UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD WASHINGTON, D.C.

ALDEN LEEDS, INC.,

Respondent Employer,

and

UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 1245,

Charging Party.

Case: 22-CA-29188

RESPONDENT'S REPLY BRIEF (# 2 of 2) IN FURTHER SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND IN OPPOSITION TO THE ANSWERING BRIEF OF THE CHARGING PARTY

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This Reply Brief is submitted in opposition to the Charging Party's Answering Brief. We are simultaneously filing with the Board a Reply Brief in opposition to the Acting General Counsel's Answering Brief.

LEGAL ARGUMENT

POINT I

BECAUSE NO CASE HAS EVER HELD THAT A NOTICE REQUIREMENT ATTACHES TO A LOCKOUT IN THE CIRCUMSTANCES HERE PRESENTED (i.e., A LOCKOUT IN THE ABSENCE OF A STRIKE), THEN -- TO THE EXTENT THAT THIS PANEL WERE INCLINED TO ESTABLISH NEW LAW AS TO THIS ISSUE -- SUCH NEW LAW, BY OPERATION OF PRINCIPLES OF FAIRNESS AND EQUITY, SHOULD BE PROSPECTIVE ONLY

Our reply brief in opposition to the Acting General Counsel's Answering Brief fully addresses this point. The argument set forth therein is incorporated herein by reference.

POINT II

IN THE ALTERNATIVE, THE FACTUAL PREDICATE AND DECISION IN <u>BOEHRINGER INGELHEIM</u>, 350 NLRB 678 (2007), COMPEL THE CONCLUSION THAT RESPONDENT PROVIDED ADEQUATE AND SUFFICIENT NOTICE TO THE UNION OF THE TERMS OF RESPONDENT'S OFFER AND OF RESPONDENT'S INTENTION TO COMMENCE A LOCKOUT ON NOVEMBER 3 IF THE UNION DECLINED TO AGREE TO THE TERMS

The only case on point with respect to the issue here presented is the Board's decision in <u>Boehringer Ingelheim</u>, 350 NLRB 678 (2007). That case, as here, addressed a lockout, in the absence of a strike and a return to work by the strikers. The factual predicate and decision in <u>Boehringer Ingelheim</u>, 350 NLRB 678 (2007), compel the conclusion that Respondent provided adequate and sufficient notice of the terms of its offer and of its intention to commence a lockout on November 3 2009 if the Union declined to agree to the terms of the offer.

As more fully set forth in our Initial Brief, the reasoning and result reached by the ALJ

¹ This argument is presented, in the alternative, to our argument in Point I, <u>supra</u>, concerning the threshold question of law here presented: *i.e.*, the question of whether *any case* has ever held that a notice requirement attaches to a lockout in the circumstances here presented (*i.e.*, a lockout in the absence of a strike). As set forth in Point I, because, in <u>Boehringer Ingelheim</u>, "there [was] no dispute [by the parties] that the lockout was lawful at its outset," <u>Boehringer Ingelheim</u>, 350 NLRB at 680, the holding of the <u>Boehringer Ingelheim</u> case does not decide the threshold question of law here presented. However, the substantial <u>dicta</u> contained in the ALJ's opinion (as affirmed by the NLRB) provides a framework for analysis of the pre-lockout notice issue here presented.

below stands in stark contrast to -- and cannot be squared with -- the reasoning and result of the Board's decision in <u>Boehringer Ingelheim</u> decision. In <u>Boehringer Ingelheim</u>, there was an extremely short interval of Union-management discussions leading up to the lockout, and the final offer of management (prior to the lockout) was not even memorialized in writing. More particularly, the facts in <u>Boeringer Ingellheim</u> disclose that not only was the employer's notice to the Union of its last best offer made *just hours* before the commencement of the lockout, but the employer's notice of the lockout itself was made just hours before the commencement of the lockout.

Here, in stark contrast to the facts in <u>Boehringer Ingelheim</u>: (1) Respondent's last best offer remained unchanged in the weeks leading up to the lockout; and (2) Respondent's notice of intention to engage in a lockout was not less than four days (as established by undisputed evidence in the record) -- and as many as seven days -- before the commencement of the lockout.²

A. In stark contrast to the facts in <u>Boehringer Ingelheim</u> wherein the Company's last best offer was made just hours before the lockout, Respondent's last best offer remained unchanged in the weeks leading up to the lockout, and the Union admitted that it knew and understood the terms of that offer

As fully set forth in our Initial Brief and as summarized below, the record is clear: the Union knew and understood that Respondent was offering a one-year freeze on all terms of the Agreement (including the cost of employee health benefits), and that Respondent's negotiating

² In its answering brief, the Union attempts to distinguish the facts in <u>Boehringer Ingelheim</u> from the facts in our case by asserting that <u>Boehringer Ingelheim</u> involved an easily understandable employer condition to avoid a lockout – a no-strike commitment – whereas our case involves "a confusing [October 30] e-mail that failed to set forth any clear condition that must be accepted to avert a lockout." Union Br., at 10. On this purported basis, the Union contends that <u>Boehringer Ingelheim</u> is inapplicable to this record.

For three reasons, the Union's purported factual "distinction" as to the <u>Boehringer Ingelheim</u> decision is unavailing. *First*, the October 30 e-mail was not confusing, for reasons fully set forth in Point IID, <u>infra</u>. *Second*, contrary to the Union's assertion, Respondent's condition to avoid a lockout -- just like the condition in <u>Boehringer Ingelheim</u> -- was actually quite "simple" in concept: *i.e.*, the extension of the existing Contract for one year, and a "freeze" on all terms of the Contract. *Third*, the record conclusively establishes that the Union representatives -- Troccoli and Cunningham --knew and understood Respondent's condition, as, for example, evidenced by Troccoli's and Cunningham's numerous admissions at the hearing. <u>See</u> Initial Br., Point IIC.

position remained unchanged throughout the entire period of negotiations leading up to, and including, the lockout of November 3, 2009.

Indeed, the ALJ's own findings of fact -- based on the entirety of the record -- show that this is so. More particularly, the ALJ's own findings of fact establish that: (1) on October 5, Respondent, through its president Mark Epstein, communicated to the Union that Respondent "wanted to keep everything the same for one year and all he was looking for was a freeze for one year;" ALJD 4:1 to 4:2; (2) on October 5, Tom Cunningham, the Union's business agent, acknowledged Respondent's position, and communicated to Epstein that "although he did not think that an offer of a one-year freeze would be acceptable, he would take it back to the membership for a vote," ALJD 4:6 to 4:7; (3) on October 8, Epstein "repeated the offer that he had made at the previous meeting that Respondent wanted to extend the contract for one year and that it wanted a one-year freeze," and, further, that "he was not offering anything more than the current agreement," ALJD 5:4 to 5:5; 5:11 to 5:12; (4) on October 30, Epstein reiterated to Troccoli, the Union's secretary-treasurer, that, "I don't want to pay anything more" and "I want to keep everything the same for one year," ALJD 8:48 to 8:50; and (5) on November 2, when "[Union President] DeVito asked Cunningham ... for a summary of developments at the negotiations, Cunningham informed him that [Respondent] proposed a freeze," ALJD 6:5 to 6:7; and (5) throughout the entire period of negotiations leading to the November 3 lockout, Respondent's "only proposal" was "its demand for a one-year freeze, which was repeated at negotiation meetings," ALJD 18:13 to 18:14.

Although the ALJ below made all of the foregoing findings of fact, the ALJ somehow failed to draw the proper legal conclusion that flows from the foregoing findings of fact: i.e., that Respondent provided adequate notice to the Union of the terms of Respondent's offer.

But even the ALJ's own findings of fact do not convey the full extent of the facts in the record that conclusively establish that Respondent provided adequate and sufficient notice to the Union of the terms of Respondent's offer. The record also contains numerous admissions

by the Union representatives that they knew and understood that Respondent was offering a one-year freeze on all terms of the Agreement (including the cost of employee health benefits) and this constitutes Respondent's last best offer in the weeks leading up to the lockout. These repeated admissions by Union representatives -- under oath at the hearing as well as set forth in numerous hearing exhibits -- are set forth at greater length in Point IIC of our Initial Brief, which is incorporated herein by reference.

By way of summary, the record contains the following admissions by the Union representatives that they knew and understood that Respondent was offering a one-year freeze on all terms of the Agreement (including the cost of employee health benefits) and this constitutes Respondent's last best offer in the weeks leading up to the lockout:

- Union representative Tom Cunningham testified at the hearing that he clearly understood that to mean that Alden wanted a one-year contract with no changes to the Agreement. (Tr. 120, 154-155.).
- Cunningham's contemporaneous notes state "keep a freeze for a one year contract". (Tr. 80, 120 154-155; RX. #4) (emphasis added).
- The parties met on October 8 in the office of Mark Epstein, Respondent's President. (Tr. 82, 171, 281). Cunningham confirmed Epstein's offer in his contemporaneous bargaining notes: "Company wants a one-year freeze." (RX #3) (emphasis added).
- John Troccoli, the Union's Secretary-Treasurer, testified that Epstein reiterated that exact same offer at least three times during the October 8 meeting:

"[Y]ou don't understand, . . . I need to keep the contract intact; I just want to continue the contract for a year" "Well, you just don't understand. I just want to continue this for a year." "You just don't understand I want to keep everything the same. I don't want to give anything more." "I just want to extend this thing for a year." (Tr. 214) (emphasis added).

- Troccoli further testified that he knew exactly what Epstein was proposing at the October 8 meeting. (Tr. 174, 175, 214,234).
- The October 8 meeting ended with Troccoli again requesting that Epstein sign an extension agreement. (Tr. 176). Epstein agreed to do so conditioned upon there being no retroactivity because **he was not offering anything more than the current Agreement.** (Tr. 283). **Troccoli understood the offer** and agreed to eliminate the retroactivity language in the extension agreement. The parties signed a thirty-day extension. (Tr. 178, 284; GCX #12).

- On or about October 26, Epstein had a telephone conversation with Cunningham and Troccoli. (Tr. 285, 286). Cunningham agreed to take the offer to a vote by Friday, October 30. (Tr. 345).
- Troccoli and Cunningham further testified that Epstein had made it clear that he was not interested in agreeing to any of the Union's demands contained in the September30 proposal. (Tr. 183-184, 286, 344). Indeed, Troccoli testified that when he attempted to discuss the other demands during October 8 meeting, Epstein always cut him off and told him that he did not want any changes to the existing terms of the Agreement. (Tr. 183-84,286,344).
- Troccoli testified that on Friday October 30 he telephoned and spoke to Epstein. (Tr. 183). Troccoli corroborated Epstein's testimony that Local 1245 rejected Alden's alternative health plans and only offered the Union's current health plan at the same cost to the Company with a cut in benefits. (Tr. 183, 237).
- Troccoli did not dispute that Epstein told him that Cunningham previously stated that a vote on the Company's offer by the employees would take place by October 30. (Tr. 286, 344). Troccoli testified: "[all I know is, he (Epstein) said he wanted to extend it for one year." (Tr. 231) (emphasis added). Troccoli testified that Epstein said an offer would be received by the end of the day and also told Troccoli that employees would be locked out if the employees did not accept the offer. (Tr. 239)

In short: The record in this case stands in stark contrast to the facts in <u>Boehringer Ingelheim</u>, wherein the Company's last best offer was made to the Union just hours before the lockout. <u>Boehringer Ingelheim</u>, <u>supra</u>, 350 NLRB 678 (2007), 2007 WL 2330905, * 21-*22. Here, Respondent's last best offer remained unchanged in the weeks leading up to the lockout, and the Union admitted that it knew and understood the terms of that offer. Under <u>Boehringer Ingelheim</u>, notice of Respondent's last best offer is manifestly adequate and sufficient on this record, and the ALJ's determination to the contrary is properly reversed.

B. In stark contrast to the facts in <u>Boehringer Ingelheim</u> wherein the Company's notice of its intention to engage in a lockout occurred just hours before the commencement of the lockout, in this case Respondent's notice of its intention to engage in a lockout was not less than four days (as established by undisputed evidence in the record) -- and as many as seven days -- before the commencement of the lockout.

Under <u>Boehringer Ingelheim</u>, the same conclusion as above is properly drawn with respect to the related issue of the timeliness of Respondent's notice of intention to engage in a lockout in the event that its offer to the Union is not accepted. In <u>Boeringer Ingellheim</u>, the facts disclose that the contract between the parties was set to expire on midnight of November 12,

2004. Just hours before the expiration of the contract, representatives of the parties engaged in intensive telephone negotiations wherein the employer gave notice of a lockout to commence at 12 midnight. Id at *13. On this record, the ALJ held (and the NLRB affirmed) that legally sufficient and timely notice of the employer's intention to impose a lawful lockout occurred within hours of the lockout's commencement. Id. at 19-20.

Here, substantial evidence in the record supports the conclusion that Respondent's notice to the Union of a lockout occurred *seven days* (i.e., October 27) before the commencement of the November 3, 2009 lockout. (tr. 218, 286) (testimony of Mark Epstein that notice was given by telephone no later than Tuesday October 27). In any event, it is undisputed (and the ALJ found) that notice of the lockout occurred at least as early as four days (i.e., October 30) before the commencement of the lockout on November 3. <u>See</u> ALJD 19:4 to 9:5 (setting forth October 30 telephone conversation between the parties wherein Epstein stated that "if the employees did not vote and agree on the offer, the employees would be locked out."); 18:25 to 18:26; GCX #3 (October 30 e-mail from Respondent).

C. Another critical aspect of the <u>Boehringer Ingelheim</u> decision is the ALJ's determination (as affirmed by the NLRB) that experienced Union negotiators should be held to a high standard with respect to their knowledge and understanding of collective bargaining negotiations in general and, in particular, the employer's conditions with respect to a lockout. Because it is undisputed that Troccoli and Cunningham are experienced Union negotiators, the <u>Boehringer Ingelheim</u> standard properly applies to the determination of Troccoli's and Cunningham's knowledge and understanding of Respondent's last best offer and of Respondent's intention to commence a lockout on November 3 2009 if the Union declined to agree to the terms of the offer.

Another critical aspect of the <u>Boehringer Ingelheim</u> decision is the ALJ's determination (as affirmed by the NLRB) that *experienced* Union negotiators should be held to a high standard with respect to their knowledge and understanding of collective bargaining negotiations in general and, in particular, the employer's conditions with respect to a lockout. <u>Boehringer Ingelheim</u>, <u>supra</u>, 350 NLRB 678 (2007), 2007 WL 2330905, *21-*22. Applying that standard, the ALJ in Boehringer Ingelheim held:

Lewis and Price were experienced union negotiators. There was no mystery

here. Both men understood that what most concerned the Employer's negotiators was not knowing whether and when a strike would commence. The lockout was intended to bring some certainty to the Respondent's production facilities, It would be naive to assume that the union negotiators did not know how to end the lockout. It was implicit in the Respondent's call for the lockout that it could be ended with an understanding that there would be no strike for a certain period of time. However, the Union was unwilling to give such an assurance except in the context of extending the expired contract, which the Respondent refused to do. Further, as of the time of their conversations on November 13, Nowalk made it explicitly clear to Price and Lewis what it would take to end the lockout. Therefore, I conclude that the Respondent's demands in connection with the lockout were sufficiently understood by the union representatives for them to make an intelligent determination as to whether to accede to those demands so that the employees might return to work. [Boehringer Ingelheim, supra, 350 NLRB 678 (2007), 2007 WL 2330905, * 21-*22 (emphasis added)]

The same result obtains here. On this record, it is undisputed that the Union's negotiators, Tom Cunningham and John Troccoli, are long-time Union officers with many years of experience in negotiating collective bargaining agreements. For example, Troccoli testified that he is a "talented negotiator." (Tr.209). Troccoli also testified that he has an excellent understanding of health insurance plans -- the critical negotiating issue that lies at the heart of this case. (Tr. 209-210).

In light of these clear admissions by the Union representatives, the stringent <u>Boehringer Ingelheim</u> standard -- applicable to *experienced* union negotiating representatives -- properly applies to the determination of Troccoli's and Cunningham's knowledge and understanding of Respondent's last best offer and of Respondent's intention to commence a lockout on November 3 2009 if the Union declined to agree to the terms of the offer. As to the relevant facts concerning Respondent's offer and Respondent's lockout notice that were before these experienced negotiators in the weeks leading up to the November 3 lockout (and as to Troccoli's and Cunningham's admissions with respect to these facts), <u>see</u> Points IIA and IIB, supra and see our Initial Brief, at 2-15.

Because the ALJ failed to consider or apply <u>Boehringer Ingelheim</u> "experienced negotiator" standard to Troccoli and Cunningham, the ALJ's decision is fatally flawed for this

reason alone.

D. In its opposition to Respondent's exceptions, the Union relies principally on the October 30 e-mail from Respondent to the Union, and contends that the e-mail is "ambiguous"-- thereby purportedly not satisfying the pre-lockout notice requirement. However, the foregoing contention by the Union is manifestly incorrect, because: (1) the October 30 e-mail cannot be considered in a "vacuum," and instead is properly considered in the context of the entire record, as is required under <u>Boehringer Ingelheim</u>; and (2) when the October 30 e-mail is properly considered in the context of the monthlong course of dealing between the parties, the conclusion is inescapable that: (a) the e-mail is not ambiguous; and (b) Respondent has satisfied the pre-lockout notice requirement.

In its opposition to Respondent's exceptions, the Union relies principally on the October 30 e-mail from Respondent to the Union as a putative basis for the Board to affirm the ALJ's decision below. In particular, the Union points to the ALJ's finding that the October 30 e-mail is "ambiguous" on its face, and contends that this finding is correct and should be affirmed. Union Br., at 5. The Union further agues that because the October 30 e-mail is purportedly ambiguous, Respondent -- for this reason alone -- has not satisfied the pre-lockout notice requirement.

The foregoing contentions by the Union are manifestly incorrect, as are the underlying findings of the ALJ to the effect that the October 30 e-mail was "ambiguous." The October 30 e-mail is *not* ambiguous; it is clear and fully consistent with the terms of Respondent's repeatedly stated and unchanging position to the Union in the weeks leading up to the November 3 lockout.

To reach its preferred result, the Union would have the October 30 e-mail considered and interpreted in a "vacuum," and without regard to the ongoing discussions and understandings between the parties. However, as the <u>Boehringer Ingelheim</u> decision instructs, a determination of an employer's compliance with pre-lockout notice requirements is properly based on the entire course of dealing between the employer and the union, not on one isolated piece of evidence that is shorn of its contextual moorings. <u>See Boehringer Ingelheim, supra,</u> 350 NLRB 678 (2007), 2007 WL 2330905, *21-*22 (holding that, in light of the parties' entire course of dealing, "[i]t would be naive to assume that the union negotiators did not know

how to end the lockout" following a last-minute inconclusive telephone conversation between representatives of the employer and the union just minutes prior to the expiration of the collective bargaining agreement).

Consistent with the foregoing principle recognized in <u>Boehringer Ingelheim</u>, the October 30 e-mail -- properly considered in the context of the month-long course of dealing between the parties that is part of the record before the Board -- was *not* ambiguous. The factual background underlying and providing the necessary context to the October 30 e-mail is fully set forth in our Initial Brief (<u>see</u> pp. 2-13, 31-34), which is incorporated herein by reference. When properly considered in light of that factual background, the October 30 e-mail is clear and unambiguous, and in full accord with Respondent's repeatedly stated and unchanging position to the Union in the weeks leading up to the November 3 lockout.

For present purposes, we briefly summarize the key statements set forth in the October 30 e-mail (and their consistency with Respondent's repeatedly stated and unchanging position to the Union) as follows:

(1) "[T]he Union will keep the existing plan and will cut benefits to keep the cost to the Company the as the expiring plan." (GCX #3)

This statement *confirms* the Union's offer and Respondent's acceptance of that offer to maintain the Union-sponsored health plan and to freeze Alden's costs.

(2) "If two years is out of the question then a one year Agreement is the only other option." (GCX #3)

This statement *confirms* that Respondent previously had advised the Union that either a one-year or two-year term for the new Agreement would be acceptable, but that Respondent believed that the Union was not interested in two years and, if so, a one-year term is the only other option that would avoid a lockout.

(3) "Tom [Cunningham] had stated that he would meet with the members by today Friday October 30." (GCX #3)

This statement *confirms* that the Union had promised Respondent that the Union would have a meeting with its members by October 30 to vote on whether to accept Respondent's terms: i.e., either a one-year or two-year extension of the Contract, with a "freeze" of all existing contract terms.

(4) "If we have no agreement between the parties by the close of business on

Monday, then the company will lock out the Union members on Tuesday morning, November 3, 2009." (GCX #3)

This statement confirms the prior undisputed telephone conversation between the parties wherein Epstein stated wherein Epstein stated that "if the employees did not

vote and agree on the offer, the employees would be locked out," Tr. 18:25 to 18:26.

In short, the October 30 e-mail is consistent, in all respects, with the terms of

Respondent's repeatedly stated and unchanging position to the Union in the weeks leading up

to the November 3 lockout: i.e., a minimum one-year extension to the existing Contract, with the

Contract freezing all terms of the existing agreement, including the cost of employee health

benefits. Moreover, the October 30 repeats - and memorializes - Respondent's prior oral notice

to the Union of the November 3 lockout, which, it is undisputed, occurred earlier on October 30

by way of a telephone conversation. See ALJD 19:4 to 9:5 (setting forth October 30 telephone

conversation between the parties wherein Epstein stated that "if the employees did not vote and

agree on the offer, the employees would be locked out."); Tr.18:25 to 18:26.

CONCLUSION

For the reasons set forth above as well as the reasons set forth in our Initial Brief and

Reply Brief # 1, the Administrative Law Judge erred in holding that Respondent violated the Act

by failing to provide adequate and sufficient notice to the Union of Respondent's Lockout that

commenced on November 3, 2009. The Administrative Law Judge's recommended finding of a

violation should be reversed, and the Complaint dismissed in its entirety.

Respectfully Submitted, Sokol Behot and Fiorenzo

Attorneys for Respondent Alden Leads, Inc.

Dated: November 23, 2010

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