

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**  
**REGION 19**

**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; AND PACIFIC COAST  
METAL TRADES DISTRICT COUNCIL,**

Charging Party,

And

**VIGOR INDUSTRIAL, LLC,**

Respondent.

Case No. 19-CA-135538

**RESPONDENT'S ANSWERING BRIEF IN RESPONSE TO EXCEPTIONS TO  
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Jacqueline M. Damm  
Adam S. Collier  
Bullard Law  
200 SW Market Street, Suite 1900  
Portland, OR 97201  
503-248-1134/Telephone  
503-224-8851/Facsimile

Attorneys for Respondent Vigor Industrial LLC

Table of Contents

I. INTRODUCTION ..... 1

II. THE GENERAL COUNSEL’S EXCEPTIONS AND THE UNION’S CROSS-  
EXCEPTIONS SHOULD BE DISMISSED BECAUSE THEY DO NOT  
CONFORM TO THE NLRB’S RULES AND REGULATIONS .....2

III. JUDGE CRACRAFT’S DECISION SHOULD BE UPHELD.....3

    A. Judge Cracraft’s Credibility Resolutions Are Supported by the  
    Record .....3

    B. Counter-Statement of Facts.....5

    C. Response to “Questions Presented.” ..... 16

IV. CONCLUSION..... 29

Table of Authorities

**Cases**

*CalMat Co.*, 331 NLRB 1084 (2000) ..... 25

*EF Int’l Language Schools, Inc.*, 363 NLRB No. 20 n 2 (Oct. 1, 2015) ..... 4

*J & J Snack Foods Handhelds Corp.*, 363 NLRB No. 21 n 1 (Oct. 1, 2015)..... 4

*McGraw-Hill Broadcasting Co., Inc.*, 355 NLRB 1283 (2010) ..... 26

*Milwaukee Terminal Services, Inc.*, 282 NLRB 637, 639 (1987) ..... 25

*Regency Service Carts, Inc.*, 345 NLRB 671 (2005) ..... 21

*Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.*, 188 F.2d 362 (3d Cir. 1951) .. 4

*Sunol Valley Golf Club*, 310 NLRB 357, 368 (1993), *enfd.*, 48 F3d 444 (9<sup>th</sup> Cir 1995) ... 18

*The Gulfport Stevedoring Ass’n—Int’l Longshoremen’s Ass’n Container Royalty Plan*,  
363 NLRB No. 10 n 1 (Sept. 25, 2015)..... 4

**Rules**

NLRB Rules and Regulations Section 102.46 .....

## I. INTRODUCTION

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Respondent Vigor Industrial (“Respondent,” “Employer” or “Vigor”) submits this Answering Brief to Counsel for the General Counsel’s Exceptions to the Decision of Administrative Law Judge Mary Miller Cracraft (“ALJ” or “Judge Cracraft”), which was issued on September 2, 2015.<sup>1</sup> This Answering Brief also responds to the Union’s Cross-Exceptions to Judge Cracraft’s decision, which incorporate General Counsel’s Exceptions.<sup>2</sup>

Judge Cracraft’s decision is supported by the record evidence and applicable law and should be affirmed in its entirety.

This case involves Vigor’s implementation of a tobacco-free policy on September 1, 2014, following notice to and good faith bargaining with the Union. The hearing in this matter lasted for three days and the central question was “what happened?” in a number of meetings between Vigor and the Union. Whether Respondent violated the Act, as alleged by the General Counsel, turns on the credibility of the witnesses who testified at hearing. Respondent presented three witnesses who were Vigor’s representatives present at the relevant meetings. They testified consistently regarding the fact that Vigor gave the Union six months’ advance notice of its intention to implement a tobacco-free policy, and that despite the Union’s tardy

---

<sup>1</sup> References to Judge Cracraft’s decision will be noted as (JD\_\_\_\_); to General Counsel’s Brief as (GC Brief \_\_\_\_); to the transcript as (Tr\_\_\_\_); to General Counsel’s Exhibits as (Ex GC-\_\_\_\_); and to Respondent’s Exhibits as (Ex R-\_\_\_\_).

<sup>2</sup> Wherever GC’s Exceptions are referenced herein, that reference also includes Charging Party’s Cross-Exceptions.

demand to bargain, bargained in good faith with the Union prior to implementing that policy.

In contrast, General Counsel presented witnesses who contradicted both each other and their prior sworn affidavits. Indeed, General Counsel's primary witness – Brian Opland – admitted that he attends so many meetings he can't remember what happened at them. (Tr 270-271). General Counsel also did not present two key witnesses who were present at the relevant meetings, despite the fact that they remain associated with the Union. They are: (1) Lance Hickey, Vice President of Boilermakers Local 104 and former Assistant Business Manager of Local 104; and (2) Gary Powers, full-time Boilermakers International Representative (Tr 243) and the Union's chief spokesperson in bargaining with Respondent (Tr 77).

The overwhelming evidence presented at hearing supports Judge Cracraft's decision. General Counsel's exceptions largely challenge Judge Cracraft's well-supported credibility determinations. In addition, they do not conform to the NLRB's Rules and Regulations. Therefore, they are not worthy of consideration and should be dismissed.

## **II. THE GENERAL COUNSEL'S EXCEPTIONS AND THE UNION'S CROSS-EXCEPTIONS SHOULD BE DISMISSED BECAUSE THEY DO NOT CONFORM TO THE NLRB'S RULES AND REGULATIONS**

Section 102.46(b)(1) provides, in part:

Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception.

General Counsel's Exceptions (and the Union's Cross-Exceptions, which incorporate General Counsel's Exceptions by reference) do not contain a single citation to the record, as is required in Section 102.46(b)(1)(iii). Therefore, General Counsel's Exceptions and the Union's Cross-Exceptions do not conform to the Board's Rules and Regulations and should be dismissed.

Section 102.46(c) of the NLRB's Rules and Regulations provides:

Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions and shall contain, in the order indicated, the following:

- (1) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.
- (2) A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.
- (3) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page reference to the record and the legal or other material relied on.

The General Counsel's Brief in Support of Exceptions and the Union's Brief in Support of Cross-Exceptions do not reference a single Exception, as required by Section 102.46(c)(2), and the "Argument" does not relate back to the Questions Presented. For these additional reasons, the General Counsel's Exceptions and the Union's Cross-Exceptions should be dismissed.

### **III. JUDGE CRACRAFT'S DECISION SHOULD BE UPHELD**

#### **A. Judge Cracraft's Credibility Resolutions Are Supported by the Record**

As noted above, the central question in this case is "what happened?" at a number of meetings between Vigor and the Union. In her decision, Judge Cracraft

carefully considered all of the testimony and documentary evidence, including the demeanor of the witnesses, and made a decision to credit the testimony of the three Vigor representatives who were present at the relevant meetings between the parties. (JD 2 n. 4, 7, 17, 21). Her conclusions regarding “what happened” necessarily turned on a determination of the credibility of the witnesses, including their demeanor. (JD 2 n. 4).

“The Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces [the Board] that they are incorrect.” *EF Int’l Language Schools, Inc.*, 363 NLRB No. 20 n 2 (Oct. 1, 2015); *J & J Snack Foods Handhelds Corp.*, 363 NLRB No. 21 n 1 (Oct. 1, 2015); *The Gulfport Stevedoring Ass’n—Int’l Longshoremen’s Ass’n Container Royalty Plan*, 363 NLRB No. 10 n 1 (Sept. 25, 2015), all citing *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.*, 188 F.2d 362 (3d Cir. 1951).

The Board explained in *Standard Dry Wall Products*:

[I]n all cases which come before us for decision we base our findings as to the facts upon a *de novo* review of the entire record, and do not deem ourselves bound by the Trial Examiner’s findings. Nevertheless, as the demeanor of witnesses is a factor of consequence in resolving issues of credibility, and as the Trial Examiner, but not the Board, has had the advantage of observing the witnesses while they testified, it is our policy to attach great weight to a Trial Examiner’s credibility findings insofar as they are based on demeanor. Hence we do not overrule a Trial Examiner’s resolutions as to credibility except where the clear preponderance of *all* the relevant evidence convinces us that the Trial Examiner’s resolution was incorrect.

*Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950), *enfd.*, 188 F.2d 362 (3d Cir. 1951).

Judge Cracraft's credibility determinations are supported by the record evidence and therefore should not be overturned by the Board, General Counsel's limited, inaccurate and/or out-of-context "picking" at them notwithstanding.

**B. Counter-Statement of Facts**

Respondent will not restate the facts which are already set forth in Respondent's Post-Hearing Brief and Judge Cracraft's decision. However, there are inaccuracies in General Counsel's statement of facts, which Respondent corrects as follows:

**1. The People.**

Sue Haley is Vigor's Executive Vice President of Human Resources and Administration. (Tr 337). Mike Trautman is Vigor's Director of Labor Relations. During the relevant time frame of this case, Trautman was Vigor's Human Resources Manager in Portland. (Tr 26). Albert Jackson is Vigor's Human Resources Manager in Seattle. (Tr 404).

Gary Powers is an International Representative for the Boilermakers Union. (Tr 77). Brian Opland is the President and Business Manager of Boilermakers Local 104. (Tr 194). Lance Hickey is the Vice President of Boilermakers Local 104. (Tr 243). During the relevant time frame of this case, Hickey also was Assistant Business Manager of Boilermakers Local 104. (Tr 77).

**a. Gary Powers is the Union's chief spokesperson in bargaining with Respondent.**

Opland is not the chief spokesperson in bargaining with Respondent. Rather, Gary Powers typically acts as the chief spokesperson in bargaining with Respondent. (Tr 77). There is nothing in the record that indicates that Opland was the

chief spokesperson in bargaining. (GC Brief 4). Opland is designated to receive and provide notices to Vigor, but Powers is typically the Union's chief spokesperson in bargaining. (*Id.*).

**b. The record does not support a claim that Hickey was “terminated” by Local 104.**

There is nothing in the record that supports the assertion that Hickey was “terminated by Opland in March 2015.” (GC Brief 4). The only evidence regarding Hickey's ceasing his duties as Assistant Business Manager with the Boilermakers was Opland's testimony. When asked why Hickey is no longer employed by Local 104, Opland replied, “...primarily due to financial hardship of the local, I made – I took action to correct that.” (Tr 199). This does not indicate that Hickey was terminated. Based on Opland's testimony, Hickey could have been laid off or taken a voluntary severance or retirement package. Hickey continues to hold the position of Vice President of Boilermakers Local 104. (Tr 243).

**2. The Bargaining Process.**

The record demonstrates that Vigor gave the Union six months' advance notice of its intention to go tobacco-free. It also demonstrates that when the Union eventually demanded bargaining over the tobacco-free policy, Vigor bargained in good faith with the Union.

**a. Respondent does not follow a particular “practice” when notifying the Union of policy changes.**

Respondent does not follow a practice whereby it notifies the Union in advance of specific changes it proposes to make and asks whether the Union has any concerns or questions about the changes. Respondent has done that in certain

circumstances, but in other circumstances has simply discussed changes at the Labor-Management Committee (“LMC”) meeting, as it did in this case. (Tr 78, 338-339, 369-370, 406). There is no consistent practice one way or the other. (*Id.*; JD 6).

Respondent did not present the tobacco-free policy “in a manner designed to preclude meaningful bargaining.” Because there was an LMC meeting already scheduled, Respondent made the decision to present the policy in person at that meeting. This was designed to encourage discussion, not preclude it (JD 11), and it was not “in contravention of prior practice” because there was not a consistent practice. (JD 6; Tr 78, 338-339, 369-370).

**b. Respondent presented the tobacco-free policy in detail at the February 27, 2014 LMC meeting.**

In its brief, General Counsel recounts various witnesses’ testimony about what happened at the February 27 LMC meeting where Respondent communicated its intent to go tobacco-free on September 1. Judge Cracraft made credibility determinations related to what happened at that meeting and concluded that Sue Haley went over the policy and the FAQs at that meeting. (JD 9). The ALJ’s credibility determination is supported by the record.

General Counsel claims that Gary Moore and Mike Trautman both testified there was only one statement made about the tobacco-free policy at that meeting. However, both Moore and Trautman testified that they recalled “discussion” about the policy. (Tr 52, 284). Opland testified that he first heard rumors about the tobacco-free policy in April or May (Tr 212), despite having been copied on emails placing it on the February 27 LMC agenda (Exs GC-7, GC-9, GC-11, GC-12), and despite having attended the February 27 LMC meeting. But in his prior sworn affidavits, he

stated first that he could not remember if he attended the meeting and then that he did NOT attend the meeting. (Tr 256-257). He also acknowledged that he attends so many meetings that he cannot remember what happens at them. (Tr 260-261, 270-271).

Barry Stevahn testified that the subject of the tobacco-free policy was not discussed at all (Tr 295), a claim rebutted by four other witnesses present at the meeting. Lance Hickey, who was present at the meeting and had prior and subsequent communications with Respondent about the tobacco-free policy, was not called as a witness.

**c. Respondent notified employees of the upcoming policy on March 7, 2014.**

While it was dated March 1, Respondent sent the notice to employees regarding the tobacco-free policy on March 7. (JD 9; Tr 379; Ex R-5). Respondent did not provide a copy to the Union because it had already provided the Union a very similar notice during the February 27 LMC meeting. (JD 9; Tr 345, 351-352; Ex R-4).

**d. Respondent did not delay bargaining over the tobacco-free policy.**

At hearing, General Counsel witness Steve Behling claimed that the Union had made verbal demands to bargain on May 20 and June 3. Respondent witness Albert Jackson refuted this testimony. Judge Cracraft concluded that the Union did make verbal demands to bargain on those dates, but also concluded that it is probable that Jackson did not perceive them to be demands to bargain, but rather questions about the policy. (JD 13-14).

The first formal demand to bargain was a June 26, 2014 letter from Opland to Haley – four months after the intention to go tobacco-free was communicated

to the Union. On June 30, just a few days later, Trautman responded to the demand to bargain, stating that Respondent would like to schedule bargaining after a management meeting that already had been set for July 23. (JD 15; GC Exs 14, 16). The Union did not object to this proposed timing, and the parties scheduled a bargaining session for August 7. (JD 15; Tr 59-60). As Judge Cracraft concluded, there is no basis in the record to conclude that Respondent's request to delay bargaining until the first week in August was a smokescreen to delay bargaining, especially given the Union's delay in requesting bargaining. (JD 16, fn 20).

**e. Respondent bargained in good faith on August 7.**

The parties met on August 7 for a bargaining session. While he had not been at the earlier meetings between the parties, Gary Powers attended the August 7 meeting – it was a formal bargaining session and he often served as the chief spokesperson in bargaining with Vigor. (Tr 77, 94). Brian Opland and Lance Hickey also were present for the Union. (Tr 94). Mike Trautman and Albert Jackson were present for Vigor. (Tr 94). Respondent did not present any additional proposals at the August 7 meeting. The ball was not in Respondent's court; on February 27, Respondent already had communicated its intent to go tobacco-free at all of its facilities on September 1, and the parties discussed the tobacco-free initiative at another LMC meeting on April 29, 2014. (Ex R-7). In addition, Respondent had told the Union on May 20 and June 3 that it intended to follow its existing progressive discipline policy rather than having a different discipline policy for tobacco-free violations. (Tr 419, 422, 423-424).

Because the Union continued to ask whether there would be a more formal policy developed, Respondent added that question to an already-scheduled July 23 internal meeting. As a result of the meeting, Respondent did not change its position. The tobacco-free policy was very simple: no tobacco use anywhere on Respondent's property. And Respondent already had a progressive discipline policy, so there was no reason to do anything differently for the tobacco-free policy. (Tr 421-422).<sup>3</sup>

Respondent's actions during the meeting on August 7 further confirm that it at all times bargained in good faith with the Union. Trautman emailed a document to Powers, Opland, and Hickey during the August 7 bargaining session that was titled "Smoke Free Facilities **Bargaining Outline** Draft for 8-7-14." (Tr 62-67; Ex R-13) (emphasis added). Powers and Opland both had laptops and Hickey had a smart phone, so they followed along with the outline electronically. (Tr 95).

The bargaining outline included an explanation of why the Employer wanted to adopt a tobacco-free policy and an overview of various issues related to the adoption of the policy. The Employer obviously would not have sent a "Bargaining Outline" to the Union if it was refusing to bargain. Furthermore, Jackson took copious notes during the meeting on his laptop computer which, as he explained, he attempted to take in "real time." (Tr 434). Jackson's notes specifically reference the fact that

---

<sup>3</sup> General Counsel argues that Vigor could not have had a "consistent position" on the tobacco-free policy and the discipline policy because it did not make a decision on it until July 23. (GC Brief 28 n. 10). That is an interesting argument given General Counsel's assertion that Respondent presented its policy on February 27 as a *fait accompli*. If Respondent did not consider it until July 23, it would be hard to present it as a *fait accompli* in February. In addition, the record is clear that Respondent had been consistent in its position. Vigor added the question about the disciplinary policy to the July 23 meeting in response to the Union's continuing questions about it. (Ex GC-21). Ultimately, Respondent decided to continue its consistent position and communicated this to the Union on August 7. (Tr 434-435).

Trautman opened the meeting by telling the Union representatives that the Employer “understand[s] your interest in representing the members,” and is “[o]pen to discuss if you have issues and proposals.” (Ex R-14, p 1). In addition, Trautman acknowledged that the Employer’s tobacco-free policy is a “mandatory subject under the law” and that the Employer was willing to “stipulate to that.” (*Id.*)

The Employer came prepared to bargain on August 7, but, as both Trautman and Jackson testified and Jackson’s notes reflect, the Union did not present a single bargaining proposal during the meeting. Rather, the Union representatives simply asked questions and wanted to discuss issues such as whether the Employer intended to force employees to stop smoking, whether customers would be prohibited from smoking on their vessels, whether employees would quit because they cannot stop smoking, whether the policy applies to e-cigarettes, and whether there would be a grace period for employees caught violating the policy. (Ex R-14). At no time during the meeting did the Union object to the implementation of the policy or ask the Employer to delay implementation of the policy. In addition, the Union did not make any request for a second bargaining session. To the contrary, Powers suggested near the conclusion of the meeting that the Employer should prepare another communication to employees explaining why the tobacco-free policy was being implemented. (Ex R-14, p 3).

Thus, as Trautman testified, the Employer believed that the August 7 meeting had satisfied the Union’s concerns about the policy. (Tr 117). As Trautman testified, “We had met. We had bargained. We had addressed issues and questions that they had about the policy. We told them what we intended to do. There were no other

concerns raised at the meeting. I asked them if they had a proposal. They said no. So I was surprised when I got another demand to bargain.” (Tr 118).<sup>4</sup>

In its supporting brief, General Counsel argues that Opland testified that both Trautman and Jackson told the Union 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. (GC Brief 14). Later in the brief, General Counsel claims that this testimony was not denied or rebutted and therefore was undisputed. (GC Brief 32). But there is no doubt that Opland’s testimony was rebutted by Respondent’s witnesses and the documentary evidence. Judge Cracraft credited Jackson’s testimony that Trautman told the Union they were there to bargain, and the “real time” notes from the meeting support that testimony. (JD 16; Ex-R 14). In addition, the “Bargaining Outline” Trautman provided demonstrates Respondent’s intention to bargain. (Ex-R-13). It is hard to imagine why the General Counsel considers Opland’s testimony unrebutted when Opland testified that Respondent said they were not there to bargain, and Trautman and Jackson both testified that they told the Union they *were* there to bargain. (Tr 60, 106, 117, 430; Ex R-13).

General Counsel did not call either Powers or Hickey to testify about the August 7 bargaining session, despite the fact that both remain officials of the Union.

---

<sup>4</sup> In its supporting brief, General Counsel argues that “there were no proposals presented from either side” at the August 7 meeting (GC Brief 14), and argues that “Respondent’s intention to avoid decision bargaining at the August 7 session is revealed by its absence of bargaining proposals.” (GC Brief 29). But this argument demonstrates a very basic misunderstanding of the bargaining process. Respondent had provided the Union with notice of its intention to go tobacco-free, and the Union demanded bargaining over that intention. Vigor’s proposal, therefore, was already on the table – its tobacco-free policy. It was up to the Union to present an alternative proposal if it wanted Vigor to consider any alternatives. (Tr 106).

**f. The Union issues another demand to bargain.**

Despite not having presented any proposals at the August 7 bargaining session, or asking the Employer to delay implementation of the tobacco-free policy, Opland sent Respondent another letter on August 15 demanding to bargain and for the first time demanding that Respondent not implement its tobacco-free policy on September 1. (Ex GC-17). Employer representatives were surprised by this communication given how the August 7 bargaining session had ended. The parties discussed the tobacco-free policy at an LMC meeting on August 20, including whether employees could smoke on lunches and breaks. (Tr 437-438). The parties agreed to have another bargaining session on August 29. (Tr 359, 438).

**g. The Employer asserts waiver of decision bargaining but agrees to bargain over the effects of the tobacco-free policy.**

The Employer sent the Union a letter on August 21 noting that the Union was informed months before of the tobacco-free policy and now was objecting to its implementation for the first time, two weeks before the scheduled implementation date. (Ex GC-18). The Employer asserted that the Union had waived decision bargaining but reaffirmed its willingness to meet and bargain over the effects of the policy.

**h. The Employer bargained in good faith on August 29.**

Sue Haley, Mike Trautman and Albert Jackson attended the bargaining session for Respondent on August 29. (Tr 361, 438). Gary Powers, Brian Opland and Lance Hickey attended for the Union. (*Id.*) During the meeting, the Employer emailed some documents to the Union related to vaporizing and marijuana use. The Union again did not present any formal proposals. (Tr 361). At some point during the

meeting, Trautman said he was confused as to why the Union had sent two letters demanding to bargain but had not presented a single bargaining proposal at either meeting. (Tr 122, 440; Ex R-15).

In response to Trautman's statement, the Union asked for a caucus and came back with a verbal proposal asking if the Employer would agree to reduce the designated smoking areas throughout the shipyards by half at the larger Portland and Seattle facilities and to continue allowing bargaining unit employees to exercise their right to use tobacco during lunch and rest breaks, and requested that the Employer not be too severe with corrective action if employees were caught smoking outside of designated areas. (Tr 362, 440). The Union's proposal to allow some smoking areas at the Employer's two larger facilities related to the Union's concern about employees having to walk too far to smoke. (Tr 393).

The Employer then took a caucus to discuss the Union's proposal. Following the caucus, the Employer rejected the Union's proposal but indicated it was willing to establish designated smoking areas in parking lots at the two larger facilities in Portland and Seattle. This was a major concession from the Employer's previous position, which was to not allow smoking anywhere on the Employer's property. In addition, the Employer indicated that employees could continue to smoke during their meal and rest breaks as long as they were in designated smoking areas. (Tr 120-121, 361-362, 440-442; Ex R-16). The Employer also stated that it would not be too severe with corrective action as long as employees were cooperative. (Tr 121-22; Ex R-16).

Toward the end of the meeting, Powers – who typically acted as the Union's chief spokesperson in bargaining with the Employer (Tr 77) – specifically stated

that the Union was not asking the Employer to delay implementation of the policy but just not to be heavy handed out of the gate by terminating employees who violate the policy. The Employer representatives assured the Union that they did not intend to be heavy handed. (Tr 122-23, 362, 444; Ex R-16, p 3).

The Union did not make any additional proposals. Following the discussion about providing smoking shelters in the parking lots, Trautman specifically informed the Union representatives that the Employer was not willing to budge any further on changes to the tobacco-free policy. (Tr 124). At no point during the meeting did the Union ask the Employer to delay or refrain from implementation of the tobacco-free policy. (Tr 122, 125-126, 363). At the conclusion of the meeting, Powers said something to the effect that the Union understood why the Employer wanted to implement a tobacco-free policy and that it basically was like the Employer implementing a new safety policy. (Tr 445; Ex R-16, p 4).

When the meeting ended, the Employer's representatives believed the parties had reached agreement. The Employer had responded to the Union's questions and concerns and made a significant concession by agreeing to add designated smoking areas in the parking lots of the two larger facilities. The Union did not make any other proposals or request another bargaining session. Trautman asked Opland to consider withdrawing the unfair labor practice charge over the tobacco-free policy, stating that it was just going to cost both parties a lot of time, money, and energy. (Tr 125-126, 363, 445-446). Opland said that they would consider it. (Tr 394, 446).

General Counsel claims that at the conclusion of the meeting Opland said the Union would get back to Respondent on its proposal. (GC Brief 19). But it was

Trautman's request for the Union to withdraw the unfair labor practice charge that remained open. (Tr 394, 446). Bargaining was finished and the Union's chief spokesperson had told the Company not to delay implementation of the policy.

**i. Vigor implements its tobacco-free policy.**

On September 1, Vigor implemented its tobacco-free policy, including a plan to install smoking areas in the parking lot of its two larger facilities in Portland and Seattle, consistent with the agreement reached at the August 29 bargaining session.

**C. Response to "Questions Presented."**

In its Supporting Brief, General Counsel sets forth the following "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 off 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?

These “Questions Presented” do not reference any specific Exceptions, nor do they appear to track all of the General Counsel’s Exceptions.

**1. Judge Cracraft properly concluded that on August 29, the Union waived its right to engage in decision bargaining.**

In her decision, the ALJ carefully reviewed the record evidence and correctly concluded that Respondent had provided the Union with six months’ notice of its intention to implement a tobacco-free policy. She also concluded that the parties had met for formal bargaining sessions on August 7 and August 29, and had engaged in bargaining following another meeting on August 20. She based her conclusion that the Union had waived its right to engage in decision bargaining on two things: (1) the undisputed evidence that Gary Powers, International Representative and typically the chief spokesperson in bargaining with Respondent, told Respondent’s representative on August 29 that the Union was not attempting to delay implementation of the policy on September 1; and (2) the fact that the Union did not present a proposal on August 29 seeking to change the decision to implement the policy. (JD 23).

General Counsel excepts to this finding on two bases: first, it claims that the ALJ incorrectly relied on an “isolated statement” by Powers, who allegedly was not the Union’s chief spokesperson in the bargaining. Second, it claims that the ALJ’s decision conflicts with her own finding that the Union made a proposal on August 29.

**a. Gary Powers told Respondent the Union was not asking Respondent to delay implementation of its tobacco-free policy.**

With regard to the first basis for the General Counsel’s exception, in

General Counsel's brief, it asserts that Brian Opland was the Union's chief spokesperson in bargaining. (GC Brief 25). But there is no record evidence to support that contention, and General Counsel's transcript cites do not state that. In fact, it is Gary Powers who typically acts as the chief spokesperson in bargaining with Respondent. (Tr 77). Trautman's testimony about Powers' role in bargaining was not disputed by any of the General Counsel's witnesses and is supported by the fact that Powers did not attend many of the more routine meetings between Vigor and the Union, but did attend the bargaining sessions on August 7 and August 29.

When the Union's International Representative, who typically acts as the Union's chief spokesperson in bargaining, tells Vigor's representatives in a bargaining session concerning the tobacco-free policy that the Union is not trying to stop implementation of that policy, that can hardly be considered an "isolated comment." Vigor was entitled to rely on that statement and the ALJ correctly found that it constituted a waiver of further bargaining. (JD 23). Powers clearly is an agent for the Union and was acting in that capacity when he made this statement during bargaining. To say that a party in bargaining is not entitled to rely on the express statements of the other party's representative would undermine the bargaining process and thereby undermine the purposes of the Act. *See, e.g., Sunol Valley Golf Club*, 310 NLRB 357, 368 (1993), *enfd.*, 48 F3d 444 (9<sup>th</sup> Cir 1995) (union entitled to rely on statements made by the employer and its agents during bargaining in assessing the employer's bargaining position).

Besides calling it an "isolated comment," General Counsel also argues that Powers' statement related to Respondent's smoking-cessation activities. (GC Brief 25-

26). But that argument is not supported by the record. The ALJ correctly found that Powers' statement related to the tobacco-free policy itself. That is what the parties were there to bargain over, and that was the subject of the discussion. It would not make sense for Powers to have been referring to the tobacco-cessation activities that had been ongoing for months. All three of Respondent's representatives who were present at the August 29 bargaining session understood Powers to be referring to the tobacco-free policy that was set to be implemented on September 1. (Tr 122-123, 362, 444). Opland did not dispute that interpretation at hearing, and neither Powers nor Hickey was called to testify.

General Counsel also argues that the timing of Powers' statement demonstrates there was no waiver because it came before the Union's proposal. (GC Brief 26). However, the Union's proposal regarding the number of shelters in the larger yards, use of tobacco during lunches and breaks, and a request to not be heavy-handed in discipline is consistent with Powers' statement that the Union was not seeking to delay implementation of the policy. Rather, they wanted to discuss the effects of that policy. In addition, Powers made a similar statement at the end of the August 29 meeting – "...let's face it, we get it..." (Tr 445; Ex R-16).

Finally, General Counsel argues that Opland's statement at the end of the meeting that he would be getting back to Respondent demonstrates an intent to engage in further bargaining. (GC Brief 27). However, the other witnesses at hearing testified that what Opland would be "getting back to" Respondent about was Respondent's request that the Union consider withdrawing the unfair labor practice charge. All of Respondent's witnesses testified that at the end of the August 29 bargaining session,

they believed they had reached agreement. (Tr 125, 363, 445). The ALJ credited this testimony and concluded that the parties were in agreement at the end of the August 29 session. (JD 21).

There is no basis to overturn the ALJ's finding regarding Powers' statement – the Union's conduct supports what Powers said – the Union was not seeking to have Respondent delay implementation of its policy, or to not move forward with its policy.

**b. The Union did not propose that Respondent not implement its tobacco-free policy.**

With regard to the second argument on waiver – that the finding of waiver over decision bargaining because the Union did not present a proposal regarding the decision at the August 29 meeting conflicts with the ALJ's own finding that the Union presented a proposal on August 29 – the ALJ's finding of waiver is consistent with her finding about the proposal presented by the Union on August 29.

Respondent acknowledges and the ALJ found that on August 29 the Union presented a proposal seeking additional smoking shelters inside Respondent's larger yards, as well as smoking shelters in the parking lots of those yards. The Union also proposed that Respondent continue allowing bargaining unit employees to exercise their right to use tobacco during lunch and rest breaks, and requested that the Employer not be too severe with corrective action if employees were caught smoking outside of designated areas. The Union did not propose that Respondent not implement its policy at all. Indeed, for the smaller yards, there was no proposal to allow tobacco use inside the facilities. For the larger yards, the Union's proposal was focused on how far employees would have to walk in order to be able to smoke.

In finding that the Union had waived its right to engage in decision bargaining over the policy by not making a proposal, Judge Cracraft was focused on the fact that the Union’s proposal dealt with the effects of the policy – how far employees would have to walk in the larger yards, whether they could still smoke during lunches and breaks, and the level of discipline for violating the policy. The ALJ correctly found that the Union did not propose that Respondent refrain from or delay implementing the policy. This finding and the Union’s proposal also is consistent with Powers’ statement that the Union was not seeking to stop implementation of the tobacco-free yards – rather, they just wanted Respondent to consider adding a few smoking shelters amid an otherwise tobacco-free yard, allow employees to smoke during lunches and breaks, and not be heavy handed on implementing discipline. Thus, the ALJ’s finding that the Union made a proposal on the effects of the tobacco-free policy is not inconsistent with her finding that the Union waived bargaining over the tobacco-free policy itself, and is supported by the record evidence.

**2. The ALJ properly concluded that Respondent was privileged to implement its tobacco-free policy on September 1, having bargained in good faith with the Union.**

**a. Respondent’s good faith.**

Good faith is judged by reviewing all of the relevant evidence and the parties’ course of conduct. *See, e.g., Regency Service Carts, Inc.*, 345 NLRB 671 (2005) (“In determining whether a party has violated its statutory obligation to bargain in good faith, the Board examines the totality of the party’s conduct, both at and away from the bargaining table.”). The overwhelming evidence presented at hearing demonstrates that

Respondent proceeded in good faith throughout the process that resulted in implementation of its tobacco-free policy on September 1, 2014.

Haley decided to present the new tobacco-free policy at an LMC meeting, which demonstrates an “openness to discussion.” (JD 11). Haley notified Lance Hickey prior to the meeting that she wanted to discuss “recommended timing and process” for that policy. (JD 5; Ex GC-13). The notice was provided to the Union six months prior to the anticipated implementation of the policy. (JD 5; Tr 345). Even after the Union delayed a demand to bargain for months, Respondent agreed to meet and bargain. Respondent prepared diligently for the first bargaining session, and responded to all of the Union’s questions about the policy. When the Union demanded to bargain again only two weeks before the scheduled implementation date, Respondent once again agreed to meet. When the Union finally presented a proposal on August 29 – three days before the scheduled implementation date – Respondent agreed to two of the three parts of the proposal (tobacco use during lunches and breaks, and reasonable discipline for violations). And Vigor gave the Union a counter-proposal on the third point – changing its position and agreeing to allow tobacco use in the parking lots of its two larger yards. Respondent clearly communicated that this was all they were willing to do and that they would not “budge” any further. The Union ended the meeting by saying, “...let’s face it, we get it – it’s like implementing a new safety policy.” (Tr 444; Ex R-16). Respondent then proceeded to implement the policy, having received the green light from the Union.

General Counsel’s tortured reading of the record notwithstanding, the overwhelming evidence demonstrates Respondent’s good faith and supports Judge

Cracraft's decision to dismiss the Complaint.

**b. General Counsel's contentions.**

In General Counsel's Brief in Support of Exceptions, it argues that Respondent's course of conduct demonstrates that it did not intend to bargain in good faith. Specifically, it claims that: (1) Respondent presented the tobacco-free policy in a way that differed from the parties' prior practice; (2) Respondent delayed bargaining; (3) Respondent didn't present a proposal when the parties met on August 7; (4) Trautman and Jackson told Opland that they were directed not to bargain; (5) there were only two bargaining sessions; and (6) the parties were not in agreement or at impasse.

Judge Cracraft addressed all of these arguments in her decision, and her conclusions are supported by the record evidence.

1. Respondent's witnesses testified at hearing that Respondent has presented changes to policies in a variety of ways, and that there had been other policies presented for the first time at the LMC meeting. (Tr 78, 339-339, 369-370, 406). As Judge Cracraft found, presenting the policy at an LMC meeting demonstrated an "openness to discussion." (JD 11).

2. Vigor responded within three days of receiving a formal demand to bargain and suggested a meeting date the first week in August to which the Union agreed. Respondent had not taken the questions asked on May 20 and June 3 at PSMTC meetings as demands to bargain and so did not respond to those alleged demands. (JD 13; Tr 418-419, 425). The suggested meeting date in August left plenty of time to bargain over a very simple policy, was agreed to by the Union, and was suggested

so that Respondent could meet and confer internally over questions posed by the Union on June 3.

3. Respondent had presented its “proposal” – the tobacco-free policy – on February 27. On May 20 and June 3, Respondent told Union representatives that it did not intend to have a different disciplinary policy but rather would apply the existing progressive discipline policy. (*Id.*). There was no reason for Respondent to come to the August 7 meeting with a different proposal. The ball was in the Union’s court. Nonetheless, Respondent prepared for the August 7 bargaining session by preparing an outline explaining the reasons in support of the tobacco-free policy. (Ex R-13).

4. Both Trautman and Jackson testified about what happened at the meeting on August 7, and Respondent introduced Jackson’s “real time” notes from that meeting. (Tr 94-112, 428-437; Ex R-14). Judge Cracraft credited their testimony over Opland’s. (JD 17-18). At no time did either of them state to Opland that they were told not to bargain or that Respondent would not bargain. To the contrary – they acknowledged the duty to bargain and said that they were there to bargain. (Tr 60, 106, 117, 430). The presentation that Trautman provided was entitled “Bargaining Outline.” (Ex R-13). General Counsel’s claim that Opland’s testimony on this point was un rebutted is bizarre given Trautman’s and Jackson’s testimony they told the Union they were there to bargain, and given their conduct during the August 7 bargaining session.

5. The number of bargaining sessions is immaterial. There is no requirement that there be a certain number of bargaining sessions. *See, e.g., Milwaukee*

*Terminal Services, Inc.*, 282 NLRB 637, 639 (1987) (“The Board does not apply ‘a rigid formula’ in determining how many bargaining sessions are required before an impasse may exist, but considers the circumstances in each case.”). The tobacco-free policy was very simple – no tobacco use on Respondent’s property. There was no new disciplinary policy proposed. It is unclear why General Counsel believes that two bargaining sessions were not enough to effectively bargain over the policy.

6. In fact, the record evidence demonstrates that it was plenty of time because the parties reached agreement. At the August 29 session, the Union presented a proposal to add a few additional smoking shelters in Respondent’s two larger yards, asked that employees be allowed to smoke during lunches and breaks, and asked that Respondent not be heavy handed with discipline. Respondent agreed to add smoking shelters in the parking lots of the two larger yards and assured the Union that employees could smoke during lunches and breaks and that it had no intention of applying discipline with a heavy hand. Trautman told the Union that providing smoking shelters in the parking lots of the Seattle and Portland yards was all Respondent was willing to do – a clear statement that Respondent had reached the end of its willingness to compromise. Absent agreement, the parties were at impasse because Respondent had provided its final position on the only issue left open. *See, e.g., CalMat Co.*, 331 NLRB 1084 (2000) (finding that parties were at impasse where they were in clear disagreement on a single remaining bargaining issue). And the Union agreed – with

Powers ending the meeting by saying, “...let’s face it – we get it. It’s like implementing a new safety policy.” (Tr 445; Ex R-16).<sup>5</sup>

The record very clearly supports the ALJ’s finding that Respondent did not violate the Act by engaging in bad faith bargaining and was privileged to implement its tobacco-free policy on September 1, 2014.

**3. The ALJ properly concluded that Respondent did not present the tobacco-free policy as a *fait accompli*.**

General Counsel excepts to the ALJ’s finding that Respondent did not present the tobacco-free policy as a *fait accompli*. Respondent’s actions described above support the ALJ’s finding. In addition, the ALJ’s finding on *fait accompli* is moot because she found that the Union’s delay in demanding bargaining was not a waiver. *Fait accompli* is a doctrine that excuses a union’s failure to timely demand bargaining if the employer gives insufficient notice or otherwise makes it clear that it has no intention to bargain over an issue. *McGraw-Hill Broadcasting Co., Inc.*, 355 NLRB 1283 (2010). Here, because the ALJ found no such failure, the issue is moot.

**4. The ALJ’s adverse inferences are appropriate and supported by the record.**

Judge Cracraft drew adverse inferences from the fact that neither Hickey nor Powers were called by General Counsel to testify at the hearing. These adverse inferences related to her findings about what occurred at the critical meetings between the parties – the LMC meeting on February 27 and the bargaining sessions on August 7

---

<sup>5</sup> General Counsel argues that Respondent’s conduct indicated an intention not to modify the tobacco-free policy. Besides not being supported by the record evidence, that argument very clearly is refuted by the fact that Respondent agreed to provide smoking shelters in the parking lots of the Portland and Seattle yards – a clear departure from its originally-communicated policy.

and August 29. General Counsel objects to these adverse inferences for two reasons: (1) the ALJ did not consider that Hickey had been terminated by the Union in March 2014; and (2) their testimony would have been cumulative.

**a. The record evidence does not support General Counsel's assertion that Hickey was terminated.**

There is nothing in the record that supports the assertion that Lance Hickey was “terminated by Opland in March 2015.” (GC Brief 4). The only evidence regarding Hickey’s ceasing his duties as Assistant Business Manager with the Boilermakers was Opland’s testimony. When asked why Hickey is no longer employed by Local 104, Opland replied, “...primarily due to financial hardship of the local, I made – I took action to correct that.” (Tr 199). This does not indicate that Hickey was terminated. Based on Opland’s testimony, Hickey could have been laid off or taken a voluntary severance or retirement package. Hickey continues to hold the position of Vice President of Boilermakers Local 104. (Tr 243). Therefore, there is nothing in the record to explain Hickey’s absence other than an adverse inference that he would not have supported General Counsel’s claims.

The ALJ noted that Hickey had ceased his duties as Assistant Business Manager at the time of the hearing, which is what the record indicates. (Tr 199). She also correctly noted that he continues to hold the position of Vice President.

**b. Powers’ and Hickey’s testimony would not have been cumulative.**

**(1) The February 27 LMC meeting.**

Respondent presented all three Employer representatives who were present at the February 27 meeting, and all three testified consistently about what

occurred at that meeting. General Counsel presented witnesses who disagreed not only with each other, but with their own prior sworn affidavits. Opland testified that he did not recall the tobacco-free policy being discussed at that meeting. However, he also testified in prior sworn affidavits that he did not remember if he was present, or that he affirmatively was not present, at the meeting. Moore testified that the tobacco-free policy was discussed at the meeting. Stevahn testified that it was not discussed because the parties ran out of time. But Opland's own notes show that the meeting ended an hour early.<sup>6</sup> Given this line-up of witnesses and their conflicting testimony, Hickey's testimony hardly would have been cumulative.

(2) **August 7 and August 29 bargaining sessions.**

There is no dispute that Powers remains an International Representative and that he typically acts as chief spokesperson in bargaining with Respondent. (Tr 77). Again, Respondent called all of Respondent's representatives who were present at these bargaining sessions, and they testified consistently about what happened at them. General Counsel called only Opland. His testimony about what happened at these meetings was disjointed and confusing. Moreover, he acknowledged at hearing that he attends so many meetings that he cannot remember what happens at them. (Tr 270-271). He presented no notes from either the August 7 or August 29 bargaining sessions. Given this, the testimony of Hickey and Powers would not have been cumulative and an adverse inference was appropriate.

---

<sup>6</sup> General Counsel notes that Opland's security badge shows he was in the yard until 4:17 PM, apparently arguing that the meeting went late. But Opland could have been doing other business in the yard – the fact that he was in the yard until 4:17 PM does not show that his notes about the end time of the LMC meeting are incorrect.

#### IV. CONCLUSION

For all of the foregoing reasons, Judge Cracraft's decision should be affirmed.

RESPECTFULLY SUBMITTED: October 28, 2015.

BULLARD LAW

By /s/ Jacqueline M. Damm  
Jacqueline M. Damm  
Adam S. Collier  
Attorneys for Respondent  
Vigor Industrial LLC

200 SW Market Street, Suite 1900  
Portland, OR 97201  
503-248-1134/Telephone  
503-224-8851/Facsimile

**CERTIFICATE OF SERVICE**

I hereby certify that on October 28, 2015, I served the foregoing

**RESPONDENT'S ANSWERING BRIEF IN RESPONSE TO EXCEPTIONS TO  
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE on:**

David A. Rosenfeld  
Xochitl Lopez  
Weinberg, Roger & Rosenfeld  
1001 Marina Village Parkway, Suite 200  
Alameda, CA 94501-1091  
Facsimile: (510) 337-1023  
Email: drosenfeld@unioncounsel.net

John Fawley  
Counsel for the General Counsel  
National Labor Relations Board  
2948 Jackson Federal Building  
915 Second Avenue  
Seattle, WA 98174-1078  
Facsimile: (206) 220-6305  
Email: john.fawley@nlrb.gov

- by **emailing** a true and correct copy to the last known email address of each person listed, with confirmation of delivery.
- by **mailing** a true and correct copy to the last known address of each person listed. It was contained in a sealed envelope, with postage paid, addressed as stated above, and deposited with the U.S. Postal Service in Portland, Oregon.
- by causing a true and correct copy to be **hand-delivered** to the last known address of each person listed. It was contained in a sealed envelope and addressed as stated above.
- by causing a true and correct copy to be delivered **via overnight courier** to the last known address of each person listed. It was contained in a sealed envelope, with courier fees paid, and addressed as stated above.

/s/ Jacqueline M. Damm  
Jacqueline M. Damm  
Adam S. Collier  
Attorneys for Respondent  
Vigor Industrial LLC