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

SOUTHERN CALIFORNIA EDISON

and

Cases 21–CA–150088
21–CA–160924

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 47, AFL-CIO

Alice Garfield, Esq.,
for the General Counsel.
John Buchanan and *Jenny Sievers, Esqs.,*
for the Respondent.
Jonathan Cohen , Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Los Angeles, California, on March 15 and 16, 2016. The International Brotherhood of Electrical Workers, 47, AFL-CIO (the Union) filed the charge in Case 21-CA-150088 on April 14, 2015, and the charge in Case 21-CA-160924 on September 28, 2015. The General Counsel issued an order consolidating cases, consolidated complaint and notice of hearing (the complaint) on December 23, 2015. Before the hearing opened on March 15, 2015, the Respondent and the Union entered into a non-Board adjustment resolving Case 21-CA-160924, which was conditionally approved by the Regional Director of Region 21. Accordingly, at the opening of the hearing the General Counsel moved to sever the allegations in the complaint relating Case 21-CA-160924. I granted the motion to sever and consequently paragraph 9, and portions of paragraphs 10 and 11 of the complaint, were not litigated at the hearing and I make no findings or conclusions with respect to those allegations.

As amended at the hearing, the complaint alleges that since about March 27, 2015, the Respondent has refused to bargain over its discontinuation of funding for the Diamond Club, an employee social club, in violation of Section 8(a)(5) and (1) of the Act.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a California corporation, has principal offices located in Rosemead, California, and has facilities located throughout Southern California where it is engaged in the production and distribution of electricity. Annually, the Respondent derives gross revenues in excess of $250,000 and purchases and receives at its Southern California facilities goods valued in excess of $50,000 directly from points outside the State of California. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Facts

Background

The Respondent and the Union have had a collective-bargaining history since 1944. The most recent collective-bargaining agreement between the parties is effective by its terms from January 1, 2015, through December 31, 2018. This agreement was executed in approximately July 2015, at the conclusion of negotiations that began in approximately November 2014. Pursuant to an agreement between the parties, the terms of their prior collective-bargaining agreement, which was effective by its terms from January 1, 2012, through December 31, 2014, was extended until the 2015-2018 agreement was executed. (Jt. Exhs.1 and 2; Tr. 111.) Pursuant to the recognition clause of the 2012-2014 collective-bargaining agreement set forth in Article 1, the bargaining unit represented by the Union consists of a number of classifications, which are listed in Exhibit A to the collective bargaining agreement. (Joint Exhs. 1 and 2). There are approximately 4100 employees in the bargaining unit and these employees work in a 50,000 square mile area in Southern California. The Respondent presently employs approximately 13,000 individuals including represented and unrepresented employees, supervisors, professional employees, managers, and executives.

The Diamond Club

The Diamond Club was formed in 1938 by active and retired individuals who had 25 years of service with the Respondent. The only requirement for membership was 25 years of service for the Respondent and the receipt of a "Diamond Pin" which the Respondent awarded to all employees who attained that level of service. All individuals who had attained 25 years of service became members, including supervisors within the meaning of the Act, bargaining unit employees, and unrepresented employees. The minutes of the first meeting of the Diamond Club held on April 29, 1938, reflects that the question of whether females with 25 years of service

would be eligible for membership was considered but, with the agreement of the females, it was determined that they would not become members of the Diamond Club (R. Exh. 1).[1] The minutes of this meeting reflect that there were 263 men and 10 women who had attained 25 years of service with the Respondent. With respect to the males, 198 were in active service and 65 were retired.

Article Two of the 1938 constitution and bylaws of the Diamond Club (R. Exh. 3) indicated the following:

> The purpose of the club will be to unite into a permanent social organization all male employees of the Southern California Edison Co., Ltd., both active and retired, who have completed twenty-five or more years of continuous service with the Southern California Edison Company Ltd., or its subsidiaries and have received their Diamond Pin; to renew and maintain old acquaintanceships; to foster and preserve the history and tradition of the company, to act as an organization independent of all other Company activities.

Article Four of the 1938 constitution and bylaws provided that:

> No regular dues shall be assessed against the membership, and all necessary funds shall be raised by donation from members of the regular meetings. There shall be no donation asked from the Company.[2]

The 1938 Constitution and bylaws further provided that the officers of the club would include a president, a first vice president, a second vice president, secretary, treasurer, and a historian and that these individuals would be elected by the membership of the club.

Throughout its history, the Diamond Club has generally maintained continuity in its purpose and structure. In this regard, the current constitution and bylaws of the Diamond Club (R. Exh. 4) reflect that its purpose is:

> To unite all active and retired employees who have completed 25 years of active service with Edison International, its predecessors and/or subsidiaries, into a permanent organization;
> To update its members with current issues and changes of Edison International so that such members, with their past experience and background, can add value to the corporation;

[1]Shortly after formation of the Diamond Club, the 10 females with 25 years of service formed their own club, the Diamondette Club. In 1970 the Diamondette Club was merged into the Diamond Club and the constitution of the club was amended to reflect that membership in the club was composed of all active and retired employees who had completed 25 years of active and continuous service with the Respondent. (R. Exh. 12) Cheryl Anderson, the current secretary of the Diamond Club and a current employee of the Respondent, credibly testified with respect to the historical evolution of the Diamond Club. Her testimony is corroborated by the records of the Diamond Club which Anderson is responsible for maintaining.

[2] The Diamond Club constitution and bylaws were amended in 1970 to eliminate the prohibition from seeking donations from the Respondent. (R. Exh. 12, p. 2.)

> To renew and maintain old acquaintanceships;
> To foster and preserve the history and tradition of Edison International.

The current constitution and bylaws provide that:

> The membership shall be composed of all active and retired employees who have completed 25 years of active service, continuous or bridged, with Edison International, its predecessors and/or subsidiaries, and who have received a Diamond Service Pin in recognition of such service.

The current constitution also provides that: "No dues, initiation fees or assessments shall be levied against the membership." The current constitution also reflects that the elected officers of the Diamond Club constitute the Executive Board, which directs the affairs of the organization.

Historically, the major activity conducted by the Diamond Club has been semiannual dinners that it holds in the spring and fall, which all members are eligible to attend. At its inception, the members of the Diamond Club paid for their own dinners. An invitation to the October 14, 1938 dinner indicates that the cost of dinner for a member was $1.25 (R. Exh. 7). In an effort to raise funds, in March 1942 the president of the Diamond Club solicited members who were working to make a donation of $1 to cover incidental expenses. In doing so the president's letter indicated that the "Diamond Club is self-sustaining and not funded by the Company." (R. Exh. 9.)

At the Diamond Club meeting held on October 16, 1970, at which the merger of the Diamondette and Diamond Club was announced, there were 147 active employees present and 254 retirees. The total membership of the Diamond Club at that time was composed of 871 active employees and 1207 retirees.

According to the minutes of the spring meeting of the Diamond Club held on April 24, 1987, 616 members were in attendance at the dinner, 520 of which were retirees and 140 were actively employed. The total membership of the club was comprised of approximately 5150 members of which 3300 and retirees and 1850 were actively employed.

The records of the Diamond Club establish that over time the Respondent began to contribute funding to the operation of the Diamond Club. In this regard, a letter dated December 11, 1987, from then Diamond Club president, D. J. Fisher, to a representative of the Respondent Glory Mahan, responded to a request from another Respondent manager, Phil Martin,[3] with respect to evidence that the Respondent had authorized financial support for the Diamond Club in the past. (R. Exh. 10.) The letter referred to minutes of the Respondent's management committee meetings that established on January 17, 1947, the Respondent's managers recommended a contribution of $250 to the Diamond Club to apply to expenses regarding the April 1947 meeting of the Diamond Club. These minutes also reflected that on April 18, 1947, the Respondent authorized a contribution of $135 to the Diamond Club for identification badges

[3] Anderson's uncontradicted testimony establishes that in 1987 Martin held an executive position with the Respondent.

to be used at club meetings. The Respondent management meeting minutes further reflected that in January 1947, the Respondent authorized a contribution of $300 to the Diamond Club to cover the estimated cost of paying for the dinner of retired employees attending the April 1947 meeting and that a similar contribution was authorized for the October 1947.

The December 1987 letter from Fisher further indicated that when he met with Martin he brought to his attention that at that time new members of the Diamond Club received their initial dinner for free, that active members were subsidized for any cost over $10 and that club officers and committee members received their meals free of charge. Fisher's letter stated that Martin had indicated no desire to change any of those arrangements.

The uncontradicted testimony of Anderson establishes that from approximately 2010 until the spring of 2015, the Diamond Club executive board would meet monthly in a conference room at one of the Respondent's facilities. Normally, such meetings would be held during the lunch hour of actively employed individuals. The record establishes that during that same period the Diamond Club published and distributed a newsletter in the spring and fall of each year which, inter alia, indicated the dates of the upcoming dinner meetings. The newsletter listed the names of the new Diamond Club members who had attained the prerequisite 25 years of service for the Respondent. Along with the newsletter an invitation to the upcoming meeting was enclosed.[4] The newsletter and invitation would either be sent to an individual's home address or, at least for some active employees, was sent through intracompany mail to an employee's work station. Along with the invitation to the dinner, and a RSVP card was enclosed with instructions to return the RSVP to the designated member of the executive Board. The RSVP card could be returned through the Postal Service or, for active duty employees, through intercompany mail. According to Anderson's uncontradicted and credited testimony, the Diamond Club executive board would determine where and when the semiannual dinner meetings would be held, who the principal speaker would be, and the charity to which a donation would be made. The Respondent had no role in these matters.

In early 2012, there were approximately 9100 members of the Diamond Club and that number increased to approximately 9500 in 2013. At the hearing the parties stipulated that from 2012 through 2015 the following number of actively employed bargaining unit employees were eligible for Diamond Club membership and thus eligible to attend the semiannual dinners: 2012-1250; 2013-1031; 2014-1013; and 2015-1036. Anderson's uncontradicted testimony established that at the time of the hearing in March 2016, there were 9483 members in the Diamond Club; 2636 were active employees[5] and 6847 were retirees.

Since at least 2010, the spring and fall dinner meetings were held at a large hotel or resort in the Los Angeles area. The format of the dinner was that there were social hours between 4 and 6 p.m., and then dinner would be served. After dinner there would be a guest

[4] At the first dinner meeting that a member of the Diamond Club was eligible to attend, the new member could bring a guest. In addition, individuals who needed assistance to attend could bring an attendant, who was considered as a guest.

[5] Since Diamond Club membership is extended to all individuals who attain 25 years of service with the Respondent, including all statutory employees and statutory supervisors, the number of members who are actively employed substantially exceeds the number of unit employee members.

speaker, who typically would be a high-level executive of the Respondent.[6] After the speaker, any new members of the Diamond Club who were present were invited to come up on the stage. The new members were acknowledged as a group by the Diamond Club president and a group photograph was taken. The dinner program concluded with the award of door prizes. The spring 2015 newsletter indicated that Southern California Edison Credit Union provided as a door prize a $50 bill to 20 ticketholders while Edison International provided a $50 bill to 10 ticketholders. (GC Exh. 4)

Mark Bennett, the Respondent's director of human resource operations for approximately 8 years, testified that he oversaw a "general function budget" that the Diamond Club used to fund its activities. During Bennett's tenure until 2015, the Respondent would place approximately $150,000 year into an account that the Diamond Club drew from in order to fund its activities. Bennett testified that he understood that this donation funded all of the Diamond Club activities including the printing and mailing of the newsletter and invitations, and paying for all of the costs associated with the semiannual dinners. The Diamond Club's summary report for the fall 2014 dinner meeting (GC Exh. 11) indicates that the total cost of the dinner was $31,869.22. There were a total of 511 individuals who attended the fall 2014 dinner meeting, 130 were actively employed, 353 were retirees, and 13 were guests of a member. [7]

The Diamond Club submitted receipts for all expenses that it incurred for money drawn from the account established by the Respondent to fund its activities. The Diamond Club also has an account with the California Edison Credit Union. According to Bennett, he did not give any direction to the Diamond Club with respect to how it conducted its activities.

The record establishes that the Diamond Club is not referred to in the Respondent's benefit plans in any fashion. Bennett testified that the Respondent periodically compares benefit programs of the Respondent with those of other utilities in California, specifically Sempra Energy and Pacific Gas & Electric. In 2015, while conducting such a comparison, the Respondent determined that both of those entities had retirement clubs that were not at all funded by the company. Bennett testified that he provided that information to executives of the Respondent and a decision was then made to terminate the Respondent's sponsorship of the Diamond Club. According to Bennett, cost savings was at least part of the basis for the Respondent to terminate the funding for Diamond Club activities.

The Respondent's vice president for Regulatory Affairs and Nuclear, Ronald Powell Nichols, first notified Barbara Diaz, the Diamond Club president, and Anderson of the Respondent's decision to cease funding Diamond Club activities. Thereafter, Patricia Miller, the Respondent's vice president, human resources, sent a letter dated March 27, 2015, to all Diamond Club members, including unit employees, indicating, in relevant part:

[6] The speaker for the spring 2012 dinner was Lisa Cagnolatti, the vice president of the Respondent's business customer division. The speaker for the fall 2012 dinner meeting was Ted Craver, the chief executive of Edison International, the Respondent's parent company. The speaker for the final dinner meeting held in April 2015 was Pedro Pizarro, the Respondent's president.

[7] 12 club members were listed as "walk-ins," without an indication as to whether they were actively employed or retired and 3 "walk-ins" were listed as guests of a member.

> Edison has decided to discontinue its sponsorship of the semi-annual Diamond Club events, beginning with this year's fall dinner. This was not an easy decision, but we feel it is a necessary one as our company continues to focus on improving operational and cost efficiency. Changes in our industry have made the company's future challenging and complex, and many of our customers continue to battle a difficult economic environment. They need us to do all we can to make rates more affordable. The best way to help our customers and ensure the company's future is to make decisions and investments that keep the company strong. That includes keeping our expenditures focused on things that are critical to our operations.

The April 2015 Diamond Club newsletter indicated:

> After 77 years the SCE leadership team has recently informed the Diamond Club that the Company has decided to discontinue its sponsorship of the semi-annual Diamond Club events, beginning with the fall dinner this year. The company explained that this was not an easy decision, but a necessary step as one of many cost reductions as our company continues to focus on approving operational and cost efficiency. Each of the SCE operating units will continue to recognize the milestone anniversaries of employees in their own organizations.

It is undisputed that the Respondent did not give the Union notice and an opportunity to bargain over its discontinuation of funding of Diamond Club activities prior to its March 27, 2015 letter to Diamond Club members informing them of that fact. On April 14, 2015, the Union filed the charge in Case 21-CA-150088 alleging that the Respondent implemented a unilateral change in a mandatory subject of bargaining in violation of Section 8(a)(5) and (1) of the Act. (GC Exh. 1a.) On April 15, 2015, the Union's business manager, Patrick Lavin, sent an email (R. Exh. 209) to Pedro Pizarro, the Respondent's president,[8] with an attached letter indicating, in relevant part,

> We received notice that Southern California Edison decided to cease providing employees with the benefit of the biannual Diamond Club dinner. As this concerns a mandatory subject of bargaining, we hereby demand to bargain over the proposed change at your earliest convenience.

The letter requested the Respondent to contact the Union's counsel, Jonathan Cohen, with its earliest available dates.

The undisputed testimony of Michael Moore, the Union's senior assistant business manager, established that the parties had a long-standing practice, since at least 1981, of limiting bargaining for a successor agreement only to those issues raised by the parties in their initial proposals. Since the issue of the Respondent's discontinuation of funding for the Diamond Club arose after negotiations for a successor collective-bargaining agreement had begun, consistent with its prior practice, the Union sought separate negotiations over this issue.

[8] Lavin sent a copy of his email with the attachments to Steven Crowell, the Respondent's principal manager for employee and labor relations.

The Respondent never contacted Cohen to discuss its cessation of funding for the Diamond Club dinners. It is undisputed that the Respondent's discontinuation of funding for Diamond Club activities was not discussed by the parties during the negotiations for a new collective-bargaining agreement that concluded with the execution of the new agreement in July 2015.

Before the execution of the new agreement, the Respondent requested that the Union withdraw pending unfair labor practice charges. While the Union agreed to withdraw pending charges regarding the negotiations for a new collective-bargaining agreement, it would not withdraw the instant unfair labor practice charge involving the cessation of funding for the Diamond Club dinners.

The parties stipulated that prior to April 15, 2015, the Union had never requested bargaining over the Respondent's funding of Diamond Club activities and that no bargaining had ever occurred regarding that matter.

The last Diamond Club dinner meeting sponsored by the Respondent took place on April 17, 2015. Because it was the last such dinner to be funded by the Respondent, there was substantial interest in attending and several hundred people had to be notified that they could not attend because the maximum number of attendees that the venue could accommodate had been reached. Since the April 2015 dinner meeting the Diamond Club has not held such a dinner and it has not distributed any newsletters. In addition, since that time the Diamond Club executive board had conducted only two meetings prior to the March 2016 hearing in this matter. According to Anderson, the Diamond Club executive board has discussed merging with the retiree club of the "gas company," but no action had been taken in that regard.

The Contentions of the Parties

The General Counsel and the Union contend that the eligibility of bargaining unit employees to attend the Diamond Club semiannual dinners was an established condition of employment and therefore a mandatory subject of bargaining. Thus, they further contend that the Respondent's unilateral cessation of its funding to the Diamond Club constitutes a violation of Section 8(a)(5) and (1) of the Act. In support of this argument, the General Counsel and the Union assert that the Respondent never replied to the Union's request to bargain over this issue.

The Respondent's principal contention, made in its brief, is that its annual contribution to the Diamond Club to fund its activities was a gift and not a mandatory subject of bargaining and that it had no obligation to bargain over the cessation of its funding of the Diamond Club activities. The Respondent also argues that the Union's failure to request bargaining over the Respondent's funding of the Diamond Club for over 70 years supports its position that such funding was a gift and not an emolument of value attached to employment that would require bargaining. At the trial, the Respondent also argued that while the Union made a request to bargain over the cessation of funding to the Diamond Club, it did not raise the issue during the negotiations for a new contract that were occurring and thus questioned whether the Union's demand for bargaining was made in good faith.

Analysis

Whether the Respondent's Annual Contribution to the Diamond Club Constitutes a Mandatory Subject of Bargaining

Section 8(d) of the Act requires that an employer bargain with a union representing its employees with respect to "wages, hours, and other terms and conditions of employment." An employer and a union representing its employees are obligated to bargain with each other in good faith with respect to those enumerated statutory issues. The mandatory duty to bargain is limited to those subjects and with respect to all other matters, the parties are free to bargain or not to bargain. *NLRB v. Borg-Warner Corp*., 356 U.S. 342, 349 (1958); *North American Pipe Corp.,* 347 NLRB 836, 837 (2006), pet. for review denied sub nom. *Unite Here v. NLRB*, 546 F.3d 239 (2d Cir. 2008). Gifts given to employees by their employers are included among those matters not requiring bargaining. *North American Pipe Corp*., at 837.

It is clear that an employer's failure to bargain with the union representing its employees over mandatory subjects of bargaining violates Section 8(a)(5) and (1) of the Act. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679-682 (1981); *NLRB v. Katz*, 369 U.S. 736, 743 (1962). In *Postal Service*, 302 NLRB 767, 776 (1991) the Board noted that it "has broadly construed the term 'wages' in Section 8(d) of the Act to include "emoluments of value . . . which may accrue to employees out of the employment relationship." *Central Illinois Public Service Co.,* 139 NLRB 1407 (1962), enfd. 324 F.2d 916 (7th Cir. 1963). In other words the term "wages" does not refer to a sum of money given for actual hours worked; rather it also encompasses numerous other forms of compensation."

An employer's regular and longstanding practices, even if not embodied in a collective bargaining agreement, cannot be changed without giving the unit employees collective-bargaining representative notice and an opportunity to bargain, absent a clear waiver of this right. In determining whether a past practice is a bargainable matter it must occur with such regularity or frequency that employees could reasonably expect the practice to continue or recur on a regular and consistent basis. *J & J Snack Foods Handhelds Corp*., 363 NLRB No. 21, JD slip op. at 15 (2015). In this connection, in *Ohio Edison Co*., 362 NLRB No. 88 (2015), the Board found that a longstanding employee recognition policy in which the employer provided awards of increasing value for every 5 years of service, beginning at 5 years and extending to 50 years of service, was a mandatory subject of bargaining. Accordingly, the Board found that the employer's unilateral cessation of the program violated Section 8(a)(5) and (1) of the Act. In *Ohio Edison Co*., supra, JD slip op. at 11, the Board noted that it has historically found that employee award programs based upon length of service are mandatory subjects of bargaining over which an employer has an obligation to bargain. *Conval-Ohio, Inc*., 202 NLRB 85 (1973), (cash awards based on years of service); *Longhorn Machine Works*, 205 NLRB 685, 690 (1973) (a gold watch awarded to 10 year employees.)

Similarly, in *United Shoe Machinery Co. Inc*., 96 NLRB 1309 (1951), the Board found that the employer's unilateral cessation of its approximately 24 year practice of distributing a stock bonus to each employee with 25 years or more of service violated Section 8(a)(5) and (1) of the Act. In that case, employees of the employer organized the "Quarter Century Club" (the Club) "to promote good fellowship among those [employees] who have a common bond of long

service." Supervisors played a large part in the formation of the club and had an important role in its administration. The Club was almost wholly financed by the employer; the business of the club was transacted on the employer's time and property; and the employer furnished the Club with clerical services.

Shortly after Club was formed the employer's board of directors passed a resolution authorizing the employer's president to present 10 shares of the employer's stock to any employee who completed "25 years of service." Thereafter, for a period of approximately 24 years, the employer consistently followed a practice of awarding 10 shares of stock to those employees who met the requirements of the bylaws of the Club to become members. The Club's bylaws provided that any employee could become a member of the Club provided that they had been continually employed by the employer for 25 years.

After approximately 24 years of this established practice, the union requested that the employer bargain regarding the policy of distributing10 shares of stock to each employee with 25 years or more of service for the employer. The employer refused and claimed that the shares of stock were a gift and not part of an employee's regular compensation. The Board found that the employer's action in granting stock to employees with 25 years of service was "an emolument of value" that came within the statutory definition of "wages" and was therefore an appropriate subject of bargaining. Accordingly, the Board found that the employer's refusal to bargain over the grant of stock to employees with 25 years of service was a violation of Section 8(a)(5) and (1) of the Act.

On several occasions, the Board has addressed the issue of whether an employer's provision of meals, beverages, and related items to employees constituted a mandatory subject of bargaining or whether it was a gift. In *Benchmark Industries*, 270 NLRB 22 (1984), affd. *Amalgamated Clothing v. NLRB*, 760 F.2d 267 (5th Cir. 1985), the employer had an established practice of providing employees Christmas dinners and hams which it unilaterally discontinued. The Board concluded that these items were "merely gifts" because they "had been given to all employees regardless of their work performance, earnings, seniority, production, or other employment-related factors." 270 NLRB at 22.[9] In *Stone Container Corp*., 313 NLRB 336, 337 (1993), an employer unilaterally discontinued a company picnic, a $20 Christmas gift certificate, and at Thanksgiving dinner. The Board found that these items were gifts rather than terms and conditions of employment because they "were not related to any performance or production standards." The Board also found that the employer's provision of doughnuts, hot dogs, or barbecue lunches to employees for meeting safety requirements did not rise to the level of a benefit or compensation that required bargaining. Accordingly, the Board found the employer's conduct did not violate Section 8(a)(5) and (1) of the Act. Finally, in *Standard Motor Products*,

[9] In *Coppus Engineering Corp*., 195 NLRB 595 (1972), the Board found that an annual employer sponsored dinner for employees, during which corporate officers discussed the company's performance as well as upcoming plans, constituted a mandatory subject of bargaining. The Board further found, however, that the union waived its right to bargain over the employer's decision to cease providing the dinner because it failed to make a timely demand following the employer's announcement that it would no longer provide such a dinner. I find the precedential value of *Coppus Engineering Corp*., supra, to be diminished because of the Board's later decision in *Benchmark Industries*, supra, which established the requirement of utilizing employment related factors in determining whether the provision of such benefits constituted a mandatory subject of bargaining or a gift.

331 NLRB 1466 (2000), the Board found that the employer did not violate Section 8(a)(5) and (1) by unilaterally providing Gatorade to employees on the days that the temperature in the plant exceeded 90 degrees and giving pizza to employees in one department to reward them for achieving 100 percent productivity. The Board found that providing Gatorade to employees under the circumstances was consistent with the employer's collective-bargaining obligations regarding health and safety issues and the effect on employees was de minimis. With respect to the pizza dinner, the Board found that it was not a sufficiently substantial benefit to constitute a term and condition of employment. Id. at 1468-1469.

In *North American Pipe Corp*., 347 NLRB 836 (2006), the same employment related factors set forth by the Board in *Benchmark Industries*, supra, were utilized in considering whether the employer violated Section 8(a)(5) and (1) by granting stock in the employer's initial public stock offering to unit employees without notifying and giving the union an opportunity to bargain. The Board found that the stock award was a gift and not a mandatory subject of bargaining. In so finding, the Board noted the following:

> The award was not tied to employee renumeration. The size of the award was established without regard to any employment-related factors, including work performance, wages, hours worked, seniority, or productivity. In fact, the value of the award, when announced and when vested, was determined solely by market demand for equity shares in Westlake. Further, all eligible employees at each of Westlake's facilities including the Respondent's Van Buren plant, received the same amount of stock whether they were the highest paid managers or the lowest paid hourly employees. Finally, the award was related to a one-time event-the parent corporation's IPO-with no promise or prospect of repetition. [Id. at 838]

In *North American Pipe Corp*., 347 at 839, the Board further found that the stock award at issue in that case was not tied to an employee's seniority. In this regard, the Board noted that in order to establish a link between an award and seniority, the seniority of employees must either be (1) proportionally related to the amount received, see e.g., *Freedom WLNE-TV, Inc*., 278 NLRB 1293, 1296-1297 (1986) (where the formula was based in part on years of service); and *Electric Steam Radiator Corp*., 136 NLRB 923 (1962), enfd. 321 F.2d 733 (6th Cir. 1963) (where the bonus amount was based on length of service) or (2) an award must be given in recognition of an employee obtaining a specific level of seniority, see *United Shoe Machinery Corp*., 96 NLRB 1309, 1326-1327 (1951) (where a stock award was authorized to "recognize long continued service by employees in a substantial way.")

In the instant case, for approximately 78 years, individuals who provided 25 years of service to the Respondent become members of the Diamond Club. As noted above, the only prerequisite for membership in the Diamond Club is 25 years of service for the Respondent and the receipt of a "Diamond Pin" which the Respondent gives to all such individuals. Therefore, supervisors within the meaning of the Act, bargaining unit employees, and unrepresented employees all become members. Individuals who have worked for less than 25 years for the Respondent are not eligible to join the Diamond Club and thus do not share in the benefits of such membership. The greatest benefit of membership is the opportunity to attend the semiannual dinners that the Diamond Club has conducted since its inception in 1938. As noted above, since approximately 1947 the Respondent contributed some financial support to the

operation of the Diamond Club and, since 1997, the Respondent fully funded the operations of the Diamond Club, including its semiannual dinners, prior to its unilateral cessation of such funding in April 2015. From approximately 2007 until 2015 the Respondent would contribute approximately $150,000 a year to the Diamond Club in order to fund its operations

While currently a substantial number of the members of the Diamond Club are retirees (6847), there are a substantial number of members who were active employees (2636) and thus eligible to attend the semiannual dinners and receive the Diamond Club newsletter. The parties stipulated that the number of bargaining unit employees in the Diamond Club ranged from 1250 in 2012 to 1036 in 2015. Thus, approximately 25 percent of the employees in the bargaining unit are members of the Diamond Club.

The record establishes that while the dinners are large affairs, with 511 individuals attending the fall 2014 dinner meeting, since the membership in the Diamond Club is so large, only a relatively small percentage of eligible Diamond Club members attend the semiannual dinners. There is a substantial cost to providing the semiannual dinners. The total cost of the fall 2014 dinner was $31,869.22 and thus the value of the meal to each individual attending was approximately $62. 130 active employees attended the fall 2014 dinner but the record does not establish how many of the active employees were bargaining unit members.

Applying the principles expressed above to the instant case, I find that the funding of the Diamond Club with respect to actively employed bargaining unit employees is a mandatory subject of bargaining. Because membership in the Diamond Club is available only to individuals, including actively employed bargaining unit members, who have worked for 25 years or more for the Respondent, the benefits of Diamond Club membership, including the ability to attend the semiannual dinners, are tied to the employment-related factor of seniority. While the Diamond Club established the eligibility requirement of 25 years of service for the Respondent, the Respondent was aware of that seniority-based criterion and actively funded all operations of the Diamond Club, including the semiannual dinners, for approximately 18 years. The Board's decision in *United Shoe Machinery Corp*., supra, establishes that the Respondent has an obligation to bargain over the provision of an economic benefit to unit employees regardless of whether the employment based criteria of seniority was established by the Diamond Club rather than directly by the Respondent. I further note that in *North American Pipe Corp*. supra, the Board cited *United Shoe Machinery Corp*. with approval for the proposition that in order to establish a link between an employer benefit and seniority, the benefit provided must be given in recognition of an employee obtaining a specific level of seniority. 347 NLRB at 839. As in *United Shoe Machinery Corp*., where the stock award was granted to employees in order to recognize their 25 years of service to the company, the benefits of Diamond Club membership for bargaining unit employees is also attained after 25 years of service to the Respondent, and it is clear that those benefits are granted in recognition of obtaining that level of service.

Because the Respondent had fully funded the activities of the Diamond Club, including the semiannual dinners, for approximately 18 years, this practice occurred with such regularity frequency that bargaining unit employees could reasonably expect the practice to continue on a regular and consistent basis. *J & J Snack Foods Handhelds Corp*., supra, JD slip op. at 15.

I also find that the Respondent's cessation of funding for Diamond Club activities constituted a substantial and material change in the working conditions of unit employees under the standard utilized by the Board. *Ohio Edison Co*., supra, JD slip op. at 12.As noted above, the value of the meals at the semiannual dinners amounted to approximately $62. If a bargaining unit employee attended both of the dinners, the value would be approximately $125 a year. In addition, membership in the Diamond Club entitled a bargaining unit to the noneconomic benefits of receiving the newsletter and also having access to high-level Respondent officials at the semiannual dinners.

Getty Refining Co., 279 NLRB 924 (1986), is another case that is supportive of my conclusion in the instant matter. In that case, the employer contributed to an Employee Recreation Fund (the Fund) that subsidized employee recreation activities including a Harvest Ball held in November of each year. All of the employer's bargaining unit employees, unrepresented employees, and independent contractors who worked at its facility were eligible to participate in activities that the Fund subsidized. The employer had exercised control over the operations of the fund since its inception. While the Fund was not mentioned in collective bargaining agreements, the employer's employee relations manual described the Respondent's policy concerning contributions for employee social and recreational activities.

During negotiations for a new collective-bargaining agreement, the union requested the Respondent to supply certain information concerning the Fund so that the union could formulate bargaining demands regarding it. The employer refused to disclose most of the information sought on the basis that the Fund was not a mandatory subject of bargaining. The Board concluded that the Fund was a mandatory subject of bargaining as it was a wage enhancement feature that was part of the employer's compensation structure. The Board recognized that the employer established the Fund unilaterally but the Board did not consider it simply a gift. Rather, the Board concluded that since the fund had existed for almost 30 years and because the employer had incorporated its policy regarding the Fund in its employee relations manual it had given employees some expectation that the benefits from the fund would remain available in connection with their employment.[10] Since the Board determined that the Fund constituted a mandatory subject of bargaining, it found that the Employer violated Section 8(a)(5) and (1) by refusing to provide the requested information. Id. at 925-926.

I note that the fact that the Fund subsidized activities that were participated in by unrepresented employees and independent contractors, as well as bargaining unit employees, did not deter the Board from finding that the Fund constituted a mandatory subject of bargaining. I similarly find that the participation of supervisors and unrepresented employees in the activities of the Diamond Club does not detract from finding that the employer's funding of the Diamond club constitutes a mandatory subject of bargaining with respect to bargaining unit employees.

I further find that the Board's decisions in *Benchmark Industries*, supra, *Stone Container Corp*., supra, and *Standard Motor Products*, supra, and *North America Pipe Corp*. supra, are distinguishable from the instant case in that, in in the instant case, the Respondent's funding of

[10] I recognize that in the instant case there is no evidence that the Respondent referred to membership in the Diamond Club as a benefit of employment. Given the other similarities between *Getty Refining Co.* and the instant case, I do not think this fact alone is sufficient to distinguish it.

the Diamond Club, including the semiannual dinners, is both based on the employment related criteria of seniority and constitutes a substantial and material benefit.

I do not agree with the Respondent's contention that the fact that the Union never requested bargaining over the Respondent's funding of Diamond Club activities for over 70 years until it did so in 2015 is supportive of a finding that the Respondent's funding of Diamond Club activities is a gift, rather than an employee benefit which constitutes a mandatory subject of bargaining. The record establishes that all of the Respondent's previous changes in funding of Diamond Club activities resulted in increases and not decreases in funding. Thus, there was no particular necessity for the Union to request bargaining over the Respondent's practice, particularly since the Respondent fully funded all Diamond Club activities since 1987. The Respondent's March 27, 2015 announcement to employees that it would cease funding altogether of Diamond Club activities dramatically altered its previous practice with respect to funding Diamond Club activities and thus precipitated the Union's request to bargain over that decision. The Board has long held that the union's acquiescence in previous unilateral changes does not constitute a waiver of its right to bargain over changes to an employee benefit program. *Ohio Edison Co*., supra, JD slip op. at 14; *Owens-Corning Fiberglass Corp*., 282 NLRB 609 (1987). Thus, the mere fact that the Union had never previously requested bargaining over the Respondent's funding of the Diamond Club does not serve to support the Respondent's argument that its funding was a gift.

On the basis of the foregoing, I find that the Respondent's funding of the Diamond Club, including the semiannual dinners, was a mandatory subject of bargaining with respect to bargaining unit employees, and that the Respondent was obligated to give notice and an opportunity to bargain to the Union before implementing any changes that would affect unit employees.

The Respondent clearly has no obligation to bargain with the Union over its decision to unilaterally cease funding the Diamond Club activities, including the semiannual dinners, as it applies to currently employed statutory supervisors and unrepresented employees and retirees of those two classifications. In this regard, Section 9(a) of the Act accords representative status only to a union selected by a majority of employees in a unit appropriate for bargaining purposes. *Chemical Workers v. Pittsburgh Plate Glass Co*., 404 U.S. 157, 171 (1971). Clearly, the Respondent has no obligation to bargain with the Union over the terms and conditions of employment of statutory supervisors and unrepresented employees who are not included within the bargaining unit represented by the Union.

In *Pittsburgh Plate Glass Co*., supra, the Supreme Court concluded that because retired employees were not employees within the meaning of Section 2(3) of the Act and their benefits did not "vitally affect" the terms and conditions of bargaining unit employees, the insurance benefits of retired employees were not a mandatory subject of bargaining. Id. at 180. In arriving at this conclusion, the Court found that any benefits that active employees may obtain by including retired employees in the same health insurance contract were speculative and insubstantial at best. Id. at 179-180. Accord: *Mississippi Power Co*., 332 NLRB 530, 530-531 (2000).

Applying those principles to the instant case, I also find that the Respondent has no statutory obligation to bargain over presently retired former unit employees as they are not employees under the Act and the benefits that they receive from Diamond Club membership do not "vitally affect" the terms and conditions of bargaining unit employees. Consequently, I do not agree with the position expressed by the General Counsel and the Union that I should order the Respondent to restore funding to the Diamond Club in full. The Union argues, in support of this position, that the opportunity of active employees to socialize with retirees is an integral part of the Diamond Club's semiannual dinners and restoring funding only for active employees would therefore change the nature of the benefit and undermine the efficacy of a remedial order. I find that the argument advanced by the Union is much too speculative a basis to support such an expansive remedy and that the Court's rationale in *Pittsburgh Plate Glass*, supra, discussed above, requires me to reject it.

The Union's Demand for Bargaining

As noted above, on March 27, 2015, the Respondent sent a letter to all Diamond Club members, including bargaining unit employees, indicating that it had decided to cease its sponsorship of the semiannual Diamond Club events beginning with the fall 2015 dinner. While prior to sending that letter, the Respondent had notified the president of the Diamond Club of its decision, it is undisputed that it gave no notice to the Union.

After receiving notice of the Respondent's decision to cease funding Diamond Club activities from a member of the bargaining unit , on April 14, 2015, the Union filed an unfair labor practice charge alleging that the Respondent's action constituted a unilateral change in a mandatory subject of bargaining in violation of Section 8(a)(5) and (1). On April 15, 2015, the Union sent an email to the Respondent's president and its principal manager for labor relations demanding bargaining regarding the Respondent's decision to cease providing employees with the benefit of the "biannual" Diamond Club dinners and requesting that the Respondent contact the Union's counsel with its earliest available dates to bargain over this matter.

Is undisputed that the Respondent never contacted the Union's counsel to discuss the cessation of funding for Diamond Club activities and that there was no discussion of this issue during the parties bargaining for a successor agreement.

The Respondent's conduct in informing employees of its decision to cease funding the activities of the Diamond Club, including the semiannual dinners, prior to advising the Union establishes that this decision was announced as a fait accompli, demonstrating that the Respondent had no interest in bargaining with the Union over this matter. The Board has consistently held that announcing a change regarding a mandatory subject of bargaining directly to employees without giving notice and an opportunity to bargain to the union is a critical factor in determining whether a change has been announced as a fait accompli. *Roll & Hold Warehouse & Distribution Corp*., 325 NLRB 41, 42 (1997); *Gratiot Community Hospital,* 312 NLRB 1075, 1080 (1993); and *Ciby-Geiby Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982).

Shortly after receiving notice of the change in the Respondent's policy regarding its funding the activities of the Diamond Club, including the semiannual dinners, the Union requested bargaining on April 15, 2015, regarding the Respondent's decision to discontinue such

funding. I find that the Union's request was made in good faith and demonstrated a sincere desire to bargain over this issue. It is undisputed that the Respondent did not respond to this request in any manner except requesting that the unfair labor practice charge regarding this issue be withdrawn at the conclusion of negotiations for a successor collective-bargaining agreement. By refusing to bargain over the mandatory subject of discontinuing its funding of Diamond Club activities, including the semiannual dinners, with respect to unit employees, the Respondent violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The International Brotherhood of Electrical Workers, Local 47, AFL-CIO (the Union) is, and, at all material times, was the exclusive bargaining representative of the employees in the appropriate unit described in article 1 and Exhibit A of the parties' collective-bargaining agreement.

2. By failing to bargain in good faith with the Union regarding the discontinuance of its practice of fully funding the activities of the Diamond Club, including its semiannual dinners, a mandatory subject of bargaining with respect to bargaining unit employees, the Respondent violated Section 8(a)(5) and (1) of the Act.

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

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall order the Respondent to rescind its discontinuance of funding to the Diamond Club with respect to bargaining unit employees. I shall also order the Respondent to bargain with the Union before implementing any further changes in its policy of funding Diamond Club activities, including the semiannual dinners, with respect to bargaining unit employees. Finally, I shall order the Respondent to make whole bargaining unit employees who were deprived of benefits by virtue of the Respondent's unilateral action in discontinuing its funding for the Diamond Club, including its semiannual dinners.

For the reasons set forth above in the section of this decision discussing whether the Respondent 's discontinuation of funding Diamond Club activities, including the semiannual dinners, constitutes a mandatory subject of bargaining, I deny the request of the General Counsel and the Union to order the Respondent to rescind its unilateral discontinuance of its funding for Diamond Club activities in its entirety and to restore such funding in its entirety.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

[11] 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.

ORDER

The Respondent, Southern California Edison Company, Rosemead, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to bargain in good faith with the International Brotherhood of Electrical Workers, Local 47 (AFL-CIO), as the exclusive bargaining representative of the employees in the unit described in article 1 and Exhibit A of the parties' collective-bargaining agreement.

(b) Unilaterally discontinuing its funding of Diamond Club activities, including the semiannual dinners, for employees included in the bargaining unit represented by the Union.

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

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

(a) On request of the Union, rescind its unilateral discontinuation of funding Diamond Club activities, including the semiannual dinners, with respect to employees in the bargaining unit represented by the Union.

(b) On request, bargain with the Union concerning any changes to its policy of funding Diamond Club activities, including the semiannual dinners, with respect to bargaining unit employees.

(c) Make whole employees in the bargaining unit for any benefits they were deprived of by virtue of the Respondent's unilateral action in discontinuing its funding for Diamond Club activities, including the semiannual dinners.

(d) Within 14 days after service by the Region, post at its facilities in Southern California where bargaining unit employees' work, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in

12 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 27, 2015.

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

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

Mark Carissimi
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 bargain in good faith with the International Brotherhood of Electrical Workers, Local 47 (AFL-CIO) (the Union) as the exclusive bargaining representative of the employees in the appropriate unit described in article 1 and Exhibit A of our collective-bargaining agreement with the Union.

WE WILL NOT unilaterally discontinuing our funding of Diamond Club activities, including the semiannual dinners, for employees included in the bargaining unit represented by the Union.

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

WE WILL, on request of the Union, rescind our discontinuance of funding Diamond Club activities, including the semiannual dinners, with respect to employees in the bargaining unit represented by the Union.

WE WILL, on request, bargain with the Union concerning any changes to our practice of funding Diamond Club activities, including the semiannual dinners, with respect to bargaining unit employees.

WE WILL make whole employees in the bargaining unit for any benefits they were deprived of by virtue of our unilateral action in discontinuing our funding for Diamond Club activities, including the semiannual dinners.

SOUTHERN CALIFORNIA EDISON COMPANY

(Employer)

By

Dated _____ _____

(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.

888 South Figueroa Street, 9th Floor, Los Angeles, CA 90017-5449

(213) 894-5200, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-150088 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, (213) 894-5184.