

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

INGREDION, INC. d/b/a PENFORD)	
PRODUCTS CO.,)	
)	
Respondent,)	
)	
and)	Case Nos. 18-CA-160654
)	18-CA-170682
BCTGM Local 100G, affiliated with)	
BAKERY, CONFECTIONARY,)	
TOBACCO WORKERS, AND GRAIN)	
MILLERS INTERNATIONAL UNION,)	
AFL-CIO)	
)	
Charging Party.)	

BRIEF IN SUPPORT OF EXCEPTIONS OF INGREDION INCORPORATED

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BRIEF IN SUPPORT OF EXCEPTIONS OF INGREDION INCORPORATED

I. STATEMENT OF THE CASE

A. Procedural History

On January 28, 2016, National Labor Relations Board (the “Board”) Region 18 issued a complaint in 18-CA-160654 (amended), which was filed by BCTGM Local 100G, affiliated with Bakery, Confectionary, Tobacco Workers, and Grain Millers International Union, AFL-CIO (the “Union”) against Ingredion Incorporated, d/b/a Penford Products Co. (the “Company”). GC Exh. 1(e). On February 29, 2016, the Union filed Charge 18-CA-170682, alleging additional violations, and Region 18 subsequently amended its complaint. GC Exh. 1(h), (j). On April 16, 2016, the Saturday before the record opened on Monday, April 18, 2016, NLRB Region 18 issued a Second Amendment to Complaint (“Complaint”). GC Exh. 1(u), 3 (demonstrative Complaint). Administrative Law Judge (“ALJ”) Mark Carissimi presided over a hearing, and issued a decision on August 26, 2016, finding certain violations and dismissing all other allegations. On October 14, 2016, the Company filed exceptions pursuant to § 102.46(a).

Among other things, the Company excepted to all conclusions of law that it violated the National Labor Relations Act (the “Act”) in any way. This brief is in support of its exceptions.

B. Union Representation and History of Communication with Employees

The Union has represented employees at the Cedar Rapids plant, and a version of the CBA known as the “Red Book” has been in effect, since at least 1948. Tr. 554-56; Tr. 74.

Management at the Cedar Rapids plant has long had a practice of keeping employees informed about what goes on at the plant and giving employees the opportunity to ask management questions regarding work matters. Tr. 768. Management has discussions with shop floor employees on a daily basis. Tr. 44, 72, 768. It holds regular safety meetings. Tr. 44, 674, 741. It posts information for employees on bulletin boards around the site. Tr. 768. For at least ten (10) years it has held InfoShares, where management and employees discuss timely, relevant issues. Tr. 44, 72, 768-69; R.Ex. 63; GC Ex. 11.

The Company is not anti-Union. At the time the Company purchased the Cedar Rapids five of its nine plants in the United States were unionized. Tr. 931. When the Company purchased the Cedar Rapids plant it continued to recognize the Union, and did not try to set initial terms and conditions of employment. Tr. 173, 932, 1087. It continued to honor the Red Book until it expired. *See* Tr. 934-36; Tr. 74; R.Ex. 11. This meant that the parties had the benefit of representational stability during that transition, especially given that the Company continued to hold Labor Relations Meetings after it purchased the Cedar Rapids plant. *See* Tr. 396, 859, 934-35; GC Exs. 13, 40; R.Ex. 12. In these meetings plant management and the Union maintained open communication, bargaining about any issues that arose. *See* Tr. 227, 559, 858-59, 940-43; GC Ex. 11, 13, and 40; R.Ex. 12. During the April, May, and June Labor Relations meetings the Company, upon the request of the Union, engaged in effects bargaining over the shutdown of the manlifts. GC Ex. 40; R.Ex. 12; Tr. 858.

Although the plant had a new owner, because the Company did not try to set initial terms and conditions of employment, the parties did not need to negotiate an *initial* contract; the parties' bargaining that began in summer 2015 was for a *successor* contract. Tr. 222, 381-83, 396, 767, 818, 859, 934-35; GC Exhs. 13, 40; R. Exh. 12.

C. Meadows' April 6 Visit to the Plant

On April 6 Director of Human Resources Ken Meadows Meadows discussed manlifts and the Company's Code of Business Ethics with Union leadership. Tr. 227-28, 399, 940-41. Then-Union President Christopher Eby asked where the Company "may be coming from" in negotiations. Tr. 940. When Meadows saw the conversation about medical insurance becoming more detailed than he was prepared for, he interrupted then-Human Resources Manager Pat Drahos as she discussed such details by raising and waving his hand at her to signal her to stop. Tr. 941-42.

Then-Operations Manager Levi Wood and then-Operations Manager Phil Kluetz routinely give tours at the facility. Tr. 822, 861. Employees had seen visitors being toured around the plant many times before and had spoken with those visitors. Tr. 33, 43, 76. On April 6 they gave Meadows a tour, which was consistent with his practice. Tr. 944. The employees were all in their normal work areas. Tr. 825. Kluetz took the tour along his general tour route. Tr. 861, 863. Meadows' tour did not target bargaining unit employees or even employee-populated areas of the plant. *See* Tr. 109, 823-25, 863-65, 944-45.

In these conversations Wood and Kluetz introduced Meadows as Human Resources Director for the Company. Tr. 825, 866. Some employees, but never Meadows, brought up things they wanted in the plant and things that were important to them in the upcoming contract. Tr. 34-35, 43, 57-59, 74-75, 79, 84-85, 110, 671-73, 826, 867, 945-46. Meadows did not bring up any of these topics. Tr. 826, 867, 945-46. Meadows responded to the

employees' inquiries in general terms as much as possible. Tr. 109-110. Never did Meadows promise employees anything or make any kinds of threats to employees. Tr. 827-28; 868, 946. Meadows took no notes during the tour. Tr. 947. The Company did not provide bargaining unit employees with anything as a result of their conversations with Meadows during his plant tour. Tr. 828, 868. Meadows told the employees that these were topics that they had to discuss with their Union. Tr. 827, 867, 946.

D. Successor Contract Bargaining

1. The Company's Preparation

The Company diligently prepared for bargaining to ensure efficiency during bargaining. It designated Meadows, an extremely experienced negotiator, to be lead negotiator for bargaining the contract in Cedar Rapids. Tr. 947. In his long experience in negotiating contracts Meadows has never been found by the NLRB to have bargained in bad faith. Tr. 947-48. The Company's bargaining team consisted of individuals with the authority to adjust proposals and bind the Company: Meadows was Human Resources Director and Erwin Froehlich was the Cedar Rapids Plant Manager. Tr. 100, 767. Froehlich and Wood were established leaders at the plant. Tr. 767, 818.

Consistent with his past practice, Meadows reviewed the Red Book in advance of bargaining and considered working from it. Tr. 948-49. In fact, he attempted to draft a Company proposal based on the Red Book. Tr. 949, 1085; R.Ex. 16. But Meadows ultimately concluded that presenting a proposal merely revisiting the Red Book was not possible because the terms of the Red Book were drastically inconsistent with other Company contracts, and did not "fit" with the Company's operational needs for the Cedar Rapids Plant. Tr. 948. The Company therefore proposed a contract that did not share the form of the Red Book and did not contain its package of terms. Jt.Exs. 1, 16. It did this to attempt to achieve its legitimate goals of obtaining

a contract that was consistent with its contracts at other facilities and allowed the Company to grow its business. Tr. 948-49. The Company sincerely believed that it could not go back to the Red Book after it expired, and consistently communicated that in bargaining. *See* Tr. 1056.

2. The Union's Preparation

The Union researched and reviewed the Company's contracts at other facilities before bargaining began. *See* Tr. 226, 389-91, 554. It brought in Jethro Head from the International to lead the negotiations because of his deep bargaining expertise. *See* Tr. 425, 557. The Union had experienced representatives on its side of the bargaining table, too: Eby and then-Recording Secretary Renitta Shannon were both 25-year employees, and Eby had been in Union leadership since 1992. Tr. 222, 381-83.

3. June 1

On the first day of bargaining, Meadows identified himself as the lead negotiator for the Company and assured the Union that he would always be there for negotiations. Tr. 956. He explained that the Company's goal in bargaining was to get a contract. Tr. 957; R.Ex. 67 at 1; R.Ex. 66 at 210; GC Ex. 7 at 1; GC Ex. 8 at 1. Meadows immediately explained the Company's business rationale for drafting a proposal that was not based on the Red Book, and expressed to the Union that the significant changes planned at the facility were largely focused on the plant's management structure and product strategy. *See* Tr. 956-57, 1074; R.Ex. 67 at 1; R.Ex. 66 at 210. He acknowledged that some would consider these to be "radical changes," but explained that they were necessary for the operational modifications the Company sought to make. Tr. 956; R.Ex. 67 at 1.

Head said that Union was not leaving the table without a substantial wage increase. Tr. 957; R.Ex. 67 at 2; R.Ex. 66 at 210. He said that if the Company sought a lot of changes then the parties' bargaining would not be productive. Tr. 957; R.Ex. 67 at 2; R.Ex. 66 at

210. Meadows responded by proposing that if the parties reached impasse on a particular subject of negotiations, they needed to continue bargaining on other subjects. *See* Tr. 964. This was the only discussion of impasse early in bargaining. *Id.*

The Union made its first proposal, and Meadows engaged the substance of it, discussing and agreeing to various proposals. *See* Tr. 958-59; R.Ex. 67 at 2; R.Ex. 66 at 210; GC Ex. 7 at 1; GC Ex. 8 at 1, Jt.Ex. 10 at 572

The Company presented its first proposal. Tr. 959. It proposed a recognition clause that kept all classifications in the bargaining unit. Jt.Ex. 1 at 1965; Tr. 786, 803, 984. It proposed dues checkoff. Jt.Ex. 1 at 1966. It proposed contractually establishing a negotiating committee. Jt.Ex. 1 at 1967. It proposed a generally-applicable grievance procedure ending with final and binding arbitration. Jt.Ex. 1 at 1968-70. It's no strike clause was balanced by a no-lockout clause. Jt.Ex. 1 at 1970. It proposed a labor relations committee. Jt. Exh. 1 at 1967.

Meadows asked if the Union wanted him to go through the proposal or if they preferred to take the time to read it on their own. Tr. 961; R.Ex. 67 at 2 (“KM asked them to read it and understand”). Meadows went through the document and pointed out items that were the same in the Red Book, explained areas where Meadows still had questions in formulating his proposals, pointed out proposed changes to the parties’ past practice, and explained the rationale for particular proposals. *See* Tr. 961-64; R.Ex. 67 at 2-3; Jt.Ex. 1 at 1966, 1971, 1975, 1976, 1978; Tr. 411-12; GC Ex. 7 at 2. Head immediately told Meadows that he was not going to accept the Company’s proposal because it was not written in the format that he wanted. Tr. 961; R.Ex. 67 at 2. He then asked to end the session. Tr. 964; R.Ex. 67 at 3.

Meadows offered to meet the following week, but Head was not willing to meet until June 27 and 28. Tr. 965; R.Ex. 67 at 3; GC Ex. 8 at 2; R.Ex. 66 at 210.

4. June 29

Meadows went through the Union's June 1 proposal, line by line, and responded to every item therein. *See* Tr. 261, 415, 969-70; R.Ex. 67 at 4; R.Ex. 66 at 217; GC Ex. 7 at 3; GC Ex. 8 at 3. He pointed out where the Company had already made proposals on topics that the Union had also raised, and agreed to a number of the Union's proposals. Tr. 415-16, 970; *see, e.g.*, R.Ex. 67 at 4 (such references on III, § 1; V, § 8; VII, § 2; X, § 1A; and X, § 1B). Where Meadows was not interested in a particular Union proposal he explained to the Union why the Company was not interested in it, including by pointing out particular costs or burdens the proposal would impose. Tr. 970; *see* Jt.Ex. 10 at 574.

Head said that the Union was going to work from the Red Book. Tr. 973; R.Ex. 67 at 6; R.Ex. 66 at 218. The Union presented another proposal asking items it had not requested in its June 1 proposal. Tr. 971; Jt.Exs. 10, 11. The only proposals from the Company's initial proposal that the Union chose to incorporate were those that benefited the Union. GC Ex. 8 at 3 ("Union gave Co noneconomic proposal w/ ours by taking what we like from theirs"). Jt.Ex. 11 at 567-69; Jt.Ex. 1 at 1967, 1971. Head did not explain the Union's proposal other than to identify how changes were marked in the document. Tr. 971-72.

5. June 30

Meadows highlighted changes in the Company's second proposal using bold print. Tr. 424, 975; Jt.Ex. 2. He went through the Company's proposal and explained each item that the Company had changed, and explained the reasons why the Company was making the proposal. *See* Tr. 424-25, 975-76; R.Ex. 67 at 7; R.Ex. 66 at 219. Head said that the Company needed to go back to the Red Book and address the issues there rather than through the Company's proposal. Tr. 425, 976. Meadows suggested that they invite a federal mediator to attend bargaining to help get the parties moving forward, but Head resisted. Tr. 978; R.Ex. 67 at

8 (“Ken – Maybe we need a federal mediator . . . Jethro – Don’t want to bring in a federal mediator”).

Head brought up whether August 1 was a “drop dead date,” to which Meadows responded that he agreed that August 1 was not a drop dead date. Tr. 427, 977; R.Ex. 67 at 8; GC Ex. 8 at 4. Head noted that they had no agreements at that point, and alluded to a possible strike. Tr. 424, 976, 978; R.Ex. 66 at 219; R.Ex. 67 at 8.

At no point on June 30 did the Company tell the Union that it intended to prepare a last, best, and final offer (“LBF”). *See* GC Ex. 3 at 8; Tr. 979; R.Ex. 67 at 7-9; R.Ex. 66 at 219.

6. Meadows Invites the Mediator to Bargaining

After the June 30 bargaining session Meadows took steps to bring in a mediator. *See* Tr. 979. He responded to an e-mail from an FMCS mediator and asked to speak with him, and they subsequently spoke about Meadows’ desire that he attend the parties’ bargaining. Tr. 979; R.Ex. 34. From then until the Company implemented the terms of its LBF the mediator was present on all but one (1) day of bargaining. Jt.Ex. 29.

7. Head Cancels Bargaining Dates

Although the parties had agreed to meet July 13-15, Head e-mailed Meadows and told him that something had come up and he would not be able to meet on those dates. *See* Tr. 980, 1071; R.Ex. 35; R.Ex. 67 at 3; R.Ex. 66 at 210; GC Ex. 8 at 2. Meadows expressed to Head his desire to continue moving forward with the bargaining. Tr. 980, 1071; R.Ex. 35; R.Ex. 67 at 3; R.Ex. 66 at 210; GC Ex. 8 at 2.

8. The Company Sends Letters to Employees

On July 17 the Company sent letters to employees. It accurately described its positions regarding gap insurance and its proposals on classifications in the bargaining unit. Gap

insurance is medical insurance that covers certain retirees from the time they retire until they turn sixty-five (65) years old or otherwise became eligible for Medicare. *See* Jt.Ex. 16 at 650; Tr. 257, 786. The Company aimed to extend gap insurance to less-tenured employees who were previously not eligible for it. Tr. 786, 984. Moreover, the Company sought from its very first proposal to maintain gap insurance for employees who were already eligible for it under the Red Book. Tr. 367, 435, 786; 893, 984; Jt.Ex. 1, Art. XX, § 3 at 1994. The Company proposed to tie the employee contribution for gap insurance to variable insurance plans, so it could go higher or lower than it was previously. Jt. Exh. 1, Art. XX, § 3 at 1994; Jt. Exh. 16 at 9634-35. The Company never sought to eliminate gap insurance. Tr. 984.

The Company also intended to maintain all of the current classifications. Tr. 786, 803, 984; Jt.Ex. 16 at 9594. Meadows wanted to ensure that the unit definition aligned with the NLRB certification of the bargaining unit and the traditional unit descriptions of NLRA law. Tr. 119, 456, 787, 791, 984-85; Jt.Ex. 1, 1965; Jt.Ex. 2, 2002; R.Exs. 31, 32; R.Ex. 31.

9. July 27

Head insisted on discussing his “process” rather than substantive proposals, and Meadows tried to get the Union to start talking by bringing up specific subjects of bargaining. *See* Tr. 986-87; R.Ex. 66 at 224.

10. July 28

Meadows walked through all of the proposed changes in the Company’s third proposal, which were marked in red. *See* Tr. 289, 433, 988; Jt.Ex. 3. Meadows went through the changes, including by giving an explanation of why he had changed the language of the gap insurance proposal and why he was taking the position that the flower fund was illegal and that the parties needed to discontinue it. *See* Tr. 287, 436, 451, 997-98; R.Ex. 67 at 12, 19. Meadows gave the Union a summary document that helped compare the Company’s current proposals to

the structure of the Red Book. Tr. 989; R.Ex. 36; R.Ex. 67 at 12. He explained that the document showed where the Union could locate terms in the Red Book that the Company's proposal already addressed. Tr. 439, 990-91; R.Ex. 66 at 225.

Head passed out R.Ex. 37, a Union meeting notice for August 1 that stated alluded to a possible strike. Tr. 991-92; R.Ex. 37; R.Ex. 67 at 13; R.Ex. 66 at 225. Later, Head said that negotiations were not going well, and that it was a "train wreck." Tr. 441, 992; R.Ex. 67 at 14; R.Ex. 66 at 225; GC Ex. 7 at 9. Eby gave the Company a contract extension offer, but Meadows explained that the Company did not agree to an extension because it was interested in getting a contract. *See* Tr. 992-93; R.Ex. 66 at 225; R.Ex. 38.

The Union asked the Company to consider withdrawing proposals related to 21 items it had raised with the Company as part of a request for information. Tr. 834, 996; Jt.Ex. 24 at 912-14; R.Ex. 67 at 16; R.Ex. 66 at 226. Meadows responded to each item. Tr. 996; *see, e.g.* R.Ex. 67 at 16-19. In many cases he agreed to withdraw his previous proposals and use the terms of the Red Book, as the Union had requested. *See* R.Ex. 67 at 16-19; Jt.Ex. 24 at 913; R.Ex. 66 at 227; GC Ex. 7 at 9. On the issue of the flower fund, Meadows proposed accommodations that responded in real time to the specific concerns raised by the Union. *See* Tr. 453, 998. After bargaining about the flower fund became emotional, Meadows took the initiative to discuss the issue with a conciliatory tone. *See* Tr. 289, 455, 999.

Then Head called Meadows an "idiot" and a "fucking idiot," then repeated those insults. Tr. 454, 999. In the course of the parties' bargaining Meadows never personally attacked anyone on the Union bargaining committee. Tr. 1007. The Union decided to end bargaining for the day. Tr. 1007-08; R.Ex. 67 at 20.

11. July 29

The Company presented its fourth proposal, which also highlighted all changes in red. Tr. 1009; Jt.Ex. 4. Meadows explained that formatting and verbally walked through the changes the Company had made, explaining where the Company had made those changes in response to the Union's twenty-one (21) items. Tr. 1010; R.Ex. 67 at 21-22; GC Ex. 7 at 13.

The Union gave Meadows a document that listed what the Union described as concessions, which it had produced weeks earlier but not shared with the Company, even though the parties had bargained during that time and communicated via e-mail between bargaining sessions. R.Ex. 39; Tr. 429-31, 461, 575-76. Meadows went through it and discussed each item. Tr. 1012; R.Ex. 67 at 23-28; GC Ex. 7 at 14-17. He identified a number of specific areas where he thought the Company might be willing to adjust its proposals based upon the list of concessions. Tr. 1013-14; R.Ex. 67 at 29. Head told Meadows that to move forward Meadows needed to go back to their Red Book. Tr. 1014; R.Ex. 67 at 23, 26. Meadows told Head that he was not willing to do that. Tr. 1014.

The Company then agreed to modify more of its proposals. Tr. 1014-16; R.Ex. 67 at 30; GC Ex. 7 at 17-18; R.Ex. 66 at 228; GC Ex. 7 at 17. The Union decided to end bargaining for the day. Tr. 1017; R.Ex. 67 at 31.

12. July 30

On July 30, the Company presented its fifth proposal, which again marked all changes in red. Tr. 1023; Jt.Ex. 5. The Company pointed out where it had made changes and how each change responded to an issue the Union had raised with the Company. Tr. 1023. The Union did not respond to any of the Company's proposals, and decided to end bargaining. Tr. 1023-24; R.Ex. 67 at 33.

13. July 31

The Company presented its sixth proposal, which again marked all changes in red. Jt.Ex. 6. Meadows also verbally identified all changes and explained them to the Union. Tr. 1026; Tr. 481. Meadows then expressed willingness to also add language extending the existence of the Company's Medicare supplement until January 1, 2016. Tr. 1026-27; R.Ex. 67 at 35.

The Union presented to the Company Jt.Ex. 12, a proposal on pension, but said nothing to explain it. Tr. 1029; *see also* Tr. 481. Head asked the Company to present its final offer. Tr. 1029-30; R.Ex. 67 at 36.

After a break, Meadows presented a final offer, explaining that changes were not marked because it was the document the Union had told him it planned to distribute to bargaining unit employees. *See* Tr. 1029, 1030, 1082; R.Ex. 67 at 36. Meadows went through it and pointed out the changes that the Company had made. *See* Tr. 311-12, 485, 1030-31, 1077, 1081; R.Ex. 67 at 37; R.Ex. 66 at 231.

Meadows told the Union the Company had reviewed the Union's pension proposal but did not agree to it. Tr. 1031, 1077; R.Ex. 67 at 37. After bargaining, Eby called Meadows back into the room and asked whether the Medicare supplement benefit would still exist through the end of the year; Meadows gave Eby a letter confirming that it would. Tr. 486.

14. August 17

Head stated that the parties had no tentative agreements, and that all of the Union's proposals were still on the table, except for its proposal regarding herbal tea and stirrer sticks. Tr. 1034; R.Ex. 67 at 40; R.Ex. 66 at 191; GC Ex. 7 at 23. Then Head again alluded to a possible strike, told the Company "you will never be the same," and said that at this point in bargaining the Company was "up shit creek." Tr. 1035; R.Ex. 67 at 38; R.Ex. 66 at 189; GC Ex.

7 at 22. Head continued to insist that the Company assume the then-expired Red Book for purposes of the parties' bargaining. Tr. 1035; R.Ex. 67 at 39; R. Ex. 66 at 189, 191 ("U – repeat, the process is to work from current"); GC Ex. 7 at 22-23.

Head also verbally threatened violence against Meadows, saying that if he were Eby he would have come across the table and cut Meadows. Tr. 1035; R.Ex. 67 at 41 ("JH . . . Make it clear again Chris will cut you up"). During bargaining Meadows never physically threatened any member of the Union's bargaining team. Tr. 1035.

After negotiations on August 17 the Company understood that the parties were at impasse. Meadows wanted to get a contract, but thought the parties were not going to be able to reach agreement unless they bargained from the original contract. Tr. 1036. Throughout bargaining the Union had told the Company that the Company had to bargain from the Red Book and that the Union would refuse to consider any proposals from the Company until they had the form and substance of the Red Book. *See* Tr. 961, 973, 976, 986-87, 991, 1014, 1017, 1019, 1035, 1044, 1045, 1047, 1049, 1056, 1119; Tr. 425, 439, 514; R.Ex. 67 at 6, 13, 23, 26, 39, 46, 51, 52; R.Ex. 66 at 218, 219, 224, 225, 189, 191, 193, 196; GC Ex. 7 at 22-23. The Company had consistently told the Union that it was not interested in such a bargaining procedure. Tr. 977, 1014; R.Ex. 67 at 7; R.Ex. 66 at 219. Meadows knew that going back to the Red Book was not possible for the Company. Tr. 1036. That night Meadows prepared Jt.Ex. 8, the Company's LBF. Tr. 1037-38.

15. August 18

Head said, "You're not willing to move from your standpoint. You're not giving us anything," and Meadows said, "I don't see that we're at anything but at impasse. And that with no movement from either party and both parties locked into where they're at that I [am] going to present this final offer." Tr. 1038-39; R.Ex. 67 at 42 ("KM . . . Bottom line Union not

presented anything back re our proposals . . . Items that have not been removed we are far apart . . . Co not & Union not willing”).

Meadows explained what he had reviewed in drafting the LBF, and walked through all of the changes it contained compared to the Company’s Final Offer. Tr. 321, 496-98, 1039-1043, 1046, 1106-12; R.Ex. 67 at 42-43; R.Ex. 66 at 192; GC Ex. 7 at 24.

Later, Head presented a Proposal on Preamble and Articles I, II, and III and the Union’s first wage proposal, both of which had the form and substance of the Red Book. Tr. 1044, 1114. These adopted only the Respondent’s proposed language that benefited the Union. Jt. Exh. 9 at 1966, 1969 70; Jt. Exh. 13 at 549, 551-52. Head said, "We're going to start presenting you stuff article by article from our book." Tr. 1044; R.Ex. 67 at 46; R.Ex. 66 at 193. Meadows identified the Company’s issues on particular items. Tr. 501-502, 1044; R.Ex. 67 at 47-49. He said that these proposals were going back to the Red Book, that the Company was not interested in going back to the Red Book, and that Head had already asked for the Company’s best offer on wages, and the Company had disclosed to the Union what those were in its LBF. Tr. 1044-45; 1047, 1114; R.Ex. 67 at 50-51; R.Ex. 66 at 195. Meadows offered to address any issues with the Company’s LBF. Tr. 1045, 1115; R.Ex. 67 at 46-47, 50-51; R.Ex. 66 at 195. Head replied that the Union was not willing to work from the LBF, that they were going to bargain from their contract, and that it was their way or nothing. Tr. 1045. The Union said that they were not going to refer to the Company’s LBF, and told Meadows that he needed to go back to the Red Book. Tr. 1047; R.Ex. 67 at 51.

Although the parties were scheduled to meet the next day, Head said, " There's no reason for us to meet anymore. We're not going to meet tomorrow," so the parties did not meet on August 19. Tr. 1047; R.Ex. 67 at 51; R.Ex. 66 at 195.

16. September 9

Head said that the Company needed to go back to the Red Book if the parties were going to get anywhere in bargaining. Tr. 1049; R.Ex. 67 at 52; R.Ex. 66 at 196. Meadows told Head that the Company was still not willing to accept the Red Book, to which Head replied, "Okay, then we're done." Tr. 1049-50, 1117; R.Ex. 67 at 52; R.Ex. 66 at 196. Meadows told Head, "[t]hen, if we're done and we're not going to be moving further, then I got no alternative left but to go ahead and implement our last, best, and final," and that he would plan on doing that the following Monday if the parties could not get movement in the meantime. Tr. 1050; R.Ex. 67 at 52; R.Ex. 66 at 196.

17. September 10

Head asked Meadows if he wanted to look at a new proposal from the Union, and Meadows said, "I'm willing to consider anything that you guys want to propose if it's in reference to our last, best and final." Tr. 1117-18. Head gave Jt.Ex. 15 to the Company, but said that the Union committee was too tired to explain it. Tr. 1054; R.Ex. 67 at 55; R.Ex. 66 at 199. Meadows thumbed through it and realized it was the Red Book. Tr. 1119. It retained the Labor Relations Committee while simply eliminating the reference to that committee as "Joint Labor Relations." Jt. Exh. 15 at 608, Article II, Section 2. Meadows told Head that the Union unacceptably continued to propose the Red Book after the Company had already proposed all it could give the Union in its LBF. Tr. 1052, 1119.

Meadows gave the Union R.Ex. 45, a letter indicating his intention to unilaterally implement his LBF. Tr. 1054-55, 1119; R.Ex. 67 at 55; R.Ex. 66 at 200.

18. September 11

The parties discussed their disagreement over bargaining from the Red Book versus the LBF. Tr. 1056; Tr. 525; R.Ex. 67 at 57; R.Ex. 66 at 200. Then Head said, "You can

lock us out, or we can strike. You do what you want to do." Tr. 1056; R.Ex. 67 at 57-58; R.Ex. 66 at 200.

19. Common Themes in the Parties' Bargaining

By the time the Company implemented the terms of its LBF, the parties had held a total of 25 distinct bargaining sessions. *See* Jt.Ex. 29; Tr. 955-1063. During this time the Company had asked the Union to bargain *even more* frequently. *See* Tr. 965, 1071; R.Ex. 67 at 3; GC Ex. 8 at 2; R.Ex. 66 at 210. The Union had called many bargaining sessions to an end, even when the Company had asked to continue meeting. *See* Tr. 964, 1007, 1008, 1017, 1024; R.Ex. 67 at 3, 20, 31, 33.

Meadows frequently implored the Union to identify its interests in bargaining. *See* Tr. 986, 1017, 1045, 1049, 1051, 1115; R.Ex. 67 at 31, 46-47, 50-51, 52; R.Ex. 66 at 195, 197-98, 224. Throughout bargaining, Head consistently insisted that the parties had to bargain from the Red Book. *See* Tr. 425, 439, 514, 973, 976, 986, 991, 1014, 1017, 1019, 1035, 1044, 1047, 1049; R.Ex. 67 at 6, 13, 23, 26, 39, 46, 51, 52. The Union refused to consider any proposals from the Company until they had the form and substance of the Red Book. *See* Tr. 425, 439 961, 973, 976, 986-87, 991, 1014, 1017, 1019, 1035, 1044, 1045, 1049, 1056, 1119; R.Ex. 67 at 2, 6, 13, 23, 26, 46, 52; R.Ex. 66 at 218, 219, 224, 193, 191, 196; Jt.Ex. 15.

20. Bargaining Movement in Proposals

Company movement in its June 30 proposal:

- Art. V, § 1 provided for drawing numbers to determine the seniority order of employees hired on the same day. Jt.Ex. 2 at 2008. This responded to the Union's June 29 proposal, "When employees have been employed on the same day, seniority as between such employees will be established by drawing numbers." *See* Jt.Ex. 11 at 568.
- Art. XI, § 4(c) added leave for union representatives participating in a union assignment or political office. Jt.Ex. 2 at 2018. This responded to the Union's June 29 proposal asking to expand benefits for such leave beyond the provisions of the Red Book. *See* Jt.Ex. 11 at 569; Jt.Ex. 16 at 9629.

- Art. XI, § 4(d) added employee leave for voting in political elections. Jt.Ex. 2 at 2018. This responded to the Union’s June 29 proposal, “Employees shall be allowed such time off as necessary to vote in any Federal, State or Municipal elections.” *See* Jt.Ex. 11 at 569.
- Art. XI, § 7 added medical insurance while on active military duty. Jt.Ex. 2 at 2019. This responded to the Union’s June 1 proposal, “Add Company will pay 100% of all plan premiums during active service.” *See* Jt.Ex. 10 at 573.

Company movement in its July 28 proposal:

- Art. X, § 2 provided double pay for Sunday work. Jt.Ex. 3 at 2051. This matched Red Book Art. VI, § 1. *See* Jt.Ex. 16 at 9622. Except to failure to find the rationale for these changes.
- Art. X, § 4, Overtime Rule #2, added that employees may not be forced more than two (2) consecutive days of overtime. Jt.Ex. 3 at 2052. This matched Red Book Art. V, § 12(5). *See* Jt.Ex. 16 at 9618.
- Art. X, § 7 provided two (2) additional personal holidays. Jt.Ex. 3 at 2054. This responded to the Union’s June 1 proposal, “Add MLK Day and day after Thanksgiving.” *See* Jt.Ex. 10 at 572.
- Art. XIII, § 1 increased the top level of vacation to six (6) weeks for twenty-five (25)+ year employees. Jt.Ex. 3 at 2058. This matched Red Book Art. VII, § 1. *See* Jt.Ex. 16 at 9625.
- Art. XIII, § 2 increased vacation pay to forty-four (44) hours. Jt.Ex. 3 at 2058. This responded to the Union’s June 1 proposal, “Modify so that all employees vacation weeks consist of seven 7 days at forty-nine 49 hours per week.” *See* Jt.Ex. 10 at 572.
- Art. XV, § 1 proposed all wage rates. Jt.Ex. 3 at 2062-63. This responded to a series of wage proposals tied to Red Book Art. IV, § 1 in the Union’s June 1 proposal. *See* Jt.Ex. 10 at 571.
- Art. XV, § 2 added a twenty-seven (27) cent differential for 4th shift. Jt.Ex. 3 at 2064. This matched Red Book Art. IV, § 8. *See* Jt.Ex. 16 at 9609.
- Art. XX, § 3 added language to make clear that the Company was, in fact, proposing gap insurance for employees with hire dates both before and after August 1, 2004. Jt.Ex. 3 at 2069. This responded to the Union’s June 1 proposal, “All employees (existing or new) with less than 60 pts on August 1, 2004 will be entitled to the same retiree medical provisions (prior to August 1, 2004) once said employees attain 20 years of service.” *See* Jt.Ex. 10 at 573.

Company movement in its July 29 proposal:

- Art. X, § 2 added time-and-a-half pay for work over eight (8) hours in a day and added double time for work over twelve (12) hours in a day. Jt.Ex. 4 at 2089-90. This responded to the Union's request that the Company withdraw its previous proposal on that subject. *See* Jt.Ex. 23 at 588 (#17).
- Art. X, § 4, Overtime Rules #10, provided for double pay for day shift maintenance employees working at night. Jt.Ex. 4 at 2091. This responded to the Union's request that the Company withdraw its previous proposal on that subject. *See* Jt.Ex. 23 at 589 (#19).
- Art. X, § 7 removed a holiday pay exclusion for probationary employees. Jt.Ex. 4 at 2092. This responded to the Union's request that the Company withdraw its previous proposal on that subject. *See* Jt.Ex. 23 at 588 (#1).
- Art. X, § 7 removed the requirement that employees be scheduled in a holiday week to receive holiday pay. Jt.Ex. 4 at 2092. This responded to the Union's request that the Company withdraw its previous proposal on that subject. *See* Jt.Ex. 23 at 588 (#2).
- Art. X, § 7(e) and (f) provided two-and-a-half-time pay for working on a holiday if an employee was not scheduled but nonetheless worked, and specified that employees will not be penalized for a holiday falling on a Sunday. Jt.Ex. 4 at 2093. This responded to the Union's request that the Company withdraw its previous proposals on those subjects. *See* Jt.Ex. 23 at 588 (#15).
- Art. XI, § 5 added the bereavement terms of the Red Book to the Company's proposal. Jt.Ex. 4 at 2095. This responded to the Union's request that the Company withdraw its previous proposal on that subject. *See* Jt.Ex. 23 at 588 (#3).
- Art. XI, § 6 removed restrictions on use of jury service leave. Jt.Ex. 4 at 2095. This responded to the Union's request that the Company withdraw its previous proposal on that subject. *See* Jt.Ex. 23 at 588 (#16).
- Art. XIII, § 8 raised the amount of vacation senior employees can bank to use as single days. Jt.Ex. 4 at 2098. This responded to the Union's request that the Company withdraw its previous proposal on that subject. *See* Jt.Ex. 23 at 588 (#5).
- Art. XIII, § 10 removed the requirement to use vacation leave before using FMLA leave. Jt.Ex. 4 at 2098. This responded to the Union's request that the Company withdraw its previous proposal on that subject. *See* Jt.Ex. 23 at 588 (#9).
- Art. XVII, § 1(A) specified that the Company would pay for temporary disability benefits. Jt.Ex. 4 at 2103. This responded to the Union's request that the Company withdraw its previous proposal on that subject. *See* Jt.Ex. 23 at 588 (#12).
- Art. XVII, § 3 raised the temporary disability benefit from \$325/week to \$375/week. Jt.Ex. 4 at 2104. This responded to the Union's request that the Company withdraw its previous proposal on that subject. *See* Jt.Ex. 23 at 588 (#12).

- Art. XVIII, § 1 raised the group life insurance benefit from \$25,000 to \$50,000. Jt.Ex. 4 at 2106. This responded to the Union’s request that the Company withdraw its previous proposal on that subject. *See* Jt.Ex. 23 at 588 (#13).

Company movement in its July 30 proposal:

- Art. I, § 2 reduced the probationary period to four (4) months. Jt.Ex. 5 at 2117. This responded to the Union’s July 29, 2015, list of concessions. *See* R.Ex. 39 at 560 (“Probation period 6 months instead of 50 working days”).
- Art. IV (B) added progressive discipline language. Jt.Ex. 5 at 2122. This responded to the Union’s July 29, 2015, list of concessions. *See* R.Ex. 39 at 559 (“No progressive disciplinary procedure”).
- Art. V, § 1(E) increased the number of days of unexcused absence before an employee loses seniority from two (2) to three (3). Jt.Ex. 5 at 2123. This responded to the Union’s July 29, 2015, list of concessions. *See* R.Ex. 39 at 560 (“Loss of seniority if absent for two unexcused days.”)
- Art. VI, § 1(D) (2) and (E) reduced the bid restriction to eighteen (18) months from twenty-four (24) months. Jt.Ex. 5 at 2124-25. This responded to the Union’s July 29, 2015, list of concessions. *See* R.Ex. 39 at 559 (“Moving to new bid job limited to once every two years vs multiple times a year”).
- Art. VII, § 1(3) changed to plant-wide seniority instead of classification seniority for layoffs. Jt.Ex. 5 at 2125. This responded to the Union’s July 29, 2015, list of concessions. *See* R.Ex. 39 at 559 (“Layoffs not done by seniority”).
- Art. VII, § 1(6) exempted only Maintenance, not Lab employees, from general layoffs. Jt.Ex. 5 at 2126. This responded to the Union’s July 29, 2015, list of concessions. *See* R.Ex. 39 at 559, 561 (“Layoffs not done by seniority . . . No bump rights for discontinuance of job, etc.”)
- Art. XIII, § 1 provided for vacation increases after 12 and 18 years of service. Jt.Ex. 5 at 2135. This responded to the Union’s July 29, 2015, list of concessions. *See* R.Ex. 39 at 560 (“5th week of vacation after 20 years instead of 18 yrs”).

Company movement in its July 31 proposal:

- Art. XIII, § 2 increased vacation pay for an additional hour beyond the forty-four (44) hours to which the Company had already increased vacation pay in its July 28 proposal. Jt.Ex. 7 at 443; Jt.Ex. 3 at 2058. This responded to the Union’s June 1 proposal, “Modify so that all employees vacation weeks consist of seven 7 days at forty-nine 49 hours per week.” *See* Jt.Ex. 10 at 572.

- Art. XVIII, § 6 added a long-term disability benefit. Jt.Ex. 6 at 2182. This responded to the Union’s July 29, 2015, list of concessions. *See* R.Ex. 39 at 559 (“STD reduced from 52 wks to 26 wks”).
- Art. XXI, § 1 unlinked the bargaining unit’s benefit plans from those of the salaried employees. Jt.Ex. 6 at 2184. This responded to a number of bullet points related to benefit plans on the Union’s July 29, 2015, list of concessions. *See* R.Ex. 39 at 559.
- Art. XX, § 3 delayed proposed changes to the gap insurance benefit until January 1, 2016. This extended the terms of the Red Book on that subject. *See* Jt.Ex. 16 at 9636.
- Art. XXVII required the Company to discuss plant rules with the Union before implementing them. Jt.Ex. 6 at 2188. This responded to the Union’s July 29, 2015, list of concessions. *See* R.Ex. 39 at 559 (“Company can make and change plant rules at any time simply by posting on board”).

Company movement in its July 31 proposal:

- Art. VII, § 1 changed bidding to be by department and plant seniority. Jt.Ex. 7 at 432. This responded to the Union’s July 29, 2015, list of concessions. *See* R.Ex. 39 at 559 (“Bidding not done by seniority”).
- Art. XVI increased maintenance wages to \$2.00 immediately, with 2%, 2.5% and 3% increases in subsequent years. Jt.Ex. 7 at 447-48. This responded to the Union’s June 1 proposal to “Immediately add \$2 to Reliability Specialist Classification.” *See* Jt.Ex. 10 at 571.

Company movement in its August 18 LBF:

- Art. I, § 2 reverted to the Red Book’s bargaining unit description. Jt.Ex. 8 at 2228. This responded to the Union’s July 29, 2015, list of concessions. *See* R.Ex. 39 at 560 (“Reducing whose [sic] represented in bargaining unit; company looking to ‘redefine’”).
- Art. III, § 1 removed language seeking to restrict the number of persons on the negotiating committee. Jt.Ex. 8 at 2230. This responded to the Union’s June 29 proposal, “The employees shall be represented by a Negotiating Committee composed of not more than four (4) including the Unit President of Local No. 100G.” *See* Jt.Ex. 11 at 567.
- Art. III, § 1 removed the requirement that bargaining committee members be employees of the Company. Jt.Ex. 8 at 2230. This matched the terms of the Red Book, which contained no such requirement. *See* Jt.Ex. 16.
- Art. V added provisions about how long discipline stays in the file and reduced the first step to an undocumented warning. Jt.Ex. 8 at 2233-34. This responded to the Union’s July 29, 2015, list of concessions. *See* R.Ex. 39 at 559 (“No progressive disciplinary procedure”).

- Art. XI, § 4 removed a proposal to make employees responsible for overtime. Jt.Ex. 8 at 2240-41. This responded to the Union’s July 29, 2015, list concessions. *See* R.Ex. 39 at 560 (“Employees line up overtime and maintain records”).
- Art. XVI, § 1 removed the requirement that employees accept paychecks via direct deposit. Jt.Ex. 7 at 457; Jt.Ex. 8 at 2250. This matched the terms of the Red Book, which contained no such requirement. *See* Jt.Ex. 16.
- Art. XVIII, § 1(F) removed language about discontinuing benefits payments during a work stoppage. Jt.Ex. 8 at 2253. This responded to the Union’s July 29, 2015, list of concessions. *See* R.Ex. 39 at 560 (“Creates greater restrictions and requirements for S&A benefits”).
- Art. XXV, § 2 contractually required effects bargaining for layoffs. Jt.Ex. 8 at 2260-61. This responded to the Union’s July 29, 2015, list of concessions. *See* R.Ex. 39 at 562 (“Eliminate severance language and benefits”).
- The Addendum provided offsets for HSP medical plans. Jt.Ex. 9 at 2263. This responded to the Union’s July 29, 2015, list of concessions. *See* R.Ex. 39 at 559 (“Medical insurance different; premium & deductible, etc.”).

The Union, for its part, withdrew only one (1), minor, proposal for herbal tea and stirrer sticks. Tr. 564. It accepted only the handful of Company proposals that benefited the Union. GC Ex. 8 at 3 (“Union gave Co noneconomic proposal w/ ours by taking what we like from theirs”). During that time it presented only two (2) comprehensive proposals, and the second proposal contained a number of terms that were regressive compared to its first. *Compare* Jt.Ex. 10 with Jt.Ex. 11 at 567 and 569.

Starting with its first proposal and continuing during negotiations, the Company proposed a number of objective improvements over the Red Book. By the time the parties reached impasse, the Company’s proposed contract:

- Increased wages for every bargaining unit member hired on or before August 1, 2015, including a \$2.00 per hour increase for all maintenance employees. *Compare* Jt.Ex. 16 at 9604 with Jt.Ex. 8 at 2250-51.
- Increased the Company’s contribution to a defined contribution plan from 2% to 3.5%. *Compare* Jt.Ex. 16 at 9676 with Jt.Ex. 8 at 2257.

- Offered gap insurance to all employees, not just employees hired on or before a certain date. *Compare* Jt.Ex. 16 at 9636 *with* Jt.Ex. 8 at 2257.
- Offered long-term disability insurance. *See* Jt.Ex. 8 at 2255.
- Agreed to provide seniority lists to the Union upon request. *See* Jt.Ex. 8 at 2235.
- Agreed to pay medical insurance premiums during active military service. *See* Jt.Ex. 8 at 2245-46.
- Provided Company space for the Union to use during Union elections. *See* Jt.Ex. 8 at 2230.
- Increased the number of days employees have to report back to work following a layoff. *See* Jt.Ex. 8 at 2234.
- Added leave for Union representatives participating in a Union assignment. *See* Jt.Ex. 8 at 2243-44.
- Lowered monthly premiums for employee-and-children or employee-and-spouse medical insurance coverage with only a modest premium increase only for family coverage. *See* GC Ex. 32 (Letter from Froehlich describing plans under LBF); R.Ex. 40.
- Improved funeral leave for employees by removing the requirement that funeral leave be taken on consecutive days. Jt. Exh. 1 at 1981; Jt. Exh. 16 at 9610.

21. Post-LBF Communications

On September 28, Meadows and Eby met in the Ethanol Control Room. They both asked each other “what are we going to do” and agreed that they wanted to get a contract done. Tr. 1058. There was no discussion of the NLRB charges. Tr. 1059-60.

E. Information Requests

The Union first requested the information from the Company on May 13 as part of a larger request for similar information. Jt.Ex. 17; Tr. 955. The Company did not have information responsive to the requests now in question, so it immediately produced all responsive information in its possession and initiated a request to obtain further responsive information from BCBS. Jt.Ex. 18; Tr. 191, 955.

The Union gave the Company no indication that it required information beyond what the Company had provided it in response to the May 13 request, until June 29, when the Union reiterated its request for the information in question. GC Ex. 9(b). Meadows immediately explained the reasons for the continued unavailability of the information the Union had requested, gave an estimate of when it might be available, and promised to provide the information as soon as he could. Tr. 414-15, 968; R.Ex. 67 at 4; GC Ex. 7 at 3. Now that the Company had drafted its bargaining positions and negotiations had begun, Meadows also noticed and raised a concern about the relevance of the Union's request for "[t]he cents per hour per individual cost for each dollar increase to the pension multiplier," but did not say that he was unwilling to provide that information, which, at any rate, the Company did yet have in its possession. *See* R.Ex. 67 at 4; Tr. 414; GC Ex. 7 at 3.

Meadows asked the plant to look for any other information that could help satisfy the Union's request. Although the Company still did not have the precise information the Union was requesting, Meadows sought to provide available information that would respond to the request, even if it was not in the precise form the Union had requested.

Meadows e-mailed Eby with the information he obtained from the plant on the same day the Union had renewed its request. Tr. 574, 974; Jt.Ex. 19. This e-mail addressed each of the Union's renewed requests. GC Ex. 9(b); Jt.Ex. 19. It addressed the Union's request for the total dollar cost and cents per hour for fringe benefits. Tr. 974. It included information on insurance rates for hourly employees. Tr. 574. Specifically, it listed the insurance rates for hourly employees effective January 1, 2014, for Wellmark medical, vision & drug, Delta Dental and Standard Insurance (accident & sickness); listed the total cost of unemployment for calendar year 2014; included a cost per hour of \$6.78 for medical and dental; and enumerated the number

of employees on each medical and dental plan. Jt.Ex. 19. Where the Company found no responsive information after its diligent search it stated, “Company has no information on new insurance cost for 2016 . . . Company has no info on increase to pension.” Jt.Ex. 19.

The following day, June 30, Meadows also provided the Union Jt.Ex. 20, a comparison of the medical coverage plans that the Company was proposing in bargaining. Tr. 978-79; R.Ex. 67 at 10. He explained the insurance costs with Eby and Head. R. Exh. 67 at 33; GC Exh. 8 at 8; Tr. 1022. Meadows asked the Union to let him know if they had any questions about the information that the Company had provided. Tr. 979.

The Union did not mention it was still dissatisfied with the Company’s responses to its information requests until July 14, when the Union provided another request asking again for the “cost per hour for 1 year credit/benefit in Pension,” but otherwise not re-requesting the other information the Union requested on May 13 and June 29. *See* Jt.Ex. 21; Jt.Ex. 17; GC Ex. 9(b). The Company did not understand what else the Union could still be requesting. It already told the Union it had no information about a potential increase to the pension. It shared this concern with the Union in a letter on July 23, in which it also provided the *current* cost per hour for the pension in an effort to satisfy the Union. *See* Tr. 982-83. Jt.Ex. 22.

The Union did nothing until July 28, when it gave the Company Jt.Ex. 23, a new seven (7)-page information request. Tr. 993-94. The Company immediately responded to this voluminous request. Jt.Ex. 24 (written responses to each item on Jt.Ex. 23), and Jt.Ex. 25 (535 pages of documents responsive to Jt.Ex. 23). Tr. 447, 994-95; R.Ex. 67 at 14.

The Union, on July 30, re-requested all three bullet points of information alleged in the Complaint as part of a larger request for information that significantly added to its previous information requests. Jt.Ex. 26. The last time the Union requested all three bullet

points of information was on June 29, and since then the Company had diligently responded. GC Ex. 9(b). At this point the Company had already produced all responsive information in its possession and initiated a request to obtain further responsive information from BCBS. Jt.Ex. 18; Tr. 191, 955. Meadows had already explained the reasons for the continued unavailability of the information, given an estimate of when it might be available, and promised to provide the information as soon as he could. *See* Tr. 414-15, 968; R.Ex. 67 at 4; GC Ex. 7 at 3.

The Company again made immediate efforts to look for further information that could satisfy the Union. Meadows immediately provided a document describing medical insurance rates, which he thought may help fulfill the Union's request, even though it had not been specifically requested. Tr. 477, 1022; R.Ex. 67 at 33. The Company then made a successful effort to obtain further information responsive to the requests. It offered to give a nearly complete response to the Union's information requests that same night, but the Union would not accept it. *See* R.Ex. 66 at 230; R.Ex. 67 at 33. Therefore, the Company provided the additional information it had obtained the following day. *See* Jt.Ex. 27 (written responses to Jt.Ex. 26) and Jt.Ex. 28 (506 pages of documents responsive to Jt.Ex. 26); Tr. 1025.

All told, the Company provided over 1,000 pages of responsive documents to the Union's requests for voluminous information. *See* Jt.Exs. 18, 19, 20, 24, 25, 27, 28.

F. Alleged Unilateral Changes

1. The Assignment of Overtime

The Company interpreted LBF Articles VI and XV as permitting it to work employees out of their classifications. Tr. 880-81; *see* Jt.Ex. 8, Art. XV, § 6 at 2235; Jt.Ex. 8, Art. VI, § 3 at 2235.

The Company has not changed whether it can force an employee for overtime more than two (2) days in a row. Tr. 881. The Company has interpreted the forcing language as

applying only when the Company forces employees to work overtime, not when employees volunteer to work overtime. Tr. 592.

The Company interpreted LBF Article XI, § 4 as permitting it to force employees to work four (4) hours of overtime both before and after their shifts where necessary. Tr. 880-81; Jt.Ex. 8, Art. XI, § 4, Overtime Rules 3 and 4, at 2240.

The Company had interpreted the LBF Article XI, §§ 3 and 4 as permitting it to not inform employees of overtime scheduled more than nine (9) days in advance, schedule employees for overtime less than nine (9) days in advance, and use the rotational basis for scheduling overtime. Tr. 880-81; Jt.Ex. 8, Art. XI, § 3 and § 4, Overtime Rules 3 and 4 at 2239-40. Ever since it implemented the terms of the LBF the Company has been using rotational overtime “nine days out,” and notifying employees if a need for overtime arises within 48 hours. Tr. 590.

The LBF also contemplated that the Company would not always be able to follow the LBF’s overtime provisions perfectly. Tr. 881; Jt.Ex. 8, Art. XI, § 4 at 2241. After the Company implemented the provisions of its LBF, it asked employees to work significant overtime, because over 20 long-tenured employees retired, which put significant strain on the facility. Tr. 881.

After the Company implemented the terms of the LBF, the Union filed a number of grievances related to the overtime issues alleged to be unilateral changes. Tr. 578, 879; R.Ex. 48. The Company resolved overtime grievances by agreeing to change its interpretation of the relevant terms of the LBF. *See, e.g.*, R.Ex. 51 at 2357, 2358, and 2359. Additionally, as discussed in more detail later, the Company created an overtime administrator position pursuant to Art. VII (Bidding) and Art. IX (Hours of Work; Overtime and Holidays) of the LBF in an

attempt to better schedule overtime under the terms of the LBF. Tr. 219, 883, 888; *see* Jt.Ex. 8 at 2235-36, 2239-43; GC Ex. 42; Tr. 371.

2. The Method for Scheduling of Hours

The Company interpreted the provisions of Art. XI of the LBF as giving employees the right to vote on whether to have 12-hour shifts. Tr. 713, 883. (“Because it mentions in the company’s contract, 8-hour days, 12-hour days”). The Company implemented the provisions of Art. XI, § 1 by, in one circumstance, allowing maintenance employees to vote regarding whether their schedules should be changed. Tr. 881; Jt.Ex. 8, Art. XI, § 1, 2239. Employees initially voted to implement 10-hour shifts, but the Union filed a grievance against it. Tr. 702-03, 717, 882; GC Ex. 64. The Company settled the grievance and, as a result, did not implement that schedule. Tr. 703-04, 717. Employees voted to add 12-hour shifts. Tr. 712-13.

The Company had an operational interest in adding 12-hour shifts in the maintenance department. Tr. 702. The Company has not abolished 8-hour shifts, and there is no evidence that any employee has been involuntarily switched to a 12-hour shift. *See* Tr. 149. The record shows that employees were given the option to volunteer for the 12-hour shifts. Tr. 714.

3. Vacation Scheduling

The vacation policy took effect immediately upon implementation of the LBF, but those same provisions specified the new vacation year did not begin until January 1, 2016. Tr. 890. Under the Red Book, an employee’s vacation year was based on the employee’s anniversary, not the calendar year. Tr. 890; Jt.Ex. 16, Art. VII, § 4 at 9625-26. To make this transition the Company paid out all accrued vacation before the end of 2015. Tr. 594, 890.

The Company bargained over the implementation of the vacation procedures at the bargaining table in October. *See* Tr. 532.

4. The Creation of the Overtime Administrator Position

Early Company bargaining proposals proposed a method for scheduling overtime that it uses at many of its other facilities, whereby each team of employees is responsible for managing its own overtime. Tr. 1041; Jt.Ex. 1, Art. X, § 4 (“Each team shall be responsible for maintaining and calling for overtime as well as maintaining records for its members, as well as equalization of hours.”) Under this method, an individual hourly employee notifies the other employees on his or her team if he or she will not be coming in, and those employees must call another employee to come in. Tr. 1041. In the Company’s opinion, this works well as the employees thoroughly understand the overtime procedure. *Id.* Head rejected that proposal, so in the LBF Meadows removed it and specified that management, not individual teams of union employees, would be responsible for administering overtime. Tr. 1041; Jt.Ex. 8, Art. XI, § 4 at 2240.

After the Company implemented the provisions of its LBF it asked employees to work significant overtime, because over twenty (20) long-tenured employees retired, which put significant strain on the facility. Tr. 881. The Union filed a number of grievances with regard to overtime. Tr. 879; R.Ex. 48. The Company responded by attempting to alleviate some of these concerns by posting an overtime administrator non-traditional role. Tr. 219. It created the overtime administrator position pursuant to Art. VII (Bidding) and Art. IX (Hours of Work; Overtime and Holidays) of the LBF. Tr. 219, 883, 888; *see* Jt.Ex. 8 at 2235-36, 2239-43; GC Ex. 42; Tr. 371.

G. Alleged 8(a)(1) Statements

1. Roseberry

In 2015, then-Customer Service Operation Manager David Roseberry had no role in negotiating a successor collective bargaining agreement. Tr. 916. He went to no bargaining

sessions, no one from the Company ever asked him for input about what positions to take in bargaining, no one from the Company kept him updated about what was happening in bargaining, and no one showed him Union or Company proposals while the parties were negotiating. Tr. 916-17. Roseberry saw no bargaining proposals until he saw the LBF just before the Company implemented the terms of the LBF. Tr. 917-18.

In July 2015, Roseberry discussed retirement with Union Steward/Liquid Natural Polymer (“LNP”) Operator Michael Sarchett and then-Union Department Steward/Mobile Supply Operator Jeff King. Tr. 733; Tr. 745. At that time twenty-one (21) employees were planning to retire. Tr. 1088. Roseberry knew from general talk in the plant that Sarchett and King were among those thinking of retiring, but he did not seek out these employees to speak with them. Tr. 918. He happened to run into Sarchett in the shared accounting area of the front office. Tr. 918-19. Roseberry had known Sarchett for over 50 years and struck up a conversation by asking: “Hey, how's it going?” Tr. 919 (Rosebery). Sarchett responded, “Not so well. Have to make a decision whether to retire or not.” Id. Roseberry said that he was speaking to him as a friend and told Sarchett to talk to his financial advisor and to find out from the Union committee what the Company was offering, so that he could make an educated decision about what was best for him and his family. Id.

Roseberry typically spoke with King a couple times a week. Tr. 923. On this day Roseberry stopped and struck up a conversation with King by asking “how things were going.” Tr. 919. King mentioned that he was having to make a tough decision whether to retire or not. Id. King knew that Roseberry was not on the Company’s negotiating committee. Tr. 743. Roseberry told King, “Make sure you talk to your financial advisor and try to find out from your

Union committee what the company is offering so you can make an educated decision on your retirement." Tr. 920.

Roseberry never told Sarchett, King, or any other employees that he was sent to talk to them, that the Company would retain their current retirement benefits in the next collective bargaining agreement, not to retire, that a "better contract was coming," or that they would "like the Company's proposal." Tr. 920-21. He never told Sarchett, King, or any other employees anything to try to put pressure on the Union committee. Tr. 921. He never said anything to employees about what was negotiable and what was not. Id. He never told employees to get the Union to start negotiating. Id.

2. Vislisel

Plant Coordinator Dave Vislisel had no role in negotiating a successor collective bargaining agreement. Tr. 928. He never told employees that they would never return to work if they went on strike, that they might want to think long and hard about walking out on the Company, that the Company has "deep pockets," or that if they went on strike they might not get back in the door. Tr. 928-29. He never had any conversations with Building Ninety-Five (95) Operator Bruce Bishop about a potential strike. Tr. 928. Vislisel did not speak with General Utilities Employee Brandon Morris about voting on a contract in summer 2015. Tr. 929. He never told Morris that the Company's contract was a good offer, asked Morris why employees voted down the Company's proposed contract, or told Morris that he could not believe that employees voted down the Company's proposed contract. Id.

3. Swails

Wet Starch Maintenance Planner John Swails had no role in negotiating a successor collective bargaining agreement. Tr. 925. He never told Grind Operator Adam Beitz

that the Company offered the Union a good contract. He never told Beitz that the Union wanted everything and was not willing to give anything up. *Id.*

4. Bumba

Operations Lead Brad Bumba had no role in negotiating a successor collective bargaining agreement. Tr. 842. In September Beitz called Bumba and asked him to come to the millhouse control room to talk about the schedule. Tr. 844. At the end of the conversation, Bumba reiterated that he was not saying that it was the Union's fault. Tr. 847.

Bumba never told employees to remember why things were the way they were, or that he was "making a statement." Tr. 847.

II. QUESTIONS INVOLVED

- A. Did the Company violate § 8(a)(5) of the Act by engaging in surface bargaining?
This question relates to Exceptions 17-1073, 1210-11, and 1213-1254.
- B. Did the Company violate § 8(a)(5) of the Act by unlawfully delaying in providing information? This question relates to Exceptions 139-475, 585-675, 846, 956, 1214, 1219, 1223-24, and 1253-54.
- C. Did the Company violate § 8(a)(5) of the Act by unlawfully implementing the terms of its LBF? This question relates to Exceptions 17-1073, 1210-11, and 1213-54.
- D. Did the Company violate § 8(a)(5) of the Act by unilaterally changing terms and conditions of employment after implementing the terms of its LBF? This question relates to Exceptions 1073-1200, 1212, 1223-24, and 1252-53.

- E. Did the Company violate § 8(a)(1) of the Act by supervisors' statements? This question relates to Exceptions 30-138, 476-584, 686-691, 849, 959, 961, 1215-16, 1223-24, and 1253-54.
- F. Did the Company violate § 8(a)(5) of the Act by engaging in direct dealing? This question relates to Exceptions 30-138, 476-584, 686-691, 845, 849, 955, 961, 1213, 1223-24, and 1252-53.
- G. If yes to any of the foregoing, what is the proper remedy? This question relates to Exceptions 1069-72, 1225-1251, 1223-51, and 1253-54.
- H. Have the procedures required by the Act been followed? This question relates to Exceptions 1-16, 1201-1209, 1220-24, and 1252-54.

III. ARGUMENT

A. It Is Clearly Wrong to Credit Certain Testimony of the GC's Witnesses

1. The Testimony of Shannon and Eby Regarding Their April 6 Meeting with Meadows

Shannon and Eby's testimony is inconsistent in their allegations that Meadows discussed strike replacement, and the record shows that other Union leaders present for that meeting specifically *did not* recall any such statement Tr. 229-30, 352. 401; GC Ex. 55.

Shannon and Eby did not accurately recall the facts of the April 6 meeting. Shannon clearly did not remember who from the Company was even at that meeting. Tr. 225, 350-51; Tr. 939; GC Ex. 55; Tr. 861. Eby inaccurately testified that Meadows brought up manlifts. *See* Tr. 227; Tr. 940; Tr. 399.

Shannon and Eby's testimony conflicted regarding Meadows waving his hand. Tr. 228, 401. Both versions conflict with the Union's notes. Although GC Ex. 55 has notes about pension, it makes no reference to Meadows waving "bye bye" about that matter. Tr. 351.

2. The Testimony of Bishop, Rausch, Fuchs, and Kuddes Regarding Conversations During Meadows' Tour

The testimony of the General Counsel's witnesses regarding Meadows' tour on April 6 is in conflict and should not be credited on the following alleged facts:

- Meadows asking Bishop what he would like to see. Tr. 34 (internally inconsistent).
- Wood mentioning that Meadows was the lead negotiator." Tr. 33, 43.
- Meadows saying he would be back in May with a plan. Tr. 61 (no other support).
- Kluetz and Meadows having a conversation about recently-purchased radios. Tr. 62, 88.
- Employees bringing up manlifts having been shut down. Tr. 86.
- Ethanol Operator Jeff Rausch bringing up gap insurance, Tr. 57, Tr. 84, 671-73, 826, 867.
- Kuddes asking Meadows about a raise percentage and Meadows' response. Tr. 58, 672, 867.
- Discussion about a rotating maintenance schedule. Tr. 64, 60, 81, 87, 668.
- Discussion about pensions going away. Tr. 61, 85.

3. The Bargaining Testimony and Notes

Shannon's bargaining testimony and notes are clearly unreliable because:

- She testified only about what *her notes purport to say* about what happened. Tr. 222-379.
- She actively referred to her notes. Tr. 252, 347, 354.
- Her notes did not reflect the Union's only pre-impasse movement. Tr. 973; R.Ex. 67 at 6; R.Ex. 66 at 218; GC Ex. 8 at 3; GC Ex. 7.
- Her notes abruptly stop. *See* Tr. 316, 369; GC Ex. 7 at 23 (notes ending with "and we").
- Her notes editorialized negotiations from the Union's partisan point of view. GC Ex. 7 at 1 ("pathetic proposals"), 2 ("they have supplement in Indy!!!"), 8 ("transparency"), 22 ("Modification for retirees"); Tr. 256-57, 314.
- Her testimony clearly shows her partisan viewpoint. *See, e.g.*, Tr. 361-62.

- She was frequently unable to remember relevant facts. Tr. 354; *see, e.g.*, Tr. 258, 261, 264, 269, 270 (Lines 1, 22), 271 (Lines 2-3, 15); 272, 280, 282, 283, 291, 301, 304, 311 (Lines 3-4, 17), 314, 316, 321, 329, and 374.
- She could not recall to whom lines of her notes were attributed, or what the notes meant. Tr. 261, 264, 269, 271, 283, 286, 291, 301, 306, 308, 311, 312, 314, 316-17, 321, 329, 344.
- She incorrectly testified that the Company’s Final Offer contained no changes compared to its previous offer. Tr. 370; Jt.Ex. 7 at 432, 447-48.
- She incorrectly testified that the Union never said that it would only bargain from the Red Book. *See* Tr. 379; GC Ex. 7 at 22-23; Tr. 973, 976, 986, 991, 1014, 1017, 1019, 1035, 1044, 1047, 1049; Tr. 425, 439, 514; R.Ex. 67 at 6, 13, 23, 26, 39, 46, 51, 52; R.Ex. 66 at 218, 224, 225, 189, 191, 193, 196.
- She incorrectly testified that it was Meadows who said, “We will be paid by company.” Tr. 256; GC Ex. 7(a) at 1.
- She incorrectly testified that *Meadows* brought up the topic of a possible strike. *See* Tr. 255-56; GC Ex. 7(a) at 6; Tr. 978; R.Ex. 67 at 8.
- She incorrectly that *Meadows* said “I can give you a LBF” and that August 1 “may be a drop dead date” for him. Tr. 267-69; GC Ex. 7(a) at 7; Tr. 977; R.Ex. 67 at 8; GC Ex. 8 at 4.

Because Shannon testified almost entirely about *what her notes said* happened in bargaining, Eby was the only General Counsel witness who testified directly about what happened at the table.¹ But his notes and testimony are also unreliable because:

- He maintained bargaining notes in front of him as he testified. Tr. 404, 418, 422, 425-26, 428, 431-32, 455, 477.
- His testimony on important subjects is not supported by his own notes. Tr. 411, 412, 413, 447, 458, 459, 466, 493, 503; GC Ex. 8.
- Eby admittedly altered his notes at a later date. Tr. 573.
- His notes conflict his testimony. Tr. 413, 957, 972; GC Ex. 8 at 2, 3; R.Ex. 67 at 2, 5; R.Ex. 66 at 210.
- He incorrectly testified that Meadows stated that August 1 was a “drop dead date.” Tr. 480; GC Ex. 8 at 9.

¹ Eby missed at least one bargaining session. *See* Tr. 428 (Eby).

- He incorrectly testified inaccurately that Meadows said nothing about impasse before he presented the LBF. Tr. 499,1038-39; R.Ex. 67 at 42; GC Ex. 7 at 24.

Additionally, Eby demonstrated a willingness to lie under oath when it could help the General Counsel's case. He swore under oath in an affidavit to the NLRB: "From his initial proposal, Meadows wanted 125 concessions. From that list we are down to about 100 concessions." Tr. 567, 586-88. However, at the hearing, he refused to admit, *even after being confronted with his affidavit*, that the Company had changed or modified at least 25 Company proposals the Union had identified. Tr. 565-66. In that same affidavit, Eby swore under oath: "In the Employer's final offer, which was given at 4 p.m. on July 31, 2015, the Employer agreed to three of the Union's items, which were agreeing to extend the amount of time that someone on active military duty can receive health insurance" Tr. 570, 586-88. However, at the hearing, Eby refused to admit that the Company "agreed to the amount of time that someone on active military duty can receive health insurance." Tr. 569. Eby showed in his testimony that he was willing to lie about the core issues of this case.

4. The Testimony of Sarchett and King

Sarchett and King's testimony regarding their conversations with Roseberry should not be credited. Sarchett admitted from the start that he could not remember much of what Roseberry told him. Tr. 725. Incredibly, he later claimed that he *could* remember everything that was said with Roseberry, word for word. Tr. 730. However, his testimony confirmed that he did not recall enough to testify with sufficient specificity. Tr. 725, 728, 729. He even contracted his own, short testimony. He first testified that he was in then-Payroll Benefits Administrator Ann Junge's office when Roseberry first told him, "Do not sign that." Tr. 724. Then he testified that Roseberry first approached him in the hall after he had left Junge's office. Tr. 726.

King admitted that when Roseberry was talking to him he was “not really listening” to what Roseberry was saying. Tr. 739. He testified that he was not a union steward at the time, and had not been a steward since the early 1990s. Tr. 744. When confronted with an affidavit he gave under oath, he then testified that he, in fact, *was* a union steward at the time. Tr. 745. He excused himself by saying that he “didn’t have the office that long.” *Id.* But he had held the office since the flood, which occurred seven to eight years earlier, in 2008. Tr. 746, 823. He testified that he kept “good law and order on his shift,” which makes it even more incredible that he would have forgotten that he was a steward at all. Tr. 746.

5. The Testimony of Bishop Regarding Vislisel’s Alleged Threat

Bishop testified that Vislisel told him, “You boys, you might want to think long and hard about walking out on these people. They’ve got the deep pockets and lots of plants that make the same thing you do. You may not get back in the door if you go out.” Tr. 38. He testified that this statement meant that he could not say that in 2015 no one ever said anything to him personally about being replaced. Tr. 46. However, once he was confronted with an affidavit he gave under oath on August 1 (within a month of when the Complaint alleges this conduct took place), Bishop agreed that no one told him that he was personally going to be replaced. Bishop’s testimony regarding his conversation with Vislisel is not credible.

6. Adverse Inferences

The General Counsel’s evidence relied heavily on testimony for which the ALJ clearly should have drawn adverse inferences. Int’l Automated Machines, Inc., 285 NLRB 1122, 1123 (1987); Teamsters Local 418, 254 NLRB 953, 955 n.4 (1981) (the testimony about what occurred at the bargaining table contrasted, but the union president had not testified); Mail Contractors of Am., Inc., 346 NLRB 164, 166 (2005) (absent witness was “still president . . . at the time of the hearing and no sufficient explanation was offered for his nonappearance.”)

Adverse inferences should clearly be drawn against the following testimony, because the General Counsel did not call potential corroborating witnesses reasonably be assumed to have been favorably disposed to his case, and gave no explanation for their absence:

- Shannon and Eby's testimony about the April 6 meeting. Then-VP Matt Employees Matt and Employee Vaude Wilford were present. Tr. 397.
- Bargaining testimony of Shannon and Eby. Glaringly absent from the record is any testimony from the Union's lead negotiator, Head, who at the time of hearing he was the International Representative for the Charging Party. Tr. 127. The adverse inference is especially appropriate for bargaining testimony about what Head did and said during bargaining and what others said to Head during bargaining.
- Bishop's testimony about his alleged conversation with Vislisel. Bishop testified that Vaude Wilford was in the room at the time. Tr. 38.
- Beitz's testimony about his alleged conversations with Swails and Bumba. Beitz testified that two other employees were in the room when Swails made allegedly unlawful statements, and that Employee Austin Coufal was present when Bumba made allegedly unlawful statements. Tr. 648.
- Sarchett's testimony. King testified that Karen Sarchett was present. Tr. 741.

B. The Company Did Not Violate § 8(a)(5) of the Act by Engaging in Surface Bargaining.

1. The Union's Own Bad Faith Bargaining Released the Company from Its Duty to Bargain in Good Faith.

Determining whether an employer is bargaining in good faith first requires the Board to look at the union's conduct. An employer's compliance with its duty under the Act cannot be challenged if the union has engaged in unlawful bargaining. *See Louisiana Dock Co. v. NLRB*, 909 F.2d 281 (7th Cir. 1990); *Chicago Tribune Co.*, 304 NLRB 259 (1991); *Remington Lodging*, 359 NLRB No. 95 (Apr. 24, 2013); *United Food & Comm'l Workers Int'l Union v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993); *NLRB v. Hi-Tech Cable Corp.*, 128 F.3d 271 (5th Cir. 1997); *Omaha Typographical Union, No. 190 v. NLRB*, 545 F.2d 1138, 1143 (8th Cir. 1976).

A “totality of the circumstances” analysis applies to the union’s conduct. *See* Leader Communications, 359 NLRB No. 90 (Apr. 10, 2013); Borg-Warner Controls, 198 NLRB 726 (1972). Basic points the Board considers include willingness to meet, consideration of proposals, making counterproposals, responses to information requests, explanations given for proposals, and sincerity with which a party's positions are taken and held. *See* St. George Warehouse Inc., 349 NLRB 870 (2007); Allied Mechanical Serv., Inc., 332 NLRB 1600 (2001); Sign & Pictorial Union Local 1175 v. NLRB, 419 F.2d 726 (D.C. Cir. 1969); NLRB v. Hi-Tech Cable Corp., *supra*; NLRB v. Columbia Tribune Pub. Co., 495F.2d 1384, 1391 (8th Cir. 1974).

The Union demonstrated an unwillingness to meet with the Company. Tr. 964-65, 980, 1007, 1008, 1017, 1024, 1047, 1071; R.Ex. 35; R.Ex. 67 at 3, 20, 31, 33, 51; R.Ex. 66 at 210; GC Ex. 8 at 2. *See* Barclay Caterers, 308 NLRB 1025, 1035-37 (1992) (delay tactics such as scheduling limited meetings, canceling meetings, and last minute changes to meeting dates and times are evidence of bad faith bargaining); Cable Vision, Inc., 249 NLRB 412, 420 (1980); NLRB v. Blevins Popcorn Co., 659 F.2d 1173 (D.C. Cir. 1981); NLRB v. Big Three Industries, Inc., 497 F.2d 43 (5th Cir. 1974).

The Union adopted a “take it or leave it approach,” unwilling to even consider Company proposals unless the Company bargained from the Red Book. Tr. 957, 961, 973, 976, 986, 991, 1014, 1017, 1019, 1035, 1044, 1047, 1049; Tr. 425, 439, 514; R.Ex. 67 at 2, 6, 13, 23, 26, 39, 46, 51, 52; R.Ex. 66 at 201, 218, 224, 225, 189, 191, 193, 196; GC Ex. 7 at 22-23. *See* Presbyterian Univ. Hosp., 320 NLRB No. 30 (1995); Teamsters Local 418, 254 NLRB 953, 957 (1981) (“As noted by the Supreme Court, it was the intent of Congress when enacting § 8(b)(3) of the Act to ‘prevent employee representatives from putting forth the same ‘take it or leave it’

attitude that had been condemned in management.’’); Teamsters Local Union No. 515 v. NLRB, 906 F.2d 719 (D.C. Cir. 1990); NLRB v. Big Three Industries, Inc., 497 F.2d 43 (5th Cir. 1974).

The Union’s insistence on using the Red Book narrowed the procedures for negotiations, which is evidence of bad faith bargaining because it put a procedural straightjacket on bargaining. Tr. 961, 973, 976, 986-87, 991, 1014, 1017, 1019, 1035, 1044, 1045, 1049, 1056, 1119; Tr. 425, 439; R.Ex. 67 at 2, 6, 13, 23, 26, 46, 52; R.Ex. 66 at 218, 219, 224, 193, 191, 196; Jt.Ex. 15. *See* Cal-Pac. Furniture Mfg. Co., 228 NLRB 1337, 1342 (1977) (holding that insistence on a bargaining procedure whereby parties would agree on economic matters before discussing economic matters “is the type of conduct antithetical to good-faith bargaining and exhibits a cast of mind against reaching agreement”).

The Union held true to its promise to not respond to the Company’s proposals. *See, e.g.*, Tr. 957; R.Ex. 67 at 1 (“Jethro . . . No need for in depth questions”). At the same time, the Union did not explain its proposals to the Company. *See, e.g.*, Tr. 971-72, 1054; R.Ex. 67 at 55; R.Ex. 66 at 199 . Even when the Union analyzed the Company’s proposals and generated an extensive list of what it considered to be concessions, it did not share that information with the Company until weeks later. R.Ex. 39; Tr. 429-31, 461, 575-76.

The Union’s lack of desire to reach agreement is further underscored by its resistance to inviting a mediator to bargaining. *See* Tr. 978; R.Ex. 67 at 8; APT Med. Transp., Inc., 333 NLRB 760, 767 (2001); Teamsters Local Union No. 515 v. NLRB, 906 F.2d 719 (D.C. Cir. 1990); NLRB v. Hi-Tech Cable Corp., 128 F.3d 271 (5th Cir. 1997).

Head created an atmosphere that frustrated bargaining by personally attacking Meadows and threatening violence against him. *See* Tr. 454; Tr. 999, 1035; R.Ex. 67 at 41.

In addition to showing bad faith by its words and actions in bargaining, the Union demonstrated its intention to frustrate bargaining through its proposals. *See Phelps Dodge Specialty Copper Products Co.*, 337 NLRB 455, 457 (2002); *Sign & Pictorial Union Local 1175 v. NLRB*, 419 F.2d 726 (D.C. Cir. 1969); *NLRB v. Hi-Tech Cable Corp.*, 128 F.3d 271 (5th Cir. 1997). From the start of bargaining until the Company presented its LBF, the Company adjusted its proposals directly in response to the Union's proposals 46 times, but the Union withdrew only one, minor, proposal for herbal tea and stirrer sticks. Tr. 564. It accepted only the handful of Company proposals that benefited the Union. GC Ex. 8 at 3. During that time it presented only two comprehensive proposals, and the second proposal contained a number of terms that were regressive compared to its first. *Compare* Jt.Ex. 10 *with* Jt.Ex. 11 at 567 and 569. The Union waited until August 18 to make its first wage proposal. Tr. 1047, 1114.

The Union frustrated bargaining by design, not by accident. The Union's bargaining committee fully expected that the Company would seek to align the Cedar Rapids contract with other Company contracts and to meet its operational plans for the facility. *See* Tr. 389-91, 554; Tr. 226. With the help of Head, an experienced negotiator, it should have understood how to engage in the give-and-take of bargaining to reach agreement. *See* Tr. 425, 557. Instead, the Union "dug in its heels," aiming to frustrate bargaining in the hopes that it could maintain the Red Book, and it maintained that stance until after the parties reached impasse and the Company implemented the terms of its LBF.

In sum, only one party—the Union—has engaged in bad faith bargaining. Although the Company has in fact at all times bargained in good faith with the Union, the Union engaged in exactly the type of conduct alleged by the Complaint. The Union's bad faith makes the bad faith allegations against the Company a nullity.

2. The Company Has At All Times Bargained With The Union In Good Faith.

In any event, the record shows that Penford has at all times bargained in good faith with the Union. To determine whether a party has bargained in good faith, the Board will review the entire bargaining process and the circumstances in which bargaining occurred. *See Am. Commercial Lines*, 291 NLRB 1066, 1078 (1988); *Sign & Pictorial Union Local 1175 v. NLRB*, 419 F.2d 726 (D.C. Cir. 1969); *NLRB v. Hi-Tech Cable Corp.*, 128 F.3d 271 (5th Cir. 1997); *Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376, 1381 (8th Cir. 1993). “[I]n determining good faith, the Board should examine the totality of the circumstances.” *Leader Commc'ns, Inc.*, 359 NLRB No. 90 (Apr. 10, 2013). “It is the total picture shown by the factual evidence that either supports the complaint or falls short of the quantum of affirmative proof required by law.” *Borg-Warner Controls*, 198 NLRB 726 (1972).

Basic points the Board considers include willingness to meet, consideration of proposals, making counterproposals, responses to information requests, explanations given for proposals, and sincerity with which a party's positions are taken and held. *See St. George Warehouse Inc.*, 349 NLRB 870 (2007); *Allied Mechanical Serv., Inc.*, 332 NLRB 1600 (2001); *Sign & Pictorial Union Local 1175 v. NLRB*, 419 F.2d 726 (D.C. Cir. 1969); *NLRB v. Hi-Tech Cable Corp.*, 128 F.3d 271 (5th Cir. 1997); *NLRB v. Whitesell Corp.*, 638 F.3d 883, 890 (8th Cir. 2011).

However, § 8(d) of the NLRA explicitly “does not compel either party to agree to a proposal or require the making of a concession.” National Labor Relations Act, 29 U.S.C. § 151 et seq. Thus, the Board does not sit in judgment upon the substantive terms of collective bargaining agreements. *Chevron Chem. Co.*, 261 NLRB 44, 46 (1982); *Regency Service Carts*, 345 NLRB 671 (2005); *Sign & Pictorial Union Local 1175 v. NLRB*, 419 F.2d 726 (D.C. Cir.

1969); NLRB v. Hi-Tech Cable Corp., 128 F.3d 271 (5th Cir. 1997); Wal-Lite Div. of U.S. Gypsum Co. v. NLRB, 484 F.2d 108, 111 (8th Cir. 1973).

a. **The Company Was More Than Willing to Meet and Bargain with the Union.**

The Complaint alleges surface bargaining during the period from about June 1 through September 11. GC Ex. 3, ¶¶ 11, 14. During that time, the parties held a total of 25 sessions. *See* Jt.Ex. 29; Tr. 955-1063. During this time the Company asked the Union to bargain *even more* frequently. Tr. 965, 1071; R.Ex. 67 at 3; GC Ex. 8 at 2; R.Ex. 66 at 210. The Company was also willing to extend bargaining on the days when the parties bargained. *See, e.g.*, Tr. 1017, 1024; R.Ex. 67 at 31, 33. Additionally, the Company diligently prepared for bargaining to ensure efficiency during bargaining. Tr. 100, 947-49, 767.

b. **The Company Drafted Its Proposals in Good Faith.**

The facts also show that the Company drafted its proposals in good faith. The rationales for the Company's proposals were legitimate, not designed to frustrate agreement. Tr. 948-49, 1056, 1085; R.Ex. 16. The package of terms proposed by the Company was different from that of the Red Book, but it was not designed to frustrate bargaining. Jt.Ex. 1 at 1965-70; Tr. 786, 803, 984; Jt.Ex. 16 at 9604, 9636, 9676; Jt.Ex. 8 at 2230, 2234-35, 2243-46, 2250-51, 2257; GC Ex. 32; R.Ex. 40. It was designed to align with union contracts at the Company's other plants, where unions effectively represent employees.

c. **The Conduct and Statements of the Company's Bargaining Team Evidences its Intention of Reaching Agreement.**

Meadows dealt with the Union in a collaborative and respectful way, communicating the Company's bargaining interests and asking the Union to do the same. Tr. 935,956, 959-60, 1074, 1076, 1087; Tr. 255; Tr. 410-11; R.Ex. 29; GC Ex. 15. R.Ex. 67 at 1;

R.Ex. 66 at 210. He expressed to the Union his intentions of reaching a contract. Tr. 957, 992-93, 980, 1071; R.Ex. 35; R.Ex. 67 at 1, 3; R.Ex. 66 at 210, 225; GC Ex. 7 at 1; GC Ex. 8 at 1, 2; R.Ex. 38. He tried to steer the parties toward substantive bargaining. Tr. 986-87, 1017, 1045, 1049, 1051, 1115; R.Ex. 67 at 31, 46-47, 50-51, 52; R.Ex. 66 at 195, 197-98, 224. At no point did he threaten the Union with impasse. *See, e.g.*, Tr. 965. Tr. 957, 964; R.Ex. 67 at 2; R.Ex. 66 at 210. Never on June 30 did the Company tell the Union that it intended to prepare an LBF. GC Ex. 3 at 8; Tr. 979; R.Ex. 67 at 7-9; R.Ex. 66 at 219. Meadows never sought to impose deadlines on negotiations. Tr. 427, 977; R.Ex. 67 at 8; GC Ex. 8 at 4.

In the course of the parties' bargaining Meadows never personally attacked anyone on the Union bargaining committee, even when Head personally attacked him and threatened him with violence. *See* Tr. 999, 1007, 1035; R.Ex. 67 at 41. After bargaining about the flower fund became emotional, Meadows took the initiative to discuss the issue with a conciliatory tone. *See* Tr. 289, 455, 999.

Additionally, even if the General Counsel could succeed in showing that the Company engaged in isolated misconduct at the bargaining table, which he cannot, it would not be dispositive to the surface bargaining allegation. *See, e.g., Logemann Bros. Co.*, 298 NLRB 1018, 1021 (1990) (overlooking comments that it would be "their agreement" or "one at all" [sic] and "it is this contract or none," and stating that "[a]lthough some statements by negotiating parties may show an intention not to bargain in good faith, the Board is especially careful not to throw back in a party's face remarks made in the give-and-take atmosphere of collective bargaining. 'To lend too close an ear to the bluster and banter of negotiations would frustrate the Act's strong policy of fostering free and open communications between the parties.'") (quoting

Allbritton Communications, 271 NLRB 201, 206 (1984), *enfd.* 766 F.2d 812 (3d Cir. 1985), *cert. denied* 474 U.S. 1081 (1986).

d. **Meadows Always Considered Proposals Made and Issues Raised by the Union.**

As discussed later, the Company's written proposals clearly show that it was considering and responding to proposals made and issues raised by the Union. In addition, the record is replete with other examples of Meadows considering and responding to each and every proposal presented and issue raised by the Union throughout bargaining: on June 1, *see* Tr. 958-59; R.Ex. 67 at 2; R.Ex. 66 at 210; Jt.Ex. 10 at 572 (Wood in margin); GC Ex. 7 at 1; GC Ex. 8 at 1, on June 29, *see* Tr. 969-70; Tr. 415-16; R.Ex. 67 at 4; R.Ex. 66 at 217; Tr. 261; GC Ex. 7 at 3; Tr. 415; GC Ex. 8 at 3. Jt.Ex. 10 at 574 (referencing 2013 extension agreement, Jt.Ex. 16 at 9684), on July 28, Tr. 996, 998; Tr. 453; R.Ex. 67 at 16-19; Jt.Ex. 24 at 913; R.Ex. 66 at 227; GC Ex. 7 at 9, on July 29, Tr. 292, 295, 1010, 1012-13; R.Ex. 67 at 21-28, Tr. 833; GC Ex. 7 at 13, 14-17, on July 31, Tr. 1031, 1077; R.Ex. 67 at 37; Tr. 486, on August 18, Tr. 501-502; Tr. 1044, 1047, 1114; R.Ex. 67 at 47-51; R.Ex. 66 at 195, and on September 10, Tr. 1052, 1119.

The General Counsel has not presented evidence of *any* instance of the Company refusing to consider a Union proposal. The record evidence instead shows that the Company did consider Union proposals, both by its words and, as discussed later, by its actions in drafting its proposals that responded to those of the Union.

e. **Meadows Made Extraordinarily Good Faith Efforts to Plainly Present and Explain the Company's Proposals.**

The Company went to extraordinary lengths to plainly present and explain its proposals and its rationales for those proposals, frequently pointing out how its proposals compared and contrasted with the Red Book and the Union's proposals. This is evidence of the

Company's good faith. *See* Frontier Dodge, 272 NLRB 722, 730 (1984) (employer's willingness to consider Union's proposals and willingness to explain and modify own proposals was evidence of good faith); Sign & Pictorial Union Local 1175 v. NLRB, 419 F.2d 726 (D.C. Cir. 1969); NLRB v. Hi-Tech Cable Corp., 128 F.3d 271 (5th Cir. 1997).

The record shows that Meadows made extraordinary efforts to plainly present and explain its proposals throughout bargaining: on **June 1**, Tr. 956-57, 960-64, 1074; R.Ex. 67 at 1-3; R.Ex. 66 at 210; Jt.Ex. 1 at 1966, 1971, 1975, 1976, 1978; Tr. 411-12; GC Ex. 7 at 2; on **June 30**, Tr. 975-76; Tr. 424; Tr. 424-25; R.Ex. 67 at 7; R.Ex. 66 at 219; Jt.Ex. 2; on **July 28**, Tr. 988-91; 997-98; Tr. 289; Jt.Ex. 3; Tr. 433, 436, 439, 451; Tr. 287; R.Ex. 67 at 12, 19; R.Ex. 36; R.Ex. 67 at 12; Tr. 439; R.Ex. 66 at 225; on **July 29**, Tr. 1009-10; Jt.Ex. 4; R.Ex. 67 at 21-22; Tr. 833; GC Ex. 7 at 13; on **July 30**, Tr. 1023; Jt.Ex. 5; on **July 31**, Jt.Ex. 6; Tr. 1026, 1029-31, 1030-32, 1077, 1081-82; R.Ex. 67 at 36-37; Tr. 485, 841; Tr. 311-12; R.Ex. 66 at 231; and on **August 17**, Tr. 1039-1043, 1046, 1106-12; Tr. 496-98; R.Ex. 67 at 42-43; R.Ex. 67 at 192; Tr. 321; GC Ex. 7 at 24.

Meadows did this by explaining his rationales for the Company's proposals, marking changes in all drafts that were presented to the bargaining committee (except in those proposals that would be given directly to employees), explaining the substance of the proposals and how they related to the Red Book, and creating and giving the Union a summary document that helped compare the Company's current proposals to the structure of the Red Book.

f. The Company Frequently Adjusted Its Proposals Based on the Union's Proposals and Statements.

The Company has made numerous proposals to-date, modifying proposals and withdrawing others based on the course of negotiations. This give-and-take by the Company is indicative of the Company's good faith bargaining with the Union. *See* Frontier Dodge, *supra*;

Phelps Dodge Specialty Copper Products Co., 337 NLRB 455, 457 (2002); Sign & Pictorial Union Local 1175 v. NLRB, 419 F.2d 726 (D.C. Cir. 1969); NLRB v. Hi-Tech Cable Corp., 128 F.3d 271 (5th Cir. 1997).

Here, not only did Meadows consider and respond to the Union's proposals, he also frequently adjusted the Company's proposals directly in response to the Union's stated positions in bargaining. The Company made at least forty-six (46) modifications to its proposals in response to the Union's bargaining positions. Jt.Ex. 2 at 2008, 2018, 2019; Jt.Ex. 3 at 2051, 2052, 2054, 2058, 2062, 2063, 2064, 2069; Jt.Ex. 4 at 2089-90, 2091, 2092, 2093, 2095, 2098, 2103, 2104, 2106; Jt.Ex. 5 at 2117, 2122, 2123, 2124-25, 2126, 2135; Jt.Ex. 6 at 2182, 2184, 2188; Jt.Ex. 7 at 432, 447, 448, 454; Jt.Ex. 8 at 2228, 2230, 2233, 2234, 2240, 2241, 2250, 2253, 2260, 2261; Jt.Ex. 9 at 2263.

The Company's adjustments to its proposals directly responded to proposals in the Union's June 1st and June 29th proposals, the twenty-one (21) items the Union raised as part of a request for information, the Union's list of concessions, and the terms of the Red Book (to which the Union had repeatedly asked the Company to revert). *See* Jt.Ex. 10 at 571, 572, 573; Jt.Ex. 11 at 568, 569; Jt.Ex. 16 at 9609, 9618, 9622, 9625, 9629, 9636; Jt.Ex. 23 at 588-91; R.Ex. 39 at 559, 560, 561.

g. The Company Enlisted the Help of a Federal Mediator.

The Company requested the help of a mediator, which is evidence of good faith in bargaining. Tr. 978-79; R.Ex. 67 at 8; R.Ex. 34; Jt.Ex. 29. *See* APT Med. Transp., Inc., 333 NLRB 760, 767 (2001); Teamsters Local Union No. 515 v. NLRB, 906 F.2d 719 (D.C. Cir. 1990); NLRB v. Hi-Tech Cable Corp., 128 F.3d 271 (5th Cir. 1997).

h. The Surrounding Facts Demonstrate that the Company Bargained in Good Faith.

The Company's conduct prior to June 1 also helps show that the circumstances in which bargaining occurred were marked by good faith on the part of the Company. *See Am. Commercial Lines*, 291 NLRB 1066, 1078 (1988).

The Company is not anti-Union. Tr. 74, 173, 931-32, 1097; R.Ex. 11. It continued to hold Labor Relations Meetings after it purchased the Cedar Rapids plant. Tr. 227, 396, 559, 858-59, 934-35, 940-43; GC Ex. 11, 13, and 40; R.Ex. 12. Meadows personally maintained open communication with the Union prior to bargaining. Tr. 227-28, 399, 940-41. Meadows is an extremely experienced negotiator who understands the Company's obligation to deal with the Union in good faith. Tr. 947-48.

i. Other Ancillary Conduct Alleged by the General Counsel Does Not Constitute Surface Bargaining.

The Complaint alleges the Company undermined and denigrated the Union, delayed in providing information, and dealt directly with employees. GC Ex. 3 at 8. As discussed later, the Company adamantly denies that it violated the Act as alleged. Even if it had, to the extent unlawful statements were directed to union stewards and officials, they cannot serve as evidence of undercutting the Union's status as collective-bargaining representative. *See Am. Stores Packing Co.*, 277 NLRB 1656, 1659 (1986). Moreover, even if the Company had engaged in this conduct as alleged, which it did not, it would not necessarily support a finding that the Company engaged in surface bargaining. *See, e.g., Roman Iron Works*, 275 NLRB 449, 453 (1985) (noting that employer's unlawful unilateral wage increase *during bargaining* was more directly related to the issue of surface bargaining than a refusal to provide information, but nonetheless holding that the unilateral changes did not necessarily demonstrate an intent to avoid entering into a contract); *ConAgra, Inc. v. NLRB*, 117 F.3d 1435 (D.C. Cir. 1997).

j. Conclusion

For all of the reasons discussed above, there is ample evidence that the Company engaged in good faith bargaining with the Union. The Company always was willing to meet and bargain with the Union, drafted its proposals in good faith, conducted itself in a manner consistent with its intention to reach agreement, considered the Union's proposals, and adequately explained its own proposals. The Company frequently adjusted its proposals in response to the Union's bargaining positions, and enlisted the help of a federal mediator. The surrounding facts demonstrate that even before bargaining began the Company worked to create an atmosphere of good faith in which the parties could successfully bargain. Finally, although the Company did not engage in other unlawful conduct, there would be insufficient evidence to derive a surface bargaining finding from such violations. On the whole, the record does not show that the Company, in the totality of the circumstances, engaged in surface bargaining. *See Litton Microwave Cooking Products*, 300 NLRB 324, 327 (1990); *Sign & Pictorial Union Local 1175 v. NLRB*, 419 F.2d 726 (D.C. Cir. 1969); *NLRB v. Hi-Tech Cable Corp.*, 128 F.3d 271 (5th Cir. 1997).

C. The Company Did Not Unlawfully Delay in Providing Information.

“In determining whether an employer has unlawfully delayed responding to an information request, the Board considers the totality of the circumstances surrounding the incident.” *West Penn Power Co.*, 339 NLRB 585, 587 (2003). “There is, of course, no duty to provide information that does not exist.” *American Benefit Corp.*, 354 NLRB 1039, 1053 (2010); *Whittier Area Parents' Ass'n*, 296 NLRB 817, 819 n.2 (1989); *Int'l Brotherhood of Elec. Workers Local 1466, AFL-CIO v. NLRB*, 795 F.2d 150 (D.C. Cir. 1986) (noting that the Board recognized that employer could not give union information that employer did not possess); *Sara Lee Bakery Group, Inc. v. NLRB*, 514 F.3d 422 (5th Cir. 2008).

When an employer does not have relevant information requested by the union, it must make a reasonable effort to secure that information from third parties and, if it is thereafter unable to do so, it must then explain the reasons for its continued unavailability. *See Hanson Aggregates*, 353 NLRB 287 (2008). Here, the record shows that the Company fulfilled its obligations to provide information as promptly as the circumstances allowed, considering “the complexity and extent of information sought, its availability and the difficulty in retrieving the information.” *Id.*, citing *House of Good Samaritan*, 319 NLRB 392, 398 (1995); Tr. 414-15, 574, 968, 974, 978-79; Jt.Ex. 19; R.Ex. 67 at 4, 10; GC Ex. 7 at 3; GC Ex. 9(b). “It is sufficient if the information is made available in a manner not so burdensome or time consuming as to impede the process of bargaining.” *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956) 7); *Oil, Chemical & Atomic Workers Local Union No. 6-418, AFL-CIO v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983).

As of June 30, the Company had fulfilled its obligations. It had provided all information in its possession relevant to the renewed information requests, explained the reasons for the continued unavailability of further information responsive to the requests, and given an estimate of when further information might be available. *See Hanson Aggregates, supra*. After June 30, the Union made a number of other requests for information, but of the three categories of information at issue in the Complaint, it renewed only one of them. *See Jt.Ex. 21*. The Company immediately responded to that renewed request. Tr. 982-83; Jt.Ex. 22. As the Union continued to request information, the Company continued to fulfill its obligations by responding and providing further information. It did so after the Union’s July 14 request, Jt.Ex. 21; Jt.Ex. 17; GC Ex. 9(b); Tr. 982-83; Jt.Ex. 22, July 28 request, Jt. Ex. 23; Tr. 447, 993-95,

1020; Jt.Ex. 24; Jt.Ex. 25; R.Ex. 67 at 14, and July 30 request, Jt.Ex. 26; GC Ex. 9(b); Jt.Ex. 18; Tr. 414-15, 191, 955, 968; R.Ex. 67 at 4; GC Ex. 7 at 3.

The July 30 request requested information the Company had already provided, thereby fulfilling its obligation. *See, e.g., Finley Hospital*, 362 NLRB No. 102 (2015) (“As to the information requests concerning work-related illness, Respondent had already provided the Union with the 2004, 2005 OSHA logs in response to another information request, *and it was not required to reprovide them.*”) (citations omitted, emphasis added); *Watts v. Securities & Exchange Comm’n*, 482 F.3d 501 (D.C. Cir. 2007) (Courts must consider whether discovery is duplicative); *Selkirk Metalbestos, N. Am., Eljer Mfg., Inc. v. NLRB*, 116 F.3d 782 (5th Cir. 1997). Nonetheless, the Company reprovided the information, plus additional information it thought might be responsive. Tr. 1022; R.Ex. 67 at 33; Tr. 477. The Company then made a successful effort to obtain further information potentially responsive to the requests, and provided it sooner than even the Union expected. *See* R.Ex. 66 at 230; R.Ex. 67 at 33; Jt.Ex. 27; Jt.Ex. 28; Tr. 1025.

The Company fulfilled its obligation to respond to the Union’s voluminous and highly complex information requests. The Company consistently made diligent efforts to obtain requested information, provided that information, requested responsive information from third parties, explained the status of temporarily unavailable information, and shared with the Union when it did not understand what else the Union was requesting and when it thought it had already provided relevant information. It provided over 1,000 pages of responsive documents to the Union’s requests for voluminous information. *See* Jt.Exs. 18, 19, 20, 24, 25, 27, 28.

The Complaint alleges that the Company delayed in providing a tiny fraction of this information. Even in those cases, the Company fulfilled its obligations to provide

information when not all information was under its control. In sum, the Company made extraordinary efforts to provide information the Union had requested. The Union delayed in informing the Company that it was dissatisfied with its requests, but upon being so informed, the Company consistently responded by providing all information under its control that it thought might be responsive.

In the end, the Complaint does not allege any delay in providing information past July 31. This was less than three (3) months from the time of the Union's initial request, during which time the Company engaged in the good faith efforts described above to fully comply with the complex information requests. *See Dallas & Mavis Forwarding Co.*, 291 NLRB 980, 984 (1988) (Finding no violation for (7)-month delay where justified by the circumstances). By its own delay the Union waived its right, not to obtain the information at all, but to obtain the information earlier than the Company was able to provide it. *See, e.g., Dupont Dow Elastomers LLC*, 332 NLRB 1071, 1085 (2000).

Counsel for the General Counsel has failed in its burden to prove that the Company violated the Act by virtue of its information request responses.

D. The Employer Lawfully Implemented Certain Terms of Its LBF after the Parties Reached Impasse.

a. The Parties Reached and Remained at Impasse.

The record demonstrates that the parties reached impasse and, therefore, that the Company's implementation of its LBF was entirely appropriate and lawful. Like a proper analysis of surface bargaining allegations, analyzing impasse requires examining the totality of the record evidence. *Grinnell Fire Prot. Sys. Co.*, 328 NLRB 585, 585 (1999). Here, the evidence is voluminous but, as discussed later, clearly shows how the parties reached impasse.

The Union and Company disagreed from the start regarding the Union's proposal that the parties bargain from the Red Book. Over the next two and a half months the Company essentially bargained against itself, adjusting its proposals until it no longer had further room to adjust them. The parties remained helplessly deadlocked over the Union's proposal for how to approach bargaining. The parties saw that they were at impasse when the Company had nothing left to give the Union, but the Union still refused to adjust its positions. The Company waited for nearly another month to see if the Union would change its position and break the stalemate, but the Union continued to insist on the very issue that had caused the deadlock in the first place. When the Company saw that there was no chance that a change in the Union's bargaining position might renew the possibility of reaching agreement, it implemented the terms of its LBF. After that it continued to bargain in good faith with the Union in the hope that a change in circumstances would break the impasse.

The Board will examine the totality of the record evidence, but will typically look at several factors in determining whether parties have actually reached an impasse, including:

- bargaining history;
- the good faith of the parties in negotiations;
- the length of the negotiations;
- whether the parties involved a federal mediator;
- the importance of the issues over which there is disagreement;
- contemporaneous understanding of the parties; and
- the firmness of the employer's position.

See Am. Golf Corp. d/b/a Badlands Golf Course, 350 NLRB 264, 273 (2007); Paccar Automotive, Inc., 320 NLRB 854, 857 (1996); Monmouth Care Ctr. v. NLRB, 672 F.3d 1085 (D.C. Cir. 2012); Carey Salt Co. v. NLRB, 736 F.3d 405 (5th Cir. 2013); NLRB v. Whitesell Corp., *supra*. All of these factors show that the parties reached impasse here.

The parties benefited in negotiations from their bargaining history. Tr. 74, 173, 222, 381-83, 396, 554-56, 767, 818, 859, 932, 934-36, 1087; GC Exs. 13, 40; R.Ex. 12.

Although the plant had a new owner, because the Company did not try to set initial terms and conditions of employment, the parties did not need to negotiate an *initial* contract; the parties' bargaining beginning in summer 2015 was for a *successor* contract. Moreover, this is not an instance of either side being poorly represented at the bargaining table. Tr. 226, 389-91. 425, 554, 557.

As previously discussed in detail, the Company bargained in good faith with the Union. One element of that good faith was the Company's willingness to meet. The Company never refused to meet with the Union or cut short any bargaining sessions. See Calmat Co., 331 NLRB 1084 (2000) (indicating that, when parties have previously negotiated contracts and where the employer has not cut sessions short or refused to meet with the union, the Board favors a finding of impasse); Monmouth Care Ctr. v. NLRB, 672 F.3d 1085 (D.C. Cir. 2012); Carey Salt Co. v. NLRB, 736 F.3d 405 (5th Cir. 2013).

The parties held extensive negotiations before the Company implemented the terms of its LBF. Jt.Ex. 29; Tr. 955-1063. During this time the Company had asked the Union to bargain *even more* frequently. See Tr. 965, 1071; R.Ex. 67 at 3; GC Ex. 8 at 2; R.Ex. 66 at 210; see PRC Recording Co., 280 NLRB 615, 635 (1977) (noting that the longer the period of bargaining, and the more meetings between the parties, the more likely impasse will be found); Laurel Bay Health & Rehab. Ctr. v. NLRB, 666 F.3d 1365 (D.C. Cir. 2012); NLRB v. Powell Elec. Mfg. Co., 906 F.2d 1007 (5th Cir. 1990).

The parties involved a federal mediator. Tr. 979; R.Ex. 34; Jt.Ex. 29. His involvement weighs in favor of finding impasse. See Mission Mfg. Co., 128 NLRB 275, 287

(1960) ("Some indication that the bargaining had reached a general bedrock area was the fact that a Federal mediator was called in by the Union"); NLRB v. Blevins Popcorn Co., 659 F.2d 1173 (D.C. Cir. 1981); NLRB v. Hi-Way Billboards, Inc., 473 F.2d 649 (5th Cir. 1973).

At the time they reached impasse, the parties disagreed about *every* issue in bargaining, including all the most important terms and conditions of employment. Indeed, the parties had *no agreements at all*. Tr. 976; R.Ex. 66 at 219; Tr. 424. See Mantanuska Elec. Ass'n, Inc., 337 NLRB 680, 683 (2002); Taft Broadcasting Co., 163 NLRB at 478 ("the importance of the issue or issues as to which there is disagreement . . . [is a] relevant factor [] to be considered in deciding whether impasse in bargaining existed"); Laurel Bay Health & Rehab. Ctr. v. NLRB, *supra*; Carey Salt Co. v. NLRB, *supra*.

The parties demonstrated a mutual understanding of their inability to reach agreement throughout negotiations leading up to impasse: on **June 30**, Tr. 976, 978, 992; R.Ex. 66 at 219, 225; R.Ex. 67 at 8, 14; Tr. 424, 441, 992-93; GC Ex. 7 at 9; R.Ex. 38; on **July 31**, Tr. 1029-30; R.Ex. 67 at 36; and on **August 17**, Tr. 1034-35; R.Ex. 67 at 38, 40; R.Ex. 66 at 189, 191; GC Ex. 7 at 22-23.

After negotiations on August 17 the Company understood that the parties were at impasse. Tr. 425, 439, 514, 961, 973, 976-77, 986-87, 991, 1014, 1017, 1019, 1035-36, 1044, 1045, 1047, 1049, 1056, 1119; R.Ex. 67 at 6, 7, 13, 23, 26, 39, 46, 51, 52; R.Ex. 66 at 218, 219, 224, 225, 189, 191, 193, 196; GC Ex. 7 at 22-23. Meadows communicated this to the Union on August 18. R.Ex. 67 at 42.

After the parties reached impasse, they understood that they remained at impasse. They expressed such an understanding on **August 18**, Tr. 1047; R.Ex. 67 at 51; R.Ex. 66 at 195; on **September 9**, Tr. 1049-50, 1117; R.Ex. 67 at 52; R.Ex. 66 at 196; on **September 10**, R.Ex.

45; Tr. 1054-55, 1119; R.Ex. 67 at 55; R.Ex. 66 at 200; and on **September 11**, Tr. 1056; R.Ex. 67 at 57-58; R.Ex. 66 at 200.

By the time the parties reached impasse they were firm in their bargaining positions. Tr. 977, 1014, 1034-35, 1037-38; R.Ex. 67 at 7, 39-40; R.Ex. 66 at 189, 191, 219; GC Ex. 7 at 22-23.

After the parties reached impasse, the Company continued to meet with the Union. It did so not because it was no longer firm in its position, but to see if a change in the Union's bargaining position might renew the possibility of reaching agreement. *See McClatchy Newspapers, Inc.*, 321 NLRB 1386, 1389 (1996) ("When an impasse in bargaining is reached, the duty to bargain is not terminated but only suspended"); *NLRB v. Tex-Tan, Inc.*, 318 F.2d 472 (5th Cir. 1963); *PRC Recording Co.*, 280 NLRB 615, 635 (1986); *Sharon Hats, Inc.*, 127 NLRB 947, 957 (1960), *enfd.* 289 F.2d 628 (5th Cir. 1961) (holding that after impasse had been reached the employer was required to meet and bargain with the union because "[t]here was always the possibility that either Respondent or the Union might retreat from its strong position"); *Brown v. Pro Football, Inc.*, 518 U.S. 231, 245 (1996) (noting that the bargaining process is not over when the first impasse is reached). Indeed, the very doctrine that allows an employer to unilaterally implement terms and conditions of employment "is legitimated only as a method for breaking the impasse." *McClatchy Newspapers, Inc.*, *supra* at 1389-90.

Because Meadows had already presented the best package of terms he could, in post-LBF bargaining he asked the Union only to let him know whether there were mistakes in the LBF that needed to be corrected. Tr. 1045, 1115; R.Ex. 67 at 46-47, 50-51; R.Ex. 66 at 195. By continuing to meet, the Company gave the Union the opportunity to respond to the

Company's notice that it intended to unilaterally implement the terms of its LBF. *See* NLRB v. Pinkston-Hollar Const. Servs., Inc., 954 F.2d 306, 311 (5th Cir. 1992).

However, the Union did not renew the possibility of reaching agreement by changing its bargaining position. Instead, Head said that the Union would not work from the LBF, reconfirmed that the Union was going to bargain from the Red Book, and said that it was the Union's way or nothing. Tr. 1045, 1047, 1114. The Union then presented a number of proposals that slightly revised the Red Book while maintaining its form and substance. Jt.Exs. 13, 14, 15; Tr. 1044, 1046-47, 1054, 1114. Once the Company saw that the Union was still refusing to change its bargaining position that had caused the impasse, it had every reason to believe that these were "empty offers." *See* Nat'l Gypsum Co., 359 NLRB No. 116 (May 3, 2013); TruServ Corp. v. NLRB, 254 F.3d 1105 (D.C. Cir. 2001).

Meadows made clear after impasse that the Company remained firm in its position that the Company would not agree to the Union's demands that the parties negotiate from the Red Book. He told the Union that its proposals were unacceptable because the Company had already given its LBF. Tr. 525, 1045, 1047, 1049-52, 1055-56, 1114-15, 1117-19; R.Ex. 67 at 50-51, 52, 57; R.Ex. 66 at 195-98, 200.

Accordingly, there is no reasonable basis on which the Union can claim that it believed the parties had not reached impasse. *See* Mantuanuska Elec. Ass'n., Inc., 337 NLRB at 683 (noting that impasse exists where the parties have assumed "adamant positions" with respect to bargaining); Anderson Enterprises, 329 NLRB 760 (1999) (the Board found that by maintaining and adhering to its position, the Employer had established its claim that impasse had been reached); Laurel Bay Health & Rehab. Ctr. v. NLRB, 666 F.3d 1365 (D.C. Cir. 2012);

NLRB v. Moore Bus. Forms, Inc., 574 F.2d 835 (5th Cir. 1978). It is clear that the parties were at impasse, and the Company's implementation of its LBF was entirely appropriate and lawful.

b. The Company Did Not Deprive the Union of Adequate Time to Consider Information It Provided to the Union.

As discussed previously, the Company did not unlawfully delay in providing information to the Union. In fact, it provided all of the voluminous information the Union requested in an incredibly expeditious manner. The Complaint alleges that a tiny fraction of the information requested was not provided until July 31, one and a half months before implementation of the LBF. The Company did not present its LBF until August 18, and did not implement any provisions of its LBF until September 14. In the meantime, the Company continued to meet with the Union. Jt.Ex. 29. The General Counsel has not shown that any delay, even an unlawful one, prevented the parties from reaching a genuine impasse that privileged the Company to implement the terms of its LBF.

c. The Company Did Not Insist to Impasse on a Permissive Subject of Bargaining.

The General Counsel alleges that the Company insisted to the point of impasse on a provision requiring that employees vote on their work schedules, alleging it is a permissive subject of bargaining. GC Ex. 3 at 9. The relevant provision is Art. XI, § 1. Jt.Ex. 8 at 2239.

The clause in question is not a permissive subject of bargaining. Length of the workday is a mandatory subject of bargaining. Weston & Brooker Co., 154 NLRB 747 (1965). To the extent that the General Counsel alleges the provision is permissive because it reserves rights to the Company, management rights clauses are also mandatory subjects of bargaining. NLRB v. Am. Nat. Ins. Co., 343 U.S. 395, 409 (1952).

Even if the provision were a permissive subject of bargaining, which it is not, and the Company included it in its LBF, there is no evidence in the record that the provision in

question contributed in any way to the parties' impasse. There is no evidence that the Union objected to the provision or that the parties even discussed it in bargaining, let alone that it contributed in some way to their impasse. See ACF Industries, 347 NLRB 1040, 1042 (2006) (“Further, we agree with the judge that the impasse was not invalidated by the fact that the Respondent's final offer contained a non-mandatory subject of bargaining . . . neither the General Counsel nor the Union demonstrated that the Respondent's insistence on the proposal contributed to the impasse in any discernible way.”)

d. The Union Frustrated Bargaining, Privileging the Company to Implement the Terms of its LBF.

The Company was privileged to implement the terms of its LBF even if the parties had not reached a genuine impasse, because, for the reasons detailed above, the Union frustrated bargaining. M & M Contractors, 262 NLRB 1472 (1982) (“When a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining, an employer may be justified in implementing unilateral changes in the terms and conditions of employment”); Jefferson Smurfit Corp., 311 NLRB 41 (1993) (union delayed meetings, failed to address key employer proposals, made extensive last-minute requests for information already supplied to it); Serramonte Oldsmobile, Inc. v. NLRB, 86 F.3d 227 (D.C. Cir. 1996); NLRB v. Pinkston-Hollar Constr. Services, Inc., 954 F.2d 306 (5th Cir. 1992).

e. Conclusion

The totality of the record evidence clearly shows that the parties reached impasse. The Company did not delay in providing information to the Union, and even if it had, no such delay prevented the parties from reaching a genuine impasse. The provision regarding employees voting on 12-hour shifts was not a permissive subject of bargaining on which the

Company insisted to impasse. The parties reached a genuine impasse, after which the Company was privileged to implement terms of its LBF. *See NLRB v. Katz*, 369 U.S. 736 (1962). Even if the parties had not reached a genuine impasse, the Company was privileged to implement the terms of its LBF because the Union frustrated bargaining.

E. The Company did Not Violate § 8(a)(5) of the Act by Unilaterally Changing Terms and Conditions of Employment after Implementing the Terms of its Last, Best, and Final Offer.

The record does not show that the Company unilaterally changed terms and conditions of employment after it implemented the terms of its LBF. On the contrary, the record shows that the Company did not deviate from its LBF after implementation. Tr. 890. “[A]n employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals.” *Taft Broadcasting*, 163 NLRB 475, 478 (1967); *Am. Federation of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). “[W]hen ‘an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it,’ the Board will not enter the dispute to serve the function of arbitrator in determining which party’s interpretation is correct.” *NCR Corp.*, 271 NLRB 1212, 1213 (1984) (quoting *Vickers, Inc.*, 153 NLRB 561, 570 (1965)); *Honeywell Int’l, Inc. v. NLRB*, 253 F.3d 119 (D.C. Cir. 1991); *Hallmark-Phoenix 3 L.L.C. v. NLRB*, ___ F.3d ___, 2016 WL 1169068 (5th Cir. 2016).

With regard to overtime, the Company has not changed whether it can force an employee for overtime more than two (2) days in a row. *See* Tr. 881; Jt.Ex. 8 at 2240; Tr. 592. Forcing employees to work four (4) hours of overtime both before and after their shifts is reasonably comprehended within LBF Article XI, § 4. *See* Tr. 880-81; Jt.Ex. 8, Art. XI, § 4, Overtime Rules 3 and 4, at 2240. Similarly, assigning employees to work overtime out of their classifications is reasonably comprehended within LBF Articles VI and XV. *See* Tr. 880-81;

Jt.Ex. 8, Art. XV, § 6 at 2235; Jt.Ex. 8, Art. VI, § 3 at 2235. Not informing employees of overtime scheduled more than nine (9) days in advance, scheduling employees for overtime less than nine (9) days in advance, and using the rotational basis for scheduling overtime are reasonably comprehended within LBF Article XI, §§ 3 and 4. *See* Tr. 880-81; Jt.Ex. 8, Art. XI, § 3 and § 4, Overtime Rules 3 and 4 at 2239-40.

The disputes regarding overtime are further comprehended within the LBF because the LBF contemplates that the Company would not always be able to follow the LBF's overtime provisions perfectly and provides a specific remedy in those cases. *See* Tr. 881; Jt.Ex. 8, Art. XI, § 4 at 2241.

The Company bargained over the implementation of the overtime procedures not only through the grievance procedure, but also at the bargaining table, where contract negotiations continued in October. *See* Tr. 218; Tr. 532; GC Ex. 38.

With regard to scheduling hours, allowing maintenance employees to vote to change their schedule and thereafter implementing a combination of 8- and 12-hour shifts is reasonably comprehended within LBF Art. XI, § 1. *See* Tr. 881, 883; Tr. 713; Jt.Ex. 8, Art. XI, § 1, 2239. Although the Company initially allowed employees to vote to implement 10-hour shifts, the Company did not implement that schedule because it agreed with the Union's position that the LBF did not permit such an interpretation. Tr. 702-04, 717.

With regard to vacation scheduling, establishing "freeze dates" by which employees may apply for vacation they wish to take and using quotas as the method for allotting vacations is reasonably comprehended by LBF Art. XIV. *See* Tr. 889; Jt.Ex. 8 at 2246-48.

The Complaint does not allege unilateral changes with regard to the creation of the overtime administrator position. *See* GC Ex. 3. Creating an overtime administrator position

is reasonably comprehended by LBF Art. VII (Bidding) and Art. IX (Hours of Work; Overtime and Holidays). *See* Tr. 219371, , 883, 888; Jt.Ex. 8 at 2235-36, 2239-43; GC Ex. 42.

The conduct that the Complaint alleges is evidence of unilateral changes is, instead, only evidence of contract interpretation disputes. The LBF contains a grievance procedure that the Company has been following since it implemented the terms of the LBF. Tr. 883, 85; Jt.Ex. 8, Art. IV at 2231-33 (LBF); *see, e.g.*, R.Ex. 48; R.Ex. 50; GC Ex. 64. The Union has filed grievances when it disagreed with the way the Company interpreted the terms of the LBF. Tr. 578, 638, 879-82; *see, e.g.*, R.Ex. 48; R.Ex. 50; GC Ex. 64. The Company has answered and adjusted the grievances and met with the Union at the various steps of the Grievance procedure. Tr. 219, 371, 883, 866-87; *see, e.g.*, R.Ex. 51; R.Ex. 52; GC Ex. 42. The Company has processed grievances all the way to the third step of the grievance procedure. Tr. 887-88, 902-03; R.Ex. 51 at 2386 (Sullivan letter regarding scheduling third-step grievances). The Company has even processed untimely grievances filed by the Union. Tr. 885-86; *see, e.g.* GC Ex. 64.

Even if the actions alleged to be unilateral changes were not reasonably comprehended within the terms of the LBF, the General Counsel has failed to show that any such deviations were changes to policies themselves rather than isolated departures from the lawful policies. *See Providence Journal Co.*, 2003 WL 1883593 (Apr. 11, 2003) (“Isolated breaches of existing practices are insufficient to show a unilateral repudiation of that practice”); Champion Parts Rebuilders, Inc. v. NLRB, 717 F.2d 845, 852 (3d Cir. 1983) (“[certain] isolated action would hardly constitute a *change* or *alteration* of established Company policy so as to trigger the duty to bargain with the Union”) (emphasis in original); Microimage Display Div. of Xidex Corp. v. NLRB, 924 F.2d 245 (D.C. Cir. 1991).

In summary, the record shows the Company implemented policies that were reasonably comprehended within its pre-impasse proposals and did not deviate from them. If it ever did deviate from them, which it did not, such deviations were isolated departures rather than changes to the policies themselves. The record does not support a finding the Company unilaterally changed any mandatory subject of bargaining after implementing its LBF.

F. The Company Did Not Violate § 8(a)(1) of the Act by Supervisors' Statements.

The Company did not interfere with, restrain, or coerce employees by statements of its supervisors. The record fails to show that supervisors ever made the statements attributed to them in the Complaint. Even if they had made those statements, they would not have coerced employees in their exercise of their § 7 rights, and would have been protected under § 8(c) of the Act. 29 U.S.C. § 158(c).

1. Meadows Did Not Threaten Employees That the Company Could Replace Them If the Union Failed to Give the Company the Concessions It Was Seeking.

At no point did Meadows threaten that the Company would replace employees if the Union failed to give the Company concessions. Tr. 942. Even by Shannon and Eby's testimony, Meadows never connected any such statement to the Union's failure to give the Company concessions, as alleged by the Complaint. *See* GC Ex. 3 at 4.

Even if Meadows had made a statement similar to those attributed to him by Shannon and Eby, and he did not, it would have been protected by 8(c). Salvation Army Residence, 293 NLRB 944, 955 (1989) (“[there is no] violation in employer statements to employees that if a union's demands are not met, the ‘strike is the only weapon,’ in which case strikers could lose their jobs as the employer had the right to replace them.”) In Southern Monterey Cty. Hosp., 348 NLRB 327 (2006), the Board overruled the ALJ and found that a

statement that “if employees went on strike, they would be permanently replaced” is protected by 8(c). Id. at 328. “Moreover, ambiguities in such statements are resolved in the employer's favor if the statements are made, as here, in an atmosphere free from threat of retaliation.” Wal-Mart, Inc., 339 NLRB 1187, 1193 (2003). Here, even by the General Counsel’s own witnesses, Meadows’s alleged statement was not framed as or coupled with any threat of reprisal. It did not violate 8(a)(1) and was protected by 8(c).

2. The Company’s July 17 Letter to Employees Did Not Misrepresent Its Bargaining Positions.

The July 17 letter accurately represented the Company’s bargaining positions. The Company intended to maintain all of the current classifications. Jt.Ex. 16 at 9594; Tr. 119, 456, 786-87, 791, 803, 984-95; Jt.Ex. 1 at 1965; Jt.Ex. 2 at 2002; R.Exs. 31, 32. The Company never sought to eliminate gap insurance. Jt.Ex. 16 at 650; Tr. 257, 367, 435, 786, 893, 984; Jt.Ex. 1, Art. XX, § 3 at 1994; Jt.Ex. 2, Art. XX, § 3 at 2032.

The accurate July 17 letter was entirely lawful under the Act and properly informed employees of the status of negotiations and the specifics of the Company’s proposals to the Union as their bargaining agent. *See, e.g., Proctor & Gamble*, 160 NLRB 334, 340 (1966) (“As a matter of settled law, § 8(a)(5) does not, on a *per se* basis, preclude an employer from communicating, in non-coercive terms, with employees during collective-bargaining negotiations. The fact that an employer chooses to inform employees of the status of negotiations or of its version of a breakdown in negotiations will not alone establish a failure to bargain in good faith. Pan American Grain Co., 343 NLRB No. 47 (2004); Safelite Glass, 283 NLRB 929, 930 (1987); Allegheny Ludlum Corp. v. NLRB, 104 F.3d 1354 (D.C. Cir. 1997) (NLRA allows employers to engage in non-coercive communications with employees); Standard

Fittings Co. v. NLRB, 845 F.2d 1311 (5th Cir. 1988) (NLRA permits employer to communicate with bargaining unit employees as to the progress of collective bargaining negotiations).

3. **Roseberry Did Not Tell Employees That the Company Would Retain Current Retirement Benefits If the Union Asked It to Do So.**

The Complaint alleges that Roseberry “informed employees who were deciding to retire that Respondent would retain their current retirement benefits in the next collective-bargaining agreement, thereby misrepresenting to employees the position Respondent was taking at the bargaining table.” GC Ex. 3 at 4.

Sarchett did not testify that Roseberry said that the Company would retain current retirement benefits if the Union asked it to do so. King’s testimony is the only support for that allegation of the Complaint. However, King also testified that he was motivated to think about retiring because of “rumors going around” and because there had been a strike in 2004. Tr. 735. King had negotiations on his mind even before Roseberry approached him. It seems likely that Roseberry’s only statement to King was, as Roseberry testified, “Make sure you talk to your financial advisor and try to find out from your Union committee what the company is offering so you can make an educated decision on your retirement.” Tr. 920. In fact, this aligns with King’s own testimony that Roseberry made “some comment about ‘You wouldn’t buy a car without knowing what the contract was for buying that car.’” Tr. 739. It is also consistent with Roseberry’s testimony about his conversation with Sarchett. Tr. 918-19.

Even if Sarchett and King’s testimony is credited, the statements they attribute to Roseberry would not violate 8(a)(1). They were accustomed to talking with Roseberry at work, and by all accounts the conversations were cordial. *See* Tr. 919, 923, Tr. 726. Both understood that Roseberry was not authorized to speak for the Company’s bargaining team. *See* Tr. 725-76; Tr. 743. They were both Union stewards at the time who should not have found the comments

they claim Roseberry made to be coercive. Tr. 733; Tr. 745. Even if Roseberry had told these employees that the Company would retain current retirement benefits, such a statement *would be true* as it related to the vested portion of their pensions. See Tr. 731. In summary, the record does not support the Complaint's allegation that Roseberry misrepresented to employees the position Respondent was taking at the bargaining table.

4. Vislisel Did Not Threaten Employees That They Would Never Return to Work If They Went on Strike.

Even if Bishop's testimony were credited, it does not show a violation of 8(a)(1). Such comments would not be unlawful. See Eagle Comtronics, 263 NLRB 515 (1983); Southern Monterey Cty. Hosp., 348 NLRB 327 (2006); Wal-Mart, Inc., 339 NLRB 1187, 1193 (2003); Jensen Precast Enterprises, 28 CA 15861, 2001 WL 1589700 (Mar. 20, 2001); Dow Chem. Co. v. NLRB, 660 F.2d 637 (5th Cir. 1981). By Bishop's own testimony, Vislisel's alleged statement was not a threat or coupled with such a threat. Bishop, in his testimony, suggested that Vislisel came upon a conversation in which employees were already talking about a strike. Tr. 37, 46. Vislisel did not threaten Bishop; Bishop swore in his August 1 affidavit and ultimately testified in the hearing that no one ever told him that he was going to be personally replaced. Bishop, especially, understood that he had the possibility of returning to work after being replaced; he had personally experienced that after the 2004 strike. Tr. 45. Even if Bishop's testimony is credited, it shows only that Vislisel addressed the subject of striker replacement without threatening employees that they would be deprived of their rights.

5. Swails Did Not Misrepresent the Union's Position in Collective Bargaining.

Even if the testimony of Beitz is credited, there is no testimony regarding Swails "misrepresenting the Union's position in collective bargaining" as alleged by the Complaint, and no record evidence that supports a finding of any violation by Swails. Beitz testified that he and

two other employees were already having a discussion about the contract when Swails entered the room. Tr. 645. Even by the testimony of Beitz, Swails merely gave his opinion about the status of negotiations and his version of a breakdown in negotiations. Such statements are protected by 8(c) and not violative of 8(a)(1). See Procter & Gamble Mfg. Co., 160 NLRB 334, 340 (1966); Allegheny Ludlum Corp. v. NLRB, 104 F.3d 1354 (D.C. Cir. 1997); Standard Fittings Co. v. NLRB, 845 F.2d 1311 (5th Cir. 1988).

6. Bumba Did Not Misrepresent the Union's Position in Collective Bargaining.

Regardless of whose testimony is credited, the record shows only that Bumba lawfully gave his opinions in a non-coercive manner. Such statements are protected by 8(c) and not violative of 8(a)(1). Tr. 647, Procter & Gamble Mfg. Co., 160 NLRB 334, 340 (1966); Allegheny Ludlum Corp. v. NLRB, 104 F.3d 1354 (D.C. Cir. 1997); Standard Fittings Co. v. NLRB, 845 F.2d 1311 (5th Cir. 1988).

7. Conclusion

The Company did not interfere with, restrain, or coerce employees by statements of its supervisors. The record fails to show that supervisors ever made the statements attributed to them in the Complaint. Even if they had made those statements, they would not have coerced employees in their exercise of their § 7 rights, and would have been protected under § 8(c) of the Act.

G. The Company Did Not Violate § 8(a)(5) of the Act by Engaging in Direct Dealing.

1. Meadows Did Not Deal Directly with Employees.

The General Counsel has failed to show that Meadows engaged in unlawful direct dealing because the record does not show that the discussion was for the purpose of establishing

or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining.

The Board has long held that conversations akin to Meadows' conversations with employees do not violate either §§ 8(a)(1) or 8(a)(5) of the Act. See Contempora Fabrics, Inc., 344 NLRB No. 106 (2005) (Supervisor asking employee if she had any problems or questions did not violate the Act – there was no promise that the supervisor would remedy the employee's problems); Wal-Mart Stores, Inc., 340 NLRB 637 (2003) (Managers' conversations with employees in which they listened to employee concerns and responded to questions did not violate the Act); Curwood, Inc., 339 NLRB No. 148 (2003) (Letter to employees asking if they had any questions and, if so, to write them down and give them to the employer did not violate the Act; there was no promise to resolve employee grievances); Mount Hope Trucking Co., Inc., 313 NLRB No. 36 (1993) (Management had conversations with employees to find out what employees wanted, but they did not agree to give employees the changes they requested; no violation of the Act because there was no evidence that management promised to address employees' concerns or that management tried to erode the union's position as employees' bargaining agent); Best Plumbing Supply, Inc., 310 NLRB 143, 148 (1993) (No violation of the Act where employer asked employees if they had "any questions," "if there was something wrong," and "whether the employees wanted to talk about it" during a meeting); Logemann Bros. Co., 298 NLRB No. 155 (1990) (Employer questionnaire to employees soliciting ideas on how to improve the plant did not violate the Act; general and innocuous questions and an open-ended solicitation for suggestions was not an attempt to erode the union's role and was motivated by legitimate business concerns); Churchill's Supermarkets, Inc., 285 NLRB 138, (1987) (No unlawful solicitation of grievances where employer asked employee during the employee's

evaluation "if he had any complaints"); Traction Wholesale Ctr. Co., Inc. v. NLRB, 216 F.3d 92 (D.C. Cir. 2000); Delco-Remy Div., Gen. Motors Corp. v. NLRB, 596 F.2d 1295 (5th Cir. 1979) (questioning employees is not illegal per se; an employer is free to communicate to employees so long as the communications do not contain a threat of reprisal or force or promise of benefit); Cincinnati Newsp. Guild, Local 9 v. NLRB, 938 F.2d 284 (D.C. Cir. 1991) (no violation where employer did not propose to strip union of its collective bargaining function); NLRB v. Haberman Constr. Co., 618 F.2d 288 (5th Cir. 1980); Shamrock Foods Co. v. NLRB, 346 F.3d 1130 (D.C. Cir. 2003); NLRB v. Intertherm, Inc., 596 F.2d 267, 277 (8th Cir. 1979); NLRB v. Dixisteel Bldgs., Inc., 445 F.2d 1260, 1262-63 (8th Cir. 1971).

Employees would have viewed Meadows' tour as a routine visit, rather than as an expedition to deal directly with them. Tr. 33, 43, 76, 109, 822-25, 861, 863-65, 944-45.

Meadows did not directly deal with employees on the tour. Tr. 34-35, 43, 57-59, 74-75, 79, 84-85, 109-10, 671-73, 826-28, 867-68, 945-47; Meadows took no notes during the tour. Tr. 947.

Even if Meadows had solicited grievances, which he did not, the Board has held that an employer does not violate the Act by soliciting grievances where, as in this instance, "the employer maintained a prior open door policy" and "employees on their own accord approach[ed] management to discuss problems." EFCO Corp., 327 NLRB 372, 378 (1998); Ohmite Mfg. Co., 290 NLRB 1036, 1049, 1050 (1988) (No unlawful solicitation of grievances where the employer maintained an "open door policy" and had consistently applied and maintained a practice of soliciting employee grievances); Traction Wholesale Ctr. Co., Inc. v. NLRB, 216 F.3d 92 (D.C. Cir. 2000) (because employer did not have any past practice of soliciting grievances, there was a compelling inference that the employer was implicitly promising to correct problems); NLRB v. O.A. Fuller Super Markets, Inc., 374 F.2d 197 (5th

Cir. 1967) (no violation where an atmosphere of informality pervaded the relations between the employer and employees).

Management at the Cedar Rapids plant has precisely the type of practice that would permit the solicitation of employees alleged by the General Counsel. Tr. 44, 72, 674, 741, 768-69; R.Ex. 63; GC Ex. 11.

2. The Company's July 17 Letter to Employees Was Not Direct Dealing.

All of the Company's letters to employees regarding the status of bargaining instructed employees to direct any questions to the Union. Tr. 786; GC Exs. 20, 26, 32, and 36. Even if the letters did invite employees to engage in discussions with the Company, such communications would not be to the exclusion of the Union. *See Permanente Med. Grp., Inc., supra.*

3. Roseberry Did Not Deal Directly with Employees.

The record evidence does not show that Roseberry dealt directly with employees. There is no evidence that Roseberry's conversations with Sarchett and King were for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining. Even if there were such evidence, which there is not, the evidence does not show that such communication was made to the exclusion of the Union, because Sarchett and King were both Union stewards at the time. Tr. 733, 745.

4. The Company Did Not Deal Directly with Employees by Holding a Vote Regarding Employee Schedules.

An employer may survey employees about their shift preferences where the collective bargaining agreement allows the employer to make shift changes. East Tennessee Baptist Hosp., 304 NLRB 872, 873 (1991); Mt. Clemens Gen. Hosp., 7-CA-43864, 2001 WL 1589776 (Aug. 27, 2001).

The LBF allows the Company to make shift changes. Jt.Ex. 8, Art. II, 2230, Art. XI, § 1, 2239. It therefore was not required to notify the Union before conducting the survey of maintenance employees on that topic. *See East Tennessee Baptist Hosp.* at 872. The Company did not delegate its right to determine work schedules directly to employees; the language of the LBF provided that the Company would *consider* 12 hour shifts based on the results of the survey. Jt.Ex. 8, Art. XI, § 1, 2239. Finally, there is no evidence that the Company surveyed employees for the purpose of developing bargaining positions. Under these circumstances, the Company did not engage in direct dealing by surveying the maintenance employees about their work schedules. *See East Tennessee Baptist Hosp., supra; Mt. Clemens Gen. Hosp., supra.*

H. Certain Allegations of the Complaint are Untimely and Violate the Company's Due Process Rights.

Additionally, under § 10(b) of the Act, the Regional Director lacked authority to issue complaint on the allegations regarding Vislisel, Swails, and Bumba because those allegations were first made on April 16, 2016, more than six (6) months from their allegedly unlawful statements, which were alleged to have occurred in July, August, and September, 2015. GC Ex. 1(u); 29 U.S.C. § 160(b). These allegations were not closely related to timely-filed allegations. *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988). *New Orleans Cold Storage & Warehouse Co. v. NLRB*, 201 F.3d 592, 599 (5th Cir. 2000); *AMCAR Div., ACF Indus., Inc. v. NLRB*, 596 F.2d 1344, 1349 (8th Cir. 1979).

The original Complaint presented the case as, at its heart, a bargaining case. While the Complaint had previously alleged 8(a)(1) statements that were closely connected to the bargaining allegations because they were also alleged as unlawful direct dealing, the April 16 amendment, for the first time, added 8(a)(1) allegations that were never alleged to be direct

dealing and, thus, stood alone, at a much greater distance from the bargaining table. Although the allegations against Swails and Bumba are alleged as instances of “misrepresenting the Union’s position in collective bargaining,” the record ultimately did not show that the alleged statements were connected to the bargaining as alleged. The April 16 amendment added independent 8(a)(1) allegations that alleged new conversations by supervisors who had not been named in previous charges or complaints, in which the supervisors were alleged to have made unlawful comments unlike any comments alleged previously. The Company was forced to prepare new defenses to these allegations many months after they allegedly first took place, and to prepare witnesses who had never been confronted with the allegations against them. Raising these allegations at such a late stage in the case—in this case, the Saturday before the record opened the following Monday—is precisely what 10(b) seeks to avoid.

Additionally, the Complaint does not encompass a direct dealing allegation regarding Swales. GC Exh. 3.

Also barred by § 10(b) is the General Counsel’s entirely new theory of “undermining and denigrating the Union.” GC Ex. 1(u). This theory largely relies on the untimely filed allegations against Swails and Bumba. The allegation forced the Company to prepare a new defense to the new theory that was wholly distinct from its earlier defenses against surface bargaining allegations, which it had already disclosed in its position statements to the Region and in its previous Answers. GC Exs. 6(b), (c); GC Exs. 1(g), (o).

In addition, the April 16 amendment and subsequent procedural steps violate the Company’s due process rights. *See Russell-Newman Mfg. Co. v. NLRB*, 370 F.2d 980, 985 (5th Cir. 1966). The new amendment left the Company insufficient time to prepare subpoenas, gather evidence, or prepare defenses. The General Counsel also raised, on the last day of the first week

of the trial, a new theory regarding discipline that he viewed “as flowing from” the unlawful implementation. Tr. 682. He introduced discipline records that were wholly unrelated to any conduct previously alleged to be unlawful. These records related to attendance, drug screens, production errors, environmental procedures, and other plant rules. *See* GC Ex. 67. Improperly, the General Counsel never moved to amend the Complaint to add this new theory, but if he had, the Company would have objected on due process grounds. This theory was wholly unrelated to any other theory previously advanced. Advancing the theory at that stage of the lengthy proceeding left the Company insufficient time to prepare, and, because most of the employee witnesses had already testified (and, in one case, returned to watch other witnesses testify, Tr. 348-49), frustrated its ability to question witnesses about the theory and GC Ex. 67.

These late-hour additions to the General Counsel’s theory were especially prejudicial in light of the incredible number of documents and motions filed by the General Counsel that changed the allegations and theories of this case. *See, e.g.*, GC Exs. 1(c), (h), (j), (k), (m), (o), (p), (r). These did not present the entire new theory of the case, but merely edited select portions of previously-filed documents, often only with citation to sections of the then-out-of-date documents. Only on April 21, 2016, the last day of the first week of the hearing and after much of his case-in-chief was complete, did the General Counsel introduce a demonstrative Consolidated Complaint that represented the totality of the various changes in the Complaint. GC Ex. 3.

The allegations of the April 16 amendment and the theories advanced thereafter should be dismissed. *See* Russell-Newman Mfg. Co. v. NLRB, 370 F.2d 980, 985 (5th Cir. 1966).

I. The Remedies Sought by the General Counsel Are Improper.

The Company adamantly denies that it violated the Act in any way. No remedy is appropriate.

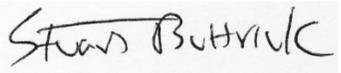
The extraordinary remedy of a notice reading is improper here. Even as alleged by the Complaint, there are no violations that justify a notice reading. *See* NLRB Casehandling Manual (Part One) Unfair Labor Practices § 10132.4(d) (noting that a notice reading may be appropriate in first contract bargaining cases and organizing campaigns involving nip-in-the-bud discharges).

Although none of the many versions of the Complaint ever alleged it, at the hearing the General Counsel raised a remedy theory under Am. Standard Companies, Inc., 352 NLRB 644 (2008), regarding discipline. Even if the General Counsel could prove all the allegations of the Complaint, such a remedy would be inappropriate. In the Am. Standard case it was “undisputed that the [alleged unilateral change] was not announced to the Union ahead of time, nor was it negotiated with the Union.” *Id.* at 656. Here, the Company does so dispute. The record does not show that the disciplines entered as GC Ex. 67 were issued pursuant to any change from the Red Book, that any such change was not announced to the Union in advance, and that they were not first negotiated with the Union. The record is devoid of the type of evidence needed to impose such a remedy.

IV. CONCLUSION

The General Counsel has completely failed in his burden to establish that the Company violated the Act in any way. The Company respectfully requests that the Amended Complaint be dismissed in its entirety.

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CERTIFICATE OF SERVICE

I certify that, on October 14, 2016, a copy of the foregoing was served via
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