specifically, Section 8(a)(4) of the Act makes it unlawful for an employer "to discharge or otherwise discriminate *against an employee* because he has filed charges or given testimony under this Act." 29 U.S.C. § 158(a)(4) (italics added).

As the General Counsel's brief points out, this allegation of employment discrimination should be analyzed according to the framework the Board established in ***Wright Line***, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence.

First, the government must show the existence of activity protected by the Act. Second, the government must prove that Respondent was aware that the employees had engaged in such activity.

Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. This third element addresses a requirement explicit in the statutory definition: An 8(a)(4) violation must concern a discharge or other discrimination *against an employee*. The government must establish that some action by the Respondent caused an adverse effect on the terms and conditions of employment of one or more employees.

For purposes of the *Wright Line* analysis, I will assume that the Complaint sufficiently alleges a violation of Section 8(a)(4), even though I reach no conclusions on that question. The General Counsel must still, of course, prove that an employee has suffered an adverse employment action because of Respondent's conduct.

Finally, *Wright Line* requires the government to show a link, or nexus, between the employees' protected activity and the adverse employment action. More specifically, the General Counsel must show that the protected activities were a substantial or motivating factor in the decision to take the adverse employment action. See, e.g., *North Hills Office Services, Inc*, 346 NLRB No. 96 (April 28, 2006).

In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083, at 1089; *Hyatt Regency Memphis*, 296 NLRB

259, 260 (1989), enfd. in relevant part 939 F.2d 361 (6th Cir. 1991). See also *Manno Electric, Inc.*, 321 NLRB 278, 280 at fn. 12 (1996).

Applying the Wright Line Standards

Having described the *Wright Line* requirements, I will now apply them to the evidence. The General Counsel clearly has proven the first element. On June 16, 2004, the Union filed an unfair labor practice charge against Respondent in Case 7–CA–47590, and amended that charge on August 12, 2004. After an investigation, the Regional Director for Region 7 of the Board issued a Complaint on September 28, 2004. A hearing opened before an administrative law judge on January 11, 2005. On April 26, 2005, the judge issued a decision unfavorable to Respondent.

The judge found that Respondent had violated Section 8(a)(5) of the Act by unilaterally putting into effect the terms and conditions of employment it had proposed, even though the Union had not agreed to those proposals and even though the negotiations were not at impasse. In a Decision and Order dated November 28, 2005, the Board adopted the judge's decision, with some modifications to the judge's remedial order. The Board stated, in part, as follows:

> Having found that the Respondent violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, and to immediately put into effect all terms and conditions of employment provided by the contract that expired at midnight on June 10, 2004, and to maintain those terms in effect until the parties have bargained to agreement or a valid impasse, or the Union has agreed to changes. We shall order the Respondent to make whole the unit employees and former unit employees for any loss of wages or other benefits they suffered as a result of the Respondent's implementation of its final proposal on June 11, 2004, as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall order the Respondent to reimburse unit employees for any expenses resulting from the Respondent's unlawful changes to their health and dental benefits, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), affd. 661 F.2d 940 (9th Cir. 1981), with interest as set forth in New Horizons for the Retarded, supra. We shall further order that the Respondent make all contributions to any fund established by the collective–bargaining agreement with the Union which was in existence on June 10, 2004, and which contributions the Respondent would have paid but for the unlawful unilateral changes, including any additional amounts due to the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn.6 (1979).

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Respondent has appealed the Board's order to the United States Court of Appeals for the Sixth Circuit, where it is now pending. Clearly, if the Court enforces the Board's Order, it will have serious economic consequences for Respondent.

The General Counsel also has established the second *Wright Line* element. Certainly, Respondent had knowledge of the protected activity. It received the charge, amended charge and complaint, and participated in the hearing. The record leaves scant room to doubt that Respondent's management was aware of the legal proceedings against it.

However, the third *Wright Line* element is more challenging. At the outset, it may be noted that the Complaint does not identify any particular employee as a victim of unlawful discrimination. In certain uncommon circumstances, a Complaint might satisfy the pleading requirements without naming any particular person as a discriminatee. Perhaps it would suffice, depending on the case, to describe a class of employees, such as replaced strikers, adversely affected by an employer's action. Is the absence of a named discriminate fatal here?

A distinction must be drawn between pleadings and proof. I should not reason that the General Counsel has failed to prove the third element simply because the Complaint is vague about who suffered the alleged discrimination. To determine whether the government has satisfied this *Wright Line* requirement, we must look to the record rather than the pleadings.

To establish an 8(a)(4) violation, the General Counsel must show, among other things, that an employer did something which harmed an employee. In other words, the government must demonstrate that some employee suffered an adverse employment action. I conclude that the General Counsel has, in fact, proven an adverse employment action, but just barely. For the following reasons, that conclusion is not free from doubt.

Respondent makes and repairs heavy manufacturing equipment. Its customers operate factories where such equipment is needed. Before 2004, Respondent fell into economic difficulties and, over time, lost its customer base. Also over time, Respondent laid off almost all of its hourly work force. Thus Union vice president Jeff Ryan, who was working for Respondent in July 2004, testified about a meeting that month in which Human Resources Director Conklin described a possible contract that would bring work for the bargaining unit employees to do:

> Q. Okay. And, now, you said there was this meeting. What — to the best of your knowledge, what did Mr. Conklin say regarding the American Axle contract?
> A. It was quite a large job, I think 12,000 hours. It was a big job.
> Q. Is that what he said?
> A. Yeah. They would have to call everybody back and even maybe hire, is what he told us, but —
> Q. Okay. So at the time when you had this conversation with Mr. Conklin about the American Axle contract, were there employee — bargaining unit employees laid off?
> A. Yes.
> Q. About how many employees were laid off at that time?
> A. I'll be guessing that there was only two or three of us in the shop at that time—
> Q. Well, I don't want you to guess.
> A. See, but I don't really know.

From this and other testimony, I gather that Conklin's description of the anticipated customer elicited a reaction similar to one produced by describing a beefsteak to people who have been adrift in a lifeboat for 3 weeks. As Respondent's customer based dwindled to zero, the active employee complement similarly shrank, to the point where it appeared the bargaining unit was dying. The prospect of new business raised hopes.

Ryan's testimony leaves open the possibility that during this July meeting, Conklin merely told the employees about an anticipated customer, a deal in progress, rather than a firm order. From other evidence, I conclude that this was the case. However, in the urgency of the moment, it was easy for the listener's mind to transform the hope or expectation of a big order into a "done deal." In more sanguine circumstances, this premature jumping to a happy conclusion might be attributed to wishful thinking, but here, desperation provided the fuel.

Our search for "discriminatees" – employees who suffered adverse employment actions because of their protected activities (or the Union's on their behalf) – leads us to these workers on layoff mentioned by Ryan in his testimony. (More precisely, it focuses on those in layoff status in October 2004 when, according to Complaint paragraph 11, Respondent began subcontracting "certain Unit work.")

It is important to observe that the Complaint does not allege, and the General Counsel has not contended, that Respondent had violated the Act by laying off these employees. In the previous case, the Board found that Respondent had violated Section 8(a)(5) of the Act by failing and refusing to provide certain information requested by the Union, and by changing terms and conditions of employment unilaterally. However, the Board neither found an unlawful layoff nor ordered the reinstatement of laid off employees.

In the absence of such allegations and supporting evidence, I must simply conclude that the employees who were on layoff in October 2004 were not in that status because of any unlawful act of the Respondent. Indeed, although the Complaint describes the remedy sought by the government, that description does not specifically include reinstatement of any of these laid off employees. Logic suggests that it would be challenging for the government to argue that laid off employees must be reinstated even though their layoffs had been lawful.

The remedy section of the Complaint seeks an order requiring Respondent, among other things, to "[t]erminate the unlawful subcontracting described in paragraphs 11 and 12 and restore such Unit work to the Unit employees." Presumably, that would cause Respondent to recall some bargaining unit employees from layoff, but that would also be true had the Complaint alleged that Respondent's subcontracting had violated Section 8(a)(5), rather than Section 8(a)(4). In other words, a reinstatement remedy, whether explicit or implicit, does not provide a sure guide to the type of violation which made such a remedy necessary.

Layoff status does not deprive an individual of the protections of the Act. An employer certainly would commit unlawful discrimination if, to retaliate for a laid off employee's protected activity, the employer sent the employee a letter stating that the employee no longer was on layoff but had been fired, and therefore had no expectation of recall. Arguably, if a similarly–motivated employer took some action that diminished, rather than extinguished, a laid off employee's expectation of recall, doing so also would constitute an adverse employment action violating Section 8(a)(4). That provision itself makes it unlawful "to discharge *or otherwise discriminate* against an employee because he has filed charges or given testimony under this Act." (Italics added.)

Logically, when Respondent decided to contract out the work generated by this new order, rather than assigning it to recalled bargaining unit employees, that action reduced the laid off workers' chances of recall and reasonable expectation of recall. Even though this reasoning appears a bit convoluted and the impact on the laid off employees somewhat attenuated, the particular circumstances of this case cause me to conclude that the subcontracting caused sufficient harm to the laid off employees' prospects for recall to constitute an "adverse employment action."

Persuading the customer, American Axle, to place a big order would keep the plant open – it allowed Respondent, in effect, to tread water – but this one contract certainly didn't pull Respondent out of the deep. This single deal did not guarantee, or necessarily increase the likelihood that Respondent would be attracting more business in the future. Therefore, subcontracting the existing work rather than recalling those on layoff certainly diminished their chances and expectations of ever being recalled.

In sum, I conclude that the General Counsel has met the third *Wright Line* requirement.

Finally, the government must prove a link between the protected activities and the adverse employment action. For the following reasons, I conclude that the evidence does not satisfy this fourth *Wright Line* requirement.

The General Counsel points to a comment attributed to General Manager Nicoson by two of the government's witnesses, although denied by Nicoson himself. Both Jeff Ryan and Scott Dennis testified that Nicoson made this remark, about why Respondent decided to subcontract the new work, during a conversation with them on the shop floor on October 22, 2004.

Ryan testified that "Mr. Nicoson said that, because of financial reasons and because of the pending NLRB case, that [the work] was going to be shipped out." Scott Dennis gave the following testimony:

> Q. And what was said to the best of your recollection in this conversation?
> A. He said that he was afraid he was going to have to send the American Axle job out for the pipe wire and build unless we could get rid of the NLRB charges.
> Q. Is there any doubt in your mind that he referenced the NLRB charges in his conversation?
> A. No doubt in my mind.

The General Counsel argues that Nicoson's reference to the case pending before the NLRB shows that an unlawful reason – retaliation against the employees because of the unfair labor practice charge and subsequent Board proceedings – entered into the decision–making process. However, Nicoson expressly and emphatically denied making the statement attributed to him. For the following reasons, I do not believe this testimony by Ryan and Dennis to be reliable, and do not credit it.

On cross–examination, Respondent's counsel confronted Ryan with a portion of his pretrial affidavit, which wasn't totally congruent with Ryan's testimony during the hearing:

Q. Now Mr. Ryan, when you met with Mr. Nickerson [sic] on October 22nd, your testimony was that he told you that the subcontracting was being done for financial reasons in the pending NLRB case?
A. That's correct.
Q. And that's what you testified to today?
A. Yes.
Q. When you gave your affidavit, do you remember when you did that?
A. Yep.
Q. That was back in February of 2005?
A. Yep. Yes. I'm sorry. I — yep.
Q. At that time you said in your affidavit that Nickerson told you that the reasons were that, quote, "They could get them cheaper," and that, "The NLRB charges were out there and was more convenient for them to do it out and not do it there"?
A. That was terrible wording.
Q. That's what you wrote at that time?
A. No, I didn't write that. I said that over the phone and a lady dictated that. I read that later and it looked terrible to me, but.
* * *
Q. So what you're saying is that the wording in your affidavit in February 2005, now you're not sure it's really very good, and now it's not quite what you meant?
A. It speaks exactly what I meant.
Q. Okay.
A. Poorly worded.
Q. Poorly worded.
A. I would have worded it different.

The variation between Ryan's pretrial affidavit and his testimony at trial might reflect only a difference in phrasing, but I am more concerned with the difference between the testimony of Ryan and Dennis. According to Dennis, Nicoson not only said that the existence of the NLRB charge affected Respondent's decision to subcontract the work, but also implied that Respondent might reverse this decision if the Union withdrew the charge. Thus, Dennis quotes Nicoson as saying "he was afraid he was going to have to send the American Axle job out for the pipe wire and build *unless we could get rid of the NLRB charges*." (Italics added)

Dennis thus would attribute to Nicoson another impropriety, something akin to extortion (for want of a more delicate term). At the least, Dennis' testimony suggests that Nicoson was offering to reverse the subcontracting decision as a quid pro quo for the Union giving up its legal right to pursue a case which turned out to have very serious consequences for Respondent. Dennis' testimony gains plausibility because, even if it were somewhat more expensive for Respondent to do the American Axle work in the plant, that would be a small price compared to the substantial liability which could result from the case then pending before the Board.

But here is the problem. Neither in his testimony at the hearing nor in his pretrial affidavit, does Ryan corroborate Dennis's testimony on this point. Ryan never claims that Nicoson told them

the work would be subcontracted unless the Union "got rid of the NLRB charges."

Ryan is vice president of the Local Union. Reasonably, if Nicoson had offered such a deal, or even implied it, Ryan would have picked up on that fact and discussed it with other Union officers. Whether the Union officials would take such an offer seriously or as an insult, the offer certainly would generate conversation at the Union hall.

Moreover, because Ryan is an experienced Union officer, he would appreciate the contribution such a comment could make to the proof of unlawful motivation. Not only would Ryan be likely to recall such a statement, he would be eager to testify about it. But he did not. I conclude that Nicoson never made the statement Dennis attributed to him.

There are other reasons to be concerned about the testimony of both Ryan and Dennis. The Complaint also alleges that Respondent reassigned certain work previously performed by bargaining unit employees to other employees outside the bargaining unit. This work involved two trips to the post office each day. The merits of this allegation will be examined later in this decision, but the testimony of Ryan and Dennis about this matter casts doubts on their credibility, and therefore is appropriate to discuss here.

Both Ryan and Dennis testified that they performed this work at various times. According to Ryan, in a "best case scenario" it would take him about 45 minutes to gather all the mail in the plant, take it to the post office, and then return to the plant.

At one point in Dennis' testimony, he said that this "mail run" took almost an hour. At another point, Dennis testified that it took "roughly an hour." Because different people's estimates of time vary, I conclude that no real inconsistency exists between the testimony of Ryan and Dennis.

However, General Manager Nicoson testified that the mail run took far less time, because the post office was only about 1.4 miles from the plant. Moreover, Respondent introduced a printout of information obtained from the Internet service MapQuest, indicating that the post office was 1.39 miles away.

As already noted, Respondent's volume of mail decreased along with the number of its customers. It is possible that Ryan and Dennis referred to some earlier period when the mail run might have made more demands. However, Ryan did the mail run until December 16, 2004, well after the decrease in volume. There is no reason to conclude that Ryan was talking about some earlier period.

In sum, it appears that Ryan and Dennis exaggerated the amount of time spent on the mail run. As already noted, Ryan is vice president of the Local Union, and Dennis also holds Union office. He is a nightshift committeeman and also serves on the bargaining committee. My observations of the witnesses lead me to suspect that partisanship may have affected their ability to recall events in a neutral way and without exaggeration.

For all of these reasons, I have some doubts about the reliability of the testimony given by Ryan and Dennis and do not credit it to the extent it conflicts with that of Nicoson. Accordingly, I find that Nicoson did not mention the NLRB case during the October 22, 2004 conversation with Ryan and Dennis.

My decision to credit Nicoson, rather than Ryan and Dennis, may warrant further discussion because Nicoson also offered testimony in the previous case and the judge did not credit it. The General Counsel suggests that this judge's credibility conclusions, even if not binding here, are entitled to some consideration and some weight.

In the previous *Newcor* case, the Board made findings of fact and conclusions of law which, without doubt, are binding here because of the principles of *res judicata* and collateral estoppel. However, I do not understand counsel to be arguing that the administrative law judge's credibility findings in that case are binding here, even though some of the same witnesses are involved. Nonetheless, it appears clear that the General Counsel would like to put those prior credibility determinations on the scales of justice, for whatever weight they might add.

In her brief, counsel for the General Counsel quotes a portion of that previous decision, in which the administrative law judge states, "In general, I did not find Nicoson to be a credible witness based on his demeanor and his sometimes evasive and defensive responses to questions." As already indicated, the General Counsel's brief stops short of arguing that the previous judge's conclusions about a witness bind me if that same witness takes the stand in the present proceeding. Such an argument would not be persuasive.

Even assuming for the sake of analysis that Mr. Nicoson did not testify credibly in the previous proceeding, that does not compel a conclusion that he would testify falsely at a later date about different facts. More persuasive would be an argument that a witness who tried unsuccessfully to dissemble, only to be found out by the judge, would be quite chastened by the experience and bent on avoiding a repetition of that mistake. Certainly, if a judge should detect untruthful testimony and expose the prevaricator in his decision, that witness suffers a public embarrassment; the judge's criticism of him may be found not only in secluded law libraries but also on the Internet, and there it will remain indefinitely, accessible to all with a few clicks of the mouse.

Anyone who has skated on a Michigan pond prematurely in the winter, and who has fallen through, will take care not to repeat the experience. Similarly, a witness who thought he could embellish his testimony without detection, but then got caught, reasonably would be less likely to skate on thin ice in the future. Such a person logically would have lost confidence in his fancied gift of blarney and gained more appreciation of the possible consequences associated with giving false testimony.

Additionally, fairness favors making a fresh credibility assessment of each witness in this proceeding, whether that person previously testified before the Board or not. Therefore, I will decide issues of credibility based upon the facts in the present record and, where appropriate, my observations of the witnesses as they testified.

Based upon my observations of Nicoson in the present proceeding, I have considerable confidence in the reliability of his testimony, and credit it. Therefore, I find that he did not make any comment about the pending NLRB case when he spoke with Ryan and Dennis on about October 22, 2006.

To establish a link between the protected activity and the adverse employment action, the General Counsel does not rely solely on the statement attributed to Nicoson by Ryan and Dennis. For one thing, the General Counsel argues that the timing of events justifies an inference of unlawful motivation. The General Counsel points to the relatively short time between September 28, 2004, when the Complaint issued, and Respondent's October announcement that it would "outsource" the work.

Even assuming that Respondent made no earlier announcement, I am reluctant to infer unlawful motivation because this time period, selected by the General Counsel, is relatively short. The Union filed the initial charge in that case on June 16, 2004. If that date is used, then the interval becomes about three and one–half months. In the absence of some other persuasive evidence of unlawful motivation, I am reluctant to infer much from that long an elapsed time.

Arguably, Respondent might be more upset by the issuance of a complaint – resulting in an unfair labor practice hearing – than by filing of a charge. However, deciding which would bother an employer more entails a bit of conjecture. In any event, I do not believe drawing an inference from timing would be appropriate here and shall not do so.

Citing *Kidd Electric Co.*, 313 NLRB 1178, 1188 (1994), the General Counsel's brief argues that "Respondent's defense that it would have subcontracted the work despite the Charging Union's Board activity should fail because it did not follow the past practice regarding subcontracting or the 2002 grievance resolution, which is further evidence of pretext." Whether or not an employer followed its past practice or a prior grievance resolution certainly would be relevant if the Complaint alleged that the subcontracting constituted a failure to bargain in good faith in violation of Section 8(a)(5). As already discussed, the Complaint does not.

In a discrimination case analyzed under *Wright Line*, does an employer's departure from a past practice or grievance resolution signify either pretextual motivation or the animus which may be inferred from the assertion of such a pretext? Certainly, a deviation from past practice has some relevance in the discrimination context because it is evidence of disparate treatment. Thus, in *Kidd Electric*, the administrative law judge noted that this particular employer had a past practice of retaining its mechanics during slow periods rather than laying them off.

Here, the issue is not whether Respondent had a past practice of retaining employees during slow periods but whether Respondent had a past practice of subcontracting bargaining unit work. The credited evidence is, in my view, insufficient to establish such a practice.

A failure to follow a grievance resolution may also be relevant to the issue of disparate treatment. However, in the instant case, the government must show, in effect, an antiunion animus which affected specific individuals. Even if Respondent failed to follow a prior grievance resolution regarding subcontracting, that deviation logically says very little about the Respondent's

reasons for doing so. The reasons could be economic or vindictive, but the fact that Respondent didn't follow the grievance resolution does not tell us which.

The government also challenges Respondent's explanation that the subcontracting saved money. Indeed, the General Counsel's brief cites various exhibits and figures to support the argument that subcontracting would not result in the savings which Respondent claimed.

However, I believe the government has misapprehended much of the Respondent's argument. Undoubtedly, saving money was an important factor. Indeed, management had to negotiate with the customer, American Axle, to obtain better terms than initially offered. However, cost was only one factor, albeit a major one.

To return to an earlier analogy, Respondent was struggling to tread water and stay afloat. However, that analogy would not be complete without a reference to the waves, that is, the uncertainties. Respondent didn't enter into the deal with American Axle expecting it to be a source of great profit; the deal offered something more valuable, a survival opportunity. The record strongly suggests that management viewed the American Axle deal as a last chance, as a reprieve, one that would either make or break the business.

So, although Respondent carefully tried to avoid a deal that lost money, it wasn't seeking to get rich quickly. It simply needed a dependable source of cash flow that would tide it through this precarious period. For the moment, management valued security and stability as essential to survival.

Although General Manager Nicoson initially favored doing the American Axle work in the plant, ultimately he decided to send the work to a subcontractor, Ultimate Manufactured Systems, Inc. Doing this would help tame the waves of uncertainty in two ways.

First, it shifted some of the risk of noncompletion to the subcontractor. A company hard pressed for cash reasonably might favor such a course because the company itself didn't have the reserves needed to pay late penalties or to shoulder other risks associated with nonperformance or untimely performance.

Second, using a subcontractor would eliminate, or at least minimize, the possibility that a strike would slow or stop production. The expired collective–bargaining agreement included a rather strong no–strike clause. The provision, found in Article 8.1, proscribed various types of concerted activity which could interfere with production, so long as the employer was willing to settle a dispute through the negotiated grievance procedure. This clause no longer was in effect, and the Union could strike at any time.

Management regarded the American Axle work as essential to the plant's survival. It was, in this view, a once–only opportunity, a last chance. A strike which prevented the completion of this job could well scuttle the last hopes of staying afloat.

Nicoson credibly testified that, on October 22, 2004, he told Ryan and Dennis, in part, that "we were going to subcontract the mechanical and electrical assembly on the American Axle job

because we didn't have a signed contract. . ." In my view, this statement did not reflect antiunion motivation, but rather the Respondent's concerns about beginning a job essential to survival without the assurance of a no–strike clause.

The General Counsel's argument focuses only on the issue of cost savings, and not on management's desire to protect this work from unforeseen problems in much the same way a camper would want to shelter a burning match from the wind. Similarly, the government's cost analysis doesn't take into account the benefits Respondent would gain by shifting some of the risks to the subcontractor. Of course, the exact value of this savings could only be determined in hindsight because, by definition, unforeseen problems give little if any advance warning.

The precise issue, of course, does not concern the precise value of the risk reduction benefit, as might be determined by an accountant two years after the fact, but rather the importance management ascribed to this factor in making the decision to subcontract. The record persuades me that management considered risk reduction quite important.

The Board does not substitute its judgment for management but instead tries to determine, as accurately as possible, what considerations really motivated management to make a particular decision. Were the concerns unrelated to union and other protected activities, or did antiunion animus somehow taint the decision–making process?

Here, the credited evidence falls short of proving a nexus between the protected activities and Respondent's decision to subcontract the work. Based on that evidence, I conclude that neither antiunion animus nor a desire to retaliate tainted the decision–making process. Because a preponderance of the evidence does not establish this necessary connection, the General Counsel has not established the fourth essential *Wright Line* element.

In these circumstances, the Respondent does not have a duty to rebut the government's case. However, even had the General Counsel proven the final *Wright Line* element, I would conclude that Respondent had carried its rebuttal burden. The legitimate business reasons discussed above would have caused management to make the same decision, even in the absence of protected activity. Therefore, I recommend that the Board dismiss the 8(a)(4) and related 8(a)(1) allegations.

The 8(a)(5) Allegation

Complaint paragraph 13 alleges that since "about January 1, 2005, contrary to its previous practice, Respondent assigned the delivery of mail, which is Unit work, to its non–Unit employees." Paragraph 14 alleges that the subject of paragraph 13 is a mandatory subject of bargaining. Paragraph 15 alleges that Respondent engaged in this conduct without having afforded the Union prior notice and a meaningful opportunity to negotiate and bargain about the alleged unilateral change and its effects on the bargaining unit. Paragraph 17 alleges that this conduct violates Sections 8(a)(1) and (5) of the Act.

Based on the credited evidence, I find that until about December 16, 2004, bargaining unit employees typically went to the post office in the morning and afternoon to pick up and convey

mail from the post office to the plant and vice versa. Although bargaining unit employees usually performed this duty, sometimes an employee outside the bargaining unit would do it.

The collective–bargaining agreement which expired in June 2004 includes no obvious reference to this "mail run" duty, and credited evidence indicates that the subject never arose during negotiations for a contract to replace the expired agreement.

Based on the credited evidence, I conclude that on about December 16, 2006, Respondent reassigned the "mail run" work to employees outside the bargaining unit, and did so without notifying the Union in advance or affording it a chance to bargain.

Moreover, a unit employee's job duties constitute a mandatory subject of bargaining. Therefore, if the reassignment of mail run duties amounted to a material, substantial and significant change in terms and conditions of employment, Respondent breached its duty to bargain with the Union in good faith and violated Sections 8(a)(5) and (1) of the Act. *Ead Motors Eastern Air Devices, Inc.*, 346 NLRB No. 93 (April 28, 2006) However, not every change in terms and conditions of employment is material, substantial and significant. *Crittenton Hospital*, 342 NLRB No. 67 (July 30, 2004).

The credited evidence fails to establish that any employee experienced a reduction in hours of employment or pay because of the change. Bargaining unit employee Jeff Ryan had been performing the mail run duties for some time when he learned, on December 16, 2004, that an employee outside the bargaining unit would take over this task. However, Ryan did not suffer any loss of pay or hours because of the change. Indeed, Respondent made the change, at least in part, because it needed Ryan to be working in the plant.

Moreover, I have not credited the testimony of Ryan and Dennis that the mail run took at least 45 minutes and perhaps an hour. Considering that Respondent's mail lessened considerably as it lost its customer base, and also considering the closeness of the post office to the plant, I find that the mail run on average probably took around 15 minutes. In these circumstances, I do not conclude that the change had a material, substantial and significant effect on the terms and conditions of employment. See, e.g., *Ironton Publications, Inc.*, 321 NLRB 1048 (1996).

In sum, I conclude that the credited evidence does not establish either the alleged violation of Section 8(a)(5) or the alleged violation of Section 8(a)(4). Since Respondent did not violate Section 8(a)(4) or 8(a)(5), there is no derivative violation of Section 8(a)(1). Accordingly, I recommend that the Board dismiss the complaint in its entirety.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, and Order. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

Throughout this proceeding, counsel consistently demonstrated professionalism and civility, which are truly appreciated. The hearing is closed.