

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

John H. Fawley
Counsel for the General Counsel
National Labor Relations Board, Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174
Telephone: 206.220.6300
Facsimile: 206.220.6305
Email: john.fawley@nlrb.gov

As the conclusion of Administrative Law Judge Cracraft ("ALJ") that the Union clearly and unmistakably waived its right to bargain is unsupported by the record evidence and her own findings, the General Counsel ("GC") reaffirms his arguments in his Exceptions Brief that the Board should reverse that erroneous conclusion. The GC further argues that, if the Board reaches the issue, it should conclude that the ALJ also improperly failed to find that Respondent presented its new smoking policy as a *fait accompli* because its conduct precluded any meaningful opportunity for the Union to bargain over its decision to implement that new policy.

Respondent has not filed cross-exceptions to, or otherwise challenged in its Answering Brief ("AB"), the ALJ's finding (JD 10:11-17) that Respondent's implementation of a new smoking policy on September 1 was a material change in employees' terms and conditions of employment over which Respondent was required to bargain. Respondent has also not filed cross-exceptions to, or otherwise challenged, the ALJ's conclusion (JD 15:12-26) that the Union had not waived its right to bargain over Respondent's decision by the time it made its verbal requests to bargain in May and June 2014,¹ and its written request to bargain in late June. Finally, because the record evidence is undisputed, Respondent has also not challenged the ALJ's findings (JD 19:12-22; 20:10-19) that the Union demanded (GCX 17) on August 21 that Respondent rescind its decision to implement the new smoking policy and allow the Union the opportunity to bargain over the decision and its effects, and Respondent responded (GCX 18) by stating it was willing to meet with the Union to bargain solely over the effects of the new policy.

As Respondent's AB, however, has mischaracterized the Union's bargaining proposal as not challenging Respondent's decision to implement a new policy, and has wrongly argued that it was

¹ All dates hereafter refer to 2014 unless otherwise indicated.

privileged to implement the new policy because it bargained in good faith, GC is compelled to file the instant reply brief.²

I. Respondent *Never* Bargained in Good Faith over Its *Decision* to Implement the New Policy

Respondent contends in its AB (at 26) that the fait accompli issue is moot because the ALJ found that the Union did not waive its right to bargain over the decision by waiting until May and June to demand bargaining. Even assuming that Respondent is correct, and because no bargaining could occur before the Union made its bargaining demand, Respondent was obligated to bargain in good faith to impasse over the *decision and its effects* after the Union first demanded bargaining before it could lawfully implement its change in policy. As the documentary and undisputed record evidence demonstrates, Respondent *never* bargained over the *decision* to implement the new policy following the Union's bargaining demands. Therefore, Respondent was not privileged to implement that new policy on September 1.

It is also undisputed that only two bargaining sessions occurred after the Union demanded bargaining. The first session on August 7 was a bargaining session in name only. That is, it is undisputed that neither side presented any bargaining proposals at that session. Rather, the August 7 meeting was merely an informational session in which Respondent's officials presented materials and photographs showing why it wanted to alter the existing smoking policy and answered questions the Union had about the new policy. Thus, there was no bargaining over the decision or its effects at that session.

It is further undisputed, and the documentary evidence (GCX 17) establishes, that one week later, on August 15, the Union demanded that Respondent rescind its decision and bargain over both the decision to alter the existing smoking policy and the effects of that decision. It is additionally undisputed that Respondent responded on August 21 by letter (GCX 18) claiming that the Union had waived its right to

² Respondent argues that the GC's and the Union's exceptions and brief should be "dismissed" because they do not strictly conform to the language of §102.46 of the Board's Rules and Regulations. As the GC's exceptions and brief in support are in substantial compliance with the relevant rules, the Board should reject Respondent's argument. See, e.g., *Solutia, Inc.*, 357 NLRB No. 15, slip op. at 1 n.1 (2011); *Niblock Excavating, Inc.*, 337 NLRB 53 n.1 (2001).

bargain over Respondent's decision to implement the new policy, and stating that it was willing to meet with the Union to bargain solely over the effects of the new policy. Thus, while Respondent agreed to meet with the Union on August 29 to bargain, it had made clear its intention to bargain only the effects of its decision.

Undisputed documentary evidence establishes that Respondent did not deviate from that intention at the August 29 session. Respondent's own notes (RX 16 at 3) reflect that its official, Sue Haley, reiterated during that August 29 session that "we are willing to discuss the effects of the policy but we are not going to discuss the policy itself." Respondent official Trautman's September 12 written response (GCX 20) rejecting the Union's September 3 bargaining proposal further emphasizes that point:

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). Regardless of which witness the ALJ chose to credit, the undisputed documentary evidence (and Respondent's own words) establish that Respondent did *not* engage in decision bargaining during the August 29 session.

Contrary to Respondent's contention (AB 21) that it was privileged to implement the change in smoking policy on September 1 because it bargained in good faith, the Board has repeatedly emphasized that bargaining in good faith over only the effects of the new policy is insufficient to satisfy an employer's bargaining obligations. *See, e.g., Solutia, Inc.*, 357 NLRB No. 15, slip op. at 8 (2011) (as respondent employer was legally obligated to bargain to agreement or impasse over both the decision to consolidate and transfer work and the effects of that decision, its offer to bargain only the effects was insufficient to satisfy its bargaining obligations and its conduct therefore violated §§ 8(a)(1) and (5)); *Public Service Co. of New Mexico*, 337 NLRB 193, 199 (2001) (employer's unilateral changes violate the Act where Board rejects

employer's defense that its agreement to bargain over the effects of its unilateral changes justified its refusal to bargain over its decision to implement the changes).

Respondent never satisfied its obligation to bargain to agreement or impasse with the Union over its *decision* to implement a new smoking policy. Accordingly, it was not privileged to implement that unilateral change until it satisfied that duty imposed by the Act. Respondent's unilateral implementation of the new policy on September 1 therefore violated §§ 8(a)(1) and (5). The ALJ's contrary conclusion should be reversed.

II. As the Union's Bargaining Proposal at the August 29 Session Reaffirmed Its Bargaining Position Challenging Respondent's Decision to Implement A New Smoking Policy, the Union Did Not Waive Its Right to Bargain Over that Decision and Respondent's Implementation of the New Policy Thereby Violated the Act

Apart from its claim that it bargained in good faith, Respondent's sole defense in its AB is to support the ALJ's misguided conclusion that the Union waived its right to bargain during the August 29 bargaining session. Respondent bears a heavy burden in proving this waiver defense, as 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. *See, e.g., Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Blast Soccer Assoc.*, 289 NLRB 84, 87 (1988). 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 Med. Ctr.*, 350 NLRB 808, 811 (2007). As the evidence establishes that the Union did not clearly and unmistakably waive its right to bargain at that session the Board should conclude that Respondent failed to meet its burden and reverse the ALJ's waiver finding.

A. The Union's Bargaining Proposal Rejected Respondent's Decision to Alter the Existing Smoking Policy

Although Respondent (unlike the ALJ) acknowledges (AB at 20) that the Union presented a bargaining proposal at the August 29 session, it incorrectly asserts (AB at 20, 25) that the Union's proposal sought to add a few additional smoking shelters inside Respondent's yards. Moreover, in an effort to rescue the ALJ's flawed waiver conclusion, Respondent further argues (AB at 21) that the ALJ "was focused on the fact that the Union's proposal dealt with the effects of the policy" and properly concluded that the Union waived its right to bargain over the *decision*. Respondent's argument is baseless.

First, the ALJ never concludes in her decision that the Union waived its right to bargain over the decision because it proposed to bargain only over the effects of the decision. Rather, as argued in GC's Exceptions Brief (at 23-24), the ALJ disregarded her own earlier finding that the Union had presented a bargaining proposal and then mistakenly concluded that the Union had waived its right to bargain because it "did not follow through by making alternative proposals or attempting to persuade Respondent from altering its decision" (JD 23:23-24). Second, Respondent's argument that the Union's August 29 proposal dealt only with the effects of the new policy totally distorts the record evidence regarding the existing smoking policy, how Respondent's decision altered the existing policy, and how the Union's proposal rejected Respondent's decision to implement a new policy.

It is undisputed that Respondent's existing smoking policy permitted employees to smoke on its property provided that they did so within designated smoking shelters on the property in Portland and a certain distance away from doorway entrances on its property in Seattle. Indeed, as the ALJ found, the record evidence (JD 4: 40-42; Tr 33:22 - 34:8; 205:15 - 206:13) is clear that the existing smoking policy in Portland resulted from the parties' agreement in 2013 to confine smoking to designated smoking areas on Respondent's property following a complaint from a state agency. Respondent then decided in 2014 to alter the existing policy by banning the use of tobacco *anywhere* on its property. That decision thereby

proposed not only to eliminate all designated smoking shelters on its property, but eliminate all smoking anywhere on its property. It is this decision whose implementation on September 1 violated the Act.

The evidence further demonstrates that the Union *never* accepted that decision to ban smoking everywhere on Respondent's property. In fact, it is undisputed that the Union initially demanded on August 15 that Respondent retain the existing policy (*i.e.*, smoking permitted in a number of designated smoking areas on Respondent's property) by rescinding its decision to ban tobacco use anywhere on its property. When the parties thereafter met to bargain on August 29, the Union proposed to *reduce* the number of designated smoking areas on Respondent's property in an effort to compromise and address Respondent's interest in reducing the amount of litter from employee smoking. Although presented as a compromise, the Union's proposal was nonetheless a direct repudiation of Respondent's decision to ban smoking or tobacco use anywhere on Respondent's property. Although Respondent attempts to obfuscate the issue by claiming that the Union's proposal sought to permit *additional* smoking shelters, such claim would be correct only if the existing policy banned designated smoking areas or smoking on its property. It did not.

In sum, the Union's proposal at the August 29 session did not address solely the effects of Respondent's decision. Rather, it challenged the decision itself to ban tobacco use anywhere on its property. Accordingly, as argued in GC's Exceptions Brief, the ALJ's conclusion that the Union waived its right to bargain over Respondent's decision to implement the new policy is based on her erroneous conclusion that the Union did not present proposals challenging Respondent's decision and must be reversed.

B. Powers' Alleged Statement Does Not Establish a Clear and Unmistakable Waiver

As the GC argued in his Exceptions Brief (at 24-27), the ALJ's reliance on an isolated remark of International Union representative Brian Powers to find waiver was improper for several reasons. Although Respondent challenges those reasons in its AB, there is no merit to its claims.

First, the ALJ's reliance on Powers' isolated remark was improper because he was only one of three Union representatives present at the August 29 session and was not the Union's designated representative for bargaining. Although Respondent disputes (AB at 18-20) the GC's contention that Powers was not the Union's chief spokesperson for bargaining based on a statement by Respondent official Trautman, Respondent's argument conflicts with the ALJ's finding, as well as testimony from its other official (Al Jackson) and Brian Opland himself. Thus, the ALJ found (JD 13:32-33) that Opland was the "normal spokesperson and point of contact for the Union." Jackson testified (Tr 426: 5-10) that the *only* demands to bargain from the Union have come from Opland. Opland testified (Tr 196:16-24; 197:7-12) that he is the designated representative for the Union to receive notice from Respondent when it seeks to make changes in employees' terms and conditions of employment. Furthermore, all of the correspondence concerning bargaining over the new smoking policy was addressed to Opland. (GCX 16, 17, 18, 19, and 20). Accordingly, as GC argued in his Exceptions Brief (at 25) it was not reasonable for Respondent to assume, or the Judge to conclude, that Powers' isolated remark reflected the Union's final bargaining position, particularly where the record is crystal clear that Opland presented a bargaining proposal on behalf of the Union during the same meeting challenging Respondent's decision.

As the GC pointed out in his Exceptions Brief (at 26), the ALJ's reliance on Powers' isolated remark to find waiver was also improper because the Union presented its bargaining proposal challenging the new policy *after* Powers' statement, as revealed by Respondent's own notes. Indeed, that bargaining proposal put Respondent's representatives on clear notice that the Union disagreed with Respondent's decision to implement the new policy and was not waiving its right to bargain. Although Respondent again argues (AB at 19) that the Union's bargaining proposal did not seek to challenge the decision to implement the new smoking policy, that argument is baseless as argued above at 5-6.

Finally, the GC further argued in his Exceptions Brief (at 26-27) that the ALJ's reliance on Powers' isolated remark was improper because: 1) Trautman's September 12 letter made no reference to Power's

remark to support his claim that the Union had waived its right to bargain; and 2) Opland stated at the end of the August 29 session (and, therefore, *after* Powers' isolated remark) that the Union would be presenting a further bargaining counterproposal regarding the new smoking policy. Respondent has elected not to address the first argument in its AB. Although Respondent does address the second argument by asserting (AB at 19) that Respondent's witnesses testified that they understood Opland's statement to mean that he would be responding to their request to withdraw the pending unfair labor practice charge, that testimony does not undermine the GC's argument.

First, the ALJ did *not* credit Respondent witness testimony to find that Opland's statement meant that he would be making a counterproposal to respond to their request to withdraw the charge. Second, that testimony makes little sense. There is no evidence that the Union ever responded to the alleged August 29 request to withdraw the charge.³ Rather, consistent with his statement at the end of the August 29 session that he would be making a counterproposal the following week, Opland *did* send Respondent the promised bargaining counterproposal challenging the decision to implement the new policy a few days later, on September 3 (GCX 19).

In sum, the evidence is clear and consistent that the Union did not waive its right to bargain over Respondent's decision to implement the new smoking policy. The Union demanded on August 15 that Respondent rescind its decision to implement the new smoking policy. On August 29 the Union presented a bargaining proposal that directly challenged Respondent's decision to implement the new policy that would prohibit tobacco use anywhere on its property. Once Respondent presented a counterproposal to the Union's bargaining proposal, the Union informed Respondent at the end of the August 29 session that the Union would present a new counterproposal the following week. On September 3, consistent with its statement that it would present a new proposal the following week, the Union did present Respondent with

³ In any event, the Union's decision not to withdraw the charge is clear, as that charge led to the instant proceeding.

a new proposal in opposition to the decision to implement the new smoking policy. Such evidence strongly refutes any finding that the Union “unequivocally and specifically express[ed] [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).

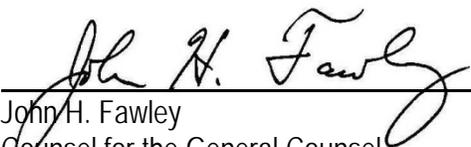
For all of these reasons, the Board should overturn the Judge's waiver finding. Further, as the parties also never reached impasse over Respondent's decision to implement the new smoking policy,⁴ the GC also requests that the Board find that Respondent's implementation of the new smoking policy on September 1 violated §§ 8(a)(1) and (5) of the Act.

III. Conclusion

The undisputed record evidence establishes that Respondent never satisfied its obligation to bargain to agreement or impasse over its decision to implement a new smoking policy. Moreover, the record evidence also shows that the Union never waived its right to bargain over Respondent's decision. Respondent therefore could not lawfully implement its unilateral change in smoking policy on September 1. Accordingly, GC requests that the Board reverse the ALJ's contrary conclusion and find that Respondent's conduct violated §§ 8(a)(1) and (5) of the Act as alleged in the amended Complaint.

DATED at Seattle, Washington, this 10th day of November, 2015.

Respectfully submitted,



John H. Fawley
Counsel for the General Counsel
National Labor Relations Board Region 19
2948 Jackson Federal Building
915 Second Avenue
Seattle, Washington 98174

⁴ Respondent has not challenged the GC's argument that the parties were not at impasse when Respondent implemented the new policy on September 1.

CERTIFICATE OF SERVICE

I hereby certify that copies of the Counsel for the General Counsel's Reply Brief were served on the 10th day of November, 2015, on the following parties:

E-File:

Gary Shinnars, Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570

E-Mail:

Jacqueline M. Damm, Esq.
Bullard Law
200 SW Market St., Ste. 1900
Portland, OR 97201
jdamm@bullardlaw.com

David Rosenfeld, Esq.
Xochitl Lopez, Esq.
Weinberg, Roger & Rosenfeld
1001 Marina Village Parkway, Ste. 200
Alameda, CA 94501-10914
drosenfeld@unioncounsel.net
xlopez@unioncounsel.net



Jacqueline Canty
Legal Assistant