

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VIGOR INDUSTRIAL LLC

and

Case 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

**COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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Pursuant to § 102.46(a) of the Board's Rules and Regulations, Series 8, as amended, Counsel for the General Counsel hereby files the following exceptions to the Decision and Order of Administrative Law Judge Mary Miller Cracraft ("the Judge") dated September 2, 2015, based upon evidence presented during a 3-day hearing following issuance of an Amended Consolidated Complaint (the "Complaint") on June 3, 2015, which was further amended at the hearing. Counsel for the General Counsel takes exception to the following:¹

1) The Judge's finding that Lance Hickey ceased his duties as the assistant business manager of International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers Local Union 104, AFL-CIO (the "Union") (ALJD 4 n.6) because the record evidence establishes that the Union discharged him from that position.

2) The Judge's finding that Haley testified that she did not observe Hickey distribute the materials at the February 27 meeting (ALJD 6: 12) because the record evidence establishes that Haley testified that Hickey distributed the materials to the meeting's participants in the room.

3) The Judge's finding that Gary Moore recalled "discussion" at the February 27 meeting about Respondent's intention to make its facilities tobacco-free (ALJD 7: 19-20) because the record evidence establishes that he heard one statement that Respondent intended to make its facilities tobacco-free.

4) The Judge's finding that Haley testified that she did not know and could not testify that Hickey distributed the policy documents at the February 27 meeting (ALJD 7:

¹ References to the Administrative Law Judge's Decision and Order appear as (ALJD____:____). The first number refers to the pages and the second number refers to the lines.

46-47) because the record evidence establishes that Haley testified that Hickey distributed the materials to the meeting's participants in the room.

5) The Judge's finding that, as she could not testify that the materials were distributed at the February 27 meeting, Haley exhibited candor (ALJD 8: 2) because the record evidence establishes that Haley testified that Hickey distributed the materials to the meeting's participants in the room.

6) The Judge's finding that Haley discussed the tobacco-free policy at the February 27 meeting (ALJD 8: 3) because it is based on the Judge's erroneous finding of candor on Haley's part and because the record evidence establishes that Haley did not discuss the details of the new policy with the meeting's participants.

7) The Judge's finding that Haley told the Union that an announcement about the new tobacco-free policy would be sent to all employees at the beginning of March (ALJD 8: 6-7) because the record evidence establishes that Haley did not make that announcement.

8) The Judge's finding that the reliability of contrary documentary evidence establishes that Stevahn misremembered or was not paying attention when the new policy was discussed at the February 27 meeting (ALJD 8: 26-28) because the record evidence supports Stevahn's testimony that details of the new policy were not discussed with the meeting's participants.

9) The Judge's finding that Stevahn's explanation that the non-smoking yards topic was skipped due to lack of time is contradicted by Opland's notes showing that the meeting that was scheduled to end at 4 p.m. actually ended at 3:15 p.m. (ALJD 8: 28-30)

because the Judge failed to consider Respondent's security records showing that Opland exited Respondent's facility at 4:17 p.m. after the meeting ended.

10) The Judge's finding not to credit Stevahn's testimony that the tobacco-free policy was not discussed at the February 27 meeting (ALJD 8: 31-32) because no credibility finding was necessary or appropriate and because her finding is not based on witness demeanor, is illogical, and is refuted by record evidence.

11) The Judge's decision to draw an adverse inference from Hickey's failure to testify to find that Respondent discussed the new policy with the February 27 meeting's participants (ALJD 8: 35-38) because the Judge failed to consider that the Union had discharged Hickey from his paid position a few months before the hearing and that Hickey's testimony would have been merely cumulative to the other testimonial and documentary evidence in the record establishing that the policy materials were not distributed to or discussed with the meeting's participants.

12) The Judge's finding that Hickey's unexplained absence to testify was a striking omission (ALJD 9: 8) because the Judge failed to consider that the Union had discharged Hickey from his paid position a few months before the hearing and that Hickey's testimony would have been merely cumulative to the other testimonial and documentary evidence in the record showing that the policy materials were not distributed to or discussed with the meeting's participants.

13) The Judge's superfluous finding that the weakness of General Counsel's testimonial panel would have been readily apparent during pre-trial preparation (ALJD 9: 15-16) because the documentary evidence and pre-trial affidavit evidence established

that Respondent had not distributed or discussed the new policy materials with the February 27 meeting's participants.

14) The Judge's finding that, under the circumstances, an adverse inference was warranted based on Hickey's failure to testify (ALJD 9: 16-17) because the Judge failed to consider that the Union had discharged Hickey from his paid position a few months before the hearing and that Hickey's testimony would have been merely cumulative to the other testimonial and documentary evidence in the record showing that the policy materials were not distributed to or discussed with the meeting's participants.

15) The Judge's finding that Haley explained the new tobacco-free policy at length and outlined questions and answers about the policy to the February 27 meeting's participants (ALJD 9: 24-25) because the finding is based on an improper adverse inference and the record evidence establishes that the new policy and the questions and answers were not discussed at length with the February 27 meeting's participants.

16) The Judge's finding that Respondent sent the tobacco-free policy announcement to employees on March 7 (ALJD 9: 27) because it is contradicted by the Judge's other finding (ALJD 11: 34) and the testimony of Respondent official Trautman that the announcement was sent to employees on March 1.

17) The Judge's finding that the questions and answers were discussed by Haley at the February 27 meeting (ALJD 9: 41 - 10: 1) because the finding is based on an improper adverse inference and the record evidence establishes that the questions and answers were not discussed with the February 27 meeting's participants.

18) The Judge's finding that there was insufficient evidence that Respondent exhibited no intention of changing its mind about implementing its new tobacco-free

policy (ALJD 11: 17-18) because the record evidence amply demonstrates that Respondent never had any intention of bargaining about its decision to implement the new tobacco-free policy.

19) The Judge's finding that Trautman, Jackson, and Moore corroborated Haley's testimony that she discussed the tobacco-free policy at length (ALJD 11: 27-28) because a thorough review of their testimony does not corroborate Haley's testimony that she discussed the policy's details with the February 27 meeting's participants.

20) The Judge's finding that Respondent's presentation at the February 27 meeting indicates that Respondent was willing to discuss the tobacco-free policy (ALJD 11: 29-30) because the record evidence with respect to Respondent's conduct, including its presentation at that meeting, reveals Respondent's intention to preclude meaningful bargaining with the Union over that policy.

21) The Judge's finding that the language of the March 1 notice sent to employees cannot be reasonably construed to be indicative of Respondent having no intention of changing its mind about the new policy (ALJD 11: 36-38) because the unequivocal language of the notice establishes that Respondent considered the changes final and is indicative of Respondent's intention to preclude meaningful bargaining over the decision to implement the new policy.

22) The Judge's conclusion to dismiss the allegation that Respondent presented its new policy as a *fait accompli* (ALJD 12:24-26) because the preponderance of the documentary and testimonial evidence in the record establishes that Respondent presented its changes in the existing smoking policy in a manner that precluded meaningful bargaining so that the changes were a *fait accompli*.

23) The Judge's finding that neither party is in a position to raise delay as an element of analysis in this case (JD 16: 2-3) because the record evidence establishes that Respondent sought to delay any bargaining over its decision to implement the new tobacco-free policy as long as possible.

24) The Judge's finding that no bad faith or purposeful evasion of the duty to bargain is apparent on the record (ALJD 16: 7-8) because Respondent's effort to delay meeting with the Union to bargain is evidence of its intention to preclude any meaningful bargaining over its decision to implement the new policy.

25) The Judge's finding that General Counsel's contention that Respondent's delay in meeting until after the July 23 meeting was a smokescreen has no basis in fact because the July 23 meeting was referenced long before the June 26 demand to bargain (ALJD 16 n.20) because the Judge misconstrued General Counsel's argument and Respondent's delay in meeting until after the scheduled July 23 meeting was indicative of Respondent's intention to preclude meaningful bargaining.

26) The Judge's finding that Respondent had a consistent position since May that its progressive disciplinary policy set forth in the employee handbook would control any disciplinary action under the new tobacco-free policy (ALJD 17: 43-47) because the documentary evidence in the record establishes that Respondent had not formulated any position with respect to the disciplinary policy to apply until at least July 23.

27) The Judge's finding that she should not credit Opland's testimony regarding his statement at the August 7 session that the Union would be forced to file an unfair labor practice charge and that Respondent's representatives told him that Respondent intended to be tobacco-free regardless of the outcome of an unfair labor

practice hearing (ALJD 18 1-5) because a credibility finding was unnecessary as Opland's statement was neither challenged nor rebutted by any other witness and his testimony was not otherwise inherently improbable.

28) The Judge's finding that Opland's statement at the August 7 session that he would be forced to file an unfair labor practice charge would only make sense if the Union had requested to bargain and Respondent had denied the request to bargain at that session (ALJD 18: 6-8) because the Judge's rationale is illogical as it would make perfect sense for Opland to threaten a bad faith bargaining charge based on his testimony that Respondent's representatives told him that they would not bargain and Respondent intended to implement the new policy regardless of what occurred at that session.

29) The Judge's finding that she draws an adverse inference over the failure to call Powers or Hickey to corroborate Opland's statement at the August 7 session (ALJD 18: 13-14) because Opland's statement was neither challenged nor rebutted by any other witness and his testimony was not otherwise inherently improbable.

30) The Judge's finding that Respondent adhered at the August 7 session to its earlier positions that the new policy would not be reduced to writing and that the already-establish progressive disciplinary policy would apply to the new tobacco-free policy (ALJD 18: 18-19) because the documentary evidence in the record establishes that Respondent had not decided whether it would reduce its new policy to writing as requested by the Union and which disciplinary policy would apply until at least its July 23 internal meeting.

31) The Judge's finding that Respondent had discussed the tobacco-free policy with the Union on February 27, June 3, and August 7 (JD 19: 5-7) to the extent that she suggests that Respondent had engaged in good-faith bargaining with the Union about the new policy and disciplinary policy on those dates because the preponderance of the record evidence establishes that Respondent did not engage in good-faith bargaining about the new policy on those dates or at any other time.

32) The Judge's finding that the overwhelming weight of the testimony that the disciplinary policy was discussed repeatedly before the August 7 session (ALJD 19: 7-9) to the extent that Respondent engaged in good-faith bargaining with the Union regarding the disciplinary policy before August 7 because the documentary evidence in the record establishes that Respondent had not formulated any position with respect to the disciplinary policy to apply until at least July 23.

33) The Judge's finding that Opland's recollection that Respondent took the position at the August 29 session that the Union had waived its right to bargain is unsupported (ALJD 20 n.24) because Respondent's own notes from that session establish that Haley stated that Respondent would not bargain over the decision to implement the new policy because the Union had waived its right to bargain.

34) The Judge's finding that Opland's statement that Respondent's representatives had told him on August 7 that Respondent had directed human resources to implement the policy without bargaining was not included in Opland's testimony regarding the August 7 meeting (ALJD 20: 38 – 21: 2) because the Judge's finding directly conflicts with the record evidence establishing that Opland did testify that

Respondent's representatives stated at the August 7 session that Respondent had directed human resources to implement the policy without bargaining.

35) The Judge's finding that, as neither Powers nor Hickey was called to corroborate Opland's statement, she would infer that they would not corroborate Opland's regarding Respondent's statements at the August 7 session (ALJD 21: 4-6) because as Opland's testimony was neither challenged nor rebutted by any other witness, and it was not otherwise inherently improbable, the Judge's inference was improper because there was no need to call Powers or Hickey to corroborate Opland's testimony.

36) The Judge's finding that bargaining took place on August 20 (ALJD 23: 6) because the record evidence establishes that there was no bargaining scheduled for August 20 and there was no bargaining that occurred at an August 20 Labor-Management Committee meeting.

37) The Judge's findings that Respondent had communicated a consistent position that it would not reduce its new tobacco-free policy to writing because the documentary evidence in the record establishes that Respondent had not decided whether it would reduce its new policy in writing as requested by the Union and which disciplinary policy would apply until at least its July 23 internal meeting.

38) The Judge's finding that Power's isolated remark that the Union was not attempting to change implementation of the new policy on September 1 constituted a waiver of decision bargaining (ALJD 23: 17-19) because the preponderance of the record evidence establishes that the Union did not clearly and unmistakably waive its right to bargain over Respondent's decision to implement the new tobacco-free policy.

39) The Judge's finding that the Union's failure to raise decision bargaining at the table at the August 29 constituted a waiver of decision bargaining (ALJD 23: 18-19) because the record evidence establishes that the Union presented a bargaining proposal challenging Respondent's decision to implement the new policy at the August 29 session, the Judge's finding directly conflicts with her other findings (JD 21: 8-14; 23: 46) that the Union presented a bargaining proposal at the August 29 session, and the record evidence otherwise establishes that the Union did not clearly and unmistakably waive its right to bargain over Respondent's decision to implement the new tobacco-free policy.

40) The Judge's finding that the Union did not make alternative proposals or attempt to persuade Respondent from altering its decision at the August 29 session (ALJD 23: 23-24) because the record evidence establishes that the Union presented a bargaining proposal challenging Respondent's decision to implement the new policy at the August 29 session and the Judge's finding directly conflicts with her other findings (JD 21: 8-14; 23: 46) that the Union presented a bargaining proposal at the August 29 session.

41) The Judge's finding that the Board's 10(k) decision misapplies the strict definition of "work acquisition" activities as set forth in *ILA II* (ALJD 23: 42-43) because the Board's determination that Respondents were seeking to acquire the disputed electrical M&R work because they cannot preserve that work that their unit employees have never performed is fully consistent with the principles set forth in *ILA II*.

42) The Judge's finding that Respondent consistently stated that it wanted its tobacco-free policy to be covered under the handbook's progressive disciplinary policy (ALJD 23: 28-30) because the documentary evidence in the record establishes that

Respondent had not formulated any position with respect to the disciplinary policy to apply until at least July 23.

43) The Judge's finding that Trautman told the Union on June 3 that there would be no separate disciplinary policy and that remained Respondent's consistent position (ALJD 23: 32-33) because the documentary evidence in the record establishes that Respondent had not formulated any position with respect to the disciplinary policy to apply until at least July 23.

44) The Judge's finding that the Union's failure to propose an alternative to Respondent's application of the handbook's progressive disciplinary policy to the new tobacco-free policy constituted implicit agreement (ALJD 23: 39-44) to the extent that it suggests that the Union waived its right to bargain about the disciplinary policy during a second bargaining session where the record evidence establishes that the Union was informed which disciplinary policy would apply for the first time at the first bargaining session, or to the extent it suggests that the Union implicitly agreed to the implementation of the entire new policy on September 1 where the preponderance of the record evidence establishes that the Union did not clearly and unmistakably waive its right to bargain over Respondent's decision to implement.

45) The Judge's finding that the Union's acknowledgement that the employees would keep the smoking structures clean in the parking lots constituted implicit agreement (ALJD 23: 2-3) to the extent that it suggests that the Union's agreement that the employees would keep the structures clean if Respondent established smoking structures in the parking lots alone constituted the Union's agreement to, or waiver of its right to bargain over, Respondent's implementation of its new tobacco-free policy that

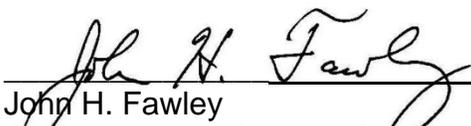
prohibited tobacco use anywhere else on Respondent's controlled property, and where the preponderance of the record evidence otherwise establishes that the Union did not clearly and unmistakably waive its right to bargain over Respondent's decision to implement.

46) The Judge's finding that the complaint is dismissed (ALJD 24: 15) where the preponderance of the record evidence establishes that Respondent violated §§ 8(a)(1) and (5) of the Act by failing to bargain in good faith or to impasse over its decision to implement the new tobacco-free policy, and presented its new tobacco-free policy as a *fait accompli*, as alleged in the Complaint.

47) The Judge's Order (ALJD 24: 14) because it fails to order that Respondent, upon request, rescind its new tobacco-free policy that was implemented on September 1, 2014, and to bargain in good faith with the Union or to impasse before making changes to its employees' terms and conditions of employment.

DATED at Seattle, Washington, this 30th day of September, 2015.

Respectfully submitted,



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