

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INGREDION, INC. d/b/a PENFORD  
PRODUCTS CO.

and

Cases 18-CA-160654 and 18-CA-170682

BCTBM LOCAL 100G, affiliated with  
BAKERY, CONFECTIONERY,  
TOBACCO WORKERS, AND GRAIN  
MILLERS INTERNATIONAL UNION,  
AFL-CIO

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ANSWERING BRIEF TO THE NATIONAL LABOR RELATIONS BOARD  
ON BEHALF OF THE GENERAL COUNSEL

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Submitted by:

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## INTRODUCTORY REMARKS

Administrative Law Judge Mark Carissimi is an experienced judge who has written a well-reasoned and balanced decision. In his decision, ALJ Carissimi exhaustively reviewed the voluminous record evidence and applied well-established case law. His decision stands on its own merits and should be summarily adopted by the Board. This is true, even with respect to the complaint allegations he dismissed, which do not undermine the overwhelming evidence of surface bargaining and other violations found by the ALJ.

The purpose of this brief filing is to highlight evidence that was ignored or mischaracterized by Respondent in its filings to the Board. These filings, while exceptionally voluminous, amount to little more than an attempt to re-hash arguments that were already considered and rejected by ALJ Carissimi, and otherwise serve to confuse and obfuscate the core issues in this case. Notably, over the course of its 1200 plus Exceptions, Respondent repeatedly excepts to:

- ALJ Carissimi's failure to find irrelevant facts. (*See, e.g.*, Exceptions 18 (failure to specifically note strike that occurred over 11 years before bargaining in instant case); 24 (failure to explicitly define "manlifts"); Exceptions 166–68 (failure to specifically discuss *Union's* preparations for negotiations); Exception 247 (failure to note call by Respondent's negotiator outside of bargaining to Department of Labor)).
- Facts related to complaint allegations that ALJ Carissimi dismissed. (*See, e.g.*, Exceptions 34–52 (addressing dismissed threat of strike replacement occurring during April 6 meeting); 476–88 (addressing dismissed allegations regarding July 17 letter to employees); 580–82 (dismissed allegation regarding supervisor Brad Bumba); 1117 (dismissed unilateral change allegations regarding Overtime Rules 1 and 2)).
- Facts that were stipulated to by the parties in writing prior to the hearing. (*Compare* Joint Exhibit 29 *with* Exceptions 19–20, 975).

- Meaningless factual or semantic discrepancies. (Exceptions 170–71 (10 minute difference in end time for June 1 negotiations); 274–75 (Respondent’s proposal vs. Respondent’s *proposals*); 298–99 (“required” vs. “indicated”); 354–55 (excepting to ALJ’s failure to quote record evidence, as opposed to summarizing record evidence); 388–89 (same)).

In essence, Respondent’s Exceptions amount to little more than an attempt to replace ALJ Carissimi’s well-reasoned decision with Respondent’s post-hearing brief.

Indeed, Respondent’s Exceptions are notable in the fact that they rely almost *exclusively* on the largely *discredited* testimony of Respondent’s lead negotiator, Ken Meadows, while ignoring the largely *credited* testimony of witnesses who testified on behalf of the General Counsel. ALJ Carissimi’s credibility assessments, as with the rest of his decision, were carefully considered and did not solely favor the General Counsel witnesses. Moreover, these credibility assessments rested, at least in part, on witness demeanor and other subjective impressions—indicators that are not present in a cold record. As such, and in accordance with the Board’s well-established precedent, ALJ Carissimi’s credibility determinations should not be disturbed.

In order to aid the Board in wading through Respondent’s voluminous filings, this filing will follow the format of Respondent’s Brief in Support of Exceptions—first addressing Respondent’s surface bargaining, next discussing Respondent’s unlawful unilateral implementation of its final offer, and finally addressing Respondent’s away-from-the table misconduct.

#### ***A. Respondent’s Surface Bargaining***

With regard to the surface bargaining violation, Respondent’s Exceptions rest almost entirely on Ken Meadow’s *discredited* testimony. Indeed, the weakness of Respondent’s case, in light of the credited record evidence, is indicated by its primary

focus on the *Union's* conduct—not its own misconduct. (R. Exceptions Br. at 37–40.) This is perhaps best emphasized by Respondent's frankly bizarre preoccupation with a (discredited) account of threatened violence by Union negotiator Jethro Head towards Meadows (*see* Exceptions Br. at 13, 39, 43)—which, even if credited, would not obviate Respondent's duty to bargain in good faith. *See, e.g., People Care, Inc.*, 327 NLRB 814, 824–25 (1999) (pushing, cursing at, and blocking employer representative from leaving room insufficient to warrant barring of union negotiator).

ALJ Carissimi's decision fully addresses Respondent's purported concerns with the Union's conduct, including these threats of violence. (ALJD at 42–45.) As addressed more fully in ALJ Carissimi's decision, the record evidence demonstrates that the Union in fact engaged with Respondent's proposals by, among other things, bargaining from a concession list and a series of information request responses that were *both derived from Respondent's proposals and formed the basis of much of the parties bargaining*. This is in marked contrast to Respondent's utter refusal to engage with the Union's proposals, which in many cases it refused to even open. Further, as found by ALJ Carissimi (ALJD at 39–42), Respondent provided virtually no justifications for its refusals to consider the Union's proposals or for the numerous substantial concessions it was seeking. (For a particularly stark example of this conduct, see the credited account of the parties bargaining on July 27, in which Respondent refused to explain why the Union's proposals would not allow the company to grow. (Tr. 431–32; GCX 7(a) at 8).)

In addition to the factors emphasized by ALJ Carissimi, other evidence further supports Respondent's surface bargaining. Notably, there were numerous instances where Respondent's lead negotiator Meadows affirmatively misled Union negotiators

about what Respondent was proposing at the bargaining table. (See for example: Respondent's attendance policy: *Compare* Tr. 473, GCX 8 at 8, GCX 7(a) at 19 *with* Tr. 474–76; Respondent's bidding process: *Compare* RX 67 at 37, Tr. 838 *with* JTX 7 at 432 (Article VII, Section D.1).) In addition, while purporting to “highlight” all of the changes in its comprehensive proposals, the evidence at trial revealed that Respondent's proposals contained numerous hidden changes, several of which were regressive in nature. (*See, .e.g.*, Tr. 455–56; *see* JTX 4 at 1.) There are also numerous credited statements made by Meadows—threatening impasse at the first bargaining session (GCX 7(a) at 1, GCX 8 at 2; Tr. 412–13), threatening its “last, best, and final offer” at only its third session (GCX 7(a) at 7, GCX 8 at 4, Tr. 426, 1097–99), and repeatedly telling Union representatives that they did not have a contract and that he would not follow its terms after the contract expired (GCX 15, GCX 7(a) at 6; Tr. 412, 426, 447)—that are simply incompatible with good-faith bargaining.

Finally, while Respondent takes pains to emphasize the numerous “concessions” that it made across its various offers, ALJ Carissimi correctly found that this movement (to the extent it was made) was insufficient to outweigh the other evidence of bad faith. In this regard, the “movement” that Respondent highlighted in its so-called “last, best, and final” offer is worth considering. At the bargaining table, Respondent highlighted five changes in its LBF—1) changing the recognition clause back to the original contract; 2) allowing employees to continue with sickness and accident coverage during a strike or lockout; 3) having a procedure for removing employee discipline; 4) removing limits on the Union negotiating committee; and 5) having management handle overtime. (Tr. 497–99, 838–40; GCX 7(a) at 24–25.) Each of these five areas, however, represented largely

illusory benefits to the Union. Respondent could not change the recognition clause without the Union's agreement, and the Union protested any changes to it throughout negotiations. The sickness and accident coverage was similarly meaningless, given the presence of the no-strike/no lockout clause in the contract. The procedure for removing discipline allowed for the removal of discipline only if the company agreed to it. The purported removal of limits on the Union negotiating committee *amounted to a wholesale removal of all contractual language referencing the negotiating committee*. Finally, as found by ALJ Carissimi, the company actually violated the overtime change in its LBF by moving administration of overtime back to the bargaining unit. (ALJD at 55.) The point to be made with these "concessions" is not that Respondent was required to make any specific changes or concessions in its offer; rather, these illusory concessions tie into Respondent's larger strategy of misleading the Union and creating a "paper record" of supposed good-faith bargaining. That Respondent's LBF also contained *undisclosed and regressive* changes—removing documentation of verbal warnings, which Meadows admitted was a regressive change, (Tr. 1109) and limiting the Union's ability to negotiate over plant closures—only serve to drive home Respondent's bad faith. (*Compare* JTX 7 at 36 *with* JTX 8 at 36.)

In the end, Respondent's conduct both at and away from the bargaining table provides ample evidence of bad faith, as found by ALJ Carissimi, and the Board should leave the ALJ's well-reasoned finding on this front undisturbed.

***B. Respondent's Unlawful Implementation of Its Last, Best, and Final Offer on September 14***

ALJ Carissimi correctly found that Respondent unlawfully implemented its LBF on September 14, 2016. In attempting to rebut this finding, Respondent is now, again, re-

arguing that the parties achieved a good-faith, bona-fide impasse and that it did not implement a permissive subject bargaining. Each of these arguments was considered by ALJ Carissimi and soundly rejected. The Board should adopt his recommendation regarding each of these issues.

As to the issue of impasse, ALJ Carissimi exhaustively examined and considered the parties respective bargaining conduct. That conduct need not be rehashed here. Three points, however, bear re-emphasizing. First, despite Respondent's repeated contentions to the contrary in its Exceptions, the parties were *starting from scratch*. Respondent and the Union had never negotiated together, and perhaps most importantly, Respondent chose to begin renegotiating the contract from square one. Indeed, its initial offer stated that the existing agreement would be "opened and renegotiated," and that "[t]here are no Articles and Sections from the prior agreement that [Respondent] proposes to remain unchanged." (GCX 2(a).) This makes it unlikely that the parties were at impasse after only ten bargaining sessions.<sup>1</sup> Second, the credited evidence demonstrates that, both before and after the alleged impasse was reached, Respondent's lead negotiator Meadows continued to state to the Union that he could "massage" his offers. (Tr. 515–16, 538, 1041, 1105, 1114–15.) Finally, Respondent has been unable to even assert a consistent date for when the parties supposedly reached impasse. This is most starkly illustrated by the discrepancies in Respondent's filings before ALJ Carissimi

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<sup>1</sup> In an effort to rebut this argument both at hearing and now before the Board, Respondent has continually attempted to characterize each time the parties' met after a caucus as a new bargaining session. This argument should be firmly rejected, as even Meadows admitted under questioning that the parties scheduled bargaining sessions by date, and that it was mutually understood by the parties that each day of bargaining represented one bargaining session. (Tr. 1096–97.) That Respondent would continue to argue otherwise before the Board simply shows the weakness of its impasse defense.

and the Board, as opposed to its filings in district court in the Section 10(j) proceedings. Although Respondent now contends that the parties reached impasse on August 18, it stated in earlier filings in district court: “Contrary to the NLRB’s allegations, there is no confusion regarding the date the parties reached impasse. On September 10, 2015, the Company properly notified the Union of its intent to implement the August 18, 2015 LBF due to the parties’ lack of bargaining movement. The record clearly supports that the parties reached impasse on September 10, 2015.”<sup>2</sup> (*Compare* Tr. 148 *with* Tr. 1039, 1113 (Meadows flip-flopping on date of impasse between August 18 and September 10) and R. Exceptions Br. at 13–14.) Given the dramatic impact that impasse has on the parties’ bargaining obligations, this is not an academic issue. Indeed, as impasse is the *moment in time* that the parties reach the end of their ropes and thereafter privileges unilateral implementation, it is arguably the most essential factual issue in this case. Respondent’s contrary positions—which it has yet to explain or address—on this issue fatally undermine its defense.

Additionally, as found by ALJ Carissimi, Respondent unlawfully insisted to impasse and implemented a proposal containing a permissive subject of bargaining. The Board has consistently held that proposals which allow employees to directly vote on their terms and conditions of employment are permissive subjects of bargaining. *Servicenet, Inc.*, 340 NLR B 1245, 1246–57 (2003); *Retlaw Broadcasting Co.*, 324 NLRB 138, 143 (*, enforced*, 172 F.3d 660 (9th Cir. 1999)). Respondent’s LBF, and indeed every proposal that it stood by prior to its LBF, included a proposal allowing

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<sup>2</sup> The above referenced quote is from page 29 of Respondent’s Resistance to Petitioner’s Request for Injunctive Relief, filed with the District Court for the Northern District of Iowa on May 27, 2016.

employees to vote to change their schedules—which has been subsequently implemented in the maintenance department.<sup>3</sup> This alone precludes Respondent’s implementation of its LBF (even assuming that Respondent had bargained in good faith and that the parties had otherwise achieved a lawful impasse).<sup>4</sup>

### ***C. Respondent’s Away-From-the Table Misconduct***

Finally, the Board should adopt ALJ Carissimi’s finding regarding Respondent’s away-from-the-table misconduct. The conduct at issue broadly breaks down into two

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<sup>3</sup> Respondent also argues, citing to *ACF Industries*, 347 NLRB 1040, 1042 (2006), that this permissive subject of bargaining does not taint the implemented LBF because the Union allegedly did not object to the proposal. This argument should be rejected by the Board. First, each of Respondent’s proposals was a package proposal containing this permissive subject of bargaining, and each proposal was rejected in total by the Union. It is undisputed that, at the time of impasse, the Union had rejected the entirety of Respondent’s proposals (with the potential exception of a proposal relating to herbal tea and stirrer sticks). Therefore, this individual portion of the continually-rejected package proposals *did* contribute to the impasse. Second, the permissive subject at issue in *ACF Industries*—the expiration date of certain retirement plans—was of an entirely different character than a proposal privileging Respondent to directly deal with employees. As the Board has held, permissive subjects that allow employers to deal directly with employees are particularly destructive if implemented (*see, e.g., Retlaw Broadcasting Co.*, 324 NLRB 138, 143 (1997)) and thus should be treated differently than the permissive subject at issue in *ACF Industries*. Third, to the extent that Respondent is arguing that the parties never discussed or disagreed over this specific proposal, this is only further evidence of the absence of impasse and Respondent’s surface bargaining. Impasse requires that the parties be at *complete* loggerheads, such that further discussions would be fruitless. The fact that the parties never reached specific discussions over a permissive subject of bargaining that eliminated the Union’s statutory bargaining rights strongly suggests that they were not at impasse. Moreover, it was Respondent’s take-it-or-leave-it position with regard to its package proposals that *prevented* substantive discussion over individual issues. The fact that the parties never reached a specific disagreement over this term only serves as further evidence of Respondent’s unlawful intransigence.

<sup>4</sup> Respondent also excepts to ALJ Carissimi’s findings related to Respondent’s failure to provide information in a timely manner. ALJ Carissimi’s decision appropriately addresses each of the arguments being raised (again) by Respondent before the Board. (ALJD at 34–37.) Additionally, while it appears that ALJ Carissimi did not rely on Respondent’s delay as an independent basis for finding Respondent’s unilateral implementation of its LBF, the General Counsel believes that it is unnecessary for the Board to pass on this issue as there are other bases, discussed above, for finding Respondent’s implementation to be unlawful.

categories—Respondent’s supervisors’ direct dealing and threats towards bargaining unit employees (ALJD 27–34), and Respondent’s unilateral changes after implementing its LBF (ALJD 51–58). ALJ Carissimi’s underlying decision carefully addresses each of these issues, including virtually all of the defenses now being raised by Respondent. His careful analysis led to some allegations being sustained, and other allegations being dismissed.

In considering the threats and direct dealing, two particular points warrant mentioning. First, as with much of its Exceptions, Respondent relies primarily on the *discredited* testimony of its managers—while ignoring the credited testimony of employees. As such, its Exceptions largely boil down to ill-founded credibility challenges. Second, in considering the context of these threats and direct dealing, all of the employees testified that these conversations *were unprecedented*. Contrary to Respondent’s insinuations, it did not have a past practice of directly questioning them about what they wanted in collective-bargaining agreements, nor did they have a past practice of convincing employees that the Union was at fault for any breakdown in negotiations (Tr. 49, 62, 79–80, 95, 733, 742.)

With regard to the unilateral changes, Respondent’s Exceptions make much of the fact that ALJ Carissimi allegedly prejudiced Respondent by ordering rescission of discipline issued pursuant to its unilateral changes. The Board should firmly reject this argument, as it flies in the face of established Board precedent. For example, in *Boland Marine & Mfg.*, 225 NLRB 824 (1976), the Board, reversing the administrative law judge, ordered as a *remedy* for an unlawfully implemented work rule that the employer rescind all discipline issued pursuant to the work rule. This decision was enforced, twice,

by the Fifth Circuit (562 F.2d 1259 (5th Cir. 1977) and 851 F.2d 1420 (5th Cir. 1988)) and represents the current state of the law on this issue. As such, Respondent is in no way prejudiced by ALJ Carissimi following established precedent.

### **CONCLUSION**

Respondent's expansive Exceptions ultimately amount to little more than an attempt to replace ALJ Carissimi's credibility assessments and reasoned findings with Respondent's slanted version of the record evidence. For the reasons discussed above, the Board should reject these Exceptions and instead summarily adopt ALJ Carissimi's thoughtful decision.

Dated: October 27, 2016

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing Answering Brief to the National Labor Relations Board on behalf of the General Counsel was filed via e-filing and served on October 27, 2016, by email on the parties whose names and addresses appear below.

**Served via Email**

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