

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 BRIEF
IN SUPPORT OF EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE

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I. STATEMENT OF THE CASE

This matter concerns the unilateral implementation of a new tobacco-free policy by Respondent Vigor Industrial LLC ("Respondent") at its shipyards after failing and refusing to bargain in good faith or to impasse with the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers Local 104, AFL-CIO ("Union") over its decision to implement the new policy. Respondent's conduct is unlawful under §§ 8(a)(1) and (5) of the Act because Respondent was not privileged to implement the new policy on September 1, 2014, in the absence of good faith bargaining or bargaining to impasse over its decision to implement the new policy, and alternatively, because Respondent presented its new policy as a *fait accompli*. Following Respondent's unilateral implementation of its new tobacco-free or non-smoking policy, an amended Consolidated Complaint ("Complaint") issued on June 3, 2015, which was further amended at the hearing, alleging that Respondent's conduct violated §§ 8(a)(1) and (5) of the Act.

Over the course of a hearing that lasted three days in Portland, Oregon, the parties presented witness testimony and documentary evidence in support of their respective positions to Administrative Law Judge Mary Miller Cracraft ("the Judge" or "Judge Cracraft"). On September 2, 2015, Judge Cracraft issued her Decision and Order dismissing the Complaint ("ALJD").

Counsel for the General Counsel has filed numerous exceptions to the ALJD. Those exceptions highlight the Judge's erroneous conclusion finding that the Union waived its right to bargain at a single bargaining session based on her flawed analysis of the record evidence and her failure to consider the effect of other relevant evidence

and her own findings on her ultimate conclusion, and the Judge's erroneous conclusion that Respondent did not present its new policy as a fait accompli based on her failure to consider all of the undisputed evidence and her imposition of an improper adverse inference. Counsel for the General Counsel files the instant brief in support of those exceptions and respectfully requests that the Board: reverse the Judge's Decision and Order; find that Respondent has violated §§ 8(a)(1) and (5) as alleged, and order the remedial relief requested.

II. QUESTIONS PRESENTED

A. Did the Judge Erroneously Conclude that the Union waived its right to bargain by failing to engage in decision bargaining over Respondent's decision to implement a new tobacco-free policy even though undisputed evidence and the Judge's own findings demonstrate that the Union presented a bargaining proposal at the final bargaining session in opposition to that decision?

B. Did the Judge Erroneously Conclude that the Union waived its right to bargain over Respondent's decision to implement a new tobacco-free policy based on an isolated remark by one of three Union representatives who was not the Union's chief spokesperson even though there is substantial countervailing evidence demonstrating that the Union was not clearly and unmistakably waiving its right to further bargaining over the decision?

C. Did the Judge Erroneously Conclude that Respondent Was Privileged to Implement Its New Tobacco-Free Policy on September 1 Even Though the Record Evidence Demonstrates that Respondent Never Bargained in Good Faith or to Impasse Over Its Decision to Implement that Policy?

D. Did the Judge Erroneously Conclude, Based of a Selective Reading of the Record Evidence and An Improper Adverse Inference, that Respondent Did Not Present Its New Policy as a Fait Accompli Even Though Objective Evidence Demonstrates that Respondent Presented the Changes in the Existing Smoking Policy in a Manner that was Designed to Preclude Meaningful Bargaining with the Union over Those Changes?

III. STATEMENT OF THE FACTS

A. Background

Respondent, through its designated subsidiaries, is engaged in the operation of shipyards and the construction, service, and repair of ships in the Pacific Northwest. Its designated subsidiaries include Cascade General, Inc. in Portland, Oregon; Vigor Shipyards, Inc. in Seattle, Washington, and Portland; Vigor Marine, LLC in Portland and Seattle, and Everett and Tacoma, Washington; and Washington Marine Repair LLC in Port Angeles, Washington. (JD 2: 9-15; Tr 74:22-75:10, 76:11-16; 195:18-23; GCX 1(j) ¶ 2(a), GCX 1(i) ¶ 2).¹ Respondent's Swan Island shipyard in Portland is approximately 62 acres in size, while its Harbor Island location in Seattle is approximately 30 acres (JD 4:24, 5 n.9; Tr 205:2-14; 208:5-17). Respondent's subsidiaries and various unions representing the subsidiaries' employees at the above locations are parties to a master collective-bargaining agreement and various individual agreements covering the employees. (JD 3:5-37; GCX 1(j) ¶¶ 5(b) – 5(e); RX 2). The Union is the designated agent, spokesperson, and point of contact for all union entities covered under the Master Agreement and the single point of contact for Respondent (JD 2: 25-31; Tr 31:20-25; 76:17-23; RX 2, p. 5).

Susan Haley is Respondent's Executive Vice President of Human Resources and Administration. (TJD 3:43; Tr 337:20-23; 381:16-24). Michael Trautman, who reports to Haley, was Respondent's Human Resources Manager in 2013 and 2014, and

¹ References to the Administrative Law Judge's Decision appear as (JD __: __), with the first number referring to the page and the second number referring to the lines. References to pages of the transcript of the hearing in this proceeding are identified as Tr __: __, with the first number being the page number and the second number referring to the lines on the page. References to General Counsel's exhibits from this hearing are identified as GCX __, and references to Respondents' exhibits from this hearing are identified as RX __. .

held the position of Respondent's Director of Labor Relations at the time of the hearing (JD 4:28-29; Tr 26:8 -13; 53:1-4). Albert Jackson is Respondent's Human Resources Manager based in Seattle who primarily handles human relations and labor issues for Respondent's Puget Sound and Alaska operations (JD:5: 35; Tr 169:10-12; 403:23 – 404:9).

The Union's designated representative for receiving notice from Respondent, and chief spokesperson for bargaining, is its business manager and secretary-treasurer, Brian Opland (JD 3:44, 13:32-33; Tr 196:16-24; 426:5-13). The Union's assistant business managers at the time of the hearing were Steve Behling and Brian Self. Lance Hickey was also an assistant business manager for the Union based in Portland, but his employment with the Union was terminated by Opland in March 2015. Following his termination from his paid position, Hickey retained his elected position of vice president. (JD 4:6-7, 4 n.6; 197:2 – 6; 199:16 -25; 243:20-24).

B. Respondent Follows a Practice of Presenting the Union in Writing with Proposed Changes in Policies that Affect Employees' Terms and Conditions of Employment

Respondent historically followed a practice whereby it notified the Union in advance of specific changes it proposed to make and asked whether the Union had any concerns or questions about the changes (Tr 198:4-12). For example, when Respondent proposed changes to the employee handbook at its various facilities in 2013, it sent e-mails to the Union with the proposed changes and requested that the Union notify it if there were any questions (Tr 198:14 – 199:8; 200:6 – 202:1 ; GCX 22-24). In November 2013 Respondent's human resources representative, Darin Sorenson, sent an e-mail to the Union's representatives informing them of changes in

the attendance policy that Respondent was proposing at all of its facilities. The proposed changes were attached to the e-mail. (JD 3: 46-47; Tr 203:2-15; 310:23 - 311:25; GCX 25). The e-mail requested that the Union representatives contact Respondent if they wanted to meet and discuss the proposed changes or if they had any questions or comments about them (GCX 25).

As a result of a smoking citation issued against Respondent by an Oregon state agency, Respondent informed the Union in April 2013 that it anticipated making changes to its smoking policy at the Portland shipyard and would keep the Union informed about any proposed changes (JD 4: 22-38; GCX 3). Respondent and the Union thereafter engaged in discussions about a revised smoking policy during subsequent joint labor-management committee ("LMC") meetings (JD 4:40; Tr 33:15-21; 206:7-10). Those meetings are held regularly and are attended by representatives of Respondent and the unions representing its employees to discuss whatever issues or policy matters are placed on the meeting's agenda by either party (JD 3:41-46; Tr 77:12-20; 338:19 - 339:4).

The Union and Respondent reached agreement on Respondent's proposal to prohibit smoking except in certain designated smoking areas at Respondent's Portland shipyard (JD 4: 40-42; Tr 33:22 - 34:8; 205:15 - 206:13). On September 12, 2013, Trautman sent the Union an e-mail stating that Respondent would be informing the employees by memo on September 17 about the change to designated smoking areas, and attached the memo to employees, as well as a poster informing employees of certain smoking-cessation resources, for the Union's review. Trautman requested that the Union inform him of any questions or concerns. (JD 4:43 - 44:2; GCX 4). The Union

did not have any questions or concerns and the changes were implemented on September 30, 2013 (JD 5:4-6;Tr 36:2-5).

C. In Contravention of Its Prior Practice, Respondent Presents Its New Tobacco-Free Policy in a Manner Designed to Preclude Meaningful Bargaining

Approximately four months after implementing the 2013 changes in its smoking policy, Respondent commenced internal discussions on February 12, 2014² regarding additional potential changes in that policy (RX 21 p. 3). After further internal discussions on February 24, Haley sent an e-mail to other officials of Respondent at 12:55 p.m. on February 26 stating that Respondent was “moving down the road” towards implementing tobacco-free environments at its shipyards, and was “suggesting” that employees be given 6 months to change their habits so that the potential changes could have an effective date of September 1. Attached to the e-mail were a proposed memo to employees, frequently asked questions (“FAQs”), and health care resources. Haley asked the other officials to let her know if the timing was okay; to review the materials and to let her know if they were comfortable with the proposed language and proposed timeline, and to let her know how these potential changes should be rolled out. The e-mail concluded by stating that a LMC meeting was scheduled the next day and that Respondent would be “advising the unions that this is coming” and that Respondent would be “prepared to roll-out thereafter as soon as you are ready.” (RX 21, p. 2).

These documents and discussions were not shared with the Union prior to the February 27 LMC meeting, nor were the specific changes to be implemented. (Tr 343:23 – 344:3; 369:16-19). However, Haley had sent Union representative Hickey a February 12 e-mail stating that she wanted to "add smoking policy [to the upcoming

² All dates hereafter occurred in 2014.

February 27 LMC meeting's agenda] as we are heading towards non-smoking yards and would like to discuss recommended timing and process" (JD 5:17-20; GCX 13). After Hickey suggested additional topics to discuss, Haley distributed by e-mail to the meeting participants the list of final agenda topics for the February 27 LMC meeting, which included "single point of contact;" "sick leave balances;" "business outlook;" and "new business." Under the heading of sick leave balances were the following listed topics: "Seattle sick leave;" "Portland sick leave;" "Portland lunchroom capacity;" "electronic applications;" "non-smoking yards;" "safety;" and "Seattle issues." (JD 5:22-27; GCX 12). Besides the list of the February 27 LMC agenda topics, the only material that was provided to the Union in advance of the February 27 meeting was the company newsletter called "The Vibe" (Tr 52:19 - 25; 277:23 -278:10; RX 7).

The LMC meeting was held at Respondent's Portland shipyard location on February 27 between 1 and 4 p.m. and was also video conferenced for viewing in Seattle (JD 5:35;Tr 409:14-21; 448:17 – 449:11). Haley testified that during this meeting, she handed Hickey a stack of documents and Hickey distributed them around the room (Tr 345:21-23; 381:8-9). According to Haley, those documents were a draft March 1 memo to employees, and Frequently Asked Questions and answers ("FAQs") about Respondent's new smoking policy to be implemented on September 1 (Tr 346:6-19; RX 4).

Gary Moore, a business representative and president of Laborers Local 296 that represents Respondent's employees in Portland, also attended the February 27 meeting (Tr 275:9-12; 276:3-10; 277:17-20). Moore denied that either the March 1 memo to employees or the FAQs were handed out to participants at the February 27

meeting (Tr 285:10 - 286:21). Barry Stevahn, a now-retired employee of Respondent and retired Union chief steward who also attended the February 27 meeting, also denied (Tr 301:6 - 302:9) that those materials were distributed to the participants at the February 27 meeting. Although Trautman initially testified that he believed that the materials were distributed and discussed, he conceded that there was no reference any discussion of the allegedly distributed materials at that meeting in his pre-trial affidavit (JD 6 n.10; Tr 49:4 -51:22). Jackson testified that he did "not recall" whether the materials were distributed to the Seattle participants at the February 27 meeting who attended by teleconference (JD 6:1-2; Tr 413:3-6; 453:7-10).

Haley also testified that she discussed the policy at length during the meeting and outlined the questions and answers in the FAQs about the new policy (JD 9: Tr 345:12 – 20). However, her contemporaneous notes do not support this. Although Haley's notes from the February 27 meeting (RX 22) refer to extensive discussion about other agenda topics, they state only "notice to emp" with respect to the topic of non-smoking yards. Consistent with Haley's notes, Moore testified that although other topics were discussed during the meeting, the only mention of the non-smoking yards agenda topic was a single statement that it was Respondent's intention to make it a tobacco-free facility (JD 7:19-20; Tr 279:3 – 280:19; 284:21 – 285:9). As with Moore's testimony, Trautman testified that the only discussion about the non-smoking yards at the February 27 meeting that he could recall was Haley's statement that it was Respondent's intention to go tobacco-free at its facilities effective September 1 (JD 5:34-37; Tr 51:9-16).

Opland's notes show that there was extensive discussion about other agenda topics, but do not show that the non-smoking yards materials were distributed or discussed at the February 27 meeting (JD 7:10-11; GCX 27). While Jackson testified that Haley discussed the memo and FAQs at the February 27 meeting, he conceded that when asked to recount to ask what he had seen or heard at the February 27 meeting in his pre-trial affidavit, he did not mention any memo or FAQs being discussed at that meeting (Tr 454:15-25; 456:17 – 457:17). Although he recounted point-by-point which topics were discussed at the February 27 meeting, Stevahn denied that there was any discussion about the non-smoking yards topic because they ran out of time before the meeting ended (JD 7:26-30; Tr 295:7-19). While the meeting was scheduled to end at 4 p.m., no one testified with respect to the time the meeting actually ended. Opland's notes state that the meeting ended at 3:15 p.m. (JD 8: 29-30; GCX 27). Respondent's security records, however, show that Opland exited Respondent's facility following the meeting at 4:17 p.m. (RX 6 p.2).

On the evening of February 27, Haley sent an e-mail to others in Respondent's human resources department stating simply, "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" (JD 6:24-25; RX 21). Less than 48 hours later, on March 1, Respondent mailed and e-mailed its employees, but not the Union, a memo dated March 1 entitled "Your health" and a document entitled "Tobacco Cessation--Frequently Asked Questions" (JD 9:28-29, 40-41; 10:1-3; 11:34; Tr 36:18-22; 379:17 – 380:4; GCX 5 – 6; RX 5). After the initial paragraphs that discussed employees staying healthy, the memo announced a new non-smoking yards/facilities policy. The March 1

memo to employees memo stated that the new “policy will be effective September 1, 2014 to allow time for individuals to take advantage of the many programs offered . . . to help people stop smoking.” Besides the set implementation date, the memo specified which individuals the new policy would apply to (“every Vigor employee, subcontractor, and visitor”); what it banned (“smoking and other forms of tobacco use, including . . . e-cigarettes”); where it would apply (“Vigor controlled property, including parking lots . . . entrance gates, warehouses and aboard new construction ships”); and individuals on Vigor property to which it would not apply (crew of “vessels berthed at the shipyard for repair” and Vigor “tenants”). (JD 9:31-38; GCX 5; RX 5).

In addition to these set policy terms, paragraph 11 of the attached FAQs specified that, while management was primarily responsible for enforcing the new policy, it was “incumbent upon all employees to . . . report all violations of company policy” Paragraph 12 specified how Respondent would handle violations of the new policy and the factors Respondent would consider in making the decision regarding what discipline would apply. (GCX 6; RX 5). Neither the employee memo nor the FAQs stated that these policy terms had been discussed or bargained with the Union (GCX 5-6; RX 5).

D. After the Union Requests that Respondent Bargain over the Change in Its Smoking Policy, Respondent Delays Meeting with the Union Until a Few Weeks Prior to the New Policy’s Implementation Date

The Union first told Respondent that it wanted to bargain about the new tobacco-free policy when that policy was discussed at a meeting of the Puget Sound Metal Trades Council (“PSMTC”). The PSMTC is a coalition of labor organizations that holds meetings the first and third Tuesday of every month to discuss union matters involving

the bargaining units they represent. (JD 13:15-17; Tr 165:13-18; 212:18-24; 213:24 - 214:8; 312:17-23; 313:5-10; 313:18-23; 416:14-20). Although the meetings are closed, employer representatives, including Respondent's, have occasionally been invited to attend these meetings to discuss various issues or talk informally with the union representatives (JD 13:17-19; Tr 218:10-15; 314:3-15; 416:21 - 417:4).

Human Resources Manager Jackson was invited to attend May 20 PSMTTC meeting. Assistant Business Manager Steve Behling was also present for the Union at that meeting. (JD 13:19-26; Tr 314:16-21; 315:4-9). Respondent's new smoking policy arose when Behling and Jackson began to discuss an employee named Rodney Gill, who was facing discipline for having just been caught smoking in a non-smoking area on Respondent's property (Tr 315:21 - 316:16; 327:20-24; 418:12-23; 458:14 - 459:13). Behling felt that the two issues of the new policy and Gill's discipline were related and expressed concern that if Respondent implemented the new tobacco-free policy, there would be many additional violations like Gill's resulting in discipline (Tr 316:25 - 317:1; 460:6-120). Behling then told Jackson that the parties needed to bargain about the new policy as it would affect the members he represented (JD 13:26-30; Tr 172:3-4; 317:1-3). Jackson responded that there was plenty of time to bargain about it and no need to discuss it now (Tr 172:5-7; 317:7-13).

The next PSMTTC meeting was held at the IBEW Local 46 hall on June 3. Human Resources Manager Jackson was again present, as was Respondent's human resources representative Darin Sorenson. (JD 13:19-20; Tr 318:8-12; GCX 21 p. 2). Following the meeting, Behling approached PSMTTC's president, Dave Jacobsen, and asked him to raise the issue of Respondent's tobacco-free policy being a mandatory

subject of bargaining with Respondent's representatives (Tr 318:13 - 319:6). Jacobsen thereafter spoke to Jackson and stated that he believed that the tobacco-free policy was a subject that the parties needed to bargain as it involved a change in working conditions (JD 13:40-42; Tr 319:9-24). Jackson again responded that he did not understand why the Union was again bringing up the policy for bargaining when that policy was not scheduled to go into effect until September 1 (JD 13:42-44; 14:22-24; Tr 319:25 - 320:5).

In a June 19 e-mail sent to Respondent's other human resources personnel, Sorenson stated that, following the June 3 PSMTC meeting, Union representatives had requested that Jackson and Sorenson provide the Union with a copy of the new tobacco-free policy and an explanation of how discipline for violations of the new policy would be handled (JD 14:15-18; GCX 21 pp. 2-3). Trautman responded immediately by e-mail to Respondent's personnel that he felt that there should be a general discussion before anything was drafted (JD 14:18-19; GCX 21 p.2). Dawn Cartwright, Respondent's Director of HR Services, responded that while she was uncertain as to what type of response was owed to the Union, Respondent had a "meeting on this topic set for 7/23 and one of the lingering items on the list is the approach to corrective action" (GCX 21 pp. 1-2). Jackson also responded internally by e-mail, stating that the item needed to be discussed among Respondent's representatives so that a recommendation would be ready to discuss at that internal July 23 meeting. (JD 14:19-20 GCX 21 p. 1).

As the Union's oral bargaining requests had not proven successful, Opland sent Respondent a written bargaining demand dated June 26 demanding to bargain the decision and effects of Respondent's tobacco-free policy (JD 14: 40-41; Tr 56:9-13; 57:5-19; 221:4-6; GCX 14-15). Trautman responded by letter dated June 30. His response stated that Respondent was willing to meet only after a planned July 23 meeting in Respondent's human resources department and suggested meeting between August 4 and 8. (JD 15:30-33, 39-41; Tr 58:9-13; 221:7-18; GCX 16). The letter did not otherwise explain why the first bargaining session had to be delayed until after the July 23 meeting and then again until the week of August 4 (GCX 16).

E. After the Parties Have One Bargaining Session During Which Information Is Shared But No Bargaining Proposals Are Presented, Respondent Declares that It Will Not Engage in Any Further Bargaining Over the Decision to Implement the New Tobacco-Free Policy

The parties met on August 7 at Respondent's facility in Portland. Boilermakers International representative Gary Powers, as well as Opland and Hickey, were present for the Union. Trautman and Jackson attended for Respondent. (JD 16:18-19; Tr 60:2-4; 223:5-16; 428:22-25). Respondent did not provide the Union with any materials in advance of the meeting (Tr 61:5-15, 21-25; 144:7-21; 225:2-5). During the meeting Trautman e-mailed several documents to the meeting participants. They included photographs of litter and no-smoking signage at Respondent's facilities, State law language regarding smoking prohibitions, smoking cessation resources, Respondent's August 1 letter to employees regarding implementation of the tobacco-free policy, posters regarding the new policy, and the outline of Trautman's August 7 meeting presentation. (JD 16:18-23; Tr 64:13-23; 95:12 – 97:8 223:22 – 224:12; RX 11-15).

Trautman made a presentation concerning why Respondent wanted to implement a tobacco-free policy and referred to some of the documents Trautman had e-mailed during the meeting (JD 17:1-3;Tr 62:1 – 63:2; 225:9-16; 431:4-17).

Trautman reasserted that Respondent intended to be tobacco-free by September 1 (JD 16:23-24; Tr 63:19-22). Opland testified that it was both Trautman and Jackson who reaffirmed that the policy was going to be implemented September 1. He further testified that they told him that Respondent's position was that they had been given a directive to proceed with implementation of the policy and therefore, they were not there to bargain. (Tr 225:13-20; 225: 24 - 226:3). In response, Opland testified that he told them that the Union would be forced to file an unfair labor practice charge (Tr 226:21-25).

There were no bargaining proposals presented from either side during the August session (JD 17:14; Tr 65:3-8). The Union representatives asked during the session if Respondent was going to provide them with a formal written policy setting forth the new smoking policy, as well as a formal policy with respect to the corrective action to be applied if violations of the new smoking policy occurred. (JD 17:14-16; Tr 109:9-12). Trautman and Jackson responded that the new policy was simple -- there would be no tobacco use or e-cigarettes permitted on any property, including parking lots, controlled by Respondent (JD 17:16-18; Tr 109:12-15). They further stated that Respondent already had a written progressive corrective action policy in the employee handbooks and did not believe that a separate corrective action policy was needed for violations of the new tobacco-free policy (JD 17:19-22; Tr 109:16-20).

The following week Haley sent Union representatives Powers, Opland, and Hickey an August 12 e-mail with attachments. Attached to Haley's e-mail were the March 1 employee memo and the tobacco-cessation FAQs that Respondent had mailed and e-mailed to all of its employees the previous March 1. (JD 18:30-33; Tr 227:6 - 228:6; 320:15-23; 321:9-21; GCX 5-6, 26; RX 5). Although Haley's e-mail stated that the attached memo "was distributed to employees and discussed in production/safety meetings across all yards/business units the first week in March," it said nothing about having already discussed or provided the Union with the same memo and FAQs at the February 27 LMC meeting. The e-mail further stated that the attached memo addressed many of the questions that the Union had raised about the tobacco-free policy the previous week. (GCX 26).

In response to Haley's August 12 e-mail, Opland sent Haley a letter dated August 15. The letter stated that: the Union objected to Respondent's unilateral implementation of the tobacco-free policy; Respondent had unlawfully announced to employees that the new policy had been implemented without first giving the Union a chance to bargain about the decision or its effects; and the Union was demanding that Respondent rescind the policy to allow the Union an opportunity to bargain over the decision and its effects (JD 19:14-22; Tr 230:20 – 231:9; GCX 17).

Non-smoking yards was one of 7 topics scheduled to be discussed at the August 20 LMC meeting (JD 19:29-31; RX 24). During that LMC meeting the parties agreed to schedule a second bargaining session on August 29 in response to the Union's bargaining demand (JD 20:1-2, 7-8; Tr 359:8-12; 360:22 – 361:2; 438:10-16). There was also brief discussion about the Union's concerns regarding employees' ability to

smoke during lunch and breaks and potential options to resolve the parties' dispute such as maintaining smoking shelters as a picnic area. (JD 19:42-46; 20:3-5; Tr 359:2-7; 360:2-6; 438:3-7). Although options were discussed, Haley stated that the LMC meeting was not an appropriate forum for the discussion as there was a subsequent bargaining session scheduled for August 29 (JD 20:4-8; Tr 438:13-16).

On the following day Opland received a written response from Haley to his August 15 bargaining demand (JD 20:10, 13; Tr 23:19 - 232:6; GCX 18). Although the parties had agreed to a second bargaining session the day before, Haley's letter clarified that Respondent was willing to meet with the Union to bargain solely over the effects of the new policy, and that Respondent still intended to implement the new policy on September 1. The letter explained that, in Respondent's view, the Union had "waived its right to bargain over the Company's decision to implement the tobacco-free policy" (JD 20:13-19; GCX 18). In response to Haley's letter, the Union filed the unfair labor practice charge at issue on August 27 (JD 20:19; GCX 1(a)).

F. Respondent Unilaterally Implements Its New Tobacco-Free Policy on September 1 Even Though the Parties Have Exchanged Bargaining Proposals During the Second Bargaining Session Three Days Earlier

On August 29 the parties met for a second time to bargain Respondent's new policy. Opland, Hickey, and Powers attended the meeting on behalf of the Union, while Haley, Jackson, and Trautman were present for Respondent (JD 20:27-28; Tr 119:15-19; 233:22 - 234:8).

Respondent's own notes (RX 16)³ show that, during the first part of the bargaining session, the Union's representatives complained that Respondent had never provided the Union with sufficient notice and a formal policy to bargain with respect to the tobacco-free policy changes. Respondent's negotiators countered that they had provided the Union with notice about the changes and distributed materials about the changes for several months. Haley specifically stated that, as Respondent had been discussing the issue with the Union since January, Respondent was willing to discuss the effects of the policy but was not going to discuss the policy itself. (RX 16 pp. 1-3). Opland expressed his opinion that implementation of the new policy would cause a significant loss in morale among all of Respondent's employees. Trautman countered that there were many employees who were happy about the new policy. Haley stated that based on her attendance at a meeting in Everett, the general feeling about the new policy was positive and employees had begun smoking cessation support groups and liked the Alere⁴ program that provided resources for smoking cessation in the absence of such coverage by the Health and Welfare Trusts. (RX 16 p. 3). In response to that comment, Powers stated that the Union was not asking Respondent to stop the clock, but was asking that Respondent not have a heavy hand and fire people when the new policy was implemented (JD:21:20-24; RX 16 p.3).

When Trautman asked whether the Union had any bargaining proposals, Opland stated initially that the Union did not. Trautman expressed confusion, asking what they

³ Al Jackson took the notes from this August 29 session (Tr 123:2-6; 446:13-19). His practice is to take notes on his laptop in "real time" (Tr 434:1-6). Trautman, who reviews Jackson's notes from the sessions and meetings they attend, finds that while Jackson's notes do not reflect exactly every word spoken, they do follow "the course of the conversation" (Tr 115:10-13; 123:7-9).

⁴ Alere is a company that provides smoking-cessation services for union members who would not otherwise have that coverage under Respondent's health benefits (Tr 354:10-13).

were doing there if the Union did not have a bargaining proposal? (JD 20:34-36; Tr 120:11-14; RX 16 p. 3). Both Opland and Trautman testified that Opland responded that the Union did not realize that Respondent was even open to bargaining in light of Respondent's prior communications. Trautman retorted that it was hard to bargain with yourself. (Tr 120:14-16; 234:17-25; 440:14-16 RX 16 p.3).

Following a caucus, Opland verbally presented a bargaining proposal on behalf of the Union. He proposed changing the existing smoking policy by reducing the number of designated smoking areas to two or one half on Respondent's property inside the gate (JD 21:8-14; Tr 120:17-25; 235:14-24; 361:20-22; 362:21-25; 440:17-25; 441:23 -442:2; RX 16 p.4). After another caucus, Respondent's personnel told the Union that they would not agree to the Union's proposal to permit smoking inside the yard. However, Respondent then verbally proposed that it was willing to deviate from its previous policy presented in the memo and FAQs (GCX 5, RX 5), and designate two areas for smoking on its property outside of the gate in the parking areas and provide a smoking shelter there. (JD:21:27-30; Tr 121:6-26; 236:11-14; 361:23 – 362:1; 442:6-16).

Respondent's proposal was conditioned on an expectation that the proposed designated smoking areas in the parking lots would be kept clean from litter and cigarette butts. The Union responded that it understood and that employees would keep those areas clean if Respondent ultimately established the smoking areas in the parking lots. (JD 21:30-36; Tr 363:2-8; 443:1 – 444:6; RX 16 p.4). Trautman stated that Respondent's counter proposal was all that Respondent was willing to do or budge on (JD 21:38-43; Tr 124:16-22; 444:14-25; RX 16 p.4).

As the parties had not reached agreement on their bargaining proposals, Opland stated at the end of the August 29 session that the Union would be making a counterproposal the following week (JD 22n.25; Tr 236:15-17; 236:25 – 237:7). Nonetheless, three days later, Respondent implemented its new tobacco-free policy on September 1 (JD 22:9-10; Tr 237:8-10).

Consistent with his statement at the end of the August 29 session, Opland sent Respondent a counterproposal by letter dated September 3 (JD 22:25-26; Tr 237:8-24; GCX 19). The letter recounted what had occurred during the August 29 session. It also set forth a new Union proposal proposing to reduce the number of designated smoking areas; to reach mutual agreement on a written smoking policy and the corrective action to apply for violations of that policy; and to make the policy effective until the expiration of the existing settlement and master agreements and for every year thereafter unless a party served a timely notice requesting to modify the policy. (JD 22:26-30; GCX 19).

Trautman replied to Opland's letter by letter dated September 12 and reasserted that the Union had waived its right to bargain over the decision. (JD 22:32; Tr 238:21 - 239:8; GCX 20). Trautman's response disputed Opland's summary of the August 29 session. He asserted that Respondent had not requested that the Union make its bargaining proposal at that session, Respondent's bargaining proposal did not permit employees to smoke during lunch and breaks inside Respondent's facility, and Respondent had not specifically requested a counter proposal from the Union at the end of the August 29 session.

With respect to Opland's bargaining proposal set forth in the September 3 letter, Trautman stated that it was "unacceptable." He noted that it was "a further attempt to

bargain over the policy itself rather than the effects of the policy, and reminded Opland that Haley had previously informed the Union in her August 21 letter that “while Respondent was willing to meet with you to bargain over the effects of the new policy ... the time for bargaining over the policy itself had passed.” The letter did make any reference to the Union having waived its right to bargain based on any remark made by International Union representative Powers at the August 29 session. Trautman’s response concluded that the new tobacco-free policy was “now in effect and will remain so.” (GCX 20).

IV. ARGUMENT

A. Respondent Violated §§ 8(a)(1) and (5) By Unilaterally Implementing A New Smoking Policy Without Bargaining in Good Faith or to Impasse Over Its Decision to Implement that Policy

The Judge found that the Union made verbal and written demands in May and June 2014 that Respondent bargain over its decision to implement a new smoking policy (JD 14:26-30, 40-41). As those requests were made many weeks before the announced implementation date of September 1, the Judge properly concluded that the Union had not waived its right to request bargaining, and that Respondent, therefore, was obligated to bargain in good faith with the Union over this decision (JD 15:12-26) *See, e.g., Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB No. 25, slip op. at 3 (2011) (even though the union waited 3 weeks to request bargaining, union did not waive its right to bargain where its bargaining request occurred well in advance of the new policy’s announced implementation date); *Indian River Mem. Hosp.*, 340 NLRB 467, 469 (2003) (Board reject’s employer’s contention that union waived its right to

bargain over schedule change where union requested bargaining prior to implementation of change).

Because she concluded that the Union waived its right to bargain during an August 29 bargaining session, she did not address whether Respondent bargained in good faith over its decision to implement a new policy or whether the parties were at a bargaining impasse when Respondent implemented the new policy. As shown below, the record evidence and the Judge's own findings refute her conclusion that the Union waived its right to bargain. Further, the record amply demonstrates that Respondent neither bargained in good faith over its decision nor bargained to impasse before unlawfully implementing the new policy on September 1.

1. Applicable Unilateral Change, Impasse, and Waiver Principles

Section 8(a)(5) of the Act makes it "an unfair labor practice for an employer . . . to refuse to bargain collectively with the representative of his employees." An employer violates § 8(a)(5) by making unilateral changes in mandatory subjects of bargaining without bargaining to a valid impasse. *NLRB v. Katz*, 369 U.S. 736 (1962). Before implementing a change in a mandatory bargaining subject, an employer must give timely notice to the union and a meaningful opportunity to bargain. See, e.g., *KGTV*, 355 NLRB No. 213, slip op. at 2 (2010); *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993). The fact that the unilateral change may benefit employees does not excuse the employer's duty to bargain. See, e.g., *Allied Mechanical Services*, 332 NLRB 1600, 1609 (2001); *Randolph Children's Home*, 309 NLRB 341, 343 n.3 (1992). As an employer's smoking policy is a mandatory subject of bargaining, an employer violates §§ 8(a)(5) and (1) by making changes in its smoking policy without notifying the union

and giving it an opportunity to bargain over the changes. See, e.g., *Regional Home Care, Inc.*, 329 NLRB 85, 102 (1999); *Dynatron/Bondo Corp.*, 323 NLRB 1263, 1272 (1997).

The party claiming the existence of a bargaining impasse to justify its implementation of a unilateral change bears the burden of proof of demonstrating that impasse existed at the time that the disputed changes were implemented. *Northwest Graphics Inc.*, 343 NLRB 84, 90-92 (2004); *CalMat Co.*, 331 NLRB 1084, 1097-98 (2000). A genuine impasse exists where there is no realistic possibility that continued discussions would be fruitful, and both parties believe that they are “at the end of their rope.” *Cotter & Co.*, 331 NLRB 787, 787-788 (2000); *PRC Recording Co.*, 280 NLRB 615, 635 (1986). With respect to the parties’ contemporaneous understanding of whether they have reached impasse, the evidence must demonstrate that both parties believed no fruitful negotiations were possible, or that both parties were unwilling to compromise further. *Essex Valley Visiting Nurses Ass’n.*, 343 NLRB 817, 840-841 (2004); *Ford Store San Leandro*, 349 NLRB 116, 121 (2007).

An employer cannot make unilateral changes that impact employees’ terms and conditions of employment unless there has been a “clear and unmistakable” waiver of the union’s right to bargain over the changes. *Doctors’ Hosp. of MI*, 362 NLRB No. 149, slip op. at 12 (2015). The waiver of statutory rights by contract or conduct is not lightly inferred, as there must be a showing that the waiver was clear and unmistakable. See, e.g., *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Blast Soccer Assoc.*, 289 NLRB 84, 87 (1988).

When an employer relies on a purported waiver to establish its freedom unilaterally to change terms and conditions of employment, the matter at issue must have been fully discussed and consciously explored during negotiations and the union must have explicitly yielded or clearly and unmistakably waived its interest in the matter. See, e.g., *Rockwell Int'l Corp.*, 260 NLRB 1346, 1347 (1982). Pursuant to “the Board’s long-settled ‘clear and unmistakable waiver’ standard, the burden is on the party asserting waiver to establish that the parties ‘unequivocally and specifically express[ed] their mutual intention to permit unilateral employer action with respect to a particular employment term.’” *Murtis Taylor Human Services Systems*, 360 NLRB No. 66, slip op. at 4 (2014), quoting *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007).

2. The Judge’s Own Findings, and the Record Evidence, Refute the Judge’s Conclusion that the Union Clearly and Unmistakably Waived Its Right to Bargain

The Judge concluded that the Union waived its right to bargain on the basis of one isolated remark and, allegedly, because the Union failed to raise decision bargaining, at the August 29 bargaining session (JD 23:18-26). Contrary to the Judge’s conclusion, the record evidence and the Judge’s own findings conclusively establish that the Union did not clearly and unmistakably waive its statutory right to bargain. In light of the abundant testimony from both sides, it is near impossible to comprehend how the Judge could have concluded that “the Union did not follow through by making alternative proposals or attempting to persuade Respondent from altering its decision” (JD 23:23-24), or that the “Union[] fail[ed] to raise decision bargaining at the table” (JD 23:18-19). The Judge’s conclusion is clearly erroneous and should be reversed.

Specifically, the Judge's conclusion that the Union did not engage in decision bargaining conflicts directly with her own finding (JD 21:8-14) that lead Union negotiator Opland proposed reducing the number of existing designated smoking areas within the yard at Respondent's facilities. Indeed, testimony from representatives of both the Union (Tr 235:17-24) and Respondent (Tr 120:17-25; 361:20-22; 362:21-25; 440:17-25; 441:23 -442:4) consistently refer to Opland making this bargaining proposal during the August 29 session.

Moreover, the Union's proposal clearly provided an alternative to the existing no-smoking policy and its August 15 bargaining demand that Respondent rescind its proposed changes to the existing policy. While the existing smoking policy permitted smoking in certain designated smoking areas in Respondent's yard, Respondent had decided to prohibit the use of tobacco anywhere on its property effective September 1. Although the Union had demanded in its August 15 letter that Respondent rescind its decision and maintain the status quo with respect to the existing designated smoking areas, the Union's August 29 bargaining proposal to reduce the number of existing smoking areas within the yard reflected the Union's effort to reach a compromise. Although the August 29 bargaining proposal deviated from the Union's position set forth in its August 15 letter, it clearly did *not* reflect any agreement on the Union's part with Respondent's decision to ban all tobacco use anywhere on its property.

The Judge's further conclusion (JD 23:17-19) that the Union waived its right to bargain places undue emphasis on an isolated remark of International Union representative Brian Powers that the Union was not asking to stop implementation or reset the clock. As shown below, the Judge's undue emphasis on that remark was

improper because there was substantial countervailing evidence, which the Judge ignored, showing that the Union had not waived bargaining.

First, Powers was only one of three Union representatives present at the August 29 meeting. More importantly, Respondent knew that it was Opland, not Powers, who was the designated representative for the Union to receive notice and the Union's chief spokesperson for bargaining, and that is why all of the correspondence concerning bargaining over the new smoking policy was addressed to Opland. (Tr 196:16-24; 426:5-13; GCX 16, 17, 18, 19, and 20).⁵ Accordingly, it was not reasonable for Respondent to assume, or the Judge to conclude, that Powers' isolated remark reflected the Union's final bargaining position on Respondent's proposed implementation. This is particularly true where, as discussed above, the record is crystal clear that Opland was making a bargaining proposal on behalf of the Union during the same meeting challenging Respondent's decision.

Second, Powers' comment is taken out of context. As Respondent's own notes from this meeting (RX 16 p. 3) reveal, Powers made his statement immediately in response to Haley's statement that employees were positive about Respondent's proposal to provide smoking-cessation resources for employees that were not covered under the existing health and welfare plans.⁶ The Union was obviously not opposed to this "wellness" aspect of Respondent's plan that encouraged employees to cease the use of tobacco. Powers' response can be read that the Union did not want to stop the

⁵ The Judge also found (JD 13:32) that Opland was the Union's "chief spokesperson" for bargaining.

⁶ The notes show that Haley stated as follows: "I have not sat in on every one of these meetings. I sat in the Everett meeting and the general feeling was positive. Even to the point of starting support groups there and that is also what started the allure service because the H&W trusts don't cover it. So we did that and no one takes advantage of it." Alere is a company that provides smoking cessation services for union members who would not otherwise have that coverage under Respondent's health benefits (Tr 354:10-13).

clock on implementation of such programs. The Union and Powers were concerned, however, about the other aspect of Respondent's new policy, which placed new restrictions on where employees could smoke while they were at work. It is for this reason that Powers also stated that he did not want Respondent to impose harsh discipline on employees initially if and when the new policy were implemented. In these circumstances, Power's single remark is too vague and far too slim a reed upon which to base a conclusion that the Union had clearly and unmistakably waived its right to bargain.

Third, the timing of Powers' statement in relation to the Union's other actions at the August 29 meeting also does not support the Judge's conclusion. As Respondent's notes further reveal, Opland presented the Union's bargaining proposal discussed above shortly *after* Powers' statement.⁷ Thus, if any representative of Respondent truly believed that Powers' remark reflected the Union's sudden agreement with Respondent's new policy, Opland's subsequent bargaining proposal placed them on clear notice that the Union was not in agreement with Respondent and was not waiving its right to further bargaining.

Fourth, Trautman's September 12 letter declining Opland's September 3 counterproposal claimed that the Union had waived bargaining as indicated in Haley's August 21 letter. His letter, however, made absolutely no reference to the Union having waived its right to bargain on the basis of Powers' alleged remark at the August 29 session that the Union did not oppose implementation of the new policy. Thus, it was

⁷ Jackson, who took Respondent's notes for the August 29 session (Tr 446:13-19), testified (Tr 434:1-6) that his practice is to take notes on his laptop in "real time." Trautman testified (Tr 115:10-13) that while Jackson's notes do not reflect exactly every word spoken, they do follow "the course of the conversation."

inappropriate for the Judge to accept Respondent's after-the-fact argument concocted for trial and conclude that the Union waived its right to bargain on the basis of Powers' isolated remark.

Finally, Opland's statement at the end of the August 29 meeting further informed Respondent that, rather than waiving its right to bargain, the Union was proposing *further* bargaining over the decision to implement the new policy. As the Judge acknowledged (JD 22 n.25), Opland stated to Respondent's negotiators at the end of the August 29 meeting that the Union would be making a counterproposal the following week⁸ to Respondent's August 29 verbal proposal to establish designated smoking areas in its parking lots on its property. The Judge further acknowledged (JD 22 n.25) that no one contradicted Opland's testimony regarding this August 29 statement.⁹ In fact, consistent with his statement, Opland *did* send Respondent the promised counterproposal a few days later, on September 3 (GCX 19). Thus, regardless of whether Respondent asked for or even wanted a counterproposal, it is clear that Respondent knew from Opland's statement at the end of the August 29 meeting that the Union would be responding and pursuing the smoking policy issue within a few days. Since the record is clear that Respondent knew at the end of the meeting that the Union did not accept Respondent's decision to implement the new policy the following Monday, the Judge's finding cannot stand.

⁸ The Board may take administrative notice that August 29 was a Friday and the following Monday was Labor Day in 2014.

⁹ Although the Judge referenced a "later letter" from Trautman as possibly undermining Opland's testimony, that letter (GCX 20 pp. 1-2) merely clarified that Respondent had not specifically requested a counterproposal at the August 29 meeting and that Opland had stated that he would be "getting back" to Respondent.

In sum, as the above evidence regarding the Union's conduct at the August 29 session shows, the Union did not "unequivocally and specifically express [its] ... intention to permit unilateral employer action" regarding implementation of the new smoking policy. *Murtis Taylor Human Services Systems*, 360 NLRB No. 66, slip op. at 4 (2014). The Board should overturn the Judge's waiver finding.¹⁰

3. The Record Evidence Establishes that Respondent Never Bargained in Good Faith or to Impasse over Its Decision to Implement a New Smoking Policy

a. Respondent Never Bargained in Good Faith Over Its Decision

The Complaint alleged that Respondent failed to bargain in good faith solely over its decision to implement a new "tobacco-free" smoking policy (GCX ¶¶ 6(f), 7(c)). There were a grand total of two bargaining sessions scheduled and held -- on August 7 and August 29 -- before Respondent implemented its new smoking policy.¹¹ A thorough review of the record evidence establishes that Respondent never bargained in good faith over its decision at these two sessions.

¹⁰ The Judge also wrongly determined (JD 23:28-44) that the Union "implicitly agreed" to Respondent's use of its existing progressive disciplinary policy because the Union did not make any alternative proposals despite allegedly being advised "consistently" by Respondent, and specifically by Trautman on June 3, that Respondent would apply the existing disciplinary policy. As argued below, Brief at 29-30, documentary evidence establishes that Respondent did not even determine until July 23 what disciplinary policy would apply and never communicated that decision until it met with the Union on August 7. As the Union did not learn how Respondent intended to handle discipline until August 7, its failure to propose an alternative at the one subsequent bargaining session on August 29 hardly reflects its "implicit agreement" or that it somehow waived its right to future bargaining over that issue. Finally, contrary to the Judge's additional "implicit agreement" finding (JD 23:46 – 24:3), the Union's agreement to have the employees it represents keep the parking lot clean if Respondent agreed to permit smoking in that area outside the gate to its yard also does not reflect any "implicit agreement" by the Union to the new policy prohibiting smoking anywhere in the yard, particularly in light of the Union's contrary bargaining proposal at the August 29 session and its notification at the end of the session that it would be making a counterproposal. There clearly was no clear and unmistakable waiver with respect to the new policy.

¹¹ Although the Judge found (JD 23:6) that a third bargaining session occurred on August 20, that session was a LMC meeting (RX 24) in which implementation of the smoking policy was one of many items discussed. Respondent knew it was not a bargaining session. Indeed, the Judge found that when discussion occurred at this LMC meeting about options to resolve the smoking policy dispute, "Haley opined that perhaps this wasn't the appropriate forum for the discussion noting that there was a bargaining session scheduled for August 29." (JD at 20:6-8).

i. The August 7 Bargaining Session

The August 7 meeting was, in fact, merely an informational session, not a bargaining session, as Respondent had no intention of bargaining. Respondent's intention to avoid decision bargaining at the August 7 session is revealed by its absence of bargaining proposals, its failure to provide the Union with critical information in advance of that meeting to permit the Union to formulate any bargaining proposals, and critically, Respondent's negotiators' statements that they were not there to bargain, as discussed below.

During the meeting on August 7 Respondent provided the Union with numerous materials, including photographs, as to *why* it wanted to alter the existing policy and prohibit tobacco use anywhere on its property. It is undisputed that Respondent did not provide the Union with any materials in advance of that meeting (Tr 61:5-15, 21-25; 144:7-21; 225:2-5). It is also undisputed that neither side made any bargaining proposals during that meeting (JD 17:14; Tr 65:3-8).

The Union's representatives understandably did not have bargaining proposals at that point because Respondent had neither provided the Union with a requested written policy to review nor an explanation as to what type of disciplinary policy would apply if employees violated the new smoking policy. The Judge's contrary conclusion (JD 18: 18-19), which she later repeats (JD 23:6-11), that Respondent adhered at this August 7 meeting to its "earlier" and "consistent" positions that the policy would not be reduced in writing and that the progressive disciplinary policy would apply is wrong, as evidenced by Respondent's own internal e-mails set forth in GCX 21.

Those e-mails show that, on June 19, Respondent representative Sorenson sent an internal e-mail stating that the Union representatives had asked whether a written policy would be drafted and what discipline plan would be administered for violations of the new policy (GCX 21 pp. 2-3). Trautman responded that general discussion was needed before anything was drafted (GCX 21 p.2). Dawn Cartwright, Respondent's Director of HR Services, responded that while she was uncertain as to what type of response was owed to the Union, Respondent had a "meeting on this topic set for 7/23 and one of the lingering items on the list is the approach to corrective action." (GCX 21 pp. 1-2). Jackson also responded internally by e-mail, stating that the item was to be discussed among three of Respondent's representatives so that there would be "a recommendation to discuss at the 7/23 meeting." (GCX 21 p. 1).

Thus, Respondent itself did not know -- at least until the July 23 meeting -- whether it would have the new policy reduced to writing or which corrective action policy would apply. As there is also no evidence that Respondent provided the Union before the August 7 meeting with any written materials, or communicated any decisions reached at the July 23 meeting, the Judge's conclusion regarding Respondent's "earlier" and "consistent" position on these items being communicated to the Union is unfounded and squarely contradicted by documentary evidence.

The most telling evidence of Respondent's intention not to bargain at the August 7 meeting is revealed by Opland's testimony regarding what Respondent's representatives, Trautman and Jackson, told him at that meeting. In response to General Counsel's question regarding what he recalled being said and discussed at the August 7 meeting, Opland testified that he recalled both Trautman and Jackson stating

that "the policy will be -- is going to be implemented September 1st and it is their position that they are not here to bargain" (Tr 225:13-20). Opland further testified that "the company's position was that they'd been given a direction to proceed with the implementation of a tobacco-free policy. And also with that they were there to give a presentation for the reasons why they were going to proceed with that policy" (Tr 225: 24 - 226:3).

When asked by General Counsel whether he responded to Trautman's and Jackson's statements that Respondent would not bargain and that the new policy was going to be implemented September 1, Opland testified as follows:

Yes, I did. There was conversation. I recall making a statement that the Union will be forced to file an unfair labor practice charge. The Employer's response was that they have the same understanding, and also that, again, they've been given a direction to proceed with the implementation . . . "

(Tr 226:21 - 25). Thus, it was clear that Respondent had no intention of bargaining over its decision as early as the very first bargaining session.

Although the Judge found (JD at 8:21-22) that "Opland was generally a reliable witness" based on her observation of his demeanor, she chose not to "credit" (JD 18:3-4; 18 n.21; 21:2-4) the above testimony regarding what Opland heard Trautman and Jackson say at the August 7 meeting. The Judge's decision to make a credibility resolution regarding Opland's testimony, however, was improper *because that testimony was neither denied nor rebutted*. Specifically, Respondent's counsel did not examine Opland on cross-examination or recross-examination regarding his testimony with respect to what he heard Trautman and Jackson say at the August 7 meeting. Trautman was not examined on direct, cross, redirect, or recross examination about

Opland's above testimony, and therefore did not deny it. Although Jackson testified after Opland, he, too, was not asked during direct, cross, redirect, or recross examination to deny or otherwise testify about Opland's above testimony concerning what he said to Opland at the August 7 meeting.

As Opland's testimony was not denied or rebutted, there was no dispute in the testimony. There was therefore no basis, and it was improper, for the Judge to make any credibility resolution regarding Opland's testimony concerning Respondent's statements at the August 7 meeting. For the same reason, it was also improper for her to draw any adverse inference (JD 18:12-14; 21:4-6) that, since neither Hickey nor Powers was called to corroborate Opland's testimony, they would not have corroborated it. Again, Opland's testimony was neither denied nor rebutted -- there was no need to call Hickey or Powers to corroborate it.

Finally, as Opland's testimony was not inherently improbable, there was no logical reason for the Judge to make an unnecessary credibility resolution and reject it. Although, at one point in her decision (JD 21:1-2), the Judge found that Opland's statement that Respondent had directed human resources to implement the policy without bargaining allegedly "was not included in Opland's testimony regarding the August 7 meeting," that portion of Opland regarding Respondent's statements at the August 7 meeting quoted above demonstrates otherwise.

The Judge further opined (JD 18:6-8) that Opland's testimony that the Union would be forced to file an unfair labor practice charge would make sense only if the Union had made a request to bargain during the August 7 meeting and Respondent denied that request. With all due respect to the Judge, that rationale makes little or no

sense. If, as Opland testified, Respondent's representatives stated that Respondent was not there to bargain and that there was a directive to proceed with implementation regardless of what the Union did, it would make complete sense for Opland to threaten to file a bad-faith bargaining charge in response to those statements alone. Whether or not the Union actually made a request to bargain during that session is simply irrelevant to the determination whether Opland's threat to file a charge made sense in light of what he was told. Where, as here, the Judge's decision not to credit Opland was not based on demeanor, was unnecessary, and was based on illogical rationale, her decision must fall. *Kelco Roofing*, 268 NLRB 456 (1983). *Accord E.S. Sutton Realty Co.*, 336 NLRB 405 (2001)

ii. The August 29 Bargaining Session

Following the initial bargaining session, it is undisputed that the Union made another written request on August 15 demanding that Respondent rescind its decision to implement the new policy and allow the Union the opportunity to bargain over the decision and its effects (GCX 17). It is also undisputed that Respondent replied in writing on August 21, claiming that the Union had waived its right to bargain over Respondent's decision to implement the new policy, and stating it was willing to meet with the Union to bargain solely over the effects of the new policy (GCX 18). Although the parties thereafter did meet on August 29 to discuss the new policy, it is clear from Respondent's own documents that, consistent with its August 21 pronouncement, it remained steadfast in refusing to bargain over the decision.

Those documents include Respondent's own notes from the August 29 session (RX 16). As those notes reveal (RX 16 p. 3), Sue Haley reiterated during that session that "we are willing to discuss the effects of the policy but we are not going to discuss the policy itself."¹² Any doubt that Respondent had changed its position at the August 29 session is dispelled by Trautman's September 12 response (GCX 20) to the Union's September 3 bargaining proposal (GCX 19). Rejecting the proposal, Trautman's response stated, in part, as follows:

In a letter from Sue Haley to you dated August 21, 2014, she told you that [Respondent] was still willing to meet with you to bargain over the effects of the new policy but the time for bargaining over the policy itself had passed. However, the proposal made in your most recent letter is a further attempt to bargain over the policy itself rather than the effects of the policy.

(GCX 20 p 2).

In sum, although Respondent was required to bargain in good faith over Respondent's decision to implement a new smoking policy following the Union's May and June demands to bargain, Respondent never had any intention to bargain over the decision and never did so.

b. Respondent Never Bargained to Impasse Over Its Decision

As the above principles establish, Respondent had the burden of proving that the parties were at impasse before it could lawfully implement its new policy on September 1. Based on the record evidence presented, and the Judge's findings, Respondent did not meet its burden of proving impasse.

¹² In light of Haley's statement set forth in Respondent's own notes, the Judge is wrong when she finds (JD 20 n.24) that "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."

The objective evidence establishes that when Respondent implemented the new policy on September 1, fruitful negotiations between the parties were still possible and that both parties were not at the “end of their rope” and unwilling to compromise further. As the Judge found (JD 21:8-14, 27-30: 23:46) both parties made bargaining proposals that deviated from their initial position and reflected willingness to compromise. Thus, while the Union had demanded in its August 15 letter that Respondent rescind its new policy prohibiting smoking anywhere on its controlled property, and thereby retain the existing policy of permitting smoking in specified smoking areas in Respondent's yard, the Union deviated from that position and proposed at the August 29 session that Respondent reduce the number of designated smoking areas to two or by half. (JD 21:8-14). By the same token, Respondent deviated from its proposed tobacco-free policy banning smoking anywhere on its property and offered to permit smoking in its parking lots outside the gates to its yard. (JD 21:27-30). Although their proposals were not accepted, the parties' deviation from their initial bargaining position reflected both parties' willingness to compromise a *mere 3 days* prior to the implementation of the new tobacco-free policy. Thus, the parties' own conduct in offering counterproposals 3 days prior to implementation mandates the conclusion that further negotiations could have proven fruitful when Respondent unilaterally implemented its new policy.

Furthermore, Opland's statement at the end of the August 29 session and his September 3 bargaining proposal to Respondent clearly demonstrate that there was no contemporaneous understanding, at least on the Union's part, that the parties were at impasse or that it believed that further negotiations were pointless. As Opland testified , he presented Respondent with new bargaining proposals in the September 3 letter

because he believed that the parties were not done with bargaining over the policy (Tr 238:5-20).

In light of the undisputed evidence above, the parties were not at impasse following the August 29 bargaining session. Accordingly, Respondent's unilateral implementation of its new smoking policy 3 days later violated the Act.

B. Respondent Violated §§8(a)(1) and (5) by Presenting Its Changes to the Existing Smoking Policy as a Fait Accompli

If, as argued above, the Board finds that the Union did not waive its right to bargain and Respondent implemented its new policy without bargaining in good faith and/or to impasse, there is no need for the Board to address the Judge's conclusion regarding General Counsel's contention that Respondent presented the new policy as a fait accompli. However, as to that contention, if addressed, the Judge failed to consider a significant amount of material evidence in reaching her conclusion that Respondent did not present the new policy as a fait accompli.

1. Applicable Fait Accompli Principles

Where "the manner of the [employer's] presentation of a change in terms and conditions of employment to the union precludes a meaningful opportunity for the union to bargain, the change is a fait accompli and a failure by the union to request bargaining will not constitute a waiver." *Aggregate Industries*, 359 NLRB No. 156, slip op. at 4 (2013), decision and rationale affirmed, 361 NLRB No. 80 (2014). If an employer has no intention of changing its mind when it gives the union notice of a proposed change, the proposed change constitutes a fait accompli because it precludes a meaningful opportunity for the union to bargain. See, e.g., *American Med. Response of CT, Inc.*, 356 NLRB No. 155, slip op. at 25 (2011); *Ciba Geigy Pharmaceuticals Div.*, 264 NLRB

1013, 1017 (1982). A finding of fait accompli requires objective evidence as the union's subjective impression of the employer's intention is insufficient. *KGTV*, 355 NLRB No. 213, slip op. at 2. Regardless of if, or when, a union requests bargaining, a union cannot be found to have waived its right to bargain where the change has been presented as a fait accompli. See, e.g., *Solutia, Inc.*, 357 NLRB No. 15, slip op. at 11 (2011); *Pontiac Osteopathic Hosp.*, 336 NLRB 1021, 1023 (2011). Moreover, no impasse is possible where an employer presents the union with a fait accompli over a matter over which bargaining to impasse is required. See, e.g., *Castle Hill Health Care*, 355 NLRB No. 196, slip op. at 34 (2010).

2. The Judge Erroneously Found that Respondent Did Not Present Its New Policy as A Fait Accompli Because She Ignored Relevant Objective Evidence and Relied on an Improper Adverse Inference

The Judge rejected (JD 11:17-18) General Counsel's argument that Respondent presented its new smoking policy as a fait accompli on the alleged basis that there was insufficient evidence that Respondent exhibited no intention of changing its mind with respect to implementation of the new policy. In making that determination, the Judge reasoned (JD 11:19 - 12:14) that Respondent's February 12 notification showed that Respondent's policy was "open for discussion;" Respondent presented and discussed the new policy at the February 27 meeting based on an adverse inference she had drawn; and the notice sent to employees on March 1, as well as the language of the notice, did not show that Respondent had no intention of changing its mind with respect to implementation of the new policy. The Judge is mistaken.

The record is replete with evidence demonstrating that the manner in which Respondent presented its new policy precluded any meaningful bargaining. As discussed below, that evidence includes Respondent's: 1) deviation from its practice in how it presented proposed changes to the Union; 2) presentation of the full details of the new policy to employees without first giving the Union a similar opportunity to see those details and to request bargaining; 3) presentation of materials whose language reveals that the proposed policy changes were a final decision not subject to bargaining; and 4) subsequent conduct in avoiding bargaining and thereafter refusing to bargain over the decision to implement. Further, as also discussed below, the Judge improperly drew an adverse inference to find that the plan had been presented to, and fully discussed with, the Union's participants at the February 27 meeting.

a. Respondent's Deviation from Past Practice Sought to Preclude Meaningful Bargaining

Although General Counsel argued that Respondent's deviation from its past practice in presenting proposed policy changes to the Union revealed its determination to preclude bargaining, the Judge's analysis of that issue is totally absent from her decision. As the record evidence establishes, Respondent followed a practice whereby it notified the Union in advance of the specific changes it proposed to make and asked whether the Union had any concerns or questions about those changes (Tr 198:4-12). This practice included notifying the Union by e-mail of proposed changes in the employee handbook, attendance policy, and smoking policy, for example, and attaching the specific proposed changes for the Union's review. The notifications also requested that the Union contact Respondent if it wanted to meet to discuss the proposed changes in advance of the proposed implementation date. (GCX 3-4, 22-25). This practice

encouraged and fostered the principles of collective bargaining that underlie and are protected by the Act. That is, the practice permitted the Union to review and consider the specific changes in policies that affected employees' terms and conditions of employment; permitted the Union to present the proposed changes to, and consult with, the employees it represents to receive their feedback; and reflected Respondent's willingness to answer questions and to meet with the Union to bargain, if necessary, in advance of implementation of the changes.

Respondent's notification of the smoking policy changes in 2014 to the Union represented an abrupt change from this existing practice. It is undisputed that Respondent never sent the Union any description of the proposed changes in advance of the February 27 LMC meeting. Unlike the existing practice, the Union never had the opportunity to review and comprehend the changes in advance in order to ask intelligent questions or demand bargaining. Unlike the existing practice, the Union never had the opportunity to consult with the employees it represents to determine what specific objections they had to the proposed changes. As the employees' bargaining representative, the Union was entitled to that opportunity to consult with employees before Respondent sprung the changes on the employees two days after the February 27 meeting.

The answer to the question why Respondent changed the existing practice of giving the Union the proposed changes in advance is simple. It did not want the Union to have the opportunity to request bargaining because Respondent did not want to

bargain over implementation of the changes.¹³ Although the Judge notes that Respondent notified the Union on February 12 that it was "heading towards" non-smoking yards and wanted to discuss "recommended timing and process" at the February 27 meeting, such notification alone was in direct contrast to existing practice because it did not give the Union notice of what, if any, specific changes Respondent was considering or that any specific proposals would be presented to the Union at the February 27 meeting. Indeed, Respondent's change in practice was designed to preclude meaningful bargaining.

b. Respondent's Distribution of the Details of the New Policy to Employees Less Than 48 Hours After the February 27 LMC Meeting Sought to Preclude Meaningful Bargaining

General Counsel argued that Respondent also presented the new policy as a fait accompli when it presented the details of the new policy to employees on March 1 without presenting the details to the Union at the February 27 meeting. The Judge concluded (JD 11:24-28), however, that Respondent presented the documents to the Union and fully discussed them at the February 27 meeting. In reaching that conclusion, the Judge faulted General Counsel for not calling Union representative Lance Hickey to testify, drew an adverse inference over the failure to call Hickey to testify, and found that General Counsel witness Moore testified that the new policy was "discussed" at the February 27 meeting (JD 7:19; 8:33 - 9:17). As discussed below, the Judge's adverse inference was improper, her criticism unwarranted, and her finding regarding Moore's testimony incorrect.

¹³ Although Respondent may argue that it could not have sent the changes in advance because the materials were still being finalized, that does not excuse its conduct. Respondent could have waited until the next meeting to discuss the new policy with the Union and sent the finalized materials in advance of that meeting.

Although the Judge drew an adverse inference from the failure to call Hickey to testify, the Judge wrongly assumes that Hickey would have given testimony favorable to the Union. The Judge incorrectly suggested that Hickey voluntarily quit when she finds (JD 4 at n. 6) that “Hickey ceased his duties.” In fact, Opland testified (Tr 199:19-23) without contradiction that he was responsible for terminating Hickey’s employment with the Union three months before the hearing. Thus, although Hickey retained an elected position with the Union, an adverse inference was improper where he was terminated from his paid position. See *Katz’s Deli*, 316 NLRB 318, 328 (1995) (improper to draw adverse inference against party for failure to call individual as a witness who was recently terminated by party).

More critically, there was no need to call Hickey as a witness because his testimony on the material issue would have been cumulative. The Judge determined that General Counsel should have called Hickey to testify because Haley testified that she gave the materials to Hickey who was sitting to her right. The material issue, however, was not which Union representative received the materials, but whether the materials were distributed to the Union representatives and discussed during the February 27 meeting. Haley further testified (Tr 345:23) that after she gave the materials to Hickey, he "distributed [the materials] around the room."¹⁴ There was no need for General Counsel to put Hickey on the stand to deny that he distributed the materials around the room, however, because **no other witness who testified at the hearing corroborated Haley's statement that the materials were distributed.** See *Roosevelt Memorial Med. Ctr.*, 348 NLRB 1016, 1022 (2006) (Judge improperly drew

¹⁴ Accordingly, the Judge's basis for crediting Haley's testimony--that Haley exhibited "candor" because she could not testify that the materials were distributed (JD 8:1-3)--is nonexistent.

adverse inference over party's failure to call individual as a witness because the other record evidence made the individual's testimony unnecessary).

In fact, General Counsel witnesses Moore and Stevahn both specifically denied that the materials were distributed to the participants at the February 27 meeting in Portland (Tr 285:10 - 286:21; 301:6 - 302:9). Although Trautman initially testified that he believed that the materials were distributed in Portland, he conceded on cross-examination that there was no reference to that in his pre-trial affidavit and the Judge properly discredited his testimony on that point (JD 6 n.10). Jackson testified that he did "not recall" whether the materials were distributed to the Seattle participants at the February 27 meeting who attended by teleconference (Tr 413:3-6; 453:7-10). Opland denied that the materials were distributed to him at the February 27 meeting in Seattle, testifying that Respondent had not provided the documents to him until early August (Tr 227:12 - 228:22).

Furthermore, the documentary evidence that the Judge failed to consider refutes the conclusion that the materials were distributed for discussion. Sorenson's June 19 e-mail (GCX 21) states that the Union's representatives were requesting a copy of the new tobacco-free policy and discipline plan at the June 3 Puget Sound Metal Trades Council meeting. Haley's August 12 e-mail, which provided Union officials Hickey and Opland with the employee memo and FAQs that she claims to have distributed to them as participants at the February 27 meeting, says nothing about her previously providing them with the materials at the February 27 meeting. Presumably the Union representatives would not have requested the policy on June 3 if it had been presented to them on February 27, and Haley would have reminded the Union's officials that she

had previously provided the materials if the materials had, in fact, been distributed on February 27.¹⁵

Finally, the Judge wrongly found that Moore testified that there was discussion about the details of the policy at the February 27 meeting. While Moore recalled discussion about other topics, he testified that there was no discussion at the February 27 meeting other than a single remark that it was Respondent's intention to make its facilities tobacco-free (Tr 284:21 - 285:9). The Judge's error is critical because she relied on Moore's alleged, but non-existent, testimony to find that Respondent discussed the details of the policy with the Union's participants at the February 27 meeting.

Like Moore, Trautman could recall only the single statement being made that it was Respondent's intention to go tobacco-free on September 1 (Tr 51:9-18). Stevahn denied that there was any discussion about the new policy (Tr 295:7-19). Although Jackson initially testified that Haley discussed the memo and FAQs, he conceded on cross-examination that, when asked in his pre-trial affidavit to recount what he had seen and heard at the February 27 meeting, he did not mention any memo or FAQs being discussed at that meeting (Tr 454:15-25; 456:17 - 457:17). Thus, although Haley testified that she discussed the materials with the meeting's participants, no other witness corroborated that testimony.

The evidence itself establishes that Haley briefly announced to the meeting's participants that Respondent had determined to make its facilities tobacco-free effective

¹⁵ In light of the Judge's failure to consider this documentary evidence, as well as the fact that there was no credible witness testimony to corroborate Haley's testimony that the materials were distributed at the February 27 meeting or to refute General Counsel's witnesses that they were not distributed, General Counsel takes particular exception to the Judge's superfluous observation (JD 9:15-16) that "[t]he weakness of [General Counsel's] testimonial panel would have been readily apparent during pre-trial preparations"

September 1. Accordingly, the Judge's determination that Respondent distributed and discussed the memo and FAQs with the Union's participants at the February 27 meeting is based on an improper adverse inference and her failure to consider all of the relevant record evidence. Less than 48 hours later, Respondent mailed and e-mailed the employees the memo and FAQs

Respondent's effort to shield the contents of its new policy from the Union, but then sharing it immediately with the employees, leads to the inevitable conclusion that Respondent's presentation of its new policy was a *fait accompli*. Indeed, Respondent's conduct stands in stark contrast to that of the employer in *Sutter Tracy Community Hosp.*, 362 NLRB No. 199 (2015), in which the Board recently found that the employer did not present its proposed healthcare and wellness program changes as a *fait accompli*. In that case, the Board specifically noted that the employer had told the union that it would delay providing employees with the materials to allow time for bargaining first and asked the union if it wanted to meet beyond the one scheduled contract bargaining session to discuss the proposed changes. Furthermore, the employer's memo to employees stated that the employer would not finalize the changes until it had given the union a full opportunity to bargain over the proposed changes. *Id.*, slip op. at 3. Thus, the employer's conduct was indicative of an intent to foster bargaining.

In sharp contrast, Respondent here immediately provided the policy change materials to employees without bargaining and never requested whether the Union wanted to schedule bargaining before implementation. Moreover, Respondent's memo to employees said nothing about the proposed changes being bargained or even discussed with their bargaining representative, and said nothing about holding off

implementation until after the Union had been given a full opportunity to bargain. Although the memo did say that implementation would not occur for several months until September 1, employees knew that the delay was not to permit bargaining. Rather, as the memo (GCX 5) explained to them, the delay until September 1 was "to allow time for individuals to take advantage of the many programs offered by [Respondent's] carriers and communities to help people stop smoking." In sum, Respondent's actions between February 27 and March 1 again reflect an intent to avoid bargaining.

3. The Language of the Memo and FAQs Distributed Reveal Respondent's Determination Not to Engage in Meaningful Bargaining Over the Changes in Smoking Policy

Although the Judge found that the memo sent to employees on March 1 "cannot be reasonably construed as indicative of Respondent having no intention to change its mind" (JD 11:37-38), she relied on a selective reading of several inconsequential parts of the memo. As the Judge failed to analyze, and essentially ignored, the several passages in the memo and FAQs that clearly informed employees that the changes in smoking policy were set in stone and not subject to bargaining, the Judge's conclusion must be reversed.

In terms of objective evidence, the language of the employee memo and FAQs undeniably demonstrate that the changes in the new policy were inevitable. The language was not merely hopeful and positive. Rather, the employee memo stated the new policy "will be" effective September 1 (GCX 5) and paragraph 1 of the FAQs

distributed to employees on March 1 states that the enforcement of the tobacco ban “will begin” on September 1.¹⁶

Moreover, Respondent’s unequivocal language was not limited solely to the implementation date of the new policy. The March 1 employee memo and the FAQs used similar unequivocal language with respect to Respondent’s determination as to whom and where the new policy applied (“This policy will be applied to every Vigor employee, subcontractor, and visitor while on Vigor controlled property” (GCX 6 ¶ 3; GCX 5)); how violations of the new policy would be handled (“we will impose similar corrective action for those found violating this policy” (GCX 6 ¶12)); which products the new policy applied to (“[t]his ban extends to all tobacco products – cigarettes, chew, e-cigarettes, etc.” (GCX 6 ¶ 5)); and to which individuals on Respondent’s property the new policy would not apply (“Vessels berthed at the shipyard for repair service will follow the Commanding Officer/Ship Captain’s policy regarding tobacco use onboard” (GCX 6 ¶ 13) and “Use of tobacco products by our tenants will be in accordance with the policies and procedures set forth by their respective organizations” (GCX 6 ¶ 14)).

As the Board explained in *Pontiac Osteopathic Hosp.*, 336 NLRB 1021, 1024 (2011), “[s]uch unequivocal language shows that the Respondent considered the changes to the ... policy to be a final decision about which it had no intent to bargain.” *Accord Aggregate Industries*, 359 NLRB No. 156, slip op. at 5 (2013), decision and rationale affirmed, 361 NLRB No. 80 (2014) (employer’s letter conveyed the unconditional message that employer was not merely proposing a change subject to bargaining, but informing the recipient that the change would occur). In sum, the

¹⁶ Even the slightly modified version of the employee memo that was allegedly distributed to the Union at the February 27 meeting (RX 4) used the same language that the change was inevitable. It stated that all of Respondent’s facilities “will become” tobacco free on September 1.

language of the materials revealed that Respondent had made a final determination with respect to the critical terms of the new policy. It had no intention of bargaining those decisions already made.

4. Respondent Continues to Engage in Conduct That Is Designed to Preclude Meaningful Bargaining Over the Decision to Implement the New Policy

Respondent's conduct subsequent to the announcement of its decision to implement a new smoking policy objectively reinforces the conclusion that Respondent had no intention of bargaining over that decision. Based on the credited testimony of Union representative Behling, the Judge found that the Union made verbal requests to Respondent's representative Al Jackson on May 20 and June 3 to bargain over Respondent's decision to implement the new smoking policy (JD 13:26-30; 14:22-24). Jackson rebuffed the Union's verbal requests to bargain on both occasions. As Behling credibly testified, Jackson responded on May 20 that there was no need to discuss the new policy then as there was plenty of time to bargain, and responded on June 3 that he did not understand why the Union was again bringing up bargaining over the new policy when that policy was not scheduled to go into effect until September 1 (Tr 317:7-13; 319:25 - 320:5). Although the Judge failed to analyze Jackson's responses, they provide strong evidence of Respondent's consistent position and intention to avoid and delay meaningful bargaining over the new policy as long as possible.

When the Union again requested bargaining, this time in writing in late June, Respondent again engaged in delay tactics. Rather than agreeing to meet immediately, Respondent's response (GCX 16) sought to delay meeting or bargaining for *nearly 6*

weeks, until the week of August 4. Respondent's alleged justification for the delay does not withstand scrutiny.

Respondent claimed that it could not meet until after an internal meeting on that new policy that was scheduled to occur on July 23. But, there was no need to delay meeting for the first time with the Union over the new policy until after the July 23 meeting. Respondent had already presented the entire new policy to employees back on March 1. There had been no deviation from that policy on Respondent's part until that time and there was no deviation from that policy when Respondent and the Union finally did meet for the first time on August 7.

The Judge rejected (JD 16 n.20) General Counsel's argument that the alleged need to wait to meet until after the July 23 meeting was a smokescreen to mask Respondent's true desire to delay bargaining on the basis that the "July 23 meeting was referenced long before the June 26 demand to bargain." The Judge, however, totally misconstrued General Counsel's argument. General Counsel did not, and does not, argue that Respondent sought to avoid bargaining by scheduling the internal July 23 meeting. Rather, General Counsel has consistently argued that Respondent sought to delay bargaining by claiming that it could not meet until after the already-scheduled meeting several weeks later.

As argued above, there was no need for Respondent to delay meeting or bargaining with the Union until after the internal meeting. In fact, had Respondent truly desired to bargain, it could have met with the Union for at least a couple of bargaining sessions and then discussed the Union's response or bargaining proposals at its internal July 23 meeting devoted to the new policy. General Counsel reasserts that

Respondent's alleged need to wait to meet until after the July 23 internal meeting was merely a smokescreen to mask Respondent's true motive to delay bargaining to a date much closer to the planned implementation date.

As argued above, even after Respondent agreed to meet, it continued to engage in conduct that was designed to preclude any meaningful bargaining over Respondent's decision to implement the new policy. Respondent and the Union met for a grand total of two bargaining sessions. The first session on August 7 was merely informational and no bargaining proposals were exchanged. Prior to the second session on August 29, Respondent announced in writing that it would not bargain over the decision to implement the new policy. Consistent with its announced position, Respondent refused to bargain over the decision to implement the new policy at that second, and final, August 29 bargaining session.

In sum, the record clearly establishes that Respondent's entire course of conduct was designed to avoid meaningful bargaining with the Union over the new smoking policy. General Counsel therefore requests that the Board reverse the Judge's finding that Respondent did not present the new policy as a *fait accompli*.

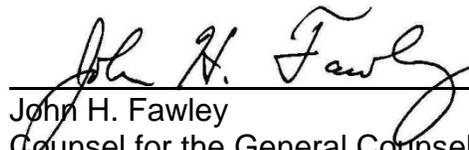
V. CONCLUSION

In light of the above and the record as a whole, Counsel for the General Counsel respectfully requests that the Board reverse the Judge's Decision in its entirety and find that Respondent violated §§ 8(a)(1) and (5) of the Act by unilaterally implementing a new smoking policy on September 1 without bargaining in good faith or to *impasse* over its decision to implement that new policy, and by presenting the new policy as a *fait accompli*.

Counsel for the General Counsel also respectfully urges that an order issue against Respondent requiring it to remedy its unfair labor practices by taking the following actions: (1) rescind, upon request, its new smoking policy implemented on September 1, 2014; (2) cease and desist from failing and refusing to bargain in good faith with the Union; and (3) post an appropriate remedial notice.

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

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the Counsel for the General Counsel's Exceptions and Brief in Support of Exceptions to the Decision of the Administrative Law Judge were served on the 30th day of September, 2015, on the following parties:

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