JD–107–16
Washington, DC

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

UNITED STATES POSTAL SERVICE

and

AMERICAN POSTAL WORKERS UNION, AFL-CIO — Case 5-CA-140963

and

STAPLES, INC., Limited Intervenor

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DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in Washington, D.C, on August 17 and 18, November 2 and 3, 2015, February 24 to 26, May 18-20, 23 and 24, 2016. The American Postal Workers Union, AFL-CIO (the Union or APWU), filed the charge on November 13, 2014, and an amended charge on May 28, 2015. The Director for Region Five of the National Labor Relations Board (the Board or NLRB) filed the Complaint on June 26, 2015, alleging that the United States Postal Service (Postal Service or Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by subcontracting bargaining unit

work to Staples, Inc. (Staples or the Intervenor) using the Postal Service's Approved Shipper program without affording the Union the opportunity to bargain over this conduct and its effects.[1] The Respondent filed a timely Answer in which it denied committing the violation alleged. Staples participated in the litigation as a limited intervenor for the purpose of addressing the effects on it of available remedies in the event that the Respondent is found to have violated the Act.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Postal Service, the Union, and Staples, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Postal Service provides postal services for the United States and operates various facilities throughout the United States for that purpose, including its headquarters facility in the District of Columbia. The Postal Service admits, and I find, that the Board has jurisdiction over the Postal Service and this matter pursuant to Section 1209 of the Postal Reorganization Act, 39 U.S.C. Section 101 et seq., and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] As originally filed, the Complaint also alleged that the Postal Service violated the Act by unlawfully refusing to provide information requested by the Union and by modifying, and/or failing to continue in effect, terms of the collective bargaining agreement (CBA) without the Union's consent. The General Counsel withdrew the allegation regarding the information request in light of an informal Board settlement dated August 17, 2015, and also withdrew the allegation regarding compliance with the terms of the CBA.

[2] The General Counsel's post-hearing brief included a motion to correct the transcript in three minor respects. None of the other parties have objected to that motion, and it is hereby granted.

II. Alleged Unfair Labor Practices

A. BACKGROUND FACTS[3]

The Union represents a bargaining unit of approximately 200,000 Postal Service employees. About 70,000 of these unit employees are sales and services associates – often referred to as "window clerks" – who serve customers at counters in local post offices.[4] The window clerks are responsible for, among other things, discussing postal options, calculating and accepting payment, and ensuring that they only accept mail that is properly labeled and packaged and contains no hazardous materials.[5]

The Postal Service – an independent establishment of the executive branch of the United States government – provides postal products and services for the United States and "operate[s] and manage[s] a . . . retail, distribution, transportation and delivery network."

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[3] *Pursuant to the protective order I issued in this case, multiple exhibits and portions of the record were placed under provisional seal upon a party's assertion of confidentiality without my ruling either about whether such evidence included confidential material, or about whether the interests in disclosure outweighed any confidentiality concerns. On October 14, 2016, after the record closed in this case, the Postal Service and Staples each filed a motion seeking to place a large amount of the provisionally sealed material under permanent seal, and on October 28, 2016, the Union filed an opposition to those motions. To the extent that any of the information set forth in this decision was gleaned from exhibits or transcript portions that were provisionally sealed, and are now the subject of one or both of the motions for a permanent seal, I find that the information set forth in this decision either is not, in fact, confidential, or that any confidentiality concerns regarding that information was not significant and/or was outweighed by the need of the parties to adjudicate this matter and for the production of a decision that adequately explains my determinations regarding the claims. Times Co. v. Rhinehard, 467 U.S. 20 (1984) (the trial court has substantial latitude to customize disclosure to match the sometimes competing needs of disclosure and confidentiality); see also International Business Machines Corp., 265 NLRB 638, 644-645 (1982) (ALJ decision on the merits places evidence under continuing seal). To the extent that it was not necessary in this decision to discuss other evidence with respect to which the Postal Service and/or Staples have moved for a permanent seal based on confidentiality concerns, I find that either the information is not necessary to render and explain this decision or that the confidentiality concerns expressed by the Postal Service and Staples outweigh the need for disclosure and I hereby grant the motions to permanently seal those portions of the record, subject to examination by the Board and any reviewing court of appeals, and as provided for in the protective order I issued in this case on November 3, 2015, and modified on December 4, 2015. This ruling does not, of course, restrict the ability of the Union, or any other party, to disseminate the same information if gained from other sources or means and not as a result of their disclosure in the instant proceeding. Times Co. v. Rhinehard, 467 U.S. at 37. In addition, I order that the provisional seal is lifted from any evidence that was provisionally sealed, but which no party has moved to permanently seal.*

[4] The bargaining unit includes:
All maintenance employees, motor vehicle employees, postal clerks, mail equipment shop employees, material distribution center employees, and operating services and facilities services employees, employed by the Respondent.

[5] There are some unit members who are assigned to window clerk duties and perform little, if any, post office duties away from the counter. There are other unit members who are specifically assigned to distribution duties in areas of the post office away from the counter. Other unit members working in post offices are categorized as "unassigned" and are likely to spend varying amounts of time on window and distribution duties.

General Counsel's Exhibit Number (GC Exh.) 40. In addition to offering its products and services at post offices staffed by bargaining unit employees, the Postal Service has begun to offer those products and services through a variety of what it calls alternative access retail "channels." In one of these alternative channels, a private retailer is designated as an "approved shipper" for the Postal Service – meaning that the Postal Service and the retailer enter into an agreement that, inter alia, authorizes the retailer to offer a menu of Postal Service products and services. That menu includes many, but not all, of the shipping products and services that are available from unit window clerks at post office counters. At the designated approved shipper locations, the workers who provide the Postal Service products and services are, in most if not all cases, employees of the retail establishment rather than bargaining unit employees of the Postal Service. After mail is accepted by the non-bargaining unit employees at an approved shipper location, the mail is placed into the regular Postal Service "mail stream" – at which point Postal Service employees are responsible for further handling of it.[6]

Staples is a nationwide retail chain. This case concerns an allegation that the Postal Service, in violation of Section 8(a)(5) and (1), failed to give the Union notice and an opportunity to bargain regarding its decision, and the effects of its decision, to subcontract bargaining unit work to Staples locations nationwide that are designated as "approved shippers." Under that plan, the work of providing postal service products and services at Staples locations is performed by Staples' employees rather than by Postal Service employees in the bargaining unit. The Postal Service contends, inter alia, that: the approved shipper program did not trigger a bargaining obligation; that the approved shipper program was an established program and that the decision to add Staples to the group of retailers participating in the program did not constitute a change over which the Postal Service was required to bargain; that the Postal Service gave the Union adequate notice but the Union waived bargaining and/or failed to act with due diligence to request bargaining; and that the CBA includes a waiver of bargaining over the change.

B. History of the Approved Shipper Program

1. Initiation of authorized service agreement program and Union reaction.

The earliest documentation in the record that relates to the approved shipper program is a letter, dated February 3, 2005, in which the Postal Service informed the Union that it planned to "start a program using an Authorized Service Agreement with retail establishments that sell mailing and shipping services." The letter does not use the phrase "approved shipper," although it describes what the Postal Service represents to be a version of that program. In the letter, the Postal Service states that the "agreements would be executed at the local level," that "[n]o compensation w[ould] be provided to the retailer," and that the retailers would be authorized "to display USPS logos and trademarks as specifically designated and approved." The letter references a participating retailer's ability to realize profits by charging customers "non-postal" surcharges for these mailing and shipping services.

[6] There are a number of other programs under which persons, or entities, that are not post office employees may sell Postal Service products and services. These programs, some of which have special statutory status not applicable to the approved shipper program, include: contract postal unit (CPU); community post office (CPO); village post office (VPO); and stamps to go/stamps on demand. The VPO program was initiated in 2011, and the Union received advance notice about this program and bargained with the Postal Service about it. The Postal Service also makes automated sales at approximately 2800 self-service kiosks and through a Postal Service website.

The Postal Service, in a March 25, 2005, letter to the Union, described the "authorized service agreements" as a program designed, inter alia, to help the Postal Service obtain a degree of control over non-Postal Service retailers that were already accepting mail and tendering it, on behalf of the retailers' customers, to the Postal Service. Prior to that time, these retailers had simply been purchasing products and services from the Postal Service and then reselling them to customers, often at above list price. The March 25 letter stated that the Postal Service would use the authorized service agreement approach to "ensure that retailers are aware of U.S. Postal Service mail acceptance and security requirements" and to increase the Postal Service's share of the growing package business. A 2005 Postal Service field guide, which was shared with bargaining unit members, represented that the purposes of the approved shipper program were to: (1) improve convenience to customers by expanding access points; (2) protect and properly represent the Postal Service brand in trademarks; and (3) ensure that hazardous material (hazmat) and aviation mail security guidelines are followed.

Susan McKeen, who was the Postal Service's manager of approved shipper and other alternative channel programs from 2005 to early 2008, testified that she had an additional goal during that time. She was aiming to divert 40 percent of transactions away from post office windows and to alternative access locations. Neither McKeen, nor any other witness, testified that the goal of diverting transactions away from the post office windows staffed by unit employees was revealed to the Union during her tenure. In the 2005 to 2008 time period, retailers who participated in the authorized service agreement program or approved shipper program were permitted to sell Postal Service products and services at above list cost, and the Postal Service did not provide the retailers with compensation or product discounts for participating in the program.

The Union objected to the Postal Service's planned use of the authorized service agreements that were described in the February 3, 2005, letter from management. In a letter dated February 16, 2005, the Union stated that it "does not and will never agree with contracting out retail services that we believe are best performed by trained professional window clerks within the Postal Service." The letter expressed concern about, among other things, the private "retailers' failure to protect our workers and the public through requiring hazmat protocol and the practice of postal managers promoting contracted out retail services through signage at postal facilities."

2. CBA Articles 32, 19, and 3, and Appendices.

The Postal Service, in a March 25 letter, reacted to the Union's criticism that the employer was "contracting out" by asserting that the authorized service agreements did not constitute "subcontracting within the meaning of Article 32" of the parties' CBA. That contract provision bears some explaining. Under Article 32, the Postal Service has special obligations to notify the Union, and consider the Union's input, when deciding whether to engage in subcontracting that will have a "significant impact" on bargaining unit work. The determination about whether proposed subcontracting will have a significant impact that triggers these special obligations is made by the Postal Services' Strategic Initiatives Action Group or "SIAG" – a panel of Postal Service management officials. In the event that SIAG determines that the subcontracting will have a significant impact on bargaining unit work, Article 32 requires the Postal Service to "give advance notice to the Union at the national level" and to "meet with the Union." It also requires the Postal Service to "consider the Union's views on costs and other factors, together with the Union's proposals to avoid subcontracting and/or to minimize the impact of subcontracting." Article 32 further requires that the Postal Service entity that is recommending the subcontracting include a statement of the Union's views and proposals

regarding the subject when the proposal is forwarded to the relevant Postal Service decision makers.

Although, the Postal Service's March 25 letter to the Union took the position that its "authorized service agreements" were not subcontracting for purposes of Article 32, the record reveals that its actions were not always consistent with that position. Specifically, when the Postal Service was considering whether to expand the approved shipper program with United Parcel Service (UPS) retail locations, it submitted that plan to SIAG for review as subcontracting. Transcript at Page(s) (Tr.) 1337-1338.

Another step towards the current version of the approved shipper initiative came when, in 2006, the Postal Service added an "approved shipper" section to its retail operations handbook. In a September 17, 2006, letter, the Postal Service provided the Union with what it characterized as Article 19 notice regarding a numerous handbook changes, including the addition of the "approved shipper" section. The attachment to the September 17 notice is 30 pages long, and includes a marked-up Retail Operations Handbook, showing the changes proposed to the existing version. There are changes to a variety of sections throughout, but the one relevant to this litigation is the addition of "Section 15-11 Approved Shipper." That provision states:

> The Approved Shipper Program was created to protect the Postal Service brand; introduce procedures to address aviation mail security at retail establishments that already hold letters and packages and tender them, on behalf of their customers, to the Postal Service; and improve the quality of information available to customers who use these stores. Participating stores must currently sell postal services, and must be approved by the local district. Stores must sign a license agreement that defines the use of signage, and the terms and conditions of participation. It is intended that a delegation of authority will be provided to District Mangers so they can sign the license agreements on behalf of the Postal Service. Participating stores will not receive any compensation from the Postal Service for the sale of post services.

The September 17 letter stated "[i]n accordance with Article 19," it was providing the "updated . . . Handbook," which included changes that "may relate to wages, hours, or working conditions of bargaining unit employees." Article 19 of the CBA provides that the Postal Service must give the Union special notice when it plans to make a handbook change that, while not in conflict with the CBA, nevertheless relates directly to wages, hours or working conditions. Article 19 requires that the Postal Service include "a narrative explanation of the purpose and impact on employees and any documentation concerning the proposed change from the manager(s) who requested the change addressing its purpose and effect." Article 19 gives the Union the right to meet about the proposed changes with "manager(s) who are knowledgeable about the purpose of the proposed change and its impact on employees."[7] In this case, the September 17 letter did not include, and the Postal Service has not claimed that it included, the required "narrative explanation," or "documentation" regarding the change's purpose and effect; nor does the Postal Service claim to have provided the Union with the opportunity to meet with knowledgeable managers at that time.

Nothing in Section 15-11 or the rest of the September 17 submission makes any mention of management's goal, alluded to above, of using the approved shipper program as part of an effort to divert 40 percent of transactions away from unit employees at post office

[7] This language is present in the version of the CBA that was in effect from 2006 to 2010. Jt. Exh. 2. at Page 126.

windows and to alternative access locations. Furthermore, the new section states that the approved shipper program will only be instituted at stores that "currently sell postal services," not at new locations. The Union did not respond to this 2006 notice.

Since at least February 3, 2007, Article 3 of the CBA has provided that the "Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations: . . . D. To determine the methods, means, and personnel by which such operations are to be conducted." Joint Exhibit Number (Jt. Exh.) 2 at Page 6. In the version of the CBA that took effect in 2010, the parties added, as an appendix, a memorandum of understanding regarding the "Consideration of National Outsourcing Initiatives." Jt. Exh. 1 at Pages 369-370.[8] In that appendix, the parties agree "that it is in their best interest to meet and discuss national outsourcing initiatives at an early stage in the process" so that the Union is provided with an "opportunity to compete for the work internally at a point in time contemporaneous with the outsourcing process and early enough to influence any management decision." The parties agree that work will be kept "in-house" if it "can be performed at a cost equal to or less than that of contract service, when a fair comparison is made of all reasonable costs." Id. at Page 369.

In addition, the CBA creates a "workforce benefits, employment opportunities, training and education fund" ("employment opportunities fund"), which totaled more than $250 million at the time of the hearing, and which could be used to help prevent the outsourcing of bargaining unit work. GC Exh. 36 at Section 7.

3. Postal Service expands approved shipper initiative with national retail chains and seeks to shift work from post office window clerks.

Many of the Postal Service's early approved shipper agreements were with retailers that had a small number of locations, rather than with nationwide chains. As described above, in 2005 the Postal Service told the Union that the approved shipper agreements would be made at the local level and only include locations that were already selling postal service products. In early 2010, the Postal Service began to expand the approved shipper program dramatically with national retail chains. By letter dated March 3, 2010, the Postal Service informed the Union that it was going to make the Office Depot retail chain an approved shipper at "over 950 locations nationwide" beginning that month. Respondent's Exhibit Number (R Exh.) 52. In a prior, November 17, 2009, letter the Postal Service had described its plans in more modest terms, stating that it intended to make Office Depot an approved shipper at "several locations." R Exh. 51. At that time, the Postal Service represented that the initiative would allow it to "focus on package growth and on giving our customers alternative access to USPS products and services without adding any significant permanent infrastructure costs in an increasingly competitive market." That letter stated that the Postal Service was informing the Union of its plans "as a matter of general interest." Both the Postal Service and the Union acknowledge that "as a matter of general interest" is the phrase that the Postal Service uses to indicate that, in its view, the Union has no right to the notice and it is being provided as a mere courtesy.

As part of a subsequent communication dated June 7, 2010, the Postal Service assured the Union that the retail expansion with Office Depot would have "no direct impact on Post Offices." R Exh. 53 (attachment). The Postal Service stated that it had "studied carefully the

[8] This appendix is not attached to the CBA dated 2006-2010 (Jt. Exh. 2), but is attached to the CBA dated CBA dated November 21, 2010 to May 20, 2015 (Jt. Exh. 1). In addition, an arbitrator's decision references testimony that the appendix on outsourcing was created as part of negotiations in 2010. GC Exh. 4 at Pages 16-17.

revenue and traffic numbers from the first 11 stores to sell our products and there was no impact on the neighboring Post Office." The same communication set forth as its first "message point" that "[t]he Postal Service must change the way it does business if we are going to stay in business." A June 2010 power point presentation that the Postal Service provided to the Union laid out a number of reasons for the Office Depot expansion. These reasons involved better access for customers and business growth. R Exh. 2 and R Exh. 3. The use of the approved shipper program to reduce window clerk labor by diverting transactions from post offices to Office Depot locations was not mentioned in this power point presentation.

Despite its June 2010 assurances to the Union, contemporaneous documentary evidence shows that the Postal service was, in 2010, actively seeking to use alternative channel programs to divert work away from window clerks and redirect it to retail partners, and also to reduce staff and adapt schedules at post offices in response to the resulting reductions in customer traffic. The Postal Service, in its 2010 annual report, stated that the solution to problems facing the "postal branch network" was to "shift[ ] retail locations from brick and mortal Post Offices to kiosks and retail partners in existing high-profile shopping areas." G Exh. 46 at Page 11. In the same report, the Postal Service stated that customers were receptive to the closing of post offices as long as the services were made available through retailers. Ibid. Similarly, the Postal Services' 2010 performance report/2011 performance plan noted that its "target [wa]s to expand the share of retail revenue generated by means other than at a postal retail counter to 35 percent by the end of 2011," GC Exh. 47 at Page 51, and touted the fact that during the past 3 years it had reduced post office retail-related work hours by 19.3 percent, and had already been successful in "reduc[ing] staff and adapt[ing] schedules to the lower customer traffic," Id. at Page 25. The record of this case does not include any assertion by the Respondent that it provided the Union with the 2010 annual report and the 2010 performance report/2011 performance plan prior to this litigation.

On January 26, 2011, the Postal Service informed the Union, by letter, that it would also be expanding the approved shipper program at another nationwide chain – UPS. The Postal Service stated that it was providing the notice "as a matter of general interest," meaning that, as with the Office Depot expansion, the Post Office's position was that the Union had no right to notice and bargaining about the UPS expansion. The letter stated that the expansion was planned for mid-February – less than a month after the notification.

In November 2011, the Postal Service's alternative access channel initiatives were discussed in a U.S. Government Accountability Office (GAO) report to Congress. That document states, inter alia, that the Postal Service reported that "retail alternatives support its goal to improve financial performance by generating revenue while offering products and services through outlets that are less costly than post offices." GC Exh. 41 at Page 17ff. GAO reported that "USPS has stated that it will realize cost savings as it closes redundant and underutilized post offices in response to decreased demand and customers shifting to retail alternatives." Id. at 21. The GAO report includes a letter from the manager in charge of the alternative channel programs, stating that, over the past 5 years, these programs had helped "enable[] operations to reduce window work hours by 23.7 percent." Id. at 40.

The Union obtained a copy of the GAO report near in time to when it was issued. Phillip Tabbita, the Union's manager of negotiations support and special projects,[9] testified that the GAO report indicated to him that the Postal was now "not just looking at . . . alternatives to Post

[9] In that capacity, Tabbita has, since 1992, been the Union official responsible for the Union's cost analysis and other arguments concerning major outsourcing initiatives by the Postal Service.

Offices for the convenience of customers," which was generally how those programs had been described to the Union in the past, "but it's also looking . . . at it as a labor saving device." Tr. 241 and 246. This November 2011 GAO report is the first time that the record shows the Union receiving information suggesting that the alternative channel plans might be used to divert work away from bargaining unit window clerks. However, as indicated above, this information did not come to the Union from the Postal Service, but rather from a GAO report that purported to convey representations that the Postal Service had made to GAO on the subject.

The Postal Service described another change in its approach to the approved shipper designation in a January 12, 2012, notice to the Union. It stated there that while, in the past, it had engaged large retailers "with an individual license agreement for each location," it was going to "begin to use a single companywide agreement that w[ould] accommodate multiple locations." During the hearing this new type of agreement was referred to as an "enterprise" agreement.

PostNet is a third retail chain with which the Respondent expanded the approved shipper program. In a letter dated June 27, 2013, the Postal Service informed the Union (here again "as a matter of general interest" that did not trigger notice and bargaining obligations) that it was initiating a test of the approved shipper program at PostNet "beginning in June-July" – meaning that the test was either already underway or was soon expected to be.

By late 2015, there were approximately 6846 approved shippers. About 2620 of these locations were not outposts of national retail chains, but rather were owned by smaller retailers that might have only a single location. Among the larger retailers who participated were UPS (2729 participating locations), OfficeMax (1001 participating locations), PostNet (191 participating locations), Office Depot and Staples.

C. Staples Pilot (Partner Post) Program and Eventual Expansion of the Staples Partnership Using the Approved Shipper Label.

1. Postal Service announces Staples Pilot (Partner Post).

The Postal Service's retail partnership with Staples started as a pilot program. This partnership resembled arrangements that the Postal Service had entered into with retailers that it designated as approved shippers, but had a number of unique aspects. The area that Staples was required to devote to the Postal Service pilot in each participating store was considerably larger than what was generally required of approved shippers. Both Mark Dimondstein (Union president) and Damien Leigh (Staples' senior vice president of business services) likened the Postal Service presence in the Staples pilot locations to a "mini post office." At the pilot locations, Staples could not offer the products of Postal Service competitors such as UPS and FedEx. In this respect, the Staples pilot differed from the Postal Services' partnerships with retailers designated as approved shippers. In the pilot locations, Staples used Postal Service sales hardware and software, but that sales technology was not made available to the retail partners characterized as approved shippers. Employee training was required for participants in the Staples pilot that was not required for participants in the approved shipper program. The Staples pilot program is referred to in the record by a number of other names, including: partner post; retail partner expansion; and approved shipper plus.

In an internal Postal Service report, dated September 12, 2012, the Postal Service stated that its initiative to expand retail partnerships was not only about increasing convenience for customers, but also about "migrating [the] majority of volume to retail partners (new &

existing) and stamp partners [thereby] lowering cost to serve" – i.e., lowering labor costs.[10] GC Exh. 52 at Page 15. Tabbita credibly testified that labor cost savings cannot be achieved from such a program unless post office staffing levels are lowered. The Postal Service did not share this report with the Union at that time, or at any other time, prior to it being subpoenaed in this litigation. Similarly a January 8, 2013, decision analysis report from Brian Code (the manager of the Postal Service's retail partnership programs) and approved by the Postal Services vice-president of alternative channel access, stated that one of the advantages of the Staples pilot was that it provided an opportunity to measure the extent to which the Postal Service could "[c]hange customer behavior from conducting transactions at Post Offices to conducting them at partner locations" and "[r]ealize savings from reduced window labor demand associated with reduced Post Office transaction volume." GC Exh. 6 at Pages 4 and 8. The same idea is expressed in an internal Post Office report, dated December 14, 2012, which states that "[t]ransferring USPS product and service transactions to retail partner locations should allow USPS to cut costs associated with window labor time." GC Exh. 5 at Page 2. These reports, like the earlier September 12 one, were not provided to the Union prior to their being subpoenaed in this litigation.

The Postal Service notified the Union about the partner post pilot, which become the Staples pilot, in a March 14, 2013, letter. That letter did not identify a particular retail partner, but rather referred to the partner only as a "leading national and regional retailer." The letter stated that this partner post pilot program was scheduled to begin in April/May at 185 locations and to end approximately a year later. According to the letter, the Postal Service "anticipated that the information" from data collected during the pilot would allow it "to determine the suitability of possible further expansion." Despite the internal Postal Service reports discussed above, which indicate that the Postal Service was hoping to use the program to reduce the amount spent on labor at post office windows, the Postal Service represented to the Union that "[n]o significant impact to the bargaining unit [wa]s anticipated" from the partner post pilot.

The Postal Service eventually settled on Staples as the retail partner for the pilot. The Postal Service and Staples executed the operating agreement for the pilot on or about September 4, 2013, and the pilot began in October or November. In an October 2, 2013, letter to the Union, the Postal Service identified Staples as the retail partner referenced in the March 14 communication. The October 2 letter was characterized as addressing "a matter of general interest" rather than one about which the Postal Service deemed itself required to provide the Union with notice or an opportunity to bargain. The letter made no mention of the previously cited April/May timeframe for launching the pilot at 185 locations, but now stated that the 1-year program would be launched in "mid-October with Grand Openings scheduled on or about November 15" at 84 locations. Once again, the Postal Service stated that "[t]here is no anticipated impact on the bargaining unit at this time" from the program. Tabbita credibility testified that the Postal Service, during briefings to the Union, had taken the position that "there's not going to be any impact on clerks and we're going to go eat UPS's lunch." Tr. 542. Donahoe (U.S. postmaster general), in a videotaped address made available to all Postal Service employees on September 24, 2014, gave assurances that there was "nothing to" employee concerns that the Staples partnership would be "taking volume away from us." R Exh. 61 at Page 4. The Postal Service's communication made these representations to the Union and unit employees without mentioning management's objective (described in the Postal Service's internal reports of September 12, 2012, December 14, 2012 and January 8, 2013) to use its retail partnerships to reduce bargaining unit labor at post office counters. Based on the limited information that the Postal Service did share, the Union initially decided not to demand

[10] "Cost to serve" refers to the amount that the Postal Service expends to obtain each dollar of sales revenue. Labor costs are the primary component of "cost to serve." Tr. 252-253, 297.

bargaining, but rather to wait and see whether the Staples locations would take business from competitors like UPS and move it into the Postal Service work stream, thereby increasing the work available for unit employees.

2. Union expresses opposition to, and seeks information about, the Staples Pilot/Partner Post Program.

On November 12, 2013, Mark Dimondstein became president of the Union. Dimondstein was suspicious of the Postal Service's representations that the bargaining unit would not be adversely affected by programs under which retailers performed many of the same transactions that unit employees performed at post office counters. Within 10 days of becoming Union president, Dimondstein met with Patrick Donahoe, postmaster general, and told him that, in the Union's view, the partnership with Staples would not provide the kind of service that postal service customers deserved and would have a detrimental effect on unit employees. This meeting came within about a week of the November 15 date when the Postal Service intended to have the "grand opening" of the Staples pilot locations. Dimondstein gave credible and uncontradicted testimony that, during the meeting, Donahoe "made it very clear that these horses had left the barn, that [the Postal Service was] very committed to this program," and planned to expand as quickly as possible. Donahoe told Dimondstein that if he wished to follow up regarding this issue he should do so with Doug Tulino, the Postal Service's vice president of labor relations, and its chief negotiator with respect to the bargaining unit. Starting at that time, and continuing through July 2014, Dimondstein raised concerns regarding the Staples partnership to Tulino multiple times each month. On more than one occasion he proposed that some of the money in the employment opportunities fund created by the CBA be used to place bargaining unit employees in the Staples pilot operations.

Dimondstein asked Tabbita to determine what impact the Staples pilot would have on the bargaining unit. Tabbita concluded that there was no way to know without obtaining information from the Postal Service. On November 22, 2013, the Union presented the Postal Service with an information request, signed by Dimondstein, regarding the matter. The Postal Service withheld much of the requested information during the period when the pilot was underway. The Postal Service did, however, provide the Union with a list of pilot locations which showed that some of them were very close to established post offices – less than a mile away in 40 of the 82 cases and as little as 1/100 mile away in one instance. The Postal Service has not shown, or asserted, that during this time period it informed the Union that one of the motivations for the Staples Pilot was to reduce the demand for window clerk labor at post office locations. On December 19, the Union filed an unfair labor practices (ULP) charge with the NLRB alleging that the Postal Service had unlawfully refused to provide information the Union requested about the Staples pilot on November 22. An administrative law judge found that the Postal Service had, in fact, unlawfully withheld information from the Union, and the Board affirmed that finding of violation.[11]

[11] On June 15, 2016, the Board held that the Postal Service violated Section 8(a)(5) and (1) by refusing to provide the information that the Union requested on November 22, 2013, regarding the Staples Pilot. *Postal Service*, 364 NLRB No. 27 (2016). The Board went on to state that the Postal Service had a "rich history of responding to information requests with denials and delay," and noted that "the delay in this instance prevented the Union from obtaining information about the pilot program with Staples until after the pilot was completed." The Board rejected the Postal Service's effort to impose confidentiality-based restrictions limiting the Union's use of the information.

After receiving limited information from the Postal Service in response to the November 22 request, Dimondstein, in a January 17, 2014, letter to Patrick Devine, Postal Service manager of contract administration, objected that "Staples employees are now clearly performing bargaining unit work" and that the Postal Service's actions were possible violations of Article 32 and other portions of the CBA. GC Exh. 14. Devine responded in a January 31, 2014, letter, asserting that pilot/test programs were exempt from the CBA under the "historical practice of the parties." He also stated that "a determination of the application of Article 32 will be made upon the conclusion of the pilot." The Union filed a "national dispute" grievance regarding the Staples pilot on January 24, 2014, and that dispute was still pending at the time of the hearing before me. The grievance alleges that the "program constitutes contracting out in violation of Article 32."

During the time that the Union's information request was pending, the Postal Service had internal discussions about how to respond to a Freedom of Information Act (FOIA) inquiry about the effect that its partnership with Staples would have on bargaining unit employees. Brian Code, at that time the manager of the Postal Service's retail partnership programs, including approved shipper and the Staples pilot, discussed this matter by email with a consultant who the Postal Service had hired to provide marketplace analysis and data review regarding the retail partner expansion/partner post/ Staples Pilot.[12] On December 16, 2013, the consultant told Code that proposed responses to a FOIA request relating to the Staples Pilot, "look fine, but I do have a question around this language 'there will be no decrease in USPS FTEs" – i.e., no decrease in "full time equivalents/employees," specifically bargaining unit window clerks. Tr. 1068 (Testimony of Code). The consultant went on to say: "Further down the road if we expand full scale we will certainly be able to decrease [bargaining unit window clerks] and will have to shut down P[ost] O[ffice]s to finance the program." The next day, Code wrote to the consultant, "You are right. Thanks." GC Exh. 63.

Dimondstein, in addition to approaching the Postal Service to discuss the Union's concerns about the Staples pilot program, also tried to raise those concerns with Staples. In a November 25, 2013, letter to Ron Sargent (Staples' CEO and chairman), Dimondstein stated that the Union "could support" the program but had "serious concerns that need to be discussed and addressed." Dimondstein asked to meet about the subject with Sargent or his management team. In response, Dimondstein received a December 2 letter from Michael T. Williams (Staples' senior vice president, general counsel, and secretary) in which Staples declined to discuss the program with the Union. The letter stated that "Staples does not discuss the terms of vendor agreements with third parties," and told Dimondstein to "discuss your concerns directly with the U.S. Postal Service." The Union subsequently initiated a "Stop Staples" campaign in hopes of ending what Dimondstein viewed as the improper subcontracting of bargaining unit work. By April of 2014 the Union's effort in this regard included a boycott of Staples and an effort to "educate" the public about the partnership.[13]

[12] The Postal Service has argued that individuals working pursuant to this consulting contract were the functional equivalent of Postal Service employees, and in an order dated February 5, 2016, I accepted that argument.

[13] This Stop Staples campaign was ongoing at the time of the hearing before me. The Union had not, as of that time, similarly targeted any other retailer's partnership with the Postal Service.

3. Postal Service and Staples plan to expand their partnership nationwide using the pilot program, but when SIAG determines that this will require Article 32 notice to, and consultation with, the Union, that plan is scrapped in favor of expanding the Postal Service-Staples relationship using the approved shipper designation without submitting the expansion for SIAG review.

By February 2014, Code proposed that the Postal Service expand the pilot program beyond the 82 Staples locations currently participating. He made two proposals: one to expand the program to 200-300 additional Staples locations and one to expand it to most or all of Staples' approximately 1600 locations nationwide. He submitted the expansion proposals to SIAG for review to determine whether, pursuant to Article 32 of the CBA,[14] they would have a significant impact on the bargaining unit. At the hearing, the Postal Service conceded that it had been treating the nationwide expansion of the Staples pilot program as subcontracting for purposes of Article 32. Tr.147 at lines 9ff. Code's Article 32 submission to SIAG states that the advantages of the subcontracting would include "[t]ransferring USPS products and service transactions to retail partner locations" so as to "allow USPS to cut costs associated with window labor time," and also reduce the amount it costs the Postal Service to generate each dollar's worth of sales revenue. Code made a presentation to SIAG on March 3, 2014.

SIAG, in an email sent on March 11, 2014, notified Code that either the smaller or the larger Staples expansions he was proposing would "have a significant impact on the bargaining unit." Given this internal determination by Postal Service managers, Article 32 required that the Postal Service, inter alia, provide the Union with advance notice of the planned subcontracting through expansion of the Staples pilot, provide the Union with data and information supporting the subcontracting proposal, and consider the Union's proposals to avoid the subcontracting or minimize its impact on bargaining unit employees.

Code testified that he shared the results of the SIAG review with Staples and that Staples was not "amenable" to the delay that Union involvement under Article 32 would cause. Tr.1001. At that point, the Postal Service and Staples decided neither to expand nationwide using the pilot/partner post arrangement as originally planned nor to abandon their plan to expand their relationship nationwide. Rather the Postal Service and Staples decided to continue and expand their relationship nationwide, but to avoid the Article 32-mandated union involvement by accomplishing the expansion using the approved shipper designation, rather than the pilot-style/partner post arrangement. The approved shipper model would restrict Staples to offering a somewhat more limited menu of Postal Service products and services than it could under the pilot program,[15] but would also remove the pilot program's prohibition on selling the products and services of the Postal Service's competitors. In addition, the Staples approved shipper locations would not use the Postal Service's sales hardware/technology and

[14] Article 32 is discussed in greater detail, supra.

[15] The enterprise agreement between the parties that was effective July 3, 2014, shows that Staples was able to provide the following domestic products at approved shipper locations: "Priority Mail Express weight and zone priced; Priority Mail Express Flat Rate Box; Priority Mail Express Flat Rate Envelopes; Priority Mail weight and zone priced; Priority Mail Flat Rate Boxes; Priority Mail Flat Rate Envelope; Priority Mail balloon pricing; Priority Mail dimensional weight priced; Priority Mail Regional Rate Boxes; First-Class Package Service (parcels)."

Among the Postal Service products and services that Staples, and other approved shippers, are not able to offer are certified mail products and registered mail products. In addition, approved shippers do not hold mail for pick-up by addressees.

would not have to devote as much square footage within each store to selling Postal Service products and services.

Damien Leigh, Staples' vice president in charge of business services, testified that Staples decided to switch to the approved shipper route for expansion after learning about the Article 32 requirements for union involvement, and the related delays, that would attend expansion through the Staples pilot/partner post program. He claimed that the approved shipper program was "seemingly union approved because it had been in existence for many years and, to our knowledge, there was no union blocking the program." Leigh testified that this "view was consistent with what the U.S. Postal Service told us at that point" and that he was not aware of any union opposition to other large retailers expanding through the approved shipper route. Leigh was aware that the Union viewed the Staples pilot very unfavorably, but he testified that he thought the approved shipper route "would get past the union issues." Tr. 1194. At that point in time the Union's "Stop Staples" campaign was well underway and Staples had already rebuffed Dimondstein's November 25, 2013, written request to meet with Staples' management regarding its retail partnership with the Postal Service.

Code did not submit the plan to reconstitute the nationwide expansion of the Postal Service-Staples partnership using the approved shipper designation to SIAG for Article 32 review of whether that plan, like the earlier plan for a nationwide expansion of the Staples pilot, would have a significant impact on the bargaining unit and trigger the special requirements for Union notice and input. Neither Code, nor any other Postal Service official who testified, explained why the Postal Service had submitted the approved shipper expansion at UPS locations to SIAG for Article 32 review, but concluded that the approved shipper expansion at Staples was not subject to SIAG review. Nor did Code, or any other Postal Service official, adequately explain why the involved managers treated the Staples pilot/partner post expansion as subcontracting for purposes of Article 32 review, but the approved shipper arrangement with Staples was not, even though both involved Staples employees nationwide providing products and services usually provided at post offices by bargaining unit employees.[16]

Reducing labor costs by shifting work from post office window clerks to retailers through the approved shipper program and other alternative channel initiatives continued to be a focus for the Postal Service, as shown by multiple internal Postal Service documents. One such document, a report dated June 20, 2014, noted that the timelines for transition to the approved shipper model had been completed, but that it was still necessary to "[f]inalize labor savings methodology." GC Exh. 74 at Page 2. On July 30, 2014, Code approved an internal Postal Service document regarding the retail partner expansion program. That document stated that the program "will reduce a main driver of USPS retail costs – Post Office window labor" since "retailers will utilize their own personnel to sell USPS products and services." GC Exh. 31 at Page 3. A February 2015 internal Postal Service report on "retail channel operations strategy," talks about using the approved shipper, and other alternative retail programs, to "reduc[e] cost to serve," the primary component of which is labor costs. GC Exh. 32 at Page 2; see also, supra, footnote 10 (labor costs are primary component of "cost to serve"). This same report described continuing plans to "shift" transactions from post offices to approved shipper, and other retail partner, locations. GC Exh. 32 at Pages 17 and 23. Another internal report, dated

[16] The record shows that all the Postal Service products and services that Staples employees provided through the two programs were products and services that unit employees provided at post offices. The record also shows that unit employees at post offices provided other Postal Service products and services that were not provided by the Staples employees, and that Staples employees had a range of duties and responsibilities unrelated to Postal Service products and services.

March 2015, discusses the Postal Service's intent to "Demonstrate financial stewardship by optimizing the network to migrate customers to the lowest-cost channels." Charging Party Exhibit Number (CP Exh.) 6, Attachment at Page 4.

4. Postal Service informs Union about transition from Staples pilot to Staples approved shipper; Union complains about lack of opportunity for input and requests information.

The Postal Service and Staples executed agreements initiating the transition from pilot/partner post to approved shipper on July 3, 2014. At the same time the Postal Service and Staples executed an "enterprise" agreement that applied to all the Staples stores that became approved shipper locations. At the time of the hearing, Staples was the only approved shipper that had an enterprise-wide agreement with the Postal Service. The enterprise agreement, inter alia, stated terms relating to participation in the program by additional Staples stores. The Postal Service informed the Union of the switch from the Staples pilot model to the Staples approved shipper model in a July 7, 2014, letter from Patrick Devine, Postal Service manager of contract administration, to Dimondstein. The letter stated that the Postal Service would be terminating the Staples pilot at all locations beginning on August 1, 2014, and that those locations would become approved shippers by August 29, 2014. The letter made no mention of the plan to expand this program to other Staples locations or, for that matter, of the SIAG determination that an expansion of the pilot would have a significant impact on the bargaining unit and entitle the Union to provide input in the decision making process. The Postal Service also did not provide the Union with the agreements between the Postal Service and Staples that set forth the terms of their approved shipper arrangement.[17] The Postal Service did not offer to bargain with the Union about its decision to designate Staples locations enterprise-wide as approved shippers before making this announcement or at any other time. The Union, for its part, did not make an express written request to bargain over the decision when it received the July 7 announcement or at any time prior to implementation.

On July 9, Dimondstein and other Union officials met with officials of the Postal Service, including Tulino and Megan Brennan (chief operating officer[18]), and discussed the arrangement with Staples. Brennan stated that she understood that the Union needed better notice about its initiatives with retailers. Dimondstein said that Brennan was wrong about what the Union needed. "What we need," Dimondstein said, "is to have input and a chance for negotiations in advance, not just another 3 weeks' or 4 weeks' notice or 3 months' notice that this is what your team has decided to implement and do." This is consistent with Tabitta's testimony that the Union believed it could successfully compete to do potentially subcontracted work, but that once the subcontracting proposal went to the Postal Service's senior management, the Union's attempts to provide input were "like banging your head against a brick wall." Tr. 219. This reality is addressed in the CBA memorandum of agreement that the Union obtained in the current contract and which recognizes that it is in the parties' "best interest to meet and discuss national outsourcing initiatives at an early stage in the process" and which gives the Union the "opportunity to compete for the work internally at a point in time contemporaneous with the outsourcing process and early enough to influence any management decision." Jt. Exh. 1 at Pages 369-370.

[17] The Postal Service provided the Union with heavily redacted versions of one or more of these agreements on February 26, 2015, and with similarly redacted versions of others on May 29, 2015 – about 6 and 9 months after the Staples pilot locations were re-designated as approved shipper locations. The Postal Service did not provide unredacted versions of these agreements to the Union until shortly before the hearing in this matter and in response to a subpoena.

[18] Brennan subsequently became the postmaster general of the United States.

During a telephone conversation the following July 20, Tulino urged Dimondstein to "take your victory lap" – presumably because the Staples pilot arrangement was being abandoned in favor of the approved shipper arrangement – and "call it day." Dimondstein testified that he did not think a victory lap was in order since, in his view, the switch from the pilot arrangement to the approved shipper arrangement meant that the Postal Service and Staples would be doing fundamentally the same thing and just calling it something else. Dimondstein reached this conclusion even though the Postal Service and Staples had not revealed that the initial impetus for switching from the Staple's pilot designation to the approved shipper designation was to accomplish a nationwide expansion while avoiding the Union involvement necessitated by SIAG's Article 32 determination that nationwide expansion of the pilot would have a significant impact on bargaining unit work. In a letter dated August 22, 2014, Clint Burelson, the Union's director for the clerk division, asked the Postal Service to meet about the switch from the pilot/partner post arrangement to the approved shipper arrangement. In addition the Union, in an August 29, 2014, letter to Tulino, made a request for information that it identified as relating to the "Approved Shipper program in general and [the Postal Service's] arrangement with Staples." Dimondstein testified that the request was "both looking for the detailed information and also is a form of – certainly an interest in bargaining over the issues that we're delving into." Tr. 706. In a follow-up letter, Burelson added that the approved shipper program might be one of the issues raised during the contract negotiations that were set to begin in February 2015, and that "[a]ccordingly, the Union also needs the information requested in the APWU's letter dated August 29, 2014, for collective bargaining." At any rate, the Postal Service asserted confidentiality concerns regarding information requested by the Union about the Staples approved shipper program and withheld much of the requested information during the relevant time period.[19] Rickey Dean, the Postal Service's acting manager of contract administration, testified that he did not interpret the Union's August 29 letter as a request to bargain regarding the Postal Service's arrangement with Staples.

On September 3, 2014, Dean and Code of the Postal Service met with Burleson and discussed elements of the approved shipper program at Staples. During that meeting, Code stated that: "No analysis was done to determine the need or opportunity to close or reduce post office hours." He stated that the purpose was, instead, to allow the Postal Service to exercise some control over commercial entities that received Postal Service mail. He also described some of the ways, discussed above, in which the approved shipper arrangement with Staples was different from the pilot/partner post arrangement with Staples. The Postal Service told the Union that Staples would be selling the Postal Service products and services at the published rate, i.e., at the same rate available at post offices, but that Staples itself would be paying the Postal

[19] The Postal Service, in a letter dated October 17, 2014, indicated that it would be willing to provide responsive information if the Union signed an agreement restricting its use of information that the Postal Service asserted was confidential. The Union responded that the proposed agreement was overbroad and refused to sign it. The Postal Service attempted to require the Union to sign such an agreement with respect to information sought by the earlier, November 22, 2013, information request relating to the Staples pilot/partner post program. The Board ruled that the Postal Service violated the Act by the refusing to provide the Union with information requested on November 22, and rejected the Postal Service's efforts to impose confidentiality-based limitations on the Union's usage of that information. 364 NLRB No. 27.

Service a discounted rate for some of those products and services.[20] These discounts were part of programs under which participating retailers would receive discounts, and in some instances could increase the size of those discounts if they reached specified sales volume benchmarks.[21] The discounts compensated Staples for handling those transactions; however, there was no service agreement by which the Postal Service further compensated Staples for the labor of its employees.

Dean testified that the Union never asked to bargain during the September 3 meeting, and that he considered the Union's questions to be "information gathering on the part of the Union, based on the fact that we were making the transition with Staples." At any rate, Dean testified that at the time of this meeting the Staples approved shipper program was already underway.

The record shows that, in addition to the terms that the Postal Service revealed to Burleson on September 3, 2014, the Postal Service's approved shipper arrangement with Staples provided for the Postal Service to make per-location payments that were characterized as an effort to defray some of Staples' costs associated with participation. For example, the agreement between the two provides that, over the next 18 months, the Postal Service would pay Staples $4000 for each new approved shipper location "as compensation for activities to be undertaken by Staples to monitor compliance with the use of USPS trademarks, to ensure training of Staples Retail Location personnel regarding the sale of Postal Service items, to monitor the sale of Postal Service products to ensure conformity, . . . and to supervise the implementation of the Aviation Security/Hazardous Material Acceptance Procedures and ensure that they are being following at the Staples Retail Locations." The Postal Service also agreed to pay Staples an additional $1500 for each store that had been part of the Staples pilot program to help defray the cost of switching to the approved shipper designation. See GC Exh. 25, Sections 1(b) and (e). Leigh testified that, with the exception of these payments, Staples received the same approved shipper terms as other participating retailers. The Postal Service and Staples also agreed that the Postal Service would not be liable in the event the contract had to be terminated as a result of "any orders or regulations that might be promulgated by any branch, agency or independent establishment of the United States Government." GC Exh. 26 at Pages 2-3.

A Postal Service Report dated April 7, 2015, shows that the Postal Service is exercising continued oversight of the Staples employees involved in the approved shipper program, including by requiring annual certification, to ensure that "all approved shippers meet hazardous materials, customer service, and product standards." CP Exh. 1(a). Leigh testified that the

[20] Staples' generates revenue from the approved shipper program in two ways. First, by selling the products to customers for more than the discounted price that the Postal Service charges Staples, and second, from the increase in traffic and sales resulting from the availability of the postal products and services in the location. Leigh, Staples senior vice-president in charge of business services, testified that shipping is "a massive growth industry," because of the rise of internet commerce. Tr. 1173.

[21] The record does not make clear how long before this September 2014 meeting the Postal Service began providing approved shippers with compensation in the form of these discounts on the products and services. A June 2008 Postal Service network plan stated that, as of that time, the Postal Service was not compensating approved shippers, but that approved shippers did charge customers fees, in addition to the list price, for the services they provided. R Exh. 11 at Page 42. Similarly, a Postal Service publication from July 2013 states that the Postal Service did not provide compensation to the approved shippers, but that an approved shipper "makes profits through nonpostal charges." R Exh. 19.

Postal Service has provided Staples with training materials and that Staples used those materials during the pilot and incorporated them into Staples' employee training materials for its nationwide partnership with the Postal Service. Tr. 1232-1233.

5. Postal Service informs the Union that it is expanding Staples approved shipper nationwide, and Union objects.

Although by July 3, 2014, the Postal Service and Staples had executed an enterprise-wide approved shipper agreement, the Postal Service's July 7 notice to the Union only spoke about converting the approximately 80 *existing* Staples pilot locations to approved shipper locations. In a letter dated September 8, 2014, the Postal Service notified the Union, "as a matter of general interest" that 2 days later, it would begin expanding the approved shipper arrangement with Staples to 44 additional locations. Then, less than a month later, in a letter dated October 2, 2014 (and received by the Union on October 7), the Postal Service informed the Union that, beginning that month, it was initiating a much greater expansion with the aim of making all of the Staples locations nationwide (approximately 1600 locations) into approved shippers. At the time of the hearing in this matter, the Postal Service and Staples had expanded the approved shipper program to a total of approximately 540 locations. Further expansion had been suspended pending the outcome of litigation regarding the program. If, as planned, all 1600 Staples locations nationwide were included in the approved shipper program, Staples overall participation would constitute an increase of more than 20 percent in the total number of locations designated as approved shippers.

In November 2014, the Union met with the Postal Service and discussed the Staples approved shipper arrangement. The officials present included union president Dimondstein and postmaster general Donahoe. At the meeting, Dimondstein advised the Postal Service that the Union wanted to enter into "broad negotiations and broad discussion around retail." On behalf of the Postal Service, Donahoe stated "you want us to pull out of this, but that affects our relationship with Staples" and "with other retailers we're talking to." He described it as being like "a game of pick-up sticks, where if you pull one out . . . you don't know what the consequences are over there." At this meeting, the Postal Service took the position that because of these concerns it would not consider changing course regarding the Staples approved shipper arrangement. On November 13, 2014, the Union filed the charge in this case, alleging that the Respondent had violated the Act by unilaterally entering into, and expanding, its retail arrangements with Staples and by refusing to provide relevant information requested by the Union.

Dimondstein and other union officials met to discuss strategies for persuading the Postal Service to make changes to the approved shipper initiative. As a result of those discussions, Dimondstein concluded that, rather than challenging the entire approved shipper initiative, the Union should first challenge the approved shipper arrangement with Staples, and then attempt to use any success in that regard as a way to change the Postal Service's other approved shippers arrangements.

As part of contract negotiations in February 2015, the Union requested bargaining over alternative channel programs and made written proposals regarding the approved shipper program. These were the Union's first written proposals regarding the approved shipper

program.[22] During these negotiations, the Postal Service took the position that the approved shipper program with Staples was not contracting and therefore was not subject to the CBA's article and memorandum that impose requirements relating to the outsourcing of work. At any rate, the parties were unable to agree to a successor contract and submitted the matter to interest arbitration, which was still pending at the time the record in this case closed.[23]

III. ANALYSIS

A. THE POSTAL SERVICE HAD AN OBLIGATION TO BARGAIN OVER THE RETAIL ARRANGEMENT IT INITIATED WITH STAPLES IN AUGUST 2014.

An employer must give the collective bargaining representative of its employees notice and an opportunity to bargain before making changes to the terms and conditions of employment of those employees. *NLRB v. Katz*, 369 U.S. 736, 743 and 747 (1962). The obligation to bargain extends to changes that shift bargaining unit work to other workers outside the unit who are not guaranteed the same terms and conditions of employment. Notice and bargaining for such a shift of work has been required in a variety of circumstances, including where the employer accomplishes the subcontracting by contracting to an outside entity or persons, see *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964), *O.G.S. Technologies, Inc.*, 356 NLRB 642, 644-645 (2011) and *Torrington Industries,* 307 NLRB 809 (1992), when the employer accomplishes it by selling distribution routes previously serviced by unit workers, see *Handy Spot, Inc.*, 279 NLRB 1320 (1986), when the employer accomplishes it by converting theaters to a management-operated system, see *Regal Cinemas v. NLRB*, 317 F.3d 300, 310 (D.C. Cir. 2003), enfg. 334 NLRB 304 (2001), and where the employer accomplishes it by changing from a hub-and-spoke delivery system to a point-to-point delivery system, see *Mi Pueblo*, 360 NLRB No. 116, slip op. at 2 (2014). See also *Local 24 Intern. Broth. Of Teamsters v. Oliver*, 358 U.S. 283, 293-294 (1959) (holding that limitations on subcontracting are a mandatory subject of bargaining because they prevent the possible curtailment of unit work and the undermining of the unit members' working conditions). In

[22] In the past, the Union and the Postal Service have entered into mid-term negotiations on subjects without the Union making a written demand to bargain.

[23] After the close of the hearing in this matter, and on the same day that the parties filed their post-hearing briefs, the Postal Service filed a motion to reopen the record for the submission and consideration of portions of an interest arbitration decision and award regarding negotiations for a successor contract between the Postal Service and the Union. The arbitration award was dated, July 8, 2016 – subsequent to the date, May 24, 2016, when I closed the record in the proceeding before me. The General Counsel and the Union both filed oppositions to the Postal Service's motion to reopen. Under the Board's Rules and Regulations, Section 102.48(d)(1), a motion to reopen the record may be granted only in "extraordinary" circumstances and where the evidence is "newly discovered" or "has become available only since the close of the hearing." In this case these requirements are not met. Although the arbitration award itself issued after the close of the hearing, what the Postal Service is asking me to do is reopen the record so that I may consider the arbitrator's discussion of evidence regarding communications between the parties that occurred from November 2014 to February 2015. To the extent that evidence of those communications is relevant, the Postal Service had the opportunity to present that evidence in the hearing before me. Indeed, some evidence regarding the communications to which the Postal Service refers was presented. The fact that evidence in existence and available to the parties during the hearing before me was also discussed in a subsequent arbitration award does not make that evidence new or previously unavailable.

Fibreboard, supra, the Supreme Court explained that treating the diversion of work out of the bargaining unit as a mandatory subject of collective bargaining promotes the "fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace." 379 U.S. at 210-211.

Under the above precedent, I find that the Postal Service had an obligation to provide the Union with notice and an opportunity to bargain before it, in August 2014, made a change under which Staples personnel would begin providing Postal Service products and services at Staples locations nationwide. Providing those goods and services to customers are the work duties of bargaining unit employees, primarily window clerks, at post offices. In this instance, the method by which the employer accomplished the shift of unit work was a licensing agreement, a method the Board has not specifically addressed under Section 8(a)(5), but one that is the equivalent in material respects to other methods of subcontracting for which the Board has required notice and bargaining. Whether the shifting of work is accomplished by a services contract with an outside entity, a sale of distribution routes that had been staffed by unit employees, a conversion to a management-operated system, a change in the design of the distribution network, or, as here, by licensing the work of selling its products and services to an outside entity, the result for the bargaining unit is the same – the work of unit members is shifted to other workers outside the bargaining unit who the collective bargaining agreement does not guarantee the same working conditions as unit employees. As with the other methods of shifting work, it threatens to curtail unit work and undermine unit members' working conditions and is properly treated as a mandatory subject of bargaining for the same reason the Supreme Court set forth in *Fibreboard* – i.e., because doing so promotes the "fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace." 379 U.S. at 210-211.

The Postal Service, while contending that the licensing arrangement with Staples should be treated differently than subcontracting through contracts for services and other methods of shifting work out of the bargaining unit, provides no persuasive rationale, or legal authority, for excluding the licensing method used here from the bargaining obligation that applies in those cases. Tellingly, the Postal Service itself treated the Staples pilot program expansion, which is at core very similar to the Staples approved shipper expansion, as subcontracting for purposes of Article 32 review. The Postal Service changed course only when the Postal Service's internal review under Article 32 reached the conclusion that the Staples pilot program expansion would have a significant impact on unit work and therefore would trigger contractual notice and bargaining obligations, and, more importantly, delays that Staples was not "amenable" to. Similarly when the Postal Service was considering whether to expand the approved shipper partnership with UPS, it submitted that plan for Article 32 review. On the record here, it appears that the Postal Service is attempting to treat, for purposes of notice and bargaining, the shift of work under the Staples approved shipper expansion as something fundamentally different from the shift of work through the Staples pilot expansion or the UPS approved shipper program not on any principled basis, but out of a desire to accommodate Staples' preferred timeline by circumventing the notice and bargaining obligations under Article 32 and Section 8(a)(5).

The Postal Service contends that even if the method by which it shifted work to non-unit employees should be treated the same as other methods of contracting out unit work, the change in this case still did not trigger a bargaining obligation because: (1) any shift of work was not significant enough to require bargaining since it was not shown to have led to unit employees being laid-off or having their schedules reduced, Brief of Respondent at Page(s) 33 and 49 ff., and (2) the shift of work was so significant as to constitute a change in the scope, nature, and direction of the enterprise, and therefore was a decision akin to one over whether to

be in business at all, Id. at Page(s) 34 ff.[24] Facially it is hard to square the Postal Service's claims that its decision to shift work away from unit employees at post office counters was simultaneously both too trivial and too profound to trigger a bargaining obligation, and closer inspection of the facts and applicable law does not render these arguments any more appealing.

The record shows that the nationwide expansion of the Postal Service-Staples partnership under the approved shipper program had the purpose and effect of shifting work from the unit employees at post offices and to non-unit employees at Staples locations. The Postal Services' internal documents show that since at least 2008 and continuing through the time that the Staples expansion was announced in 2014, management's objective was to use alternative channels, including designated approved shippers, to cut labor costs by shifting 35-40 percent or more of transactions from post offices counters to such locations. As of the time of an internal Postal Service report, dated September 12, 2012, management was stating that the expansion of retail partnerships was directed at "migrating [the] *majority* of volume to retail partners (new & existing) and stamp partners." (Emphasis Added). According to a GAO report from November 2011, the Postal Service told GAO that it planned to "realize cost savings as it close[d] redundant and underutilized post offices in response to . . . customers shifting to retail alternatives." By the Postal Service's own account, its efforts were meeting with success. Its internal 2010 performance report/2011 performance plan touted the fact that it had succeeded in cutting costs by "reduc[ing] staff and adapt[ing] schedules to the lower customer traffic" at post offices. The 2011 GAO report included a statement by the Postal Office that its alternative access programs had helped "enable[] operations to reduce window work hours by 23.7 percent." In an internal June 20, 2014, document the Postal Service discussed the approved shipper partnership with Staples, and noted that it was still necessary to "[f]inalize labor savings methodology" for that partnership. An internal Postal Service document from July 2014, states that the retail partnerships would "reduce a main driver of USPS retail costs – Post Office window labor" since "retailers will utilize their own personnel to sell USPS products and services." In an internal report from February 2015, the Postal Service discussed that it was using approved shipper partnerships and other alternative retail programs to shift transactions away from post offices and reduce cost to serve. Given the Postal Service's many statements acknowledging this purpose and effect – which it neglected to communicate to the Union – it is frivolous for the Postal Service to now argue that the change at-issue here had no meaningful effect on bargaining unit work.

The Postal Service attempts to portray any reductions in window work resulting specifically from the nationwide Staples expansion as not significant when considered in the context of the total alternative retail channel program. That argument is not persuasive. First of all, the Postal Service's own internal SIAG review reached the conclusion that expanding its retail partnership to all 1600 Staples locations, or even to just 200-300 additional locations, under the pilot program would have a significant impact on bargaining unit work Code himself agreed, in an internal email exchange, that full scale expansion of the Staples pilot would mean that the Postal service would reduce work for window clerks and "have to shut down P[ost]O[ffice]s to finance the program." That view was confirmed by the Union's top analyst, Tabitta, who stated that the cost savings that the Postal Service was seeking through the approved shipper program could not be achieved unless post office staffing levels were lowered.

[24] The obligation to bargain over a decision to work from unit members to others outside the unit is limited in that it does not extend to situations where the shift of bargaining unit work constitutes a change in the "scope and direction of the enterprise and was akin to a decision whether to be in business at all." *Dubuque Packing Co*., 303 NLRB 386, 388 (1991), enfd. in rel. part 1 F.3d 24 (D.C. Cir. 1993), cert. denied 511 U.S. 1138 (1994); see also *Torrington Indus., Inc*., 307 NLRB 809, 810 (1992).

Although Code and Staples attempted to avoid the SIAG-generated requirements for Union notice and input by reconstituting the expansion of the Staples pilot program as an expansion under the approved designation, the Postal Service has not offered any credible basis for thinking that the effect on unit work would be meaningfully reduced under the latter as compared to the former. The expansion of the Staples partnership to all 1600 of its locations under the approved shipper program was a very significant one for that program – increasing by 20 percent the total number of designated approved shipper locations as compared to the pre-Staples level. At those Staples approved shipper locations, Staples employees would begin, as had been planned under the Staples pilot expansion, to sell Postal Service goods and services at the same prices charged at post offices staffed by unit employees.

In reaching the conclusion that the change in this case had a significant effect on the bargaining unit, I considered that the General Counsel has not identified unit employees that were laid off or that had their work schedules reduced as a result of the Staples approved shipper program. As discussed above, the evidence does show that the Postal Service was using its retail partnership with Staples to shift work away from unit employees in post offices and permit it to reduce labor costs through reductions or closings at post offices. At any rate, the Board has held that finding a violation does not depend on the General Counsel identifying specific individuals who have been directly injured by such a shift. In *Mi Pueblo Foods*, supra, slip op. at 3, for example, the Board held that the employer had an obligation to bargain over the decision, and the effects of the decision, to change from a hub-and-spoke delivery model to a point-to-point model even though that change "did not result in layoffs or significantly affect wages and hours." The Board explained that, while there may have been no such "immediate impact of the loss of work on unit drivers," "[a]bsent an obligation to bargain" over such changes, "an employer could . . . not only potentially reduce the bargaining unit but also dilute the Union's bargaining strength." Ibid. In *Mi Pueblo Foods*, the Board reaffirmed the rule, previously set forth in *Overnite Transportation Co.*, 330 NLRB 1275, 1276 (2000), affd. in part, reversed in part mem. 248 F.3d 1131 (3d Cir. 2000), that a "bargaining unit is adversely affected whenever bargaining unit work is given away to nonunit employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees who would have been hired into the unit." See also *Spurlino Materials, LLC*, 353 NLRB 1198, 1218-1219 (2009) (same), affd. 355 NLRB 409 (2010), enfd. 645 F.3d 870 (7th Cir. 2011), and *Clear Channel Outdoor, Inc*., 346 NLRB 696, 702-703 (2006) (same). When considering whether a change that shifts work from unit employees to others outside the unit must be bargained over, the Board finds a significant impact even when the employer has not laid off or reduced the schedules of existing unit members, because the cognizable effects of such a change include those on the potential for growth and overtime in the unit. See also *St. George Warehouse, Inc.,* 341 NLRB 904 (2004), enfd. 420 F.3d 294 (3d Cir. 2005) (bargaining obligation triggered when the employer did not lay off or reduce the hours of existing employees, but stopped hiring new bargaining unit employees, and replaced those who left with temporary employees); Acme *Die Casting,* 315 NLRB 202 fn. 1 (1994) (duty to bargain over decision to give bargaining unit work to nonunit individuals exists even when unit employees are not laid off or replaced, since unit employees have an interest in overtime).

In the instant case the *Mi Pueblo* holding is particularly applicable. First, the Staples partnership created the potential for additional work for window clerks since an increase in Postal Service business was expected to result and the Union had offered to use the existing employment development fund to place unit employees in the participating Staples locations to meet that increased demand. The expected increase in this type of package business was "massive" according to Leigh (Staples' senior vice president for business services) because of the rise of internet commerce. Second, the Postal Service was using the Staples approved shipper designation to redirect transactions from unit window clerks at post offices to retail

partners – something that could "potentially reduce the bargaining unit" and "dilute the Union's bargaining strength."

As noted above, the Postal Service argues, in the alternative, that it had no obligation to bargain with the Union over its partnership with Staples because that initiative was so profound as to constitute a change in the scope, nature, and direction of the enterprise. That contention is, given the facts and applicable law, even less persuasive that the Postal Service's contention that the change was too insignificant in its effect on the unit to warrant bargaining. The Postal Service's enterprise, as recognized by both the General Counsel and the Post Service, is to provide postal services for the United States and operate various facilities throughout the United States in performing that function. See Complaint Paragraph 2(a) and Postal Service's Answer. That was the scope, nature, and direction of the enterprise at all relevant times both before and after the Postal Service initiated its nationwide retail partnership with Staples. Even if one considers the magnitude of the Postal Service's general effort to shift responsibility for performing a substantial portion of sales transactions from post office window clerks to a variety of retail partners, that would not transform its enterprise into something other than providing postal services for the United States or approach the threshold of being "akin to a decision about whether to be in business at all." *Dubuque Packing Co.*, 303 NLRB 386, 388 (1991), enfd. in rel. part 1 F.3d 24 (D.C. Cir. 1993), cert. denied 511 U.S. 1138 (1994). To the contrary, the evidence shows that the Postal Service's decision to shift window clerk work to employees of Staples and other retail partners was intended to reduce labor costs – exactly the type of decision that the Board has repeatedly held is not a change in the "scope, nature, and direction of the enterprise." *Rock-Tenn Co.*, 319 NLRB 1139 n.2 (1995), quoting *Fibreboard*, 379 U.S. at 214; *Clear Channel Outdoor, Inc.*, 346 NLRB 702. As the Supreme Court stated in *Fibreboard*, an employer's effort to cut labor costs by shifting work from unit members to an outside entity implicates factors that "have long been regarded as matters peculiarly suitable for resolution within the collective bargaining framework" and this "warrant[s] subjecting such issues to the process of collective negotiation." 379 U.S. at 213-214. Indeed, in the instant case the Union made at least one proposal that demonstrated its ability to address cost concerns. Dimondstein repeatedly proposed to the Postal Service that some of the $250 million already accumulated in the CBA-created employee opportunities fund should be used to place bargaining unit employees in participating Staples approved shipper locations. That is a proposal that could potentially allow the Postal Service to meet the goals of the Staples partnership without shifting bargaining unit work to the nonunit personnel of an outside entity.

B. The Postal Service Did Not Meet Its Bargaining Obligation.

For the reasons discussed above, when, in August 2014, the Postal Service initiated a nationwide retail partnership with Staples that shifted work from unit members to Staples personnel it had an obligation under Section 8(a)(5) and (1) of the Act to provide the Union with notice and an opportunity to bargain over the decision and its effects. *Mi Pueblo*, supra, Slip Op. at 1; *O.G.S. Techs., Inc.*, 356 NLRB 642, 647 (2011); *Pontiac Osteopath Hospital*, 336 NLRB 1021 (2001). In the instant case, the Postal Service failed to meet this obligation both because it did not provide the Union with adequate notice and because it foreclosed bargaining regarding the change and its effects.

When an employer's communications to the union conceal key details or mislead the union about the nature of a decision those communications do not meet the obligation to provide clear notice under Section 8(a)(5) and (1). *Barnard Engineering*, 295 NLRB 226 (1989); *Republic Engraving*, 236 NLRB 1150, 1157 (1978). In the instant case, the Postal Service failed to meet its notice obligation regarding the decision to undertake a nationwide Staples retail

partnership because the Postal Service's written communications to the Union regarding that action concealed key details. Moreover, the Postal Service's overall communications about the approved shipper retail partnership were misleading. As discussed above, internal Postal Service documents and trial testimony make clear that the Postal Service was using the expansion of retail partnerships to reduce labor costs by shifting work from the post office counters staffed by unit employees to retail partners staffed by non-unit employees. None of the three letters to the Union regarding the Staples approved shipper program and expansion discloses that the program would be used to shift work away from post office counters to nonunit personnel, and ultimately to close post offices or reduce schedules. To the contrary, when Code met with Union officials on September 3, 2014, about reconstituting the Staples retail partnership using the approved shipper designation, he said that the purpose of the program was to allow the Postal Service to have some control over retailers that received Postal Service mail. Not only did he fail to disclose that the program was intended to save labor costs by shifting work from unit window clerks, but he implied that that was not one of its intents – stating that the Postal Service had not analyzed the "need or opportunity to close or reduce post office hours."

Similarly when the retail partnership with Staples was at the pilot stage, the Postal Service concealed the true purpose of the plan by withholding information showing that its intent was to reduce window clerks and close post offices. To the contrary, in an October 2, 2013, letter to the Union, it stated that "there is no anticipated impact on the bargaining unit at this time." In briefings at around the same time, the Postal Service told Union officials that there was "not going to be any impact on clerks" from the program. When the Union requested more complete information that would have allowed it to evaluate that claim, the Postal Service illegally withheld the information – something, the Board recently noted, was part of a "rich history of responding to information requests with denials and delay." *Postal Service*, 364 NLRB No. 27 (2016).

Going back further, to 2005, the record shows that the Postal Service represented to the Union that the reasons it was initiating a version of the approved shipper program was to improve convenience to customers, protect the Postal Service brand, and ensure that mail entering the Postal Service stream was safe. It did not reveal that it also hoped to use this and other alternative channels to divert 40 percent of transactions away from unit window clerks. In 2010 when discussing its plans to develop a version of the approved shipper program at Office Depot locations, informed the Union that the program had been "carefully studied" and "had no impact on the neighboring Post Office."

In addition to concealing that its expanded retail partnership with Staples would shift work from unit window clerks to outside entities, the Postal Service's communications to the Union also concealed the fact that the Postal Service was providing Staples with monetary compensation, beyond postal product discounts, for participating in the program. Under the July 3, 2014, agreements between the Postal Service and Staples, the Postal Service paid Staples $4000 or $5500 for each location that became an approved shipper during the first 18 months of the program. This cash compensation was not a standard part of its agreements with other retailers who the Postal Service designated as approved shippers. The Respondent did not inform the Union of the payments to Staples and despite the Union's August 29 information request, the Respondent withheld the contracts revealing these payments until after the expansion of the Staples retail partnership was well underway.

Even if I had found that the Postal Service notification was not incomplete and misleading, I would find that it did not meet its obligations under the Act because it presented the nationwide Staples partnership to the Union as a fait accompli regarding which any attempt

to bargain would have been futile. *Westinghouse Elec. Corp.*, 313 NLRB 452, 453 (1993) (union has no duty to make a formal request to bargain where decision was presented as a fait accompli), enfd. sub nom. *Salaried Employees Ass 'n of Baltimore Div. v. NLRB*, 46 F.3d 1126 (4th Cir. 1995), cert. denied 514 U.S. 1037 (1995). Indeed, as discussed further below, despite Postal Service presenting the change as a fait accompli, the Union did make attempts to bargain over it and those attempts were, in fact, futile because the Postal Service would not discuss altering its decision. The conclusion that the Postal Service provided the Union with notice of the expanded partnership with Staples as a fait accompli is supported, first, by the fact that the Postal Service has continuously maintained that it did not have an obligation to bargain over that change. See, e.g., *Solutia, Inc*., 357 NLRB 58, 64 (2011), enfd., 699 F.3d 50 (1st. Cir. 2012); *Pontiac Osteopathic Hosp.*, 336 NLRB at 1023-1024, *Keystone Consol. Indus.*, 309 NLRB 294, 297 (1992), revd. on other grounds in 41 F.3d 746 (D.C. Cir. 1994), and *Westinghouse Elec.*, 313 NLRB at 453. The letter dated September 8, 2014, that the Postal Service sent to inform the Union that it was expanding the Staples partnership to 44 stores beyond the pilot-test locations, and the October 2, 2014, letter that it sent to inform the Union that it was expanding the Staples partnership nationwide to approximately 1600 locations, both included language by which the Postal Service disavowed any legal obligation to provide the Union with notice, much less an opportunity to bargain, about the change. The Postal Service has continued to argue, up to and including in its posthearing brief, that it had no obligation to bargain with the Union over the decision to embark on the nationwide retail partnership with Staples. The Postal Service's continual insistence that it does not, and never did, have to bargain over the change supports the conclusion that it had no intention of bargaining and presented its decision to the Union as a fait accompli.

Under Board precedent, the change was presented as a fait accompli for another reason. The Postal Service did not provide the Union with adequate time to react to the notice of the change before implementing it. See, e.g., *Concord Honda*, 363 NLRB No. 136, slip op. at 9 (2016); *Downtown Toyota*, 276 NLRB 999, 1020 (1985), enfd. sub nom. *NLRB v. Sullivan*, 859 F.2d 924 (9th Cir. 1988); *Exchange Parts*, 139 NLRB 710, 726 (1962), enfd. 339 F.2d 829 (5th Cir. 1965). The fact that, as here, the change will be implemented over a period of time does not alter that the change itself was presented as a fait accompli. *S & I Transportation, Inc.*, 311 NLRB 1388, 1388 n.1 (1993). The timing of notice in the instant case is comparable to that the Board found showed a failure to bargain in *Borg Warner Corp.*, 245 NLRB 513, 518-519 (1979), enfd. 663 F.2d 666 (6th Cir. 1981), cert. denied. 457 U.S. 1105 (1982). There the Board held that the employer did not meet its obligation to provide an opportunity to bargain where it gave the union just 10 days prior to implementation of a decision it had made nearly 2 months earlier. In the instant case, the Postal Service sent the September 8 and October 2 letters about the Staples expansion over 2 months after the contracts to do so were executed, but only days before implementation. As in *Borg Warner*, the disparity between the months that the Postal Service waited to provide notice after the decision was made, and the few days' notice that it gave the Union to react before implementation, shows that the employer presented the decision as a fait accompli. Indeed, Dean testified that as of September 3 – before the Postal Service sent either the September 8 or the October 2 letter to the Union – the Staples approved shipper partnership that it had agreed to on July 3 was already underway.

The fact that the Postal Service presented its decision to the Union as a fait accompli is confirmed by management's refusals to consider the Union's expressions of concern about the program and its requests that the program be changed or abandoned. In November 2013, during the pilot stage of the Staples partnership, Dimondstein met with postmaster general Donahoe and objected that the program would have a detrimental effect on unit employees. Donahoe responded that the horses had left the barn and that management would go ahead with the program. Nevertheless Dimondstein continued to raise the Union's objections to the

program with management multiple times each month. On more than one occasion Dimondstein made a proposal that the employee opportunities fund be used to put unit employees into the Staples pilot operations, but the Postal Service refused to engage in discussions addressing the Union's objections and proposal. When the Union requested information about the Staples pilot program so that it could better understand what the Postal Service was doing with Staples and the repercussions on unit work, the Postal Service, as the Board previously found, illegally refused to provide the information. When the Postal Service told the Union that it was reconstituting the pilot of the Staples partnership as a version of the approved shipper program, Dimondstein met with Brennan and told her that the Union needed "input and a chance for negotiations," but Brennan only offered to provide better notice about initiatives the Postal Service had already decided to pursue. On August 29, 2014, the Union requested information about the Postal Service's plan to go ahead with the Staples partnership expansion under the "approved shipper" heading, but the Postal Service resisted providing that information, relying on arguments similar to those it asserted when it unlawfully refused to provide information during the pilot stage. In November 2014, after the Postal Service informed the Union that the Staples partnership under the approved shipper program was to be expanded to include all Staples locations nationwide, Dimondstein stated that the Union was seeking "broad negotiations . . . around retail," but postmaster general Donahoe said the Postal Service would not consider a change in course. The Postal Service's conduct shows that it had no intention of bargaining over its decision to enter into a nationwide partnership with Staples using the approved shipper designation and that it informed the Union of its decision as a fait accompli.

To sum up, I find that the Postal Service provided the Union with incomplete and misleading information about its retail partnership with Staples, resisted (unlawfully in the case of the Staples pilot) the Union's requests for additional information that likely would have revealed that is plans included the diversion of bargaining unit work, and presented the Staples approved shipper program to the Union as a fait accompli over which it said it had no obligation to bargain. Despite that, the Union attempted to engage the Postal Service in bargaining over the program, and the Postal Service responded that the program was not subject to change and otherwise refused to bargain.

C. The Postal Service's Other Defenses

1. Waiver/Due Diligence Defense: The Postal Service argues that finding a violation is not appropriate because the Union waived bargaining by failing to make a request to bargain, or otherwise exercising due diligence to bargain, after the Postal Service provided the Union with a letter regarding the Staples approved shipper program on July 7, 2014. For the reasons discussed above, the July 7 letter, and the other letters the Postal Service sent to the Union regarding the planned expansion of the Staples partnership were not adequate notice because they concealed key details about the plan and were misleading. Moreover, the July 7 letter primarily relied on by the Postal Service makes no mention of any expansion of the program beyond the 80 or so pilot locations, and certainly does not notify the Union of the Postal Service's plan to expand the partnership to almost 20 times its size by including approximately 1600 Staples locations nationwide. Moreover, as discussed above, the Postal Service, in the letters regarding the subject, presented the Staples partnership and expansion as a fait accompli and therefore a failure bargain violation would be shown even if the Union had not requested bargaining. *Westinghouse Elec. Corp.*, 313 U.S. at 453.

Assuming that the Postal Service was correct that, even under the circumstances present here, a bargaining violation should not be found in the absence of a Union request to bargain, a violation is still established since the Union did request bargaining. Dimondstein

attempted to initiate discussions with the Postal Service about the Staples partnership by, inter alia, making a proposal that unit employees be placed in participating Staples locations, telling Brennan that the Union needed "a chance for negotiations," and informing postmaster general Donahoe that the Union was seeking "broad negotiations . . . around retail."

Moreover, the Union made information requests regarding the Postal Service's retail partnership with Staples both at the pilot stage and when the Postal Service decided to expand the partnership nationwide using the approved shipper designation. As the General Counsel correctly notes, it is well settled that "a request for information is tantamount to a demand for bargaining," *Lawrence Livermore National Security, LLC*, 357 NLRB 203, 206 (2011), citing *Sterling-Salem Corp*., 231 NLRB 336, 337 fn. 6 (1977); *Dubuque Packing Co.*, 303 NLRB at 398, n. 36, *Biewer Wisconsin Sawmill*, 306 NLRB 732 n.4 (1992); *Pak-Well*, 206 NLRB 260, 261 (1973). It is especially appropriate under the circumstances present here to find that the Union's information request was a request to bargain that triggered an obligation to refrain from making a unilateral change because at around the same time the Union approached the Postal Service to discuss objections to the change. See *Oak Rubber Co.*, 277 NLRB 1322, 1323 (1985) (information request made close in time to request to "try and work out any problems" further indicated a timely bargaining request), enfd. denied mem. 816 F.2d 681 (6th Cir. 1987). Under the circumstances, the Postal Service cannot force the Union to "buy a pig in a poke" by either engaging in comprehensive negotiations over, and potentially agreeing to, a complex program that the Postal Service was largely hiding from view, or constructively agreeing to that program through an implied waiver. See *Vore Cinema Corp*., 254 NLRB 1288, 1292 (1981) (union is "not . . . required to buy a 'pig in a poke,'" where the employer withheld information). The Postal Service, rather than meet its responsibility to refrain from making changes with the respect to the subject matter of the information requests, reacted by unlawfully refusing to provide the information requested about the Staples pilot program, raising similar arguments to avoid providing the information requested about the Staples approved shipper expansion, and proceeding to make the changes unilaterally.

The Postal Service's argument is also unpersuasive because it relies on slicing up into discrete slivers the Union's efforts to meaningfully engage the Postal Service over the Staples partnership, and then asserting that none of those individual slivers is independently adequate to show due diligence. This is not persuasive. To begin with, a number of those individual slivers – for example, the Union's information requests about the Staples partnership – were tantamount to a request to bargain. But more importantly, the fact is that the Union did not merely file an information request regarding the change; and it did not merely request to meet with the Postal Service about the change; and it did not merely inform the Postal Service repeatedly of objections to the Staples partnership; and it did not merely tell the Postal Service that the Union needed a chance to negotiate about the retail initiatives; and it did not merely make a proposal to place unit employees at Staples partnership locations in order to minimize or avoid the diversion of work to non-unit employees; and it did not merely file a grievance and an unfair labor practice charge about the change. Rather, the Union did *all* of those things. Not only that, but it did them despite the fact that the Postal Service engaged in a campaign of withholding relevant information, providing incomplete and misleading notice, insisting that it had no obligation to bargain, presenting the change to the Union as a fait accompli, and responding to the Union's efforts to discuss the matter by making clear that the Postal Service would not consider altering its plans.

To the extent that the Postal Service's argument regarding due diligence is based on the contention that the Union waived its right to bargain over the Staples retail partnership expansion because it took no action when the Postal Service implemented earlier versions of

the approved shipper program, Brief of Respondent at Page(s) 46-48, that argument is without merit. In this regard the Respondent relies on *Westinghouse Electric Corp. (Mansfield Plant)*, a decision from 1965 in which the Board found that an employer had not violated the Act by unilaterally subcontracting work where, inter alia, it had freely subcontracted thousands of times in the past without restriction, where the new subcontracting did not "vary significantly in kind or degree" from the prior subcontracting, and where the subcontracting had "no demonstrable adverse impact on employees in the unit. 150 NLRB 1574, 1577 (1965). In the years since *Westinghouse (Mansfield Plant)* was issued, a number of the Board's decisions on the subject, while not mentioning *Westinghouse (Mansfield Plant)*, have cast some doubt on the continuing viability of the language that the Postal Service relies on from that decision. In a prior decision involving the Postal Service, the Board found that even where a union "failed to challenge prior labor-cost reductions, '[a] Union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time.'" *Postal Service*, 306 NLRB 640, 642-643 and n. 15 (1992), enf. denied 8 F.3d 832 (D.C. Cir. 1993). The same principle led the Board to find violations of the duty to bargain in *Johnson-Bateman Co.*, 295 NLRB 180, 187-188 (1989) and *Owens-Corning Fiberglas Corp.,* 282 NLRB 609 (1987).

Even assuming that the *Westinghouse (Mansfield Plant)* language cited by the Postal Service still reflects the state of the law on the subject, the Postal Service's reliance on it is misplaced because the nationwide retail partnership that it implemented with Staples in 2014 using the approved shipper label *does* "vary significantly in kind" from the approved shipper program it initiated in 2005 and 2006. First, in 2005 and 2006 the Postal Service expressly described the approved shipper program to the Union as one under which the retailers would receive no discounts or compensation for participating. This meant that the retail partners would have to charge higher prices than those available at union-staffed post offices in order to make a profit on individual transactions. Where such a price differential existed, customers would have an economic incentive to continue taking their business to post offices. Under the version of the approved shipper program at-issue here, on the other hand, Staples was *required* to sell the postal service products for the *same price* charged at post offices and was granted discounts by the Postal Service in order to make it possible for Staples to do that while still turning a profit on individual transactions. Second, when the Postal Service initiated the approved shipper program in 2005/2006 it told the Union that the program would be open only to retailers that were *already providing* Postal Service products and/or services. The Staples approved shipper program, on the other hand, expanded the program to a total of 1600 *new* locations, over 1500 of which were not selling postal service products prior to July of 2014, and none of which were doing so prior to 2013. Many of those new locations were in close proximity to existing post offices. Such an expansion, along with the elimination of any pricing advantage for post offices, meant that the Staples version of the approved shipper program, as opposed to early programs that used the approved shipper label, would entail a far more substantial diversion of unit work.

Application of *Westinghouse (Mansfield Plant)*, supra, also requires that the subcontracting have "no demonstrable adverse impact on employees in the unit," and the Postal Service's reliance on that decision fails to meet that requirement as well. The Postal Service's own SIAG review concluded that a very similar Staples expansion that, like the one at issue here, expanded the Staples retail partnership to either all 1600 locations nationwide (or in the alternative to only 200-300 additional locations) and under which Staples charged standard post office rates, would have a significant impact on bargaining unit work. The Postal Service knew this, and then decided to avoid the implications of that knowledge by reconstituting the expansion using the "approved shipper" label and neglecting to consult SIAG about whether that "approved shipper" plan would also have a significant impact on unit work. Other Postal Service

documents and reports confirm that it was using the retail partnerships, including the Staples approved shipper program, to reduce labor costs by shifting work from unit employees at post office counters to Staples and other retail partners.

During the years between the first appearance of the approved shipper program in 2005 and the announcement of the very different Staples program using the "approved shipper" label in 2014, the Postal Service took a number of steps that amount to a kind of creeping subcontracting. The Staples approved shipper program was not merely the addition of a new participant to a fully defined framework, but another step in that evolution. Even the more recent prior versions of the program that the Postal Service initiated with other large retailers were different than the Staples version, although the Union could not be expected to have been aware of those differences given the Postal Services' campaign of concealment. The differences include the Postal Service making per-location cash payments to Staples that were not in other approved shipper agreements, and the execution with Staples of the first "enterprise" level agreement with a national retail chain. I am reminded of the allegory of the frog that when placed in a pot of boiling water jumps out, but when placed in a pot of cold water that is gradually heated does not react before it is cooked.[25] Here the approved shipper initiative is like the pot of cold water, and the Postal Service seems to have hoped that if it heated the water gradually enough, the Union would be like the frog that does not jump out of the pot before it is too late. In this case, however, the frog jumped.

2. Express Contractual Waiver: The Postal Service attempts to defend its actions by arguing that the Union waived its right to bargain over the Staples approved shipper program when it agreed to Article 3 of the CBA, which has been in effect since at least 2007. Contractual waiver is an affirmative defense and the respondent has the burden of showing that the contractual waiver is explicitly stated, clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708-709 (1983); *Quality Roofing Supply Co.*, 357 NLRB 789 (2011); *Provena St. Joseph Medical Center*, 350 NLRB 808, 810-811 (2007).

The Postal Service, in its brief, attempts to establish clear and unmistakable waiver by quoting Article 3 as stating that the employer "shall have the right . . . to determine the methods, means, and personnel by which such operations are to be conducted." Brief of Respondent at Page 45. However, the Postal Service conveniently deletes a key phrase. What Article 3 actually says is: "The Employer shall have the exclusive right, *subject to the provisions of this Agreement and consistent with applicable laws and regulations:* . . . D. To determine the methods, means, and personnel by which such operations are to be conducted." Jt. Exh. 2 at Page 6 (emphasis added). The Respondent's contractual waiver argument fails for multiple reasons, including that, as discussed above, the Respondent made the unilateral change regarding a mandatory subject of bargaining in violation of Section 8(a)(5) of the Act and therefore was not acting "consistent with applicable laws."

The Respondent's contractual waiver argument fails for a second reason. Article 3 expressly provides that any management rights it creates are "subject to the provisions of" of the CBA and here the CBA *does* prohibit management from unilaterally outsourcing unit work. Subsequent to the creation of Article 3, the Union successfully negotiated an appendix to the

[25] "The boiling frog is an anecdote describing a frog slowly being boiled alive. The premise is that if a frog is put suddenly into boiling water, it will jump out, but if it is put in cold water which is then brought to a boil slowly, it will not perceive the danger and will be cooked to death. The story is often used as a metaphor for the inability or unwillingness of people to react to or be aware of threats that rise gradually." Boiling Frog entry, Wikipedia, downloaded October 14, 2016.

CBA that prohibits management from unilaterally engaging in outsourcing of the kind at issue here. That appendix states that the parties agree "that it is in their best interest to meet and discuss national outsourcing initiatives at an early stage in the process" so that the Union has an "opportunity to compete for the work internally at a point in time contemporaneous with the outsourcing process and early enough to influence any management decision." Moreover, the CBA appendix prohibits the Postal Service from outsourcing the work if the Union shows that it "can be performed at a cost equal to or less than that of contract service, when a fair comparison is made of all reasonable costs." Since the Postal Service embarked on the Staples approved shipper expansion in violation of these requirements of the CBA, its action was not authorized by Article 3. Moreover, Article 3 is also subject to Article 19 of the CBA which requires that management not only give the Union special notice and documentation regarding Handbook changes that relate directly to wages, hours or working conditions, but also provides that the Union has the right to meet with "manager(s) who are knowledgeable about the purpose of the proposed change and its impact on employees." As discussed in the Statement of Facts, the Postal Service added the approved shipper program to the Handbook without fulfilling the Article 19 requirements for notice, documentation, and meeting. For this reason as well, Article 3 did not authorize the Postal Service to unilaterally embark on the nationwide Staples approved shipper expansion.

Even if Article 3 was not subject to other contractual provisions that disallow the Postal Service's unilateral action, the Postal Service's argument based on Article 3 would fail because a management rights clause that does not mention the specific change at issue does not constitute the required clear and unmistakable waiver of bargaining, especially in the absence of bargaining history showing that the specific waiver was considered and intended. See *Minteq Int'l, Inc.*, 364 NLRB No. 63, Slip Op. at 4-5 (2016); *Allison Corp.*, 330 NLRB 1363, 1365 (2000); *Trojan Yacht*, 319 NLRB 741, 742 (1995). Indeed, the Board has already rejected the Postal Service's similar attempt to rely on Article 3 in another case. In that case, the Board ruled that Article 3 did not constitute a clear and unmistakable waiver of bargaining with respect to reductions in operating schedules and window service because it did not "specifically refer[] to the type of employer decision or mention[] the kind of factual situation presented." In the instant case, Article 3 does not specifically refer to the Postal Service's nationwide Staples approved shipper program or for that matter to any nationwide retail partnership or licensing arrangement. *Postal Service*, 306 NLRB at 642-643. At trial, no testimony at all was presented directly addressing Article 3. No witness from the Postal Service, much less from the Union, testified that Article 3 was intended by the parties as a waiver of bargaining with respect to retail partnerships with outside entities in general or the Staples approved shipper partnership in particular.[26]

For the reasons discussed above, I find that the Postal Service has violated Section 8(a)(5) and (1) of the Act since August 2014, by failing to give the Union notice and an opportunity to bargain about its decision, and the effects of its decision, to shift bargaining unit work from window clerks at post offices to others outside the bargaining unit through the nationwide retail partnership with Staples.

[26] The Postal Service notes that the Court of Appeals for the D.C. Circuit denied enforcement of the Board's decision relating to Article 3, based on its rejection of the Board's "clear and unmistakable" waiver standard, in favor of the Circuit's own "contract coverage" standard. The Board continues to expressly reject the "contract coverage" standard. The Board noted that its own "clear and unmistakable" waiver standard is one of the Board's "most familiar" doctrines and "has been applied consistently by the Board for more than 50 years, and has been approved by the Supreme Court." *Provena St. Joseph Medical Center*, 350 NLRB at 810-811, citing *NLRB v. C & C Plywood*, 385 U.S. 421 (1967).

Conclusions of Law

1. The Board has jurisdiction over the Postal Service and this matter by virtue of Section 1209 of the Postal Reorganization Act.

2. American Postal Works Union, AFL-CIO (the Union or APWU) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Postal Service has violated Section 8(a)(5) and (1) of the Act since August 2014 by failing to give the Union notice and an opportunity to bargain about its decision, and the effects of its decision, to shift bargaining work from unit employees at post office counters to others outside the bargaining unit through a nationwide retail partnership with Staples, that is referred to in this decision as the Staples approved shipper program. By this conduct the Postal Service has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Where a respondent makes a unilateral change in violation of Section 8(a)(5), the standard remedy includes rescission of the change and restoration of the status quo ante. See, e.g., *San Luis Trucking, Inc.*, 352 NLRB 211, 237-238 (2008);[27] *Cub Branch Mining, Inc.*, 300 NLRB 57, 61-62 (1990); *N.C. Coastal Motor Lines, Inc.*, 219 NLRB 1009, 1009-1010 (1975), enfd. 542 F.2d 637 (4th Cir. 1976). The Board has extended this principle to require contract rescission where, as here, an employer fails to give the union the statutorily required notice and bargaining opportunity before entering into a third party contract that impacts bargaining unit employees. See, e.g., *Buffalo Weaving and Belting*, 340 NLRB 684, 685 fn. 2 (2003); *Tennessee Const. Co.*, 308 NLRB 763, 764-765 (1992); *General Electric Co.*, 296 NLRB 844 (1990), enfd. 915 F.2d 738 (D.C. Cir. 1990); *St. John's Const. Corp.*, 258 NLRB 471, 481-482 (1981); *Jay Foods, Inc.*, 228 NLRB 423 (1977); *R.L. Sweet Lumber Co.*, 227 NLRB 1084, 1989 (1977); *Town & Country Manufacturing Co., Inc.,* 136 NLRB 1022, 1029-1030, enfd. 316 F. 2d 846 (5th Cir. 1963). The General Counsel and the Union both argue that rescission is a necessary

[27] This decision was remanded to the Board by the Court of Appeals for further proceedings consistent with the intervening decision of the United States Supreme Court in *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010). Thereafter, the Board issued a second decision, 356 NLRB 168 (2010), that adopted the relevant portions of its pre-remand decision and the second decision was enforced by the Court of Appeals, 479 Fed. Appx. 743 (9th Cir. 2012).

and proper remedy here. Staples was granted intervenor status in this case limited to presenting evidence and argument regarding the potential impact of a remedy.[28]

Staples' argument for denying the rescission remedy, relies on the contention that forcing the Postal Service to rescind the approved shipper program with Staples would result in unfair harm to Staples, an innocent third party. The Board has held that in cases involving subcontracting, the standard remedy includes restoration of the status quo unless a party establishes that restoration would be unduly burdensome. *Buffalo Weaving Belting*, supra; *Lear Siegler, Inc.*, 295 NLRB 857 (1989); *Cities Service Oil Co.*, 158 NLRB 1204 (1966). I note at the outset that an order requiring the Postal Service, upon request from the Union, to rescind the approved shipper arrangement with Staples allows for the possibility that the Postal Service and the Union would negotiate a post-decision accommodation that does not require discontinuation of the program. Even assuming that the Union ended up insisting on rescission of the approved shipper arrangement with Staples, the Order would not prohibit the Postal Service from engaging in such a program with Staples, it would only require the Postal Service to first bargain with the Union – something the Postal Service has illegally refused to do thus far.[29] Either of these scenarios would restore the Union's rightful bargaining position while mitigating the attendant harm to Staples. Finally, even if Staples does not succeed, post-rescission order, in continuing or resuming participation in the approved program, that would apparently not prevent it from selling some of the same products and services since the Postal Service has represented that there is no legal impediment to retailers doing just that, with or without the Postal Service's agreement or oversight. At the hearing, counsel for the Postal Service stated: "[T]here is no law or regulation that prohibits a retailer or anyone from purchasing and reselling Postal Service products and services. You could do it, Judge. I could do it. Retailers were already doing this with makeshift signs and outside the Postal Service's control." Tr. 147-148.

In addition, after reviewing the record, I find that discontinuation of the Staples approved shipper program would cause financial harm to Staples, but also find that the record does not

[28] On November 4, 2015, the Board reversed my earlier order granting Staples full intervention status in this case, and stated that Staples' "interest is limited to the potential effect of the litigation on Staples, particularly the potential impact of any remedy if the Respondent is found to have violated the Act." Staples moved for limited intervention status, and on November 30, 2015, I granted such status. Consistent with Board's November 4 order, I specified that the scope of Staples' limited intervention included filing a post-hearing brief "on the potential impact of any remedy on Staples," and expressly disallowed Staples from participating "regarding the question of whether the Respondent subcontracted, failed to bargain, or committed any violation alleged in the complaint." In Staples post-hearing brief it blatantly violated the limits on its participation by arguing, expressly and at length, that the General Counsel failed to demonstrate subcontracting or a refusal to bargain. These arguments on the underlying merits appear not only in the sections of the brief with headings that reference such arguments (Argument Section I.A. and I.B.), but are also forwarded in the brief's Introduction and are intertwined with the Factual Background section. Counsel for the Union and Counsel for the General Counsel have both moved that Staples' brief be stricken in its entirety. The Union's and the General Counsel's motions to strike are granted to extent that I order Staples' brief stricken with the exception of Argument section II, which begins on page 22 of the brief, and which focuses on the potential impact of the rescission remedy on Staples. I give no weight or consideration to other portions of Staples' brief.

[29] As was noted in *St. George*, supra, "Absent discriminatory intent, nothing in the law prevents the Respondent from making and implementing a decision" to shift work from unit employees to others outside the unit. "What the law requires is that it first offer to bargain about such a decision." 341 NLRB at 1014-1015.

credibly establish the extent of such harm or that such harm would unduly burden Staples. Staples did not present documentary evidence substantiating the amount of financial harm, but rather relied on the testimony of Leigh (Postal Service senior vice president of business services) on that subject. Leigh's testimony regarding dollar figures, however, careened wildly and I find that he was not a reliable witness in that regard. For example, at first Leigh implausibly claimed that Staples' cost for making modifications necessary for the approved shipper program was $500,000 per store. Tr. 1255. When Staples' own counsel questioned this surprising figure, and pointed out to Leigh that he had previously testified that the total cost for all 540 stores was $11.5 million, Leigh dramatically reduced his per store estimate to $50,000 – one tenth of what he had claimed just moments before. Ibid. Even the $50,000 cannot be squared with Leigh's other testimony since dividing the $11.5 million figure among 540 participating stores works out to an average per store cost of $21,296 – still less than one half of Leigh's revised figure. It would seem that even that lower figure would have to be adjusted downward to reflect the fact that the Postal Service reimbursed some of Staples' per-store costs. Leigh's testimony was similarly unbelievable regarding the amount of revenue that Staples would lose directly from its sales margins at the existing approved shipper locations. At first he testified, during direct examination, that in 2015 the revenues that Staples obtained from its margins on Postal Services products and services (i.e., from selling at full list price what it obtained from the Postal Service at a discounted price) had reached $27 million. Tr.1260. However later in his testimony, and still under direct examination, Leigh, without explanation, set that figure at $2.7 to $3 million – only about a tenth of what he had previously claimed. Tr. 1268 lines 17-18, Tr. 1269 line 22 to Tr.1270 line 3. Leigh also testified about dollar amounts for costs including: the storage of signs that had been purchased in expectation of further expansion; lost revenues from the additional customer traffic that the approved shipper program brought to stores; remodeling work per store to uninstall the trappings of the approved shipper program. He also stated that discontinuing the program would damage Staples' customer relations since many of its customers had become accustomed to, and pleased with, the approved shipper program.

Neither the General Counsel nor the Union presented evidence contradicting that Staples would suffer the categories of harm Leigh identified if, in fact, a rescission remedy forced Staples out of the approved shipper partnership. In my view, the record of this case, and common sense, justifies finding that many, if not all, of the categories of harm identified by Leigh, and discussed above, would be borne by Staples to some extent. However, I find that the record lacks credible evidence regarding the extent of those financial harms given that Leigh's testimony quantifying the harm was unreliable for the reasons discussed above,

Leigh also testified that discontinuing the approved shipper program at Staples' locations would put it at an unfair disadvantage with its competitors who would continue to have access to the approved shipper program. The record did show that the Union was not currently challenging the Post Office's approved shipper relationships with Office Depot, UPS, OfficeMax, PostNet, or any of the numerous smaller retailers. However, Dimondstein credibly testified that the Union's plan is that Staples will be just the first retailer challenged, and that the Union hopes to use any success regarding Staples as leverage to seek changes that would extend to other retailers that already participate in the approved shipper program or that enter into partnerships with the Postal Service in the future. Moreover, as discussed above, granting a rescission remedy would not necessarily lead to Staples being excluded from the program or precluded from offering Postal Service products and services.

Assuming I were to credit at least some of Leigh's figures, that would not show that the financial harm that Staples would suffer from a discontinuation of its participation in the approved shipper program would be unduly burdensome for Staples to bear. Staples has not

shown that discontinuation of that program would place an undue burden on it given the magnitude and profitability of Staples overall operation and other sources of revenue.

Finally, with regard to Staples' characterization of itself as an innocent third party, I view the situation as somewhat more complicated. It is true that there is no allegation that Staples committed a violation of the Act when it entered into its retail arrangement with the Postal Service. On the other hand, Leigh admitted that the initial impetus for Staples' decision to abandon the pilot program model, and switch to the approved shipper model, was its desire to circumvent the delays from union consultation and union input that it knew the Postal Service's own SIAG review had determined were required under Article 32 of the CBA. Similarly, Code's testimony indicated that the Postal Service reconstituted the expansion in that manner in part out of a desire to appease Staples. Second, the evidence showed that before Staples' retail relationship with the Postal Service was meaningfully underway, the Union's president had sought to meet with high level Staples officials to discuss the Union's concerns about the relationship, but that Staples refused to engage in any communication with the Union regarding those concerns. Third, throughout the period that Staples was forging ahead with the expansion and refusing to discuss the initiative with the Union, Staples was aware that the Union was publicly campaigning to stop the partnership between Staples and the Postal Service in its planned form. Thus while Staples did not violate the Act, it cannot plausibly suggest either that the company was unaware that what it was doing, and the way it was doing it, entailed financial and business risks or that the company was blind-sided by Union-initiated legal action to prevent its retail relationship with the Postal Service from going forward. Indeed, in their agreement, the Postal Service and Staples specifically contemplated, and accounted for, the possibility that their contract would have to be terminated as a result of "any orders . . . promulgated by any . . . agency or independent establishment of the United States Government." GC Exh. 26 at Pages 2-3.

Lastly, while there is appeal to the argument that it is unfair to visit the burden of the Postal Service's violation on a party that committed no violation of the Act, that argument provides no useful guidance on the question of the rescission remedy in this case. While denying such a remedy would mean that Staples was relieved of a burden, allowing the unlawful diversion of bargaining unit work to continue unabated would impose a burden on the Union, which also committed no violation of the Act. In other words, there is no approach available that does not burden an arguably innocent party.

In this case, the General Counsel states that it seeks the "standard remedy" including the rescission of the unilaterally adopted Staples approved shipper program, but does not specifically mention make whole relief for any loss of wages and benefits that unit members have suffered as a result of the diversion of work out of the bargaining unit. Such make whole relief has, however, been ordered as part of the status quo ante remedy in cases involving the subcontracting of unit work. See, e.g., *Buffalo Weaving and Belting*, supra; *Pollution Control Indus. of Indiana*, 316 NLRB 455, 467 (1995); *W.H. Froh, Inc.*, 310 NLRB 384, 388 (1993). As discussed above, the record does not identify any specific unit employees who have lost work because of the Staples approved shipper partnership, but the record did show that the Postal Service was using it to reduce unit work at post office counters. Under these circumstances I find that it is appropriate to order that make whole relief be provided to the extent, if any, that during the compliance stage of this proceeding it is established that specific employees lost work as a result of Staples approved shipper. Backpay, and other make whole relief, shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), 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). The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters and shall

also compensate the individuals for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[30]

ORDER

The Respondent, United States Postal Service, District of Columbia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to give the American Postal Workers Union, AFL-CIO (Union or APWU) notice and an opportunity to bargain over any decision, and the effects of any decision, to subcontract, or otherwise shift work, from bargaining unit employees at post office counters to others outside the bargaining unit through a retail partnership with Staples, Inc.

(b) In any like or related manner 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) On request by the Union, discontinue its retail partnership with Staples, Inc.

(b) On request by the Union, rescind the agreements, dated July 3, 2014, that it executed with Staples, Inc. in furtherance of their retail partnership.

(c) Make employees whole for any loss of earnings and other benefits suffered since August 2014, as a result of the Postal Service unlawfully shifting work from bargaining unit employees at post office counters to others outside the bargaining unit through its retail partnership with Staples, Inc.

(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 payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its post offices nationwide copies of the attached notice marked “Appendix.” Copies of the notice, on forms provided by the Regional Director for Region Five, after being signed by the Postal Service’s authorized representative, shall be posted by the Postal Service 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

[30] 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.

as by email, posting on an intranet or an internet site, and/or other electronic means, if the Postal Service customarily communicates with its employees by such means. Reasonable steps shall be taken by the Postal Service 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 Postal Service has gone out of business or closed a facility involved in these proceedings, the Postal Service shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Postal Service at any time since August 2014.

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

Dated, Washington, D.C., November 8, 2016

PAUL BOGAS
Administrative Law Judge

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 to give the American Postal Workers Union, AFL-CIO (Union or APWU) notice and an opportunity to bargain over any decision, and the effects of any decision, to subcontract, or otherwise shift work, from bargaining unit employees at post office counters to others outside the bargaining unit through a retail partnership with Staples, Inc.

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

WE WILL, on request by the Union, discontinue our retail partnership with Staples, Inc.

WE WILL, on request by the Union, rescind the agreements, dated July 3, 2014, that we executed in furtherance of our retail partnership with Staples, Inc.

WE WILL make employees whole for any loss of earnings and other benefits suffered since August 2014, as a result of our unlawfully shifting work from bargaining unit employees at post office counters to others outside the bargaining unit through our retail partnership with Staples, Inc.

United States Postal Service
(Employer)

Dated _____ By _____
(Representative) (Title)

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

Bank of America Center, Tower II, 100 S. Charles Street, Ste 600, Baltimore, MD 21201-4061

(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-140963 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.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (410) 962-2864.