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**COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

Jacqueline Rau, Counsel for the General Counsel in the above case, submits this post-hearing brief to the Honorable Christine E. Dibble, Administrative Law Judge (ALJ).

I. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On February 1, 2016, the United Steelworkers Union, Local 4880 (the Union) filed a charge in Case 15-CA-168733 with Region 15 of the National Labor Relations Board (the Board) alleging, as amended, that Huber Specialty Hydrates, Inc. (Respondent) violated Section 8(a)(5) of the National Labor Relations Act (the Act) by: a) on December 17, 2015, announcing its intent to change its attendance policy, b) since December 17, 2015, failing to bargain with the Union regarding changes to its attendance policy, and c) on February 1, 2016, unilaterally changing its attendance policy. (GCX-1(a); GCX-1(c)).¹ This charge, and the subsequent amendment, were served on Respondent. (GCX-1(b); GCX-1(d)). On May 13, 2016, a Complaint and Notice of Hearing issued. (GCX-1(e)). On June 13, 2016, Respondent filed an Answer to the Complaint and Notice of Hearing. (GCX-1(s)).

On June 1, 2016, Brandon Harmon (Harmon) filed a charge in Case 15-CA-177324 with Region 15 of the Board alleging, as amended, that Respondent violated Section 8(a)(1) of the Act by instructing employees not to discuss grievances with other employees. (GCX-1(g); GCX-1(i)). This charge, and the subsequent amendment, were served on Respondent. (GCX-1(h); GCX-1(j)). On July 6, 2016, Harmon filed an additional charge in Case 15-CA-179549 with Region 15 of the Board alleging Respondent violated Section 8(a)(1) and 8(a)(3) of the Act by

¹ References to the Exhibits of the General Counsel, Respondent, and to Joint Exhibits are designated as "GCX-#," "RX-#," and "JX-#" respectively, with the corresponding number for the exhibit. References to the transcript are designated as "Tr. at #," with the corresponding page number.

disciplining him in retaliation for his union activities, and in retaliation for his protected concerted activity. (GCX-1(k)). This charge was also served on Respondent. (GCX-1(l)). On September 29, 2016, a Consolidated Complaint and Notice of Hearing issued, and on January 10, 2017, an order issued setting the hearing date for April 6, 2017. (GCX-1(m); GCX-1(p)). On October 13, 2016, Respondent filed an answer to the Consolidated Complaint and Notice of Hearing. (GCX-1(s)). Administrative Law Judge Christine E. Dibble presided over the hearing on April 6 and 7, 2017 in Little Rock, Arkansas.

B. STATEMENT OF FACTS

1. OVERVIEW OF RESPONDENT'S FACILITY

Respondent operates a facility in Bauxite, Arkansas where it refines aluminum, which is used in a variety of industries. (Tr. at 173; Tr. at 177). Although the facility has been in operation for many years, Respondent began operating the facility in 2012, and employs about 60 employees. (Tr. at 22-23). Hourly employees work as baggers, operators, and in craft job classifications. (Tr. at 24). Employees generally start by working as a bagger, and then must bid into the higher job classifications as they gain experience. (Tr. at 24). Operators tend to have more seniority than baggers, and are paid at a higher hourly rate because the position requires advanced skills and training. (Tr. at 24).

2. BARGAINING RELATIONSHIP BETWEEN RESPONDENT AND UNION

Hourly employees at the facility are represented by the Union, which has continuously represented employees employed by different employers at the facility for several decades. (Tr. at 25; Tr. at 182). The parties have a current collective bargaining agreement, which went into effect on March 1, 2015 and expires on March 1, 2020. (JX-1). The collective bargaining agreement contains a management rights clause under Article IV, which states:

Except as may be limited by the provisions of this Agreement, the operation of the plant, and the direction of the working forces, including the right to hire, lay off, suspend, dismiss, and discharge any employee for proper and just cause and to assign employees to tasks as needed are vested exclusively with the Company. This includes the right to adopt reasonable rules and policies subject to at least seven (7) days' notice prior to implementation of such rule or policy to provide the Union with the opportunity for input during that time and subject to the Union's right to promptly grieve the reasonableness of any such rule or policy. However, as the parties have a joint interest in and obligation for workplace safety, drug and alcohol testing will be performed pursuant to the agreed upon policy. The Company will offer employees a last chance agreement in lieu of termination on one occasion unless the employee was in fact impaired on the job.

The parties' previous collective bargaining agreement, which was in effect from April 1, 2012 until March 1, 2015, contained essentially the same language in the management rights clause. (RX-5). However, the current collective bargaining agreement omitted the sentence "[t]he Company will continue to apply the existing Employee policy book," which was the last sentence of the management rights clause in the previous collective bargaining agreement. (RX-5). The parties discussed the elimination of that sentence during contract bargaining. Local Union President Albany Bailey (Bailey), who served on the Union's negotiating committee, testified that during bargaining Respondent told the Union that it did not foresee any changes to any policies. (Tr. at 79).

During bargaining, the parties also discussed the possibility of including the attendance policy, which is a separate policy from the collective bargaining agreement, in the collective bargaining agreement itself. The Union and Almatris, the previous employer at the facility, bargained the attendance policy separately from the collective bargaining agreement in 2009, and Respondent and the Union have continued to maintain the attendance policy as a separate policy. (Tr. at 83). Ultimately, the parties decided to keep the attendance policy as a separate policy, because as the Union specifically stated to Respondent at bargaining, any changes over the

attendance policy would need to be bargained even if the attendance policy is not in the collective bargaining agreement itself because attendance is a mandatory subject of bargaining. (Tr. at 295-296; GCX-26). The parties' decision to maintain the attendance policy separately from the collective bargaining agreement is consistent with how they maintain other policies, including the corrective action discipline policy. (JX-10).

3. ATTENDANCE POLICY

a. RESPONDENT ANNOUNCES CHANGES TO ATTENDANCE POLICY

On December 17, 2015, the Union and Respondent had a Central Committee meeting. (JX-4; JX-5; Tr. at 29; Tr. at 90). Central Committee meetings are contractually agreed upon, and give the Union and Respondent an opportunity to meet monthly and discuss issues at the facility. (JX-1; Tr. at 29; Tr. at 90). The December 17, 2015 Central Committee meeting was attended by Bailey, Local Union Vice President Michael Brian Christian (Christian), Union Representative Oscar Murdock, Respondent's Human Resources Manager Jessica Rowan (Rowan), Respondent's Plant Manager Frank Viguerie, Respondent's Facility Manager Travas Parker, and Respondent's Back End Process Engineer Jason Smith (Smith). (Tr. at 30).² At the meeting, Rowan gave the Union representatives a draft copy of a revised attendance policy. (JX-3; Tr. at 31; Tr. at 91). Rowan testified she told the Union that Respondent intended to implement a revised attendance policy, and she discussed the changes in the policy with the Union during that meeting. (Tr. at 263). Further, she testified that she intended to implement a new attendance policy on January 1, 2016 regardless of the Union's position. (Tr. at 289; GCX-7). Upon receipt of the changed policy, both of the Union representatives immediately protested the significant changes in the policy. Bailey objected to the drastic decrease in the number of

² Although called by Respondent to testify, neither Travas Parker nor Jason Smith testified to the December 17, 2015 Central Committee meeting. (Tr. at 173-200; Tr. at 240-250).

occurrences (days absent from the facility) that an employee could receive before discharge, from twelve (12) occurrences to eight (8) occurrences. (Tr. at 32-33; Tr. at 52; Tr. at 92). Christian questioned whether employees who already had nine (9) occurrences, which was now more than the allowable number of occurrences before discharge, would be adversely impacted by the changes. (Tr. at 92; Tr. at 103). The Union told Respondent that it could not agree to the new attendance policy without seeking feedback from the Union's membership. (Tr. at 34; Tr. at 54; Tr. at 92).

Respondent gave the Union a new attendance policy, which changed the procedures in material and significant ways.³

b. UNION DEMANDS TO BARGAIN REGARDING CHANGES TO ATTENDANCE POLICY

i. UNION'S WRITTEN DEMAND TO BARGAIN

On January 4, 2016, Rowan sent Bailey an e-mail entitled "Attendance Policy," asking him if the Union had any questions and/or issues regarding the new attendance policy. (JX-6(a)). On January 5, 2016, Bailey responded and stated, "We have a few concerns and suggestions. We plan to have them appropriately bargained and/or grieved if necessary." (JX-6(a)).

About a half hour later, on January 5, 2016, Bailey sent an e-mail entitled, "Cease and Desist/Attendance Policy" to Rowan, Travas Parker, and Smith. Bailey also copied Christian and United Steelworkers Staff Representative Michael Martin (Martin) on the e-mail. (JX-6(b)). In the e-mail, Bailey stated:

On behalf of the members of United Steelworkers Local 4880 employed by Huber Specialty Hydrates, llc [*sic*], and whereas attendance policies along with any changes in working conditions are mandatory subjects of bargaining, we hereby request that a unilateral implementation of such policies are ceased and that you desist from such actions and that you desist from such actions until after those

³ Changes discussed, *infra* at (c)(i).

items have been appropriately bargained. Please contact our Staff Representative, Michael Martin, to schedule a suitable date, time, and place for discussion of all issues involved with policies, process disputes and causes for this and other cordial demands. (JX-6(b)).

On January 13, 2016, Rowan responded to Bailey's e-mail and citing the managements rights clause (Article IV) in the collective bargaining agreement, told him that Respondent notified the Union of its intent to implement a new attendance policy, but offered the Union additional time for input as a courtesy. (JX-6(b)). Rowan also informed Bailey that management planned to implement the revised attendance policy on February 1, 2016. (JX-6(b)). Later that day, on January 13, 2016, Bailey responded to Rowan's e-mail and reiterated his demand to bargain, stating, in part:

The Attendance Policy will be bargained. If you choose not to bargain, we will take the appropriate actions to correct your unreasonable behaviors. After consulting with the employees, you received a notice of cease and desist on January 5th [2016] to bargain all issues associated with the proposed attendance policy. It also prompted you to contact our International representative. Please do so immediately. Nothing in the contract precludes you from mandatory bargaining. (JX-6(b)).

On January 14, 2016, Rowan responded to Bailey's e-mail and stated, in part: "[T]he management rights clause is a clear and unmistakable waiver of the company's obligation to bargain over adopting policies. [...] The policy will then become effective 2.01.16." (JX-6(b)).

Bailey responded later that day, stating, in part:

[W]e simply did not discuss any 'waiver' of the legal obligations concerning the implementation of your rough draft of attendance policy changes. In fact our agreement is far from the clear and concise definition that you have embarked upon in determining the right to bargain any changes in our working conditions. [...] [W]e welcome the opportunity for input and reserve our right to bargain any changes subject to the protections under the NLRA, FMLA, and all applications of federal and state law. Our International representative has agreed to bargain on the 28th of this month. If the input we have for you is not an agreeable standard, our obligations are to bargain the changes that you have presented. Again we request and reaffirm that Huber Specialty Hydrates, LLC, cease any unilateral

change and desist from implementation until bargaining has reached completion. (JX-6(b)).

ii. UNION GRIEVANCE PROTESTING UNILATERAL CHANGES TO ATTENDANCE POLICY

On January 14, 2016, Christian filed a grievance over the Respondent's announced changes to the attendance policy. (JX-7; Tr. at 93). In the grievance, the Union requested that no changes be made to the existing attendance policy without "explicit agreement between the Union and the [C]ompany." (JX-7). Respondent never responded. (Tr. at 93).

iii. UNION'S VERBAL DEMANDS TO BARGAIN REGARDING CHANGES TO THE ATTENDANCE POLICY

a) JANUARY 13, 2016 DEMAND TO BARGAIN

On January 13, 2016, Facilities Manager Travas Parker called Bailey into his office to discuss Bailey's e-mail demanding to bargain over changes to the attendance policy. (Tr. at 36). Bailey met with Travas Parker and Rowan. Rowan complained that Bailey's e-mail was more assertive than normal. (Tr. at 37). Travas Parker told Bailey that Respondent had the right to implement policies. (Tr. at 37-38). Bailey asserted that "everything was subject to bargaining and the grievance process." (Tr. at 38).⁴

b) JANUARY 20, 2016 DEMAND TO BARGAIN

On January 20, 2016, the Union and Respondent had another monthly Central Committee meeting. Although the attendance policy was not scheduled to be discussed during this meeting, Rowan told Bailey that the Company had taken the Union's input into consideration and had further revised the attendance policy that was presented on December 17, 2015. Rowan did not tell him exactly how Respondent had changed the policy, except for increasing the amount of

⁴ Although called by Respondent to testify, and although she referenced the conversation in her January 14, 2016 e-mail, Rowan did not testify to the conversation. (Tr. at 254-294; JX-6(b)). Similarly, Travas Parker was called to testify by Respondent, but did not testify to the conversation with Bailey. (Tr. at 173-200).

occurrences before discharge from eight (8) to nine (9) occurrences. (Tr. at 68). Rowan did not mention any other specific changes, or present a further revised version of the attendance policy. (Tr. at 39). Bailey told her that the Union still wanted to bargain over the changes to the attendance policy. (Tr. at 39). Rowan did not respond. (Tr. at 40).⁵

c) JANUARY 22, 2016 DEMAND TO BARGAIN

On January 22, 2016, the Union and Respondent met at the second step of the grievance and arbitration procedure on an unrelated grievance. (Tr. at 94). Union representatives Bailey and Christian, as well as Respondent's representatives Rowan and Travas Parker were in attendance for the grievance meeting. (Tr. at 94). At the start of the meeting, Bailey requested to discuss the attendance policy. (Tr. at 94). Rowan told the Union that she wanted to discuss the grievance at issue first, and then the parties could discuss the attendance policy. (Tr. at 94). Once the parties discussed the grievance, Bailey again asked whether Respondent was going to bargain over the attendance policy. (Tr. at 94). Rowan advised him that Respondent planned to implement the policy on February 1, 2016. (Tr. at 94). Bailey responded that to do so would be an unfair labor practice, and the Union would be forced to file a charge with the National Labor Relations Board. (Tr. at 94). Rowan responded that she understood, but Respondent was still going to implement the revised attendance policy on February 1, 2016. (Tr. at 95).⁶

d) JANUARY 28, 2016 DEMAND TO BARGAIN

On January 28, 2016, the parties met at the third step of the grievance and arbitration procedure on several unrelated grievances. (Tr. at 40). Union representatives Bailey, Christian, and the Union's Staff Representative Michael Martin met with Respondent's representatives

⁵ Although called by Respondent to testify, Travas Parker did not testify to the January 20, 2016 Central Committee meeting. (Tr. at 173-200).

⁶ Although called by Respondent to testify, neither Rowan nor Travas Parker testified to the conversation. (Tr. at 254-294; Tr. at 173-200).

Rowan and Travas Parker. (Tr. at 40-41). At the start of the meeting, Martin asked Respondent's representatives if they were ready to start bargaining over the attendance policy as the Union requested in Bailey's January 14, 2016 e-mail. (Tr. at 40-41; Tr. at 96; Tr. at 266; Tr. at 291). Rowan said, "No." (Tr. at 41). Martin informed Respondent that if they did not bargain with the Union over the changes to the attendance policy, the Union would file a charge with the Board. (Tr. at 41; Tr. at 96-97). Rowan and Travas Parker simply nodded, but still did not agree to any bargaining with the Union. (Tr. at 41). Rowan testified that although the Union demanded bargaining, Respondent's position was that the collective bargaining agreement gave it the right to implement the policy without bargaining. (Tr. at 291).

After the meeting, Rowan pulled Bailey aside and asked him if he would like to see the final draft of the attendance policy. (Tr. at 41). Rowan told him that she was planning to implement the policy on February 1, 2016 and showed Bailey a copy of the new attendance policy with her handwritten final changes on the policy. (Tr. at 41-42). Prior to their conversation, Bailey had never seen that version of the attendance policy, and he never saw the finalized version until Respondent implemented the policy on February 1, 2016. (Tr. at 42).

c. RESPONDENT IMPLEMENTS NEW ATTENDANCE POLICY

On February 1, 2016, Respondent implemented the new attendance policy for all hourly employees at the facility. (JX-8; JX-9; Tr. at 42-43). Each employee was given a copy of the new policy. (Tr. at 42; Tr. at 98). Respondent's changes to the attendance policy that it implemented on February 1, 2016 are still currently in effect at Respondent's Bauxite, Arkansas facility. (Tr. at 43; Tr. at 98). The Union never agreed to the implemented attendance policy. (Tr. at 44; Tr. at 99).

i. DISTINCTIONS BETWEEN NEW ATTENDANCE POLICY AND PREVIOUS POLICY

On February 1, 2016, Respondent changed the attendance policy in four significant ways. First, in exactly the same manner as Respondent announced to the Union on December 17, 2015, Respondent created a new call off procedure requiring employees, if necessary, to call three different managers until they received an answer in order to call off from work. (JX-3; JX-9). In the existing policy, employees were only required to call their immediate supervisors. (JX-2). Second, exactly as Respondent announced to the Union on December 17, 2015, Respondent created a new no call/no show provision that if employees did not appear for work after three (3) consecutive work days without notification, the employee was considered to have voluntarily terminated his or her employment. (JX-3; JX-9). In the previous policy, an employee terminated his or her employment after not appearing for work for four (4) consecutive work days. (JX-2; JX-9). Additionally, Respondent changed the discipline given to employees in the no call/no show provision of the attendance policy. In the previous policy, after one (1) no call/no show day in twelve (12) months, an employee received a written warning, now an employee received a one (1) day suspension for the same infraction; after two (2) no call/no show days, an employee received a one (1) day suspension, now, an employee received a three (3) day suspension; after three (3) no call/no show days, an employee received a three (3) day suspension, and now, he or she is discharged. (JX-2; JX-9). Third, Respondent changed the level of discipline that an employee would receive as a result of absences in a twelve (12) month period. Significantly, in the previous policy, after eight (8) occurrences in a rolling twelve month period (i.e. each occurrence stays in the employee's file twelve (12) months from the date of the occurrence), the employee received a one (1) day suspension, and after ten occurrences, an employee received a three (3) day suspension. (JX-2). Now, after nine (9) occurrences, an employee is discharged.

(JX-9). Respondent increased the number of occurrences before discharge from eight (8) occurrences originally announced to the Union on December 17, 2015 to nine (9) occurrences, still maintaining a number of occurrences significantly less than the twelve (12) occurrences afforded to employees in the previous attendance policy. (JX-2; JX-3; JX-9). Fourth, in exactly the same manner as Respondent announced to the Union on December 17, 2015, Respondent gave itself ultimate discretion to discharge an employee even if he or she had not reached nine (9) occurrences if in the exclusive opinion of management, the occurrences established a pattern. (JX-9).

4. RESPONDENT ISSUES DISCIPLINE TO BRANDON HARMON

a. EMPLOYMENT HISTORY OF HARMON

Brandon Harmon (Harmon) started working for Respondent as a bagger around September 2013. (Tr. at 125). Harmon has a clean disciplinary record. (Tr. at 136; Tr. at 286-287). Harmon was never disciplined for any reason other than attendance, and all of his attendance related discipline occurred more than twelve months before May 31, 2016. (Tr. at 136; Tr. at 286; GCX-25(a)-(g)). Notably, Respondent does not consider attendance discipline when issuing non-attendance related discipline. (Tr. at 286; JX-9; JX-10).

Around February 2016, Respondent promoted Harmon to an operator, a higher paid and more skilled position. (Tr. at 126). After his promotion into the operator position, Harmon worked continuously in that position, and never worked as a bagger again. (Tr. at 128).

b. EVENTS LEADING TO HARMON'S DISCIPLINE

On May 31, 2016, Harmon began his work day at 7:00 am, and started working in the control room with the other operators. (Tr. at 126). An hour later, around 8:00 am, Harmon's immediate supervisor Chris Skinner and Supervisor Craig Parker came into the control room

where Harmon was working with fellow operators, Jake Gardner and Rick Jackson. (Tr. at 126). Parker singled out Harmon specifically, and instructed him to “bag the jet mill.” (Tr. at 127). Baggers perform the bagging in the jet mill, manually loading either 2,000 pound bags or 50 pound bags with refined alumina material. (Tr. at 127-128; Tr. at 178). Harmon dutifully went to the jet mill to begin bagging, even he had not performed bagger job duties since he was promoted. (Tr. at 158; RX-4).⁷

From around 8:00 am to 9:00 am, Harmon worked without interruption at the jet mill, preparing 50 pound bags to be filled with product, filling the bags with product, and loading the bags onto the pallet. (Tr. at 145). The previous bagger had placed 10 bags on the pallet (which holds 40 bags), but first Harmon needed to prepare the next bags to be filled. (Tr. at 145). Before a bag can be filled with product, a bagger must stencil and dry the bags, which Harmon did. (Tr. at 145).

Around 9:00 am, Harmon took his first scheduled break. He went to the break room, and spoke with Justin Lang, who works as a bagger. (Tr. at 130). Harmon told Lang that he was required to perform a bagger’s job, which was not his responsibility as an operator. (Tr. at 130). Harmon told Lang that he thought the highest bagger on the overtime list should have been offered the work, and they should file a grievance over the missed opportunity to perform that work and earn overtime. (Tr. at 131). The overtime list organizes employees by job classification, and governs how overtime is awarded. (Tr. at 134). The employee in that job classification with the fewest amount of overtime hours is at the top of the list, and is first eligible to receive overtime pay. (Tr. at 131-132; Tr. at 27-28; Tr. at 89). Harmon testified that his understanding of the collective bargaining agreement’s provision on overtime was that if the

⁷ This assignment was unusual as Harmon has not been assigned to work as a bagger since this date either. (Tr. at 129).

employer needs someone to work in a certain job classification, the employer should first offer overtime to an employee who works in that job classification instead of reassigning someone from a different job classification. (Tr. at 152-153). Lang agreed with Harmon, and suggested that Harmon inform the highest bagger on the list that he was eligible for filing a grievance. (Tr. at 131). Harmon then checked the overtime list posted on the break room wall and discovered that the highest bagger on the list was Charles Kirtley. (Tr. at 132; Tr. at 134).

Around 9:10 am, towards the end of his scheduled break, Harmon headed back to the jet mill to continue bagging. Before he could get to the jet mill, Harmon was immediately stopped by Back End Production Manager Jason Smith (Smith). (Tr. at 241). Smith told him that he had talked to Craig Parker. (Tr. at 133). Smith told Harmon that Respondent “paid him to do a job, and [he] needed to do it.” (Tr. at 133). Smith informed Harmon that he needed to “quit talking to other folks around here about filing grievances.” (Tr. at 133).

Harmon went back to the jet mill and continued to work without interruption until around 10:00 am. (Tr. at 150). At 10:00 am, Harmon went to the restroom and got a drink of water. (Tr. at 150). While he was getting a drink, his immediate supervisor Chris Skinner told all the operators, “You all need to shut down the number one spray dryer.” (Tr. at 150). Consequently, per Skinner’s instructions, Harmon and Gardner began shutting down the spray dryer. Gardner began the time consuming process of idling the spray dryer to enable it to slow down before the operators are able to shut it completely down. (Tr. at 156). Harmon continued bagging at the jet mill for about an hour, until he needed to help Gardner with the spray dryer. (Tr. at 156).

While Harmon was bagging, around 10:30 am, Craig Parker stopped by Harmon’s work station. Parker asked Harmon how it was going. Harmon told him that the machine was bagging

a little slow. (Tr. at 156). Parker did not respond to Harmon's comment, or return to Harmon's work area at any point again during Harmon's shift. (Tr. at 156-157; Tr. at 206; Tr. at 211).

Then, around 11:00 am, Gardner called Harmon to help him finish shutting down the spray dryer, which took about 45 minutes to accomplish. (Tr. at 130). After Harmon and Gardner had completed the task, Harmon went back to work in the jet mill and continued bagging for the remainder of his shift until it ended at 3:00 pm. (Tr. at 130).

Harmon bagged thirty (30) bags, and was able to complete one pallet during the shift. (Tr. at 156; GCX-4). Although Respondent does not have a production quota, Harmon's production level was consistent with employees who worked the day before, and the shift after Harmon. (GCX-4; GCX-5; Tr. at 121-122). Additionally, Harmon's production was consistent with other baggers. Around March 2017, Fitzgerald Williams and Kyle Peterson, who normally work as baggers, were assigned to work together, and completed one pallet between the two of them on their twelve hour shifts without consequence. (Tr. at 198; Tr. at 285).

c. HARMON DISCUSSES FILING A GRIEVANCE WITH A CO-WORKER

The next day, around June 1, 2016, Harmon reported back to work and returned to his regular operator duties. (Tr. at 133). During his first break, around 9:00 am, he spoke with bagger Charles Kirtley. Kirtley was also the first employee on the bagger overtime list, and thus entitled to overtime if Respondent was contractually required to call overtime the day before. (Tr. at 133). Harmon told Kirtley about the work Harmon performed, which Harmon thought should have been an overtime opportunity for a bagger. Kirtley told Harmon that he would file a grievance, which the Union subsequently did on his behalf. (Tr. at 133; JX-14). In the grievance, the Union alleged that Respondent violated the contract by failing to call overtime, and instead

tasking an operator to complete operator and bagging duties. (JX-14). The Union pursued the grievance, and Respondent ultimately denied it at second step. (JX-15).

d. RESPONDENT ISSUES WRITTEN DISCIPLINE TO HARMON

Later that day, on June 1, 2016, Facilities Manager Travas Parker and Supervisor Craig Parker called Harmon to the office. (Tr. at 135). Travas Parker told Harmon that he got paid to complete a job, but he did not complete the number of bags that he was supposed to complete the day before. (Tr. at 135). Travas Parker also informed Harmon that he should have ignored the instructions from his immediate supervisor, Chris Skinner, to shut down the spray dryer, and he should have continued to bag in the jet mill. (Tr. at 135-136). Craig Parker gave Harmon a written warning, which stated: “Mr. Harmon was instructed to bag the jet mill empty, he only bagged 30 bags all shift. Mr. Harmon did not perform the job he was asked to do, nor did he notify anyone of any serious problems that would have been causing an issue. Mr. Harmon failed to fill out any paperwork for this work station.”⁸ (Tr. at 134; JX-11).

i. RESPONDENT’S DECISION TO DISCIPLINE HARMON

Respondent has a corrective action discipline policy, which it follows when issuing non-attendance related discipline. (JX-10; Tr. at 275). Under the policy, there are three levels of discipline based on the severity of the offense: Level One offenses result in verbal warnings, Level Two offenses result in written warnings, and Level Three offenses result in a suspension. (JX-10; Tr. at 275). The offenses that correlate with each level are listed in the policy. (JX-10). Human Resources Director Rowan testified that she reviews all discipline at the facility before it

⁸ However, Harmon’s paperwork was completed and provided to Craig Parker before he issued the discipline. (Tr. at 166; Tr. at 169).

is issued to ensure consistency, and considers an employee's prior non-attendance discipline before making the determination to issue work related discipline. (Tr. at 274; Tr. at 283).

Craig Parker prepared Harmon's discipline; he decided to discipline Harmon after consulting with Travas Parker, Smith, and Rowan. (Tr. at 117; Tr. at 187; Tr. at 247). Travas Parker and Craig Parker testified that they knew Harmon discussed filing grievances with his co-workers before they decided to discipline him. (Tr. at 187; Tr. at 209). Smith told Travas Parker and Craig Parker he had chastised Harmon about discussing grievances with his co-workers before Harmon was disciplined. (Tr. at 249). In fact, Craig Parker testified that what Smith told him influenced his decision to discipline Harmon. (Tr. at 233).

Before he prepared Harmon's discipline, Craig Parker talked to other baggers in the jet mill. (Tr. at 213). Craig Parker never examined any production documentation relating to Harmon or any other employees. (Tr. at 206-207; Tr. at 211; Tr. at 228).

At the hearing, Respondent added a new reason for Harmon's discipline that was not referenced in Harmon's disciplinary documents or in response to the Union's grievance over Harmon's discipline. (JX-11; JX-12; JX-13). Craig Parker testified that Harmon's conduct warranted a written warning, instead of a lesser form of discipline, because Harmon caused Respondent to be "behind so far on NGK [customer order] that [it] delayed the startup of the NGK material." (Tr. at 218). Craig Parker explained that the jet mill has to be completely empty before Respondent could switch from the material that they had been bagging, S-11, to another material, Coat 7, for customer NGK's order. (Tr. at 205). However, Respondent's production records indicated it switched to using the jet mill for NGK's material on time, as planned. (Tr. at 235; RX-8).

Neither Travas Parker nor Smith mentioned Harmon delaying production as a reason for his discipline. Travas Parker testified that he, Smith, and Craig Parker decided to discipline Harmon for poor performance, i.e. not doing the assignment satisfactorily and performing below what Respondent accepts. (Tr. at 187-188). Smith testified that he, Travas Parker, and Craig Parker decided to discipline Harmon for not completing the job. (Tr. at 248).

ii. RESPONDENT TREATS SIMILAR EMPLOYEES MORE FAVORABLY THAN HARMON

Rowan admitted that there is no required production level for employees. (Tr. at 285). Further, Rowan, who reviews all the discipline at the facility, does not ever recall issuing discipline to a bagger based on production level. (Tr. at 285).

Although under Respondent's corrective action discipline policy, an employee's failure to follow proper procedures or standards and creating an "undue hardship on the Company in regard to cost, time or customer satisfaction" warrants a written warning, Respondent has issued verbal warnings for that conduct in the past. (JX-10). On May 20, 2013, Respondent issued Glen Alan Bailey a verbal warning for losing material to be shipped that day (his material went down the drain), and thus, delaying production by one day. (GCX-23). Rowan testified that Respondent was more lenient with Bailey because although he did not do what he was required, he was "following instructions [of his supervisor] to some degree." (Tr. at 279). Similarly, on April 16, 2014, Respondent issued Mike Halpain a verbal warning for sending a railcar back to a supplier filled with "approximately 2/3 of a railcar of product" instead of unloading it. (GCX-24). Halpain also had prior discipline at the time of his verbal warning.

Under Respondent's corrective action discipline policy, failure to properly perform assigned duties, failure to follow instructions or procedures, and failure to meet quality/quantity standards are all considered Level One offenses, which warrant a verbal warning. Respondent

routinely issues verbal warnings for those reasons. For example, on March 13, 2016, Respondent assigned David Duke, who had a previous work performance discipline, to deep clean the “#1 Pannevis filter.” Duke failed to complete the task on March 13, 2016, and consequently, he was assigned again to complete the task on March 14, 2016, which he also failed to do. For not completing his assigned task two days in a row, Respondent issued Duke a verbal warning. (GCX-11; GCX-12).

On February 1, 2016, Respondent issued Randall Lambert a verbal warning for “consistently fail[ing] to complete the bottom operator reporting duties after being instructed to do so on more than 1 occasion.” (GCX-19). At the time of his discipline, Lambert had previous verbal and written warnings. (GCX-27(a)-(c)). On the same date, Respondent issued Pam Lunsford a written warning for the same reason of “consistently fail[ing] to complete the bottom operator reporting duties after being instructed to do so on more than 1 occasion.” (GCX-21). However, Lunsford had a significant disciplinary record, including multiple verbal warnings and a suspension. (GCX-28(a)-(e)).

On December 17, 2015, Respondent issued Justin Lane a verbal warning for failing to empty the jet mill as assigned. (GCX-20). Respondent issued Charles Kirtley a written warning for the same incident, but his supervisor noted that Kirtley admitted that he did not read the packaging instructions, complaining that they were too “wordy.” (RX-15).

However, even though failing to complete a job assignment leads to a verbal warning, Respondent has also issued a coaching for that conduct in the past. (JX-10). On January 6, 2016, Craig Parker issued a coaching to Jake Garner and Rick Jackson for failing to start a feed pump. Gardner and Jackson waited until significantly into their shift to even attempt to accomplish the task. (GCX-13; GCX-15).

II. STATEMENT OF ISSUES PRESENTED

- A. Whether Respondent violated Section 8(a)(5) of the Act by failing to bargain with the Union over changes to the attendance policy?
- B. Whether Respondent, by Jason Smith, violated Section 8(a)(1) of the Act by prohibiting employees from discussing grievances with other employees?
- C. Whether Respondent violated Section 8(a)(1) and Section 8(a)(3) of the Act by disciplining Brandon Harmon on June 1, 2016?

III. ARGUMENT

A. RESPONDENT VIOLATED SECTION 8(A)(5) OF THE ACT BY FAILING TO BARGAIN WITH THE UNION OVER CHANGES TO THE ATTENDANCE POLICY

1. RESPONDENT FAILED TO BARGAIN WITH THE UNION OVER CHANGES TO THE ATTENDANCE POLICY

Respondent failed to bargain with the Union over the changes to the attendance policy.

Attendance policies and/or attendance issues are mandatory subjects of bargaining. Mandatory subjects of bargaining include “wages, hours, and other terms and conditions of employment.” 29 U.S.C. § 158(d). The Board has long held that attendance policies fall within the definition of “terms and conditions of employment.” See *Ciba-Geigy Pharm.*, 264 NLRB 1013, 1016 (1982) *enf’d* 722 F.2d 1120 (3d Cir. 1983); (attendance rules are “unquestionably mandatory subjects of bargaining”); *Dorsey Trailers*, 327 NLRB 835, 835 fn. 26 (1999) *enf’d* in relevant part 233 F.3d 831 (4th Cir. 2000) (“An employer’s attendance policy has long been held to be a mandatory subject of bargaining.”).

On January 5, 2016, the Union made a formal demand in writing to Respondent to bargain over the changes to the attendance policy, a mandatory subject of bargaining. (JX-6(b)). Respondent denied the Union’s bargaining request, and insisted that it had the right to implement the attendance policy under the collective bargaining agreement. The Union requested bargaining in writing on two additional occasions. (JX-6(b)). However, Respondent continued to insist that

the collective bargaining agreement waived its bargaining obligation. (JX-6(b)). The Union, then, requested verbally requested bargaining on four separate occasions. During the last meeting between the parties, on January 28, 2016, when the Union requested bargaining, Human Resources Manager Rowan flatly denied bargaining and told the Union that she was going to implement a revised attendance policy on February 1, 2016. The Union did not even see the finalized attendance policy before it was implemented. On every instance that the Union demanded bargaining, Respondent refused and told the Union that the collective bargaining agreement allowed it to implement the attendance policy. By implementing the attendance policy, a mandatory subject of bargaining, without bargaining with the Union, Respondent violated Section 8(a)(5) of the Act. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991).

Respondent argues that the Union fully exercised any right it had to bargain, and also bargained with Respondent until impasse. However, these arguments are disingenuous. Respondent never bargained with the Union over the changes in the attendance policy. In fact, Respondent consistently denied the Union's requests for bargaining, citing the collective bargaining agreement's management rights clause. As Human Resources Manager Rowan wrote in her e-mail to Local Union President Bailey, it was Respondent's position that "the management rights clause is a clear and unmistakable waiver of the company's obligation to bargain over adopting policies." (JX-6(b)). Respondent maintained the position that they were not obligated to bargain over the policy from the time that the policy was announced to the Union on December 17, 2015 until it was implemented on February 1, 2016. Respondent changed the number of occurrences before discharge from eight (8) to nine (9), allegedly in response to the Union's objections. (JX-3; JX-9). However, the Union never specifically

proposed changing the number of occurrences to nine. Additionally, the Union did not see any version of the attendance policy at any time since Respondent first announced the new policy on December 17, 2015, until Rowan showed the Union her handwritten changes on January 28, 2016. Rowan's handwritten changes were presented the Union as the final version that she was going to implement on February 1, 2016, and she was not interested in any additional suggestions by the Union. The Union did not see the final version of the attendance policy until Respondent implemented it. Therefore, no bargaining could have occurred.

Respondent never agreed to bargain with the Union, therefore bargaining could not have reached impasse. Impasse occurs when the parties are warranted in assuming further bargaining is futile. *A.M.F. Rowling Co.*, 314 NLRB 960 (1994). But the Board does not easily find impasse, and places the burden on the party asserting impasse to establish it. *CJC Holdings, Inc.*, 320 NLRB 1042 (1996). Here, any assumption that any bargaining is futile would be unwarranted. On January 28, 2016, the Union again asserted bargaining, but Respondent denied and presented the Union with a version of the final policy complete with handwritten changes. The Union continued to request to bargain, and gave no indication that bargaining would be futile. Accordingly, there is no evidence that supports Respondent's argument that the parties bargained until impasse.

2. COLLECTIVE BARGAINING AGREEMENT DOES NOT WAIVE RESPONDENT'S BARGAINING OBLIGATION

Respondent's bargaining obligation was not waived by the language of the collective bargaining agreement. A party's bargaining obligation is only waived by contractual language if the language is a "clear and unmistakable waiver." *NLRB v. C&C Plywood*, 385 U.S. 421 (1967). The "clear and unmistakable waiver" standard, which was endorsed by the Supreme

Court, requires bargaining partners to “unequivocally and specifically express their mutual intention to permit unilateral employment action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply.”⁹ *Provena St. Joseph Med. Ctr.*, 350 NLRB 808, 811 (2007).

The Board has held that in order to find a waiver based on contractual language, the language must be “sufficiently specific.” *Johnson-Bateman Co.*, 295 NLRB 180, 189 (1989). The parties’ collective bargaining agreement contains a management rights clause under Article IV, which affords Respondent the right to “the operation of the plant, and direction of the working forces, including the right to hire, lay off, suspend, dismiss, and discharge any employee [...] and to assign employees to tasks as needed [...] This includes the right to adopt reasonable rules and policies [...]” (JX-1). The collective bargaining agreement does not contain any specific reference to attendance policies. (JX-1).

In *Graymont PA, Inc.*, the Board determined that a management rights clause similar to Respondent’s did not waive the employer’s obligation to bargain with the union over a new attendance policy. *Graymont PA, Inc.*, 364 NLRB No. 37 (2016). In that case, the management rights clause contained no specific reference to attendance policies, but afforded the employer the “sole and exclusive right to manage; to direct its employees; [...] to evaluate performance, [...] to discipline and discharge for just cause, to adopt and enforce rules and regulations and policies and procedures.” The Board determined the language lacked the specificity required to constitute a “clear and unmistakable waiver.” The Board noted that the language reserving the

⁹ Although Respondent raised contract coverage as a waiver to its obligation to bargain in its Answer to the Consolidated Complaint, the contract coverage approach has been expressly disavowed by the Board in favor of the long standing “clear and unmistakable waiver” standard. (GCX-1(t)); *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007).

employer the right to “adopt and enforce rules and regulations and policies and procedures” is insufficiently vague to constitute a basis for finding a waiver. Similarly, Respondent’s management rights clause affords Respondent the right to “adopt reasonable rules and policies,” but contains no mention of attendance or any other rule that Respondent is authorized to unilaterally adopt. Like *Graymont PA, Inc.*, Respondent’s management rights clause lacks an “unequivocal and specific expression of the parties’ mutual intent to permit unilateral employer action” and there is no basis for finding a waiver of Respondent’s bargaining obligation. *Id.* See *Dorsey Trailers, Inc.*, 327 NLRB 835, 836 (1999) enf’d in relevant part 233 F.3d 831 (4th Cir. 2000) (management-rights clause referencing “reasonable rules, not in conflict with this agreement” was too vague to waive union’s right to bargain over changes to attendance policy); see also *Murtis Taylor Human Serv.*, 360 NLRB 546, 549 (2014) (management rights clause referencing employer’s right to “make and alter from time to time reasonable rules and regulations [...] to be observed by employees” was too vague to waive the union’s right to bargain over the new requirement that employees sign notes of administrative interviews to attest to the notes’ veracity); *Windstream Corp.*, 352 NLRB 44, 50 (2008), aff’d and incorporated by reference 355 NLRB 406 (2010) (management rights clause referencing employer’s right to “establish reasonable rules and regulations” did not amount to a waiver of the union’s right to bargain over changes in the level of discipline the employer could impose for work rule violations); *Hi-Tech Cable Corp.*, 309 NLRB 3, 4 (1992) enf’d per curiam 25 F.3d 1044 (5th Cir. 1994) (management rights clause referencing employer’s right to make, change, and enforce reasonable rules lacked the requisite specificity to constitute a waiver of the union’s right to bargain over the employer’s implementation of a no-tobacco rule).

Respondent has argued that the Board’s decision in *Provena St. Joseph Medical Center* supports its position, but it is not applicable in this case. In *Provena*, the management rights clause in the parties’ collective bargaining agreement gave the employer the right to “change reporting practices and procedures and/or to introduce new or improved ones”; “to make and enforce rules of conduct”; and “to suspend, discipline, and discharge employees.” *Provena St. Joseph Med. Ctr.*, 350 NLRB 808, 815 (2007) (italics added). The Board determined that by agreeing to that combination of provisions in the management rights clause, the union waived its right to demand bargaining over the implementation of a new attendance policy. However, here, unlike *Provena*, the management rights clause lacks any language specifically referencing attendance, e.g., “change reporting practices and procedures.” *Id.* Consequently, Respondent’s management rights clause lacks the specificity to waive Respondent’s bargaining obligation, and Respondent was required to bargain with the Union over the changes to the attendance policy.

Additionally, the Union has not engaged in any other conduct that waived its right to bargain over the attendance policy. Even in contract bargaining, when the attendance policy was discussed, the Union always asserted that it had the right to bargain over the attendance policy. See, e.g., *Merillat Indus., Inc.*, 252 NLRB 784, 785 (1980) (union did not waive its right to bargain over new absentee rules where “neither the wording of the clause itself, nor any other evidence, suggest[ed] that by agreeing to the management rights clause . . . the [u]nion waived its right to bargain” about the subject).

3. RESPONDENT’S CHANGES TO THE ATTENDANCE POLICY WERE MATERIAL, SUBSTANTIAL, AND SIGNIFICANT

Respondent’s changes to the attendance policy violated Section 8(a)(5) of the Act because they were “material, substantial and significant.” Any efforts by Respondent to

trivialize its policy changes are self-serving and ineffective. The Board has held that a respondent's change to a mandatory subject of bargaining is unlawful if it is a "material, substantial and significant change." *Flambeau Airmold Corp.*, 334 NLRB 165 (2001) (quoting *Alamo Cement Co.*, 281 NLRB 737, 738 (1986)). A change is determined "by the extent to which it departs from the existing terms and conditions affecting employees." *S. Cal. Edison Co.*, 284 NLRB 1205 fn. 1 (1987), enf'd mem. 852 F.2d 572 (9th Cir. 1988). The Board has held the "initiation of new or more stringent rules with respect to absenteeism" to be a significant change. *Womac Indus.*, 238 NLRB 43 (1978). See also *Murphy Diesel Co.*, 184 NLRB 757, 763 (1970), enf'd 454 F.2d 303 (7th Cir. 1971) (employer's creation of a specified limit of absences after which discipline would be taken where no such limit existed before was a significant change); *Ciba-Geigy Pharm. Div.*, 264 NLRB 1013, 1016 (1982) (change in progression of discipline associated with absences leading to discipline a significant change). Here, Respondent created more stringent call-in procedures for employees requiring employees to call three supervisors before they were able to call in absent from work. Additionally, like *Ciba-Geigy Pharmaceutical Division*, Respondent changed the discipline associated with absences leading to fewer absences before discharge. There is nothing more material or significant to an employee's employment than the terms upon which an employer can terminate employment. By failing to bargain over these changes, Respondent violated Section 8(a)(5).

B. RESPONDENT UNLAWFULLY PROHIBITED EMPLOYEES FROM DISCUSSING GRIEVANCES IN VIOLATION OF SECTION 8(A)(1) OF THE ACT

Back End Production Manager Jason Smith unlawfully told Harmon not to discuss grievances with employees. In *Lockheed Martin Astronautics*, the Board found that an employer violated Section 8(a)(1) when it instructed employees not to discuss work conditions that may be

grounds for filing a grievance. In that case, employees were discussing working conditions and the possibility of filing a grievance. The Board found that those conversations are protected, and by prohibiting them, the employer violated Section 8(a)(1). *Lockheed Martin Astronautics*, 330 NLRB 422 (2010); see also *Aroostook Cty. Reg'l Ophthalmology Ctr.*, 317 NLRB 218 (1995) (employer's rules interfering with employee discussions of grievances amongst themselves reasonably interfere with employees' Section 7 rights); *Double Eagle Hotel & Casino*, 341 NLRB 112, 116-117 (2004), enf'd 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006) (the Board found unlawful handbook rule that prohibited disclosure of grievance and complaint information). Harmon testified that Smith specifically told him that he needed to "quit talking to other folks around here about filing grievances," which directly prohibited Harmon from engaging in his Section 7 rights. As such, Smith's directive was unlawful, and violated Section 8(a)(1) of the Act.

C. RESPONDENT UNLAWFULLY DISCIPLINED BRANDON HARMON IN VIOLATION OF SECTION 8(A)(1) AND 8(A)(3) OF THE ACT

1. HARMON WAS ENGAGED IN PROTECTED CONCERTED ACTIVITY AND UNION ACTIVITY

Harmon engaged in protected concerted activity on May 31, 2016 and June 1, 2016. On May 31, 2016, Harmon discussed with Justin Lang his work assignment, and that Respondent should have offered overtime to a bagger instead of assigning the work to him. Lang agreed and encouraged Harmon to file a grievance. On June 1, 2016, Harmon discussed with bagger Charles Kirtley the fact that Kirtley may have been entitled to overtime under the collective bargaining agreement. Kirtley agreed, and decided to have the Union file a grievance on his behalf regarding not receiving overtime. It is undisputed that Harmon had these discussions with his co-

workers and their discussions about job assignments and overtime are protected concerted activity. *Manimark Corp.*, 307 NLRB 1059 (1992).

An employee also engages in protected concerted activity by asserting a right grounded in the collective bargaining agreement. *Interboro Contractors*, 157 NLRB 1295 (1966), enf'd 388 F.2d 495 (2d Cir. 1967). The employee's honest and reasonable invocation of a collectively bargained right is protected concerted activity, regardless of "whether the employee turns out to have been correct in his belief that his right was violated." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 840 (1984). Even inquiries about the scope of an employee's contractual rights are protected. In *King Soopers*, the Board found an employee engaged in protected concerted activity when she questioned whether she should bag groceries, or if that work belonged to a different bargaining unit or union. In that case, the employee's grocery bagging assignment was unusual, her job description did not include bagging groceries, and her interpretation of the collective bargaining agreement was consistent with her union representative's interpretation. *King Soopers*, 364 NLRB No. 93 (2016). Similarly, here, Respondent assigned Harmon to an assignment that was outside of job description and was unusual. Harmon's interpretation of the contract was consistent with the Union's interpretation, as demonstrated by the grievance it filed on behalf of Charles Kirtley. It is immaterial whether Harmon ultimately interpreted the contract correctly. See *Tillford Contractors*, 317 NLRB 68, 69 and fn. 5 (1995) (employee's protest that another employee's conduct violated the contract was protected concerted activity, even though his contractual claim was incorrect). By raising these claims and by discussing the issue with co-workers, Harmon engaged in protected concerted activity.

Harmon also undisputedly engaged in union activity. Filing grievances is a quintessential union activity. By discussing filing grievances with other employees, the record established that Harmon was engaged in union activity.

2. RESPONDENT DISCIPLINED HARMON IN RETALIATION FOR HIS PROTECTED ACTIVITIES

Respondent unlawfully disciplined Harmon in retaliation for his protected concerted activity and union activity. In *Wright Line*, the Board adopted a two part test for determining whether an employer's decision to take adverse action against an employee was discriminatorily motivated. First, the General Counsel must show that the employee's protected activity was a motivating factor for his adverse action. Second, once the first prong is accomplished, the burden shifts to Respondent to establish that it would have taken the same action even in the absence of protected conduct. *Wright Line*, 251 NLRB 1083 (1980), *enfd* 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982) (approved by *Transport. Mgmt. Corp.*, 462 U.S. 292 (1983)).

Harmon's protected activity was a motivating factor for his discipline. In order to establish that Harmon's protected activity was a motivating factor, the record must establish 1) Harmon engaged in union related or protected activity, 2) Respondent had knowledge of Harmon's union related or protected activity, and 3) Respondent demonstrated animus towards protected activities. *Manno Electric*, 321 NLRB 278 (1996). Those elements are present in this case.

Harmon engaged in protected concerted activity and union activity.¹⁰ Respondent also had knowledge of Harmon's protected activities. Craig Parker, Travas Parker, and Jason Smith testified that they were aware of Harmon's protected conduct before they decided to discipline

¹⁰ See discussion, *supra* at C(1) and (2).

him. (Tr. at 187; Tr. at 209; Tr. at 249). There is also direct evidence of Respondent's animus towards Harmon's protected activities; Smith told Harmon directly to stop engaging in protected activities. (Tr. at 233).

Respondent's animus for Harmon's protected activities motivated its decision to discipline Harmon. For one, Craig Parker directly testified that his conversation with Smith about Harmon's protected conduct influenced his decision to discipline Harmon. (Tr. at 249). Additionally, Respondent's unlawful motivation is demonstrated by the close timing of Harmon's protected conduct to his discipline. When analyzing an employer's motivation for disciplining an employee, the Board considers the "proximity in time of the discipline" to the protected activity. *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). Harmon discussed filing grievances with bagger Kirtley around 9:00 am on June 1, 2016. Within hours, Respondent issued a written warning to Harmon. See *McClendon Electrical Serv.*, 340 NLRB 613, fn. 6 (2003) (Board stated that "where adverse action occurs shortly after an employee has engaged in protected activity, an inference of unlawful motive is raised.").

Respondent is unable to establish that it would have taken the same action even in the absence of protected conduct. Respondent has treated similarly suited employees more favorably than Harmon. See *Embassy Vacation Resorts*, 340 NLRB No. 94, slip op. at 3 (2003) (The Board considers "disparate treatment of certain employees compared to other employees with similar work records or offenses" as evidence of an employer's motivation). Multiple employees were given only verbal warnings for similar conduct. For instance, Glen Alan Bailey lost material, and delayed production by over a day, and was only issued a verbal warning. (GCX-23). Rowan testified that he was treated more leniently because he was following the

instruction of his supervisor to some degree. (Tr. at 279). However, Harmon, following the directions of his supervisor, was not afforded the same leniency.

Respondent's perfunctory investigation into Harmon's performance on May 31, 2016 rebuts Respondent's assertion that it would have taken the same action regardless of Harmon's protected conduct. See *New Orleans Cold & Storage Warehouse Co.*, 326 NLRB 1471 (1998) (Board has inferred a discriminatory motive from an employer's failure to conduct a meaningful investigation). After assigning Harmon to the jet mill, Craig Parker never monitored the area or Harmon's performance for the rest of the day. Once he was notified of Harmon's protected conduct, and decided to issue discipline, Craig Parker did not examine productivity charts to determine whether Harmon's production level was unreasonably low. Instead, Craig Parker supposedly asked other employees informally about their experience in the jet mill. Notably, Respondent did not call any of these employees to testify.

Respondent's asserted reason for Harmon's discipline that Harmon delayed production is pretextual. Respondent first raised delaying production as a reason for Harmon's discipline at the hearing. This rationale is not referenced in Harmon's disciplinary documents, or in Respondent's response to the Union's grievance over Harmon's discipline. Despite this new justification, Respondent's production was not delayed—production occurred on the scheduled date. Consequently, the evidence establishes that Respondent's justification for Harmon's discipline was pretextual. See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966) (where an employer's asserted reason is false, the Board may infer the employer is concealing an unlawful motive).

Because Harmon can establish that his protected activity motivated his discipline, and Respondent cannot establish that it would have disciplined Harmon in the absence of his protected conduct, Respondent violated Section 8(a)(1) and Section 8(a)(3) of the Act by disciplining Harmon in retaliation for his protected activities. *Wright Line*, 251 NLRB 1083 (1980).

IV. CONCLUSION

For the reasons discussed above, the General Counsel submits that the record evidence supports all of the allegations in the Consolidated Complaint, and requires a finding that Respondent violated Sections 8(a)(1), 8(a)(3), and 8(a)(5) as alleged. The General Counsel respectfully requests Respondent be ordered to rescind any and all unilateral changes made to the attendance policy, and rescind any discipline issued in accordance with the policy. The General Counsel also requests Respondent be ordered to rescind the discipline issued to Brandon Harmon on June 1, 2016. Respondent should be required to post an appropriate Notice to Employees to remedy all of its unlawful conduct and to take any other action deemed proper by the Administrative Law Judge to fully remedy Respondent's unlawful conduct.

Dated at Little Rock, Arkansas this 19th day of May, 2017.

Respectfully submitted,

s/Jacqueline N. Rau
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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2017, a copy of Counsel for the General Counsel's Brief to the Administrative Law Judge was electronically filed via NLRB E-Filing system with the Division of Judges.

Christine E. Dibble
Administrative Law Judge
Division of Judges
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Washington, D.C. 20570-0001

I further certify that on May 19, 2017, a copy of Counsel for the General Counsel's Brief to the Administrative Law Judge was served by e-mail, or first class mail, as noted below, on the following:

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