

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

VIGOR INDUSTRIAL, LLC

and

19-CA-135538

**INTERNATIONAL BROTHERHOOD OF
BOILERMAKERS, IRON SHIPBUILDERS,
BLACKSMITHS, FORGERS AND HELPERS
LOCAL UNION 104, AFL-CIO**

PORTLAND METAL TRADES COUNCIL

PUGET SOUND METAL TRADES COUNCIL

METAL TRADES DEPARTMENT, AFL-CIO

PACIFIC COAST METAL TRADES DISTRICT COUNCIL

John H. Fawley, Esq., for the General Counsel
Jacqueline M. Damm, Esq. for the Respondent
David A. Rosenfeld, Esq. and Xochitl Lopez, Esq., for the
Charging Party

DECISION

MARY MILLER CRACRAFT, Administrative Law Judge. The General Counsel alleges that Vigor Industrial, LLC presented its tobacco-free policy on February 27, 2014,¹ as a fait accompli and since that time has refused to bargain regarding its decision to implement the policy. Alternatively, the General Counsel alleges that Vigor Industrial, LLC failed and refused to bargain after verbal requests on May 20 and June 3, and written requests on June 26 and August 15.

These allegations are based on an underlying unfair labor practice charge, an amended charge, and a second amended charge which were filed by International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers Local Union 104, AFL-CIO (Boilermakers Union) on August 27, October 31, and December 29, respectively. The original complaint issued on December 31. An amended complaint issued on June 3, 2015, and was further amended at the hearing.²

¹ All dates are in 2014 unless otherwise specified.

² The complaint as amended both before and at the hearing will be referred to as the complaint.

Hearing was held in Portland, Oregon on June 26, 27, and 28, 2015. On the entire record,³ including my observation of the demeanor of the witnesses,⁴ and after considering the briefs filed by counsel for the General Counsel, counsel for the Union, and counsel for Respondent, the following findings of fact and conclusions of law are made.

JURISDICTION

Vigor Industrial LLC is an Oregon corporation with unionized subsidiaries Cascade General, Inc. (Cascade General) located in Portland, Oregon; Vigor Shipyards, Inc. (Vigor Shipyards) located in Seattle, Washington, Vigor Marine LLC (Vigor Marine) located in Portland, Oregon and Seattle, Tacoma, and Everett, Washington; and Washing Marine Repair LLC (Washington Marine Repair) located in Port Angeles, Washington (collectively, the Designated Subsidiaries) and has at each of its Designated Subsidiaries been engaged in the operation of a shipyard as well as the construction, service, and repair of ships. Vigor Industrial LLC and the Designated Subsidiaries will be referred to collectively as Respondent. 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 National Labor Relations Act (the Act).⁵

LABOR ORGANIZATION STATUS

Pursuant to a July 12, 2012, National Settlement and Agency Agreement between the Boilermakers Union, the Metal Trades Department, AFL-CIO, and the Designated Subsidiaries, the parties agreed to negotiate a master collective-bargaining agreement (Master Agreement) applicable to the Designated Subsidiaries. The Boilermakers Union is the designated agent, spokesperson, and point of contact for Portland Metal Trades Council (Portland MTC), Puget Sound Metal Trades Council (Puget Sound MTC), Metal Trades Department, AFL-CIO (Metal Trades Dept.), and Pacific Coast Metal Trades District Council (District Council). Respondent admits and I find that the Boilermakers Union, the Portland MTC, the Puget Sound MTC, the Metal Trades Dept., and the District Council (referred to collectively as the Union) are labor organizations within the meaning of Section 2(5) of the Act.

COLLECTIVE BARGAINING RELATIONSHIPS

The following employees of each of the Designated Subsidiaries constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

³ The transcript is corrected to change “Judge Cracraft” to “Ms. Damm” at page 185, line 2; page 186, lines 3 and 7; to change “a lawyer” to “Alere” at page 384, line 17; to change “Mr. Think” to “there more” at page 437, line 6; and to change “though” to “so” at page 449, line 10.

⁴ When necessary, credibility resolutions have been made based on a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

⁵ 29 U.S.C. §151 et seq.

All unit production, repair, and maintenance employees involved in the construction, conversion, repair, or scrapping of any vessel on the Pacific Coast.

5 Since at least August 14, 2012, the date that the Master Agreement was signed, Cascade General has recognized the Portland MTC as the exclusive collective-bargaining representative of its Cascade General unit employees. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which are effective from August 14, 2012, to June 1, 2017 (Master Agreement) and from October 2, 2012 to November 30, 2014 (Cascade General Local Agreement). Based on Section 9(a) of the Act, at all times since at least August 14, 2012, the Portland MTC has been the exclusive collective-bargaining representative of the Cascade General unit employees.

15 Since at least August 14, 2012, Washington Marine Repair has recognized the District Council as the exclusive collective-bargaining representative of its Washington Marine Repair unit employees. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which are the Master Agreement and the Washington Marine Repair Local Agreement effective from November 30, 2014 to November 30, 2016. Based on Section 9(a) of the Act, at all times since at least August 14, 2012, the District Council has been the exclusive collective-bargaining representative of the Washington Marine Repair unit employees.

25 Since at least August 14, 2012, Vigor Shipyards has recognized the District Council as the exclusive collective-bargaining representative of its Vigor Shipyards unit employees. This recognition has been embodied in successive collective-bargaining agreement, the most recent of which are the Master Agreement and the Vigor Shipyards Local Agreements effective from December 1, 2011 to November 30, 2016. Based on Section 9(a) of the Act, at all times since at least August 14, 2012, the District Council has been the exclusive collective-bargaining representative of the Vigor Shipyards unit employees.

30 Since at least December 1, 2011, Vigor Marine has recognized the Boilermakers Union as the exclusive collective-bargaining representative of its Vigor Marine unit employees. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is the Vigor Marine Local Agreement in effect from December 1, 2011 to November 30, 2016. Based on Section 9(a) of the Act, all times since at least December 1, 2011, the Boilermakers Union has been the exclusive collective-bargaining representative of the Vigor Marine unit employees.

LABOR MANAGEMENT COMMITTEE MEETINGS

40 As a collaborative partnership, Respondent and the Union hold labor management committee (LMC) meetings on an ongoing basis. In 2014, the co-chairs for LMC meetings were Respondent's Senior Vice President of Human Resources Susan C. Haley and from the Boilermakers Union either Business Manager Brian Opland or Assistant Business Manager Lance Hickey. These meetings are attended both in person and by videoconference. The parties discuss a wide variety of topics including policy changes. For instance, in November 2013, Respondent announced a tentative plan to implement a new attendance policy in January 2014.

Other policy matters discussed during LMC meetings were sick leave changes, lunch changes, and bicycles on the property.

During 2014, in advance of each meeting, Haley typically sent a draft or proposed agenda to the Union. After receiving response from the Union, Haley then sent a final agenda. Contract interpretation issues and disputes between the parties were discussed at LMC meetings. Steve Behling, assistant business manager for the Union, received this announcement but did not recall that the Union raised any concerns about implementation at the subsequent LMC meeting.

2012 NO-SMOKING POLICY

Since at least November 2012, Respondent prohibited smoking throughout indoor work spaces and in company vehicles. Its “Hourly Employee Handbook,” (the Handbook) revised November 2012, set forth this no-smoking policy while the “Rules of Conduct” (the Rules) in the Handbook stated, inter alia, “The following are examples of behaviors and actions that violate the code of conduct rules: . . . Smoking in unauthorized areas.” Corrective action for violation of the Rules could include verbal or written warning, final warning (which may or may not include suspension), last chance agreement, and discharge.

2013 CHANGE IN PORTLAND YARD NO-SMOKING POLICY

In April 2013, Respondent received citations from the Oregon Health Authority due to allowing smoking within 10 feet of primary and secondary doors. These violations involved the Portland Yard known as the Swan Island facility, a 62-acre facility. The Authority noted that garbage cans were being used as ash trays and areas were littered with cigar and cigarette butts. Insufficient signage was also noted.

On April 19, 2013, Michael R. Trautman, Respondent’s Human Resources Manager at that time, emailed Boilermakers Union Business Manager Brian Opland and Assistant Business Manager Lance Hickey⁶ notifying them of the citation and attaching a copy of the citation. Trautman stated,

This is just a heads up to [the Boilermakers Union] that we anticipate taking action in the near future regarding smoking in the Portland yard. We will be keeping [the Boilermakers Union] updated as things progress. We will provide information about what measures we have taken already, how many times we have been visited by authorities regarding smoking issues, and what we anticipate doing to address this issue.

Discussions at various LMC meetings ensued. Trautman and Opland agreed that Respondent ultimately proposed designated outdoor smoking areas and there was no “pushback or disagreement” (Trautman’s words) or “questions or concerns” (Opland’s words) from the Union. Respondent ultimately sent an email of September 12, 2013, from Trautman to Opland and Hickey attaching a memorandum to all Portland yard employees to be distributed on

⁶ In April 2015, Hickey ceased his duties as assistant business manager. He remained in the elected position of vice president of the Boilermakers Union at the time of hearing.

September 17, 2013, announcing that smoking would be limited to 15 outdoor designated smoking structures. The memorandum further provided that effective Monday, September 30, 2013, corrective action would apply to anyone found smoking in an area other than one of the 15 outdoor designated smoking areas. The Union did not respond with any questions or concerns and the 2013 Portland yard smoking policy was distributed to the Portland yard employees on September 17 with corrective action beginning September 30, 2013.

**ALLEGED ANNOUNCEMENT OF 2014
TOBACCO-FREE POLICY AS A FAIT ACCOMPLI**

Facts

In emails to and from the Union on February 12 and 25, Respondent and the Union Set Out Agenda Items for the February 27 LMC Meeting. Respondent Suggested adding Smoking Policy to the Agenda as it Was Heading to “Nonsmoking Yards”

It is undisputed that on February 12, Haley emailed a draft agenda to Hickey for the February 27 LMC meeting stating, inter alia, “Would also suggest we add smoking policy [to the upcoming February 27 LMC meeting agenda] as we are heading towards non-smoking yards and would like to discuss recommended timing and process.”⁷ Haley’s draft agenda contained 5 topics including “Non-smoking yards.” In response to the February 12 email, Hickey suggested other topics to the agenda including lunchroom capacity, time clock congestion which was blocking restroom access, and providing notice of accrued and unused sick time to employees.⁸

On February 26, via email to Hickey, Opland, Gary Powers, International Representative of the Boilermakers Union, and others, Haley distributed the final agenda for the Thursday, February 27 LMC meeting scheduled from 1 to 4 p.m. in the main conference room in Portland with video connections to other locations. The final agenda included the Union’s items which Hickey had suggested and continued to include “Non-smoking yards” as an agenda item.

On February 27, Respondent announced its intention to become tobacco free as of September 1 and provided relevant draft documents to the Union

At the LMC meeting on February 27, Trautman and Haley (in Portland), and Vigor Shipyards Human Resources Manager Albert Jackson (present in Seattle by videoconference) testified that Haley stated that it was Respondent’s intention to become tobacco free at its facilities in Portland and Seattle⁹ effective September 1, 2014. Further, Trautman and Haley testified that a draft of a March 1 announcement to all employees regarding “Use of Tobacco and Nicotine Products” was discussed at the meeting. Trautman did not recall specific discussion of

⁷ In a separate paragraph immediately after this one-sentence paragraph, Haley stated, “Will let you know when everyone has confirmed and the final date,” apparently in reference to the final date for the LMC meeting rather than the final date for the timing of the non-smoking yards.

⁸ Another email exchange of February 12 was initiated by Trautman to Hickey referencing “Smoking Cessation Support through the Union Trust Plan.” This email does not specifically refer to a proposed change in either the 2012 or 2013 no-smoking policy. Opland was not copied on this email either.

⁹ As mentioned before, the Swan Island facility in Portland is 62 acres. The Harbor Island facility in Seattle is about 30 acres.

the tobacco-free policy but believed Haley spoke about the draft announcement.¹⁰ Jackson did not recall distribution of those documents in Seattle although he accessed them on his own laptop during the meeting.¹¹

5 Haley testified that she did indeed present and explain the draft announcement and told the Union it would be distributed to all employees on March 1. She recalled telling the attendees that the original plan was to implement tobacco-free facilities on June 1 but Respondent had decided that September 1 was a more achievable date. Haley amplified the main points of the tobacco-free policy including e-cigarettes, chewing tobacco, tenants, ships' crew, and vendors.
10 She further recalled that she gave copies of the draft announcement to Hickey who was sitting to her right, to distribute to others at the meeting.¹² Haley believed that Hickey handed out the draft announcement with attached questions and answers but she did not actually observe this. Haley also recalled explaining that she had left a blank for resources for the Union trust and Hickey said he would look into that. Finally, Haley testified that she told the Union that there would be a
15 general communication campaign from the present through September in order to bring employees on board with the change.¹³ Haley also recalled that she went through the questions and answers attached to the draft announcement and discussed some but not all of them.

20 Jackson remembered that Haley went through the materials and recalled that Hickey asked whether the policy would apply to chewing tobacco and was told that it would apply. Jackson also recalled there was some discussion about whether the various union trusts encompassed smoking cessation benefits.

25 Later in the day, Haley emailed others in human resources stating, "We presented to the Lmc today. No big pushback. Presented as a health benefit and extension of wellness. This will have more reaction from employees but will be fine." On cross-examination, Haley testified that presenting the substance of the tobacco-free policy at the meeting, rather than in advance of the meeting, was not a change in practice because there was no set practice, according to her. She also noted that there was some advance notice to the Union in her earlier February emails which
30 listed non-smoking yards as an agenda item.

¹⁰ Trautman did not recall distribution of the documents at the meeting at the time he gave his affidavit in October. At hearing, he testified that he did recall distribution. I do not credit his recollection at hearing. It was assertedly based on further review of relevant but unspecified documents which were not produced at hearing. Although recollections may be refreshed post-affidavit and pre-hearing, more explanation of the refreshing process would be necessary in this instance in order for me to credit the refreshed recollection.

¹¹ Jackson's affidavit does not mention the draft announcement or the questions and answers that Trautman and Haley testified were distributed in Portland.

¹² Haley did not know whether these documents were available to those participating by videoconference from Seattle. Jackson, who was in Seattle, had the documents on his computer but he could not recall if he printed them and handed them out to the Seattle participants. Further, he did not recall anyone asking to see them.

¹³ Haley's minutes of the meeting indicate that "Non-smoking yards – Notice to emp" was the last item discussed although it was on the final agenda as an item to be discussed about half way through the list. Haley explained that she had no independent recollection of the order in which agenda items were discussed although she stated that the order set forth in the agenda was not always followed in the meetings.

5 The draft announcement began, “We want to provide you with some advance notice of an upcoming change in the Vigor environment. All Vigor facilities will become tobacco-free on September 1, 2014.” The reasons for the policy were set out and answers to frequently asked questions were attached to the draft announcement.

10 Opland agreed that he was present via videoconference from Seattle at the February 27 LMC meeting even though one of his affidavits indicated that he could not remember whether he attended and a subsequent affidavit states that he did not attend the February 27 LMC meeting. At hearing, Opland denied that he was aware of the no-smoking proposal in February 2014. His notes of the February 27 LMC meeting do not reflect any discussion of the no-smoking policy.

15 Gary Moore, president of Laborers Union Local 296, who represents laborers who work for Respondent in the Portland area, is also executive secretary of the Portland MTC and regularly attends LMC meetings. In advance of the February 27 meeting, he recalled receiving the agenda as well as a copy of the February 2014 Vigor Vibe, the employee newsletter. The February Vigor Vibe did not mention the tobacco-free policy. While at the meeting, Moore made notes which make no reference of any discussion regarding a new no-smoking policy. However, he did recall discussion at the meeting about the company’s intention to make its facility tobacco free. Moore did not recall which individual made this statement and he did not recall any date for implementing this policy nor did he recall that any materials were handed out regarding non-smoking yards. When shown copies of the draft notice and final notice to employees regarding smoking, Moore testified that they were not distributed at the meeting and that the first time he saw them was two days prior to this hearing.

25 Until his retirement in September 2014, Barry Stevahn was Portland “bull” steward, elected by all other stewards to attend LMC meetings on their behalf. At the February 27 LMC meeting, he recalled extended discussion on the first four agenda topics: single point of contact, sick leave, lunch room capacity, and electronic applications. His recollection was that due to time constraints, there was no mention of the fifth item, “Non-smoking yards,” and there were no handouts on this subject. According to Stevahn, this agenda item was skipped and the committee moved on to safety glasses, Seattle issues, and new business. Neither version of the announcement to employees, the draft or the final, regarding non-smoking yards was distributed at the February 27 meeting according to Stevahn. Moreover, Stevahn did not recall receiving the announcement at any time before or after the February 27 meeting. He did recall seeing it and the frequently asked questions sometime after March 1 during a conversation with Hickey.

30 After full consideration of the entire record, I find that Haley alerted the Union on February 12 that Respondent was heading toward non-smoking yards, and Haley stated at the February 27 meeting that it was Respondent’s intention to become tobacco-free effective September 1. Thus, I credit Haley’s, Trautman’s, and Jackson’s testimony to that effect. I further note that Moore’s testimony was not to the contrary in that he remembered that a no-smoking policy was mentioned but could recall no further details.

45 No witness could recall whether the policy documents were distributed at the meeting. Haley testified that she gave them to Hickey to distribute to the Portland participants but she did not specifically know that he did so. No witness recalled whether the Seattle participants were

5 supplied copies. Although I credit Haley's testimony that she gave copies to Hickey to distribute, she could not testify that they were distributed. This candor on Haley's part is another reason that I credit her testimony that she announced and discussed the tobacco-free policy. I further note support of her testimony based on the contemporaneous email on February 27 that "we" made the presentation to the LMC and there was no big pushback. Thus, I find that Haley provided the relevant documents to the Union by handing them to LMC co-chair Hickey and that she told the Union that an announcement would be sent to all employees at the beginning of March.

10 In crediting Haley, Jackson, and Trautman's testimony that the new tobacco-free policy was announced on February 27 rather than Opland and Stevahn, who testified that it was not discussed, I note that Opland could not recall whether he attended the February 27 meeting until shortly before the hearing. In fact, in his two pre-hearing affidavits he initially could not recall the meeting and then recalled that he positively did not attend the meeting. This failure to recall is understandable given that he attends at least 300 meetings per year. Opland's testimony at 15 hearing was that due to a document search in preparation for hearing, he had now verified that he did attend the hearing. This testimony is credited. However, his further testimony that he is positive that the tobacco-free policy was not discussed is not credited. This later assertion – that the tobacco-free policy was definitely not discussed – strains credulity in light of his failure to recall attending the meeting until shortly before this hearing. Moreover, it is unclear whether 20 Opland actually recalled the fact that the tobacco-free policy was not discussed or if the absence of any mention of the tobacco-free policy in his brief notes led him to this conclusion. Opland was generally a reliable witness but his sudden recollection of the substance of a meeting that he could not recall attending shortly after the events occurred cannot be credited.

25 Although Stevahn was a generally credible witness with certainty and exactitude of recollection, the reliability of contrary documentary and testimonial evidence convinces me that he simply misremembered the February 27 meeting or was not paying attention during the discussion of the tobacco-free policy. Moreover, I note that his explanation for lack of discussion, that this topic was skipped for lack of time, is contradicted by Opland's notes which 30 indicate that the meeting ended at 3:15 p.m. rather than extending, as planned, to 4 p.m. Accordingly, I do not credit his testimony that the tobacco-free policy was not announced or discussed on February 27.

35 Finally, it is noteworthy that Hickey, who was a Union officer at the time of the hearing and additionally was a Union co-chair of the LMC throughout 2014, was not called to testify. I draw an adverse inference from his unexplained failure to testify and find that had he testified, he would have supported Respondent's evidence that the tobacco-free policy was announced and discussed at the February 27 LMC meeting and that he was given the relevant documents during the meeting. In general, an adverse inference is warranted in such circumstances. As the Board 40 stated in *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006),

45 Normally, it is within an administrative law judge's discretion to draw an adverse inference based on a party's failure to call a witness who may reasonably be assumed to be favorably disposed to the party and who could reasonably be expected to corroborate its version of events, particularly when that witness is the party's agent and thus within its authority or control. It is usually fair to assume

that the party failed to call such a witness because it believed that the witness would have testified adversely to the party. [footnote omitted]

5 In *Roosevelt Memorial*, however, the Board reversed the judge's finding that an adverse inference was warranted because the employer had called three witnesses to the event at issue and was not required to call a fourth cumulative witness. The same might be said here in that the General Counsel had already presented three witnesses who attended the meeting. However, Hickey's unexplained absence under the circumstances was a striking omission. Hickey was the Union co-chair of the particular LMC meeting at issue. He communicated with Haley prior to the meeting about agenda items. He sat next to Haley throughout the meeting. He was not called to testify. Rather, the General Counsel presented one witness to the meeting who gave two prior affidavits in which he was unable to state whether he was at the meeting or not and two other witnesses who both clearly recalled the meeting but disagreed on whether the new tobacco-free policy was discussed: one said it was mentioned and the other said it was absolutely not discussed. The weakness of this testimonial panel would have been readily apparent during pre-trial preparations but Hickey was, nevertheless, not called to testify. Thus, under these circumstances, an adverse inference is warranted.

20 Based on the credited testimony and exhibits, I find that notice was given to the Union on February 12 that Respondent was moving toward smoke-free yards and wanted to discuss the timing and process with the Union. After this announcement and inclusion of the tobacco-free policy as an agenda item in a February 26 email, I find that at the LMC meeting on February 27 Haley announced Respondent's intention to implement a tobacco-free policy on September 1. Finally, on February 27 she provided Hickey with copies of the policy, explained the policy at length, and outlined questions and answers about the policy.

30 Respondent sent its final tobacco-free policy announcement to all employees on March 7. The subject description in the announcement was changed to "Your Health" from the draft announcement subject description: "Use of Tobacco and Nicotine Products." Just as the draft announcement, the final was dated March 1.¹⁴ Respondent announced that it was "mov[ing] to non-smoking yards/facilities." Further, the final announcement provided,

35 This policy will be effective September 1, 2014 to allow time for individuals to take advantage of the many programs offered by our carriers and communities to help people stop smoking. This policy will apply to every Vigor employee, subcontractor and visitor while on Vigor controlled property, including parking lots immediately adjacent to the yard, the entrance gates, warehouses and aboard new construction ships.

40 The final announcement was accompanied by a two-page list providing answers to frequently asked questions which were unchanged from the questions and answers discussed by

¹⁴ Substantively, the draft version and the final version of the announcement were the same. Verbiage in the first two paragraphs of the draft was changed in the final and became three paragraphs. The first sentence of the fourth paragraph of the final, quoted above, was part of the draft but in a different place. Except for the first sentence of the fourth paragraph, the fourth through eighth paragraphs of the final are identical to the third through seventh paragraphs of the draft.

Haley at the February 27 meeting. There is no evidence that the final version of the March 1 announcement to all employees was sent to the Union prior to or at the same time it was sent to employees. Opland could not recall whether he and Hickey discussed a demand to bargain over the policy in March 2014.

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Analysis

The General Counsel alleges that the announcement on February 27 that a new tobacco-free policy was to be implemented on September 1 was a fait accompli and, thus, Respondent violated Section 8(a)(5) and (1) of the Act in failing to bargain in good faith. The parties agree that the tobacco-free policy was a mandatory subject of bargaining.¹⁵ Further, there is no disagreement and I find that the tobacco-free policy constituted a material change from the prior practice of allowing smoking within the yards.¹⁶ At a minimum, under the prior no-smoking policy, those who were able to leave enclosed, inside areas at the facilities could simply walk outside and smoke. Under the tobacco-free plan, employees would be obligated to walk substantial distances to areas outside the yard. Given the size of the larger yards, such a walk would become impossible during normal break periods.

Section 8(d) requires that the parties meet at reasonable times and confer in good faith regarding wages, hours, and terms and conditions of employment. An employer violates Section 8(a)(5) when, without consulting the union, it unilaterally institutes changes in mandatory terms of employment. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). In general, good-faith bargaining requires timely notice and a meaningful opportunity to bargain regarding a proposed change. See *First National Maintenance*, 452 U.S. 666, 682 (1981); see also, *Wackenhut Corp.*, 345 NLRB 850, 868 (2005); *Brimar Corp.*, 334 NLRB 1035, 1035 (2010). Similarly, once notice is given, the union must request bargaining with due diligence or else it waives bargaining. *Kansas Education Assn.*, 275 NLRB 638, 639 (1985)(failure of union to act with due diligence upon receipt of notice may result in waiver of its rights); *Medicenter Mid-South Hospital*, 221 NLRB 670, 678-679 (1975)(unilaterally implemented polygraph testing lawful because union did not prosecute right to bargain by requesting information or making any bargaining proposals).

In general, if notice is given too short a time before implementation of the change, that is, without time for meaningful bargaining to take place, the notice is nothing more than announcement of a fait accompli. *Toma Metals, Inc.*, 342 NLRB 787, 787 fn. 1 (2004). The same is true when an employer has no intention of changing its mind. *UAW-DaimlerChrysler National Training Center*, 341 NLRB 431, 433 (2004)(when director told union the layoff is a “done deal,” he announced a fait accompli excusing the requirement of requesting bargaining); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), enf. 722 F.2d 1120 (3d Cir. 1983) (employer admission that it was committed to implementation regardless of union response and immediate implementation after union asked for time to study proposal constitutes

¹⁵ Respondent admitted that the tobacco-free policy was a mandatory subject of bargaining in its answer to the complaint. See also, *WI Forest Products Co.*, 957, 958-959 (1991)(no smoking policy was mandatory subject of bargaining).

¹⁶ See *WI Forest Products*, supra, 304 NLRB at 959 (The difference between being allowed to smoke only during breaks in designated areas (including break rooms)—the pre-1989 rule—and not being allowed to smoke on the employer’s property at any time clearly was a substantial and material change for those who smoked).

fait accompli). Finally, when notice is given to employees prior to notification to the union, the employer’s decision has been held a fait accompli. See *AT&T Corp.*, 325 NLRB 150 (1997); *Roll & Hold Warehouse & Distribution Corp.*, 325 NLRB 41 (1997), enfd 162 F.3d 513 (7th Cir. 1998). When faced with a fait accompli, a union cannot be held to have waived bargaining. *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983).

In determining whether an employer has presented a “fait accompli,” objective evidence is required. *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 fn. 12 (1993); *Haddon Craftsmen, Inc.*, 300 NLRB 789, 790 (1990), enfd mem. 937 F.2d 597 (3d Cir. 1991). A union representative’s subjective impressions of the employer’s state of mind and the employer’s use of positive language in its notice announcing the changes are insufficient evidence of a “fait accompli.” *Id.*

I find that the timing of the announcements on February 12 and 27 regarding a change slated for September 1 provided sufficient time to allow for meaningful bargaining. Six months’ notice was given. This is more than a reasonable amount of time to bargain a single policy change under the circumstances presented here. Further, I find insufficient evidence that Respondent was entrenched, i.e., that Respondent exhibited no intention of changing its mind. In fact, there is evidence that Respondent wanted to discuss the matter with the Union. The initial notification to Hickey on February 12 was, “we are heading towards non-smoking yards and would like to discuss recommended timing and process.” A reasonable reading of these words is that the matter was open for discussion.

Thereafter, on February 27, Respondent presented the policy at a meeting attended by the exclusive bargaining representatives of its employees. Such presentation indicates, in and of itself, openness to discussion. Although only one of the three Union witnesses presented by General Counsel recalled Haley making comments regarding the policy, I have credited Haley’s testimony, corroborated by Trautman, Jackson, and Moore, that she discussed the policy. Presentation at the joint labor-management meeting indicates that Respondent was willing to discuss the matter with the Union, much as it stated in its initial email to Hickey. Accordingly, I find insufficient evidence that Respondent’s announcements on February 12 and 27 indicate that Respondent had no intention of changing its mind.

Although a notice was sent to all employees on March 1, I do not find that the notice alone proves that Respondent had no intention of changing its mind. First, I find that the Union had previously been notified of the tobacco-free policy. Second, I find that, in and of itself, the language of the notice cannot be reasonably construed as indicative of Respondent having no intention to change its mind. The March 1 notice contains the following statements:

- While we have encouraged participation in stop smoking programs, we feel the next step is to move to non-smoking yards/facilities.
- We are joining the trend of many communities and businesses in the areas in which we operate that have banned smoking and other forms of tobacco use, including the most recent form of nicotine delivery, e-cigarettes.

- This policy will be effective September 1, 2014 to allow time for individuals to take advantage of the many programs offered by our carriers and communities to help people stop smoking.

5 None of these statements alone or in context provides sufficient proof that Respondent was entrenched or that its decision was irrevocable. In fact, the statement “we feel the next step is to move to non-smoking yards/facilities” is somewhat equivocal in that “we feel” is a softer, more tentative statement than, for example, “we will” or “we are.” A statement that Respondent is “joining a [smoke-free] trend similarly fails to show a plan to move forward without
10 bargaining. Rather, a reasonable reading is that only the health trend of quitting smoking and exposure to second-hand smoke is at issue. The specifics of the plan announced for Respondent’s yards are not linked as a necessary ingredient to trending with other communities and businesses in the area. Similarly, a reasonable reading of the explanation of an effective date six months in the future is not tied to the exact specifics of the proposed plan.

15 In *Bell Atlantic Corp.*, 336 NLRB 1076 (2001), with remarkably similar facts, the Board affirmed the administrative law judge’s finding that an announcement six months prior to implementation did not constitute a fait accompli. Sufficient time for bargaining was not at issue. As to entrenchment, the positive tone of the announcement together with the subjective
20 impression of the union as to the finality of the announcement were insufficient to establish that the notice was a fait accompli. *Id.* at 1087. Similarly, referral of the issue to a joint labor-management committee indicated that the decision was not irrevocable. *Id.*

25 Thus, I conclude that due to insufficient proof of entrenchment, the announcements of February 12 and 27, and the announcement to employees on March 7 do not constitute a fait accompli. Thus, I recommend that this allegation be dismissed.

ALLEGED FAILURE TO BARGAIN IN GOOD FAITH

30 The complaint alleges that even if the original announcement was not a fait accompli, Respondent nevertheless failed to bargain in good faith. A summary of the issues and findings on those issues follows:

- Timeliness of Requests to bargain: Respondent claims that the Union’s requests to
35 bargain on May 20, June 3, and June 27 were too late. By waiting for three to four months to request bargaining, Respondent claims the Union waived bargaining over the decision to implement the tobacco-free policy as well as the effects. Despite the passage of time, I find that under the particular circumstances of this case, the delay did not constitute waiver.
- Respondent’s Availability to Bargain: Further, the General Counsel and the Union urge that Respondent’s delay in waiting to bargain until the week of August 4 constitutes
40 evidence of bad faith. Under the circumstances, I find that the delay does not constitute evidence of bad faith.
- Bargaining Sessions: By letter of August 15, the Union demanded decision and effects bargaining. The parties met for bargaining three times in August, once before the August
45 15 letter and twice after the letter. I find that except for the request to decision bargain in

the August 15 letter, the Union made no further attempt to bargain about the decision to implement the tobacco-free plan and that decision bargaining was thus waived. Further, the Union’s statement at the August 29 meeting that it was not attempting to change the implementation on September 1 constituted waiver of decision bargaining. I find there was implicit agreement on application of the Handbook disciplinary provisions to breaches of the tobacco-free policy and on installation of smoking structures outside of the yard.

Timeliness of Request to Bargain: Facts

The Union requested bargaining on May 20, June 3, and June 27

During the April LMC meeting, the tobacco-free policy was on the agenda and further discussion occurred regarding the contours of the tobacco-free initiative. The Union made no request to bargain in April. The Puget Sound MTC is a conglomerate of business agents in the Puget Sound area. The employees they represent work at multiple employers in the area. They meet on the first and third Tuesdays of each month. Their meetings are closed to employer representatives but, on occasion, after their formal meeting is concluded, employer representatives meet with the Union representatives. After the May 20 and June 3 regular meetings, Jackson was invited to attend as an employer representative.

- At the employer post-session meeting of the Puget Sound MTC Meeting held May 20, Behling told Jackson he felt the parties needed to bargain at least the disciplinary portion of the tobacco-free policy

On May 20, Behling testified that he told Jackson he felt that the parties needed to bargain about the new tobacco-free policy – at least the disciplinary part of it.¹⁷ Jackson recalled that he and Behling discussed only the disciplinary aspect of the new policy and denied that Behling requested bargaining. Although Jackson denied that a demand to bargain was made, I credit Behling based on all the surrounding circumstances. Generally, Jackson was a credible witness. However, I find it probable that he did not understand Behling’s statement as a formal request to bargain given that it did not emanate from Opland, the normal spokesperson and point of contact for the Union, and given that the setting was not typically utilized for bargaining and demands to bargain.

- After the June 3 Puget Sound MTC employer post-session meeting ended, Jacobsen told Jackson that he believed the tobacco-free policy was a subject that needed to be bargained

Behling testified that after a June Puget Sound MTC meeting, Dave Jacobsen, president of the Puget Sound MTC, addressed Jackson stating, “Al, I believe this [tobacco-free policy] is a subject that we need to bargain, it’s a change in conditions.” Behling testified that Jackson responded. “I don’t know why you keep bringing this up, it’s not going to happen for – until September 1st.”

¹⁷ Opland recalled a similar remark by Behling but he could not recall the date.

Jackson recalled that at the June 3 Puget Sound MTC meeting, he told those present that he had checked into whether there was going to be a new standalone policy on discipline for violations of the tobacco-free policy and he reaffirmed his May 20 statement that there would be no separate disciplinary provision for the new tobacco-free policy. Rather, it would be governed by the current Handbook corrective action policy. Jackson's statement was in response to a question from Jacobsen, "What is the policy related to smoking and what is the discipline . . . policy related to violating the [new] smoking policy?" Jackson told the participants that the smoking policy itself was simple: "There's no smoking on any Vigor owned or operated facility." Jackson testified that there was "absolutely not" a demand for bargaining made at either the May 20 or June 3 meeting. Jackson stated that he was only asked what the policy on no smoking was and what the policy on discipline was. He explained that had such a demand been made, he would instantly have contacted Haley or Trautman because, "this was a big issue for the company. I also know it's a mandatory subject of bargaining."

In an internal June 19 email exchange, Darin Sorenson, a human resources representative based in Seattle, noted that while attending a Puget Sound MTC meeting on June 3, the Union asked if there would be a policy drafted regarding the tobacco-free initiative and what discipline plan would be administered if employees did not comply. Trautman responded that he would prefer a general discussion before anything was drafted. The parties on the email exchange agreed to have an internal discussion before a meeting scheduled for July 23.

For the same reasons that I credited Behling's testimony over that of Jackson as to the May 20 meeting, I also credit his testimony that Jacobsen said that he thought the tobacco-free policy was a subject that needed to be bargained.

Thus, the record reflects that after the May 20 Puget Sound MTC meeting Behling stated that the tobacco-free policy should be bargained – at least the disciplinary portion. After the June 3 meeting, Jacobsen stated that he believed the tobacco-free policy should be bargained. Whether Respondent understood the statements that the tobacco-free policy should be bargained as demands to bargain or not, I find that they were indeed demands to bargain. "While a request to bargain is a prerequisite to the employer's duty to bargain . . . the request need take no special form, so long as there is a clear communication of meaning." *Scobell Chemical Co. v. NLRB*, 267 F.2d 922, 925 (2d Cir. 1959); see also *NappeBabcock Co.*, 245 NLRB 20, 21 fn. 4 (1979) (request for information so we can proceed to negotiate a contract found to be request to bargain). A statement that a subject should be bargained is not a mere expression of opinion but rather is tantamount to a request to bargain.

- On June 26, the Union made a written request to bargain

By letter of June 26, the Union submitted a written demand to bargain the decision and effects regarding the tobacco-free policy.

Timeliness of Request to Bargain: Analysis

As mentioned in the prior analysis of *fait accompli*, the duty to bargain arises on a request to bargain from the union. *Kansas Education Assn.*, supra, 275 NLRB at 639; *Medicenter Mid-South Hospital*, supra, 221 NLRB at 678-679. Waiver may occur even where a union has

received no formal, written notice of the proposed change if the union in fact received sufficient notice of the proposal to give it the opportunity to make a meaningful response. *American Buslines*, 164 NLRB 1055, 1055-1056 (1967)(union must act diligently to enforce representational rights). Waiver may also occur when a union takes no action after receiving notice, see *Reynolds Metal Co.*, 310 NLRB 995, fn. 3, 1000-1001 (1993)(union's initial request to bargain was pursued and then abandoned); *The Goodyear Tire & Rubber Co.*, 312 NLRB 674, fn.1 (1993)(union must follow up where there is discussion but no agreement; silence indicates a lack of due diligence) or makes an untimely request to bargain after receiving notice. *Kansas Education Assn.*, supra, 275 NLRB at 639 (request to bargain untimely where one month advance notice given and request to bargain made one month after implementation).

Under the particular facts of this case in which the earliest notice to the Union occurred on February 12 and the earliest request to bargain occurred on May 20, i.e., three months and one week later, I find that the Union did not waive its right to bargain. The Union received notice six months in advance of implementation. With such advance notice, requesting bargaining one-half of the way through the process is not inherently unreasonable. Further, other contemporaneous and relevant events would appear to mollify any waiver or disclaimer of interest in bargaining. The parties continued to discuss the topic. For instance, the April Vibe was sent to LMC members in preparation for an April 29 meeting. This copy of the Vibe included a reprint of the March 1 notice to all employees. General discussion of the new policy continued at the April 29 LMC meeting. There the focus was on the wellness aspect of smoking cessation and potential support for quitting smoking as well as a raffle for employees who had ceased smoking for 30 days or more. There was also further discussion about September 1 being the date for implementation of the tobacco-free policy. Thus, I find that the tobacco-free policy was actively pursued by both Respondent and the Union throughout the months prior to a formal request to bargain.

Respondent's Availability to Bargain: Facts

Trautman responded to the June 26 demand letter on June 30 stating that Respondent would like to schedule bargaining after a management meeting set for July 23 and suggested August 4 through 8. Trautman explained that human resources was meeting on July 23 "to talk further about moving toward Smoke Free facilities." There is no evidence that the Union objected to this proposed timing for bargaining. Opland testified that he thought there were vacations scheduled between July 23 and August 4 that caused the additional 12-day delay.

Respondent's Availability to Bargain: Analysis

On June 26, the Union's letter demanded decision and effects bargaining and Respondent's June 30 letter requested that bargaining take place during the week of August 4-8 so that it could have internal discussion culminating at an already-planned July 23 meeting. There is no evidence that, at this point, waiver was asserted by Respondent nor is there evidence that an objection was made by the Union to the 5-week delay in beginning bargaining.¹⁸ Although the Union might be faulted for three-month's delay in seeking to bargain, Respondent

¹⁸ Opland understood that the further delay after July 23 until the week of August 4 was due to vacation plans of some of Respondent's representatives.

also sought delay in postponing bargaining for five weeks after it received the June 26 letter. Given these facts, I find that neither party is in a position to raise delay or waiver¹⁹ as an element of analysis in this case.²⁰

5 As after-the-fact observers, we see that the six-month time period between announcement of the tobacco-free policy and the implementation date for the policy was regrettably whittled down to four and one-half weeks to engage in bargaining. Yet no bad faith or purposeful evasion of the duty to bargain is apparent on the record. The July 23 meeting was long-planned. The Union raised no alarms at the delay caused by the additional vacations. Thus, under these
10 circumstances, I do not find the delay amounted to evidence of bad faith bargaining.

Bargaining Sessions: Facts

15 On August 7, the parties met to bargain. Neither side presented any written proposals. No agreements were reached. The Union made no request to engage in decision bargaining and there was no request to postpone implementation of the tobacco-free policy.

The parties met on August 7. Jackson and Trautman were present for Respondent. International Representative Gary Powers, Opland, and Hickey were present for the Union.
20 Trautman used a bargaining outline to discuss the Oregon and Washington laws regarding smoking and the Oregon citations resulting from employee complaints about workplace smoking. He presented information and pictures about environmental concerns and litter problems caused by workplace smoking. Trautman stated that the company wanted to be tobacco free by September 1 consistent with the earlier February 27 discussion.
25

During the discussion, Trautman emailed his presentation to the Union representatives including the pictures, signage, and an outline of his presentation. The Union asked about e-cigarettes and Trautman stated that Respondent would prefer not to allow e-cigarettes because of problems already encountered in that regard with individuals smoking e-cigarettes or “vaping” in
30 offices. The Union voiced concern about the policy and about corrective action and how it would be administered. The Union also was concerned about corrective action being administered heavy handedly. Trautman responded that Respondent did not have time to be the smoking police. He opined that as long as employees put out the cigarette immediately and behaved appropriately “without a bunch of pushback or attitude,” he thought Respondent would be fairly
35 light on corrective action.

Jackson, the designated note keeper for Respondent, recalled that he or Trautman said that the company was there to bargain pursuant to the Union’s June 26 letter demanding bargaining. Trautman went through the exhibits that he emailed to the Union representatives at
40 the beginning of the meeting. Jackson recalled that Opland and Powers were using laptops and

¹⁹ Respondent did not assert waiver until August 21 and then regarding the decision but not the effects.

²⁰ The General Counsel’s assertion that the delay until after the meeting on July 23 “was merely a smokescreen to mask Respondent’s true motive to delay bargaining to a date much closer to the planned implementation date” is without basis in fact. The July 23 meeting was referenced long before the June 26 demand to bargain.

Hickey was using a phone to access the materials. Trautman gave an overview of the health and safety issues in Portland including smoking near doors, cigarette butts, and burn marks on trash cans. Jackson spoke about a smoldering fire on the pier in Seattle. Jackson recalled Powers suggested that these reasons be communicated with employees, “so the members don’t feel like it’s a dictatorship being thrown down their float.” Trautman told the Union there would be no specific discipline provision relating to the tobacco-free policy. The handbook progressive discipline policy would apply. Jackson also recalled that Trautman told the Union that under the tobacco-free policy, there would be no smoking on Vigor owned or operated property including parking lots. If employees were on public property, they could smoke. Trautman cited issues of healthcare, a clean environment, and litter as the reasons for the new policy. Jackson testified that the Union made no proposals at this meeting. No other witness testified contrary to this statement.

Neither side presented any written proposals at this meeting. The Union asked if Respondent was going to provide a formal written tobacco-free policy as well as a formal written policy on corrective action pursuant to the tobacco-free policy and Respondent informed the Union that the policy was simple: “There would be no tobacco use or e-cigarettes in our facilities or parking lots, anything controlled by the company.” Trautman added that Respondent had no control over public property such as sidewalks and streets outside company property. Regarding corrective action, Respondent’s position was that there was already a written policy about case by case progressive corrective action in the employee handbooks and Respondent did not believe a different corrective action policy was needed for the tobacco-free policy. There was discussion about a short grace period, perhaps one week, before any corrective action would be taken.

Powers opined that he thought the policy would “come across better if the communication talked a little bit more about the company caring about employees and less coming across dictatorial.” Trautman testified that there was no request during the meeting that Respondent postpone implementation of the policy. No other witness testified to the contrary.

However, without further context, Opland testified that he told Respondent’s representatives that the Union would be forced to file an unfair labor practice charge. According to Opland, an employer representative responded,

they have the same understanding, and also that, again, they’ve been given a direction to proceed with the implementation and also they had the understanding that regardless of the outcome of a ULP hearing they – they intend to be tobacco-free at all locations, regardless.

Opland did not deny any of Trautman, Jackson, or Haley’s testimony. I credit their testimony and find there was a great deal of information exchanged during this meeting but no real progress was made in terms of reaching agreement. Respondent declined to put its tobacco-free policy in writing but stated it clearly: “There would be no tobacco use or e-cigarettes in our facilities or parking lots, anything controlled by the company.” This was Respondent’s consistent position since May. Additionally, consistent with its position since at least May, Respondent stated that the parties’ collectively-bargained progressive disciplinary policy set for the in the employee Handbook would control any disciplinary action taken under the new tobacco-free policy.

Regarding Opland's testimony that the Union would be forced to file an unfair labor practice charge, I do not credit Opland's testimony that he made this statement at the August 7 meeting nor do I credit his further recollection that an unspecified employer representative stated that regardless of the outcome of an unfair labor practice hearing, the employer intended to be tobacco free at all locations. The statement, that the Union would be forced to file a charge, would only make sense in the context of the Union making a request to bargain about the decision at the August 7 meeting and being denied that request. On August 7, there is no evidence that the Union made a request to bargain about the decision. In other words, there is no evidence that the Union followed up on its written request of June 26 to engage in decision bargaining. Further, no one else who testified about the meeting included the unfair labor practice scenario in their testimony. Neither Hickey nor Powers was called to corroborate Opland's testimony about an unfair labor practice statement. I draw an adverse inference, therefore, that they would not have been able to corroborate this testimony.²¹

Thus, I find that on August 7, information was given to the Union regarding the tobacco-free policy. No demand to engage in decision bargaining or to postpone implementation was made. Respondent adhered to its earlier positions that the tobacco-free policy need not be further reduced to writing and the already-established progressive disciplinary policy would apply.

Informal Discussions of Haley and Opland

On the following day, August 8, at a step 4 grievance meeting, Haley, Powers, and Opland present, Haley expressed surprise that the parties had been talking about the tobacco-free plan since early February and nothing had come of the meeting on August 7. She also noted that, based on her understanding of what happened at the meeting, the Union had not provided any proposals at that meeting. Powers told Haley he had never received copies of the original handouts.

By email of August 12, Haley wrote to Powers with copies to Behling, Opland, Jackson, and Trautman forwarding the prior email of February 28 with the attachments of the March 1 "Your Health" announcement to all employees of the September 1 implementation of a tobacco free workplace together with the answers to frequently asked questions. According to Opland and Behling, this was the first time they had seen these documents although Opland heard rumors about the institution of the policy. Because it is without controversy that Hickey received these documents on February 27, I give little credence to Opland and Behling's testimony above. Certainly the Union had been given these documents²² at the LMC meeting on February 27.

²¹ When asked in the context of an August 21 letter whether this was the first time Respondent had stated that it would not bargain about the decision to implement, Opland responded that Respondent made this statement at the August 7 meeting as well. For the same reasons, I did not credit Opland's testimony about the unfair labor practice hearing, I do not credit this testimony in the context of the August 21 letter. It was not developed any further regarding who made this statement and the context of the statement. Accordingly, I do not credit it.

²² In the case of the March 1 announcement to employees, as fully explained supra, the document was similar but not identical to the document provided to Hickey on February 27.

According to Opland, at this point, Respondent had not sought input from the Union or bargained with the Union about how the tobacco-free policy would apply and to whom it would apply. Nor had the parties discussed how the company would handle violations of the tobacco-free policy according to Opland. Opland’s opinion that input from the Union was not sought and that discipline had not been discussed is contrary to the credited evidence that the policy was initially presented at an LMC meeting on February 27, at the June 3 Puget Sound MTC meeting, that the disciplinary aspect was discussed on May 20, June 3, and August 7. His testimony that there had been no discussion about discipline is contrary to the overwhelming weight of the testimony of all parties that discipline was discussed repeatedly. Thus, I do not give weight to his testimony on these facts.

On August 15, the Union sent a second letter demanding bargaining

By letter of August 15, the Union sent a further demand to bargain the decision and effects, stating in relevant part:

Boilermakers Local 104 objects to the unilateral implementation of the Tobacco Cessation or No Smoking Policy. This is a mandatory subject and what Vigor did was unlawfully announce that the policy had been implemented without giving the Union a chance to bargain about the decision or the effects. We demand that the policy be rescinded and allow the Union a chance to bargain about the decision and the effects.

On August 20, the parties discussed potential resolution of the tobacco-free policy at an LMC Meeting. Respondent adhered to its consistent position that it would utilize the handbook progressive discipline which covered all other discipline, including prior no-smoking policies. No specific agreements were reached.

Prior to the LMC meeting scheduled for August 20. Haley sent members of the committee a proposed agenda and the Vigor Vibe. “No smoking initiative update” was listed as the first agenda item. At the LMC meeting on August 20, attended by Opland, Hickey, Jackson, Trautman, and Haley, among others, Opland recalled that Haley asked if having designated smoking areas in the parking lot would resolve the matter. Opland said that Union would not agree to that and that there was no movement from the employer’s side. Opland agreed that Trautman and Jackson acknowledged that the policy was a mandatory subject of bargaining.

Haley did not testify regarding this exchange. Rather, she recalled merely updating the committee on communications with employees regarding the countdown to go tobacco free. Although Haley agreed that a demand to bargain had been made shortly before the meeting, she did not recall it being discussed at the meeting. Looking at her notes from the meeting, she explained that the initial language at the start of the notes was a reminder to herself to talk about “What do we need to do to come to agreement.” Haley agreed that there was some discussion about employees being able to smoke on lunch and breaks, litter issues from smoking, and potentially retaining some of the smoking shelters as picnic shelters. Haley thought a comment in her notes, “Brian – ability for emp to smoke on lunch/break,” meant that Opland wanted to confirm that employees could smoke on their lunches and breaks and she testified that the company agreed and stated, “we weren’t stopping that.” She also recalled that Opland was

concerned that employees would have to walk to get to designated smoking areas. Her notes also reflected agreement to meet further on the issue.

5 Jackson recalled that Haley asked if there were any options to resolve the dispute on tobacco-free, referencing the unfair labor practice charge. Discussion ensued about leaving the shelters in place but there was no real back and forth on this. Haley opined that perhaps this wasn't the appropriate forum for the discussion noting that there was a bargaining session scheduled for August 29.

10 Respondent replied to the August 15 demand letter on August 21 asserting waiver on decision bargaining but agreeing to bargain effects at a meeting set for August 29

15 Respondent answered the Union's letter of August 15 by letter of August 21 noting that, "the Union was informed . . . almost eight months ago. Now, just two weeks before the policy is to be implemented and just one week after the parties met for a formal bargaining session, the Union is objecting. . . ." Based on its chronology of communications and bargaining, Respondent asserted that the Union had waived its right to bargain over the decision. Respondent offered to bargain over the effects on August 29²³ but insisted it would nevertheless go forward with implementation. On August 27, the instant unfair labor practice charge was filed.

20 At the August 29 meeting, Respondent offered to set up smoking areas in outside-the-yard parking lots and reiterated its position since May that disciplinary action would be according to the Handbook. Respondent stated that this was the best they could do. The Union stated it was not trying to stop implementation of the tobacco-free policy. The Union stated that it understood the employees would be responsible for keeping the outside-the-yard smoking areas clean.

30 At the meeting on August 29, Haley, Jackson, and Trautman were present for Respondent while Opland, Hickey and Powers represented the Union.²⁴ Trautman recalled the Union asked about whether e-cigarettes would be allowed on company premises. Trautman said Respondent would not allow e-cigarettes and presented an article about "vaping" marijuana or hashish oil utilizing e-cigarettes. The ban on e-cigarettes was consistently Respondent's position since at least May when it was explained at the May 20 Puget Sound MTC meeting.

35 Trautman, Jackson, and Opland agree that Trautman asked if the Union had a proposal. The Union responded that it did not. Trautman expressed confusion. "What are we doing here? I thought we were here to bargain." Jackson recalled words to this effect as well. Trautman testified that Opland responded, "well, I didn't realize you were open to bargaining." Opland agreed that Trautman asked for the Union's proposal and testified that his confusion was based on a statement on August 7 that Respondent had directed human resources to implement the

²³ The letter actually says both "August 29" (first paragraph) and "September 29" (last paragraph). However, it appears that the reference was to an already-planned meeting scheduled for August 29.

²⁴ Opland remembered that Respondent took the position that the Union had waived the right to bargain. Discussion ensued about whether the no-tobacco policy was a mandatory subject of bargaining. As mentioned previously, neither Powers nor Hickey testified. Opland's recollection that Respondent took the position at this meeting that the Union had waived the right to bargain is not supported by any other witness and was not developed regarding who made this statement. I do not credit this statement.

5 policy without bargaining. This statement was not included in Opland's testimony regarding the August 7 meeting and was not developed any further at this point. I do not credit the testimony to the extent it asserts that an unknown representative of Respondent stated that Respondent was going to implement the policy without bargaining. Further, I note that neither Powers nor Hickey was called to corroborate this statement and I infer that had they been called they would not have corroborated the statement.

10 The Union caucused and then, according to Trautman and Jackson, proposed retaining two within-the-yard designated smoking areas at the major facilities in Seattle and Portland with smoking permitted during meals and rest periods. Opland recalled that his proposal was slightly different than Trautman and Jackson's version. He recalled the Union proposal was to reduce the number of designated within-the-yard smoking areas at each facility by one-half their current number. In any event, it is clear that the Union's proposal envisioned inside-the-yard smoking facilities.

15 Trautman recalled the Union agreed to corrective action if it was not too severe. Trautman explained to the Union that corrective action would be on a case-by-case basis and would not be severe if an employee was cooperative. However, if smoking was in an area in violation of state law, such as too close to a doorway, it would be a different matter because Respondent could be fined. Trautman recalled that Powers stated, "he wasn't asking us to stop, that he got it. It was like implementing a safety – a new safety policy. And that they were just asking that the corrective action not be too severe." Haley recalled the same Powers' comments as well. I credit this testimony and find that Powers made the statement that the Union was not trying to stop implementation of the policy. Once again, I note in this regard that Powers was not called to testify. I further note that Opland did not deny this statement attributed to Powers.

20 Respondent caucused and then responded that it was not interested in the Union's proposal to allow smoking inside the yard but it agreed to move on smoking in the parking lots and would establish or maintain two designated smoking areas in the major Seattle and Portland facilities outside of the gate in its parking lots. Haley recalled discussion about employees maintaining these areas with no litter or cigarette butts and the Union agreed that the employees would maintain the areas or else these areas would be taken away. Jackson recalled someone from the Union stating that they understood and would make sure the employees helped to keep the area clean. Opland did not dispute this testimony. Thus I find that the Union stated that it understood that employees would be responsible for maintaining the parking lot smoking structures.

25 Trautman testified that he said, "this is all we're willing to budge on." Haley recalled Trautman saying, "to be clear this is what we are willing to do." Jackson recalled Trautman saying, "This is the best I can do. This is where we're at. This is the concession from . . . February." Trautman also said, according to Jackson, "This is what I can do, and it's the two spot[s] outside the gate, they need to be kept clean and that's . . . all we can offer." Opland did not testify about such statements one way or the other. I find these statements were made.

30 Trautman also asked that the Union consider withdrawing the unfair labor practice charge. Jackson also recalled this comment. Haley testified that someone from the Union said they would consider withdrawing the charge. Jackson recalled Powers stating that the Union was

not asking Respondent to reset the clock or stop implementation. Powers asked that Respondent not have a heavy hand when it came to discipline. Opland did not testify that such statements were or were not made. I find that Powers stated that the Union was not asking to stop implementation or reset the clock.²⁵

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The Tobacco-Free Policy was Implemented on September 1 and Respondent established Smoking Structures outside the yard in its Parking Lots in the Portland and Seattle yards

On September 1, Respondent implemented its tobacco-free policy at all Designated Subsidiaries in Oregon and Washington. There is no dispute that implementation of the policy changed existing no-smoking policies at these facilities. Consistent with the August 29 bargaining, eventually two designated smoking areas/facilities were established in Seattle and Portland within parking lots. In Portland where there were existing smoking shelters, it took until mid-September to put these in place in the parking lots by disassembling them at their prior within-the-yard locations and reassembling them in the outside-the-yard parking lots. In Seattle, new smoking shelters were erected in parking lots outside the gates. Implementation of the tobacco-free policy impacted employees in the two larger facilities, Harbor Island and Swan Island, in that it took more time to reach the parking lot designated smoking areas in order to smoke.

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In communications regarding the August 29 negotiation session, Opland and Trautman disagreed about details of the August 29 meeting

Despite the fact that Powers told Respondent on August 29 that the Union was not asking Respondent to reset the clock or stop implementation, on September 3, Opland sent a letter regarding “Demand to Bargain the Decision and Effects.” In this letter, he summarized the August 29 meeting and set forth a counter proposal which would require that Respondent maintain one or two within-the-yard designated smoking areas on Respondent’s property at each facility. The letter also proposed education of employees on use of these areas, agreement between the parties on corrective action, and expiration of the policy on notice of either party.

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By letter of September 12, Trautman, on behalf of Respondent, reasserted waiver and reiterated its earlier proposal to have at least one smoking area in parking lots outside the yards in each location. Respondent rejected the need for education, stated the parties’ current corrective action clause would govern, and stated its intent that its policy go forward indefinitely. In both Portland and Seattle, smoking areas were established outside the yards in the parking areas.

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Bargaining Sessions: Analysis

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The General Counsel and the Union argue that Respondent failed and refused to bargain in good faith before altering its smoking policy. As mentioned before, there is no dispute that the

²⁵ Opland recalled stating that the Union would counter this proposal later in the week. No Respondent witnesses contradicted this testimony but a later letter from Trautman to Opland recalled that the Union said it would get back to Respondent.

change in smoking policy was a mandatory subject of bargaining and there is no dispute that the tobacco-free policy constituted a substantial and material change in working conditions. I find, based on the record as a whole, that Respondent did not violate the Act by bargaining in bad faith.

5

Bargaining took place on August 7, August 20, and August 29. At the August 7 meeting, Respondent declined to offer a written tobacco-free policy. This was consistently Respondent's position and it always added that the policy was clear. No tobacco/no smoking was self-explanatory. Respondent adhered to its consistent position that the Handbook corrective action applicable to the new tobacco-free policy would be the parties' current corrective action agreement set forth in the Handbook. There was some give and take in that Respondent offered, as it had on prior occasions, to "go easy" on disciplinary actions, at least when the policy was initially implemented. No progress was made during informal discussions on August 20. By letter of August 21, responding to the Union's August 15 demand to bargain decision and effects, Respondent asserted that the Union had waived decision bargaining.

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Thereafter at the August 29 meeting, the Union stated it was not attempting to change implementation on September 1. I find that this statement as well as the Union's failure to raise decision bargaining at the table constituted a waiver of decision bargaining. Once furnished with the opportunity to bargain, it was incumbent on the Union to test Respondent's intent to bargain by engaging in negotiations. *Berklee College of Music*, 362 NLRB No. 178, slip op. at 2 (2015), citing *Richmond Times-Dispatch*, 345 NLRB 195, 199 (2005). Although the Union's August 15 letter requested decision bargaining, the Union did not follow through by making alternative proposals or attempting to persuade Respondent from altering its decision. Certainly, the Union voiced objections and filed unfair labor practice charges. However, these objections and charges do not amount to bargaining.

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As to the disciplinary aspect of the tobacco-free policy, Respondent consistently stated that it wanted its tobacco-free policy to be covered under the parties' Handbook progressive disciplinary policy. There is no evidence that the Union specifically stated that it agreed to this coverage. Initially, the Union asked if a separate policy was envisioned to govern the tobacco-free policy. Trautman told the Union on June 3 that there would be no separate policy and that remained Respondent's position throughout. However, it is undisputed that the Union did not propose any alternative to the Handbook disciplinary policy and voiced its chief concern about application of the policy being heavy-handed. That is, the Union did not disagree with application of the extant progressive discipline policy but only asked that it not be applied in a heavy-handed manner. Respondent sought to alleviate this fear by explaining that it did not intend to be the smoking police and that it would go easy as long as there were not flagrant violations. Thus, I find that by failure to propose an alternative disciplinary policy and by expressing only concerns about how the Handbook progressive disciplinary policy would be applied, the Union implicitly agreed to application of the parties' extant progressive disciplinary policy and the discussion proceeded to how it would be applied. Once Respondent stated that it would, in effect, not be heavy handed, there was implicit agreement on the matter. No further comments or proposals were made.

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Respondent countered the Union's proposal to set up inside-the-yard smoking areas and offered to set up designated smoking areas outside the yard in the parking lots of its two larger

facilities. Respondent stated this was the best it could do and it expected the employees to maintain the structures. The Union acknowledged that employees would keep such structures clean. Once again, I find this acknowledgement amounted to implicit agreement.

5 Thus, I find that Respondent did not violate the Act by implementing its tobacco-free policy on September 1 and by applying the progressive discipline provisions of the employee Handbook to any infractions of the policy. I further find that Respondent did not violate the Act by installing outside-the-yard smoking shelters in employee parking lots.

10 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁶

ORDER

15 The complaint is dismissed.

Dated: Washington, D.C. September 2, 2015



Mary Miller Cracraft
Administrative Law Judge

²⁶ 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.