

**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.)	

EMPLOYER’S REPLY BRIEF TO THE GENERAL COUNSEL’S ANSWERING BRIEF

Employer, Ingredion, Incorporated d/b/a Penford Products Co. (the "Company"), by counsel, hereby submits its reply brief to the General Counsel’s Answering Brief, in the above-entitled matter, pursuant to § 102.46(h) of the Board’s Rules and Regulations.

I. The General Counsel’s Answering Brief is Procedurally Deficient and Should Be Stricken

The General Counsel’s Answering Brief failed to follow Board Rules and Procedures and is therefore procedurally deficient. Specifically, the Board’s Rules and Regulations require an answering brief to cite the exception it is currently responding to and the corresponding page(s) of record evidence it alleges supports challenged portions of the Administrative Law Judge (“ALJ”) decision. NLRB Rules and Regulations §102.46(d)(2). The Board should strike filings that do not comply with §102.46. *See Carson Trailer*, 352 NLRB 1274 (2008); *Frank E. Nash Fence*, 242 NLRB 233 (1979).

In its Answering Brief, the General Counsel plainly avoids identifying the exceptions to which it is responding or the record evidence it alleges supports challenged portions, thus

prejudicing the Respondent by rendering it unable to reply with specificity. The General Counsel complains that the Company's exceptions are "voluminous," but the Company's Exceptions and Brief in Support contrast with the General Counsel's Answering Brief because they fully comply with NLRB Rules and Regulations. Indeed, the Company was compelled to except to all outlined issues, as any ruling, finding, conclusions, or recommendation not excepted to is waived. GC Brief at 2; NLRB Rules and Regulations §102.46(b)(2).

While the Board will show leniency when a pro-se party fails to follow the requirements of §102.46, in this case it was Counsel for the General Counsel who failed to follow the Rules and Regulations, and the non-conforming brief should be stricken. Six Star Janitorial, 28-CA-023491, 2012 WL 59546521 (DCNET Nov. 28, 2012).

II. The Company Properly Addressed All Issues, Including the ALJ's Ill-Founded Credibility Determinations

The General Counsel also takes issue with the Company's full analysis of the record. First, the General Counsel contends that the Company repeatedly excepts to ALJ Carissimi's failure to find "irrelevant facts," as exemplified in Exceptions 18, 24, 166-68, and 247.

GC Br. 2. However, these facts are directly relevant to each party's bargaining conduct. *See Am. Commercial Lines*, 291 NLRB 1066, 1078 (1988) ("In determining whether a party has negotiated in good faith, it is necessary to scrutinize the totality of the circumstances and the party's conduct."). Specifically:

- Exception 18 relates to the ALJ's failure to find facts related to a significant strike the last time the plant and this Union engaged in substantive contract negotiations.
- Exception 24 relates to the ALJ's failure to find facts related to "manlifts" and the related bargaining which took place prior to bargaining for a new contract. This is important as it shows the Company's good faith bargaining and away-from-the table conduct in contrast to the General Counsel's allegations.
- Exceptions 166-68 identify the ALJ's lack of attention to the Union's pre-bargaining preparations, which form a key part of the totality of the relevant evidence concerning the

Union's bad faith in that they demonstrate that the Union was a savvy and experienced negotiator. An employer's compliance with its duty under the Act cannot be challenged if the union has engaged in unlawful bargaining. *See Remington Lodging*, 359 NLRB No. 95 (Apr. 24, 2013).

- Exception 247 identifies ALJ Carissimi's failure to find that during bargaining Meadows called the Department of Labor to gain information about the Flower Fund. This is clearly relevant to the Company's good faith attempts to be prepared for and engage in meaningful good faith bargaining on issues important to the Union.

The General Counsel further contends that the Company's attention to facts related to portions of the Second Amendment to Complaint ("Complaint") dismissed by the ALJ is misguided. GC Br. 2. Although the Company agrees with ALJ Carissimi's ultimate legal conclusion to dismiss Complaint allegations, the Board's Rules and Regulations require that the Company except to all findings of fact and intermediate legal conclusions with which it disagrees, or else they are waived. *See supra*. In addition, the fact that the portions of the Complaint these findings of fact relate to were dismissed does not discredit the weight and relevance the facts have on other allegations in the Complaint.

The General Counsel's Answering Brief further suggests the Company's Exceptions rest "almost *exclusively*" on Meadows "*discredited*" testimony. GC Br. 2 (emphasis in original). This is simply untrue. The Company cited to evidence from all relevant sources. Meadows' testimony was a minority source, and most of his cited testimony was not discredited. Although a fraction of the citations are to Meadow's discredited testimony, such citations are entirely proper, as the Company excepts to those credibility findings.

In addition to improperly characterizing the Company's citations, the General Counsel's Answering Brief misstates the Board's standard in evaluating ALJ credibility assessments. The General Counsel brazenly states that "ALJ Carissimi's credibility determinations should not be disturbed." GC Br. 2. Although the ALJ's credibility findings are a factor for the Board to

consider, they must “be considered along with the consistency and inherent probability of testimony.” Universal Camera Corp. v. NLRB, 340 U.S. 474, 497 (1951). The Board will overrule a hearing officer's credibility resolutions when the clear preponderance of all the relevant evidence shows that they are incorrect. FedEx Freight, 362 NLRB No. 43 (Mar. 24, 2015); *see also* NLRB v. Centeno Super Markets, Inc., 555 F.2d 442, 444 (5th Cir. 1977); ConAgra Foods, Inc. v. NLRB, 813 F.3d 1079, 1084 (8th Cir. 2016).

III. The Company Did Not Engage in Surface Bargaining, Unlawfully Implement Its LBF, and Did Not Engage in Away-from-the Table Misconduct

A. The Company Did Not Engage in Surface Bargaining

The Company’s good faith bargaining is well corroborated by the record and is supported by undisputed evidence. The General Counsel contends that the Company’s coverage of the Union’s conduct in its Brief in Support of Exceptions exposes a weakness in its case. GC Br. 4. On the contrary, discussion of the Union’s conduct – a dispositive issue – is entirely relevant. *See* Remington Lodging, 359 NLRB No. 95 (Apr. 24, 2013); 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.”)

The General Counsel attempts to downplay the threatened violence by lead Union negotiator Jethro Head towards Meadows by calling it “bizarre.” There is nothing bizarre about considering such facts, as they plainly show the Union’s bad faith in bargaining (and the Company’s good faith response to ignore such behavior and not engage in similar conduct). The General Counsel cites People Care, 327 NLRB 814 (1999), to argue such conduct is acceptable at bargaining. GC Br. at 4. People Care is inapplicable to this case because there the issue was whether the Employer properly conditioned bargaining on the removal of a union negotiator. To

the extent such an issue is analogous to the relevant question in this case (i.e., the Union’s overall bad faith), People Care supports the *Company’s* argument. In that case, the Board adopted the ALJ’s finding, which relied in part on the factual finding that the bargaining member at issue “did not assault or threaten to assault the Respondent’s representative.” Id. at 824. In the instant case, Head’s threat of assault released the *Company’s* bargaining obligations. See Union Nacional de Trabajadores, 219 NLRB 862, 863 (1975) (“We would not expect or require an employer to sit down and bargain with a union guilty of such misconduct absent adequate assurances against continuation thereof.”); Broadway Hospital, 244 NLRB 341, 345–46 (1979) (vulgar and threatening remarks by union president directed at employer’s chief negotiator “must certainly be regarded as provocative and coercive” and relieved the employer’s bargaining duty).

In response, the General Counsel contends that unidentified record evidence suggests the Union was bargaining in good faith by bargaining from a concession list and invoking a series of information requests derived from the *Company’s* proposals, while the *Company* refused to open Union proposals and engage them. GC Br. 4. The General Counsel’s only citation to the record, regarding bargaining on July 27, is the subject of Exceptions 228-229. The General Counsel has not presented evidence of *any* instance of the *Company* refusing to consider a Union proposal. Rather, the record evidence shows that the *Company* considered Union proposals, both by its words and by its actions in drafting its proposals that responded to those of the Union with at least forty-six (46) modifications to its proposals in response to the Union’s bargaining positions. See Jt. Exh. 2 at 2008, 2018, 2019; Jt. Exh. 3 at 2051, 2052, 2054, 2058, 2062, 2063, 2064, 2069; Jt. Exh. 4 at 2089-90, 2091, 2092, 2093, 2095, 2098, 2103, 2104, 2106; Jt. Exh. 5 at 2117, 2122, 2123, 2124-25, 2126, 2135; Jt. Exh. 6 at 2182, 2184, 2188; Jt. Exh. 7 at 432, 447, 448, 454; Jt. Exh. 8 at 2228, 2230, 2233, 2234, 2240, 2241, 2250, 2253, 2260, 2261; Jt. Exh 9 at 2263.

The General Counsel then moves beyond “the factors emphasized by ALJ Carissimi,” in effect asking the Board to make conclusions of law in the General Counsel’s favor beyond those found by the ALJ. Because the General Counsel did not file exceptions or cross exceptions, it has not preserved any such arguments to present before the Board. The Board should not consider these arguments. GC Br. 4-5. Further, the General Counsel’s arguments ignore significant record evidence to the contrary. The Respondent did not propose that GC Ex. 28 be part of the collective bargaining agreement. Tr. 144, 475. Meadows explicitly pointed out on July 31 that bidding had been changed to “department then plant.” See Tr. 485, 1031-32, 1081; R. Exs. 66 at 231, 67 at 37. The record shows that Meadows made extraordinary efforts to plainly present and explain its proposals throughout bargaining, including on July 29. Tr. 1010. The Company’s proposals contained no regressive changes. Jt. Exs. 1-9.

The General Counsel further argues that credited facts show the Company’s bad faith bargaining. GC Br. 5. However, the General Counsel misstates the ALJ’s findings, and the facts tell a different story. Meadows did not threaten impasse; rather, he said that if the parties reached impasse *on a particular subject*, they needed to continue bargaining on other subjects.¹ Tr. 964. At no point on June 30 did the Company tell the Union that it intended to prepare a last, best, and final (“LBF”). See GC Ex. 3 at 8; Tr. 979; R.Exs. 66 at 219, 67 at 7-9. Indeed, Meadows suggested bringing in a federal mediator at that session – certainly inconsistent with surface bargaining or preparing a LBF. Tr. 978; R.Ex. 67 at 8. The ALJ did not credit the record cited by the General Counsel for the proposition that Meadows repeatedly told Union representatives that they did not have a contract and he would not follow the terms of the Red Book. GC Br. 5. Meadows never told the Union that he was not obligated to follow any of the

¹ The GC is incorrect that the ALJ found that Meadows threatened impasse on June 1. The ALJ made no such finding, and credited Meadows’ testimony on this point. JD 12, ll. 17-19.

terms and conditions of the Red Book and had no specific conversation with the Union about that. Tr. 1032.

The General Counsel's remaining surface bargaining allegations, which it has failed to preserve by filing exceptions or cross-exceptions, are likewise without support. The Company's movement during negotiations is well outlined in the record, Exceptions, and Brief in Support, and was well beyond "illusory" to the Union. *See supra*. The ALJ did not find that the Company was merely trying to create a paper trail and mislead the Union, and even the General Counsel makes no attempt to cite to the record in support of that position. GC Br. at 6. Nor did Meadows attempt to "hide" proposals or make regressive proposals. The ALJ did not so find, and the General Counsel's only citation to the record does not support its contention that the Company made a regressive proposal regarding the discipline procedure. The LBF added provisions about how long discipline stays in the file and reduced the first step to an undocumented warning because the Union had asked for a progressive disciplinary procedure. Jt. Ex. 8 at 2233-34; R.Ex. 39 at 559.

B. The Company Lawfully Implemented its Last, Best, and Final Offer

The record demonstrates that the parties reached impasse and, therefore, that the Company's implementation of its LBF was entirely appropriate and lawful. The ALJ explicitly found no inconsistency in the Company's position that the parties reached impasse on August 18, and the General Counsel has not excepted to that finding.² JD 23, fn. 22. Despite arguing otherwise, the General Counsel even acknowledged impasse in its Answering Brief. GC Br. 9, fn. 3 ("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.")

² The General Counsel relies on the Company's 10(j) brief, which does not form part of the record of the instant case. Even if the Company's 10(j) brief were in evidence, it is not inconsistent with the Company's consistent position that the parties reached impasse on August 18 and remained there until after September 10.

The General Counsel still attempts to argue otherwise, relying on the newness of the parties' relationship and the number of bargaining sessions. GC Br. 7. Despite the General Counsel's claims, the ALJ did not find that GC Exh. 2(a) was part of the Company's initial offer. The Union has represented the bargaining unit since approximately 1948, and neither a change in ownership nor the Company's desire to reopen all terms of the agreement washes that history away. Tr. 555-56. Further, the mere number of bargaining sessions is not indicative of impasse. Dallas Gen. Drivers, Warehousemen and Helpers, Local 745 v. NLRB, 355 F.2d 842, 845 (D.C. Cir. 1966) ("There is no fixed definition of an impasse or deadlock which can be applied mechanically to all factual situations.")

Nor did Meadow's offers to "massage" his offers erode the bona-fide impasse. 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. 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.

In addition, the Company did not impede impasse by including a permissive bargaining subject in its LBF. Neither of the two cases the General Counsel cites in support involves voting on work schedules by bargaining unit members. GC Br. 8. Moreover, the General Counsel has clearly failed to prove that the voting proposal caused the impasse. *See ACF Industries*, 347 NLRB 1040, 1042 (2006) ("the General Counsel nor the Union demonstrated that the Respondent's insistence on the proposal contributed to the impasse in any discernible way").

The ALJ did not find that the voting proposal contributed to the parties' impasse, and the General Counsel did not except to his failure to so find. The General Counsel incorrectly claims, without citation, that "[i]mpasse requires that the parties be at *complete* loggerheads." GC Br. 9, fn. 3. Indeed, parties need not reach impasse on all bargaining issues before an employer may lawfully implement its bargaining proposals. Taft Broadcasting, 163 NLRB 475, 478 (1967) ("a deadlock is still a deadlock whether produced by one or a number of significant and unresolved differences in positions"); Calmat Company, 331 NLRB 1084, 1097 (2000) (a single issue may be of such overriding importance that it justifies an overall finding of impasse on *all* of the bargaining issues); Laurel Bay Health & Rehab. Ctr. v. NLRB, 666 F.3d 1365, 1376 (D.C. Cir. 2012).

The General Counsel further contends that the Company presented "packaged" proposals. GC Br. 9, fn. 3. The opposite is true, as illustrated by Meadows asking the Union what areas could be massaged or tweaked to get the parties closer to agreement. *See, e.g.*, Tr. 1013 (Meadows offering to change seniority proposal), 1115. Nor is it true that the Union rejected *all* of the Company's proposals. GC Br. 9, ft. 3. The Union did, in fact, select certain terms from the Company's proposals to incorporate into its own (although they were only the handful of Company proposals that benefited the Union). GC Exh. 8 at 3.

C. The Company Did Not Engage in "Away-From-The Table" Misconduct

The General Counsel again resents the Company's citation to discredited testimony. GC Br. at 10. As discussed above, the Company primarily relies on credited testimony, and it properly excepted to any discredited testimony. The General Counsel further argues that the Company's alleged direct dealing is unprecedented because the Company had no past practice of direct questioning of bargaining unit employees or convincing employees that the Union was at fault for breakdowns in negotiations. GC Br. at 10. Yet, management at the Cedar Rapids plant

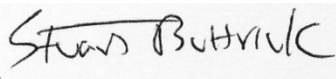
has long had a practice of keeping employees informed about what goes on at the plant and giving employees the opportunity to ask management questions regarding work matters. Tr. 44, 72, 674, 741, 768; R.Ex. 63; *see also* GC Ex. 11.

Finally, the General Counsel claims that the ALJ did not prejudice the Company by ordering rescission of discipline issued pursuant to valid unilateral changes. GC Br. 10. The General Counsel has confused the Company's argument that the "flowing from" allegation is prejudicial and the separate argument that rescission of discipline is an inappropriate remedy in this case. The General Counsel cites Boland Marine & Mfg., 225 NLRB 824 (1976), to argue that it is possible for rescission of discipline to be an appropriate remedy. For the reasons discussed in the Company's Exceptions and Brief in Support, such a remedy remains inappropriate. Am. Standard Companies, Inc., 352 NLRB 644 (2008).

IV. CONCLUSION

The Company respectfully requests that the Complaint be dismissed in its entirety.

FAEGRE BAKER DANIELS LLP

By:  _____

Stuart R. Buttrick
Ryan J. Funk
300 N. Meridian Street, Suite 2700
Indianapolis, IN 46204
Telephone: 317-237-0300
stuart.buttrick@faegrebd.com
ryan.funk@faegrebd.com

Attorneys for Respondent, Ingredion
Incorporated
d/b/a Penford Products Co.

CERTIFICATE OF SERVICE

I certify that, on November 10, 2016, a copy of the foregoing was served via electronic mail upon the following:

DEVKI K. VIRK, ESQ.
BREDHOFF & KAISER, PLLC
805 15TH STREET, N.W., 10TH FLOOR
WASHINGTON, D.C. 20005
dvirk@bredhoff.com

Tyler Wiese
Chinyere Ohaeri
Counsel for the General Counsel
National Labor Relations Board
Region 18
Federal Office Building
212 Third Avenue South, Suite 200
Minneapolis, MN 55401
tyler.wiese@nlrb.gov
chinyere.ohaeri@nlrb.gov

