

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

**ORCHIDS PAPER PRODUCTS COMPANY**

**And**

**UNITED STEEL, PAPER AND FORESTRY,  
RUBBER, MANUFACTURING, ENERGY,  
ALLIED INDUSTRIAL AND SERVICE  
WORKERS INTERNATIONAL UNION,  
AFL-CIO**

**Cases 14-CA-184805  
14-CA-184807  
14-CA-188413  
14-CA-189031  
14-CA-190022  
14-CA-192908  
14-CA-199035**

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

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Counsel for the General Counsel William LeMaster and Julie Covell respectfully file this brief with the Honorable Andrew S. Gollin, Administrative Law Judge (ALJ). This case is before the ALJ based upon an Amended Fifth Consolidated Complaint and Notice of Hearing alleging that Orchids Paper Products Company (Respondent) violated Sections 8(a)(1), (3), (5) and 8(d) of the National Labor Relations Act (Act). The issues in this matter were heard by the ALJ in Tulsa, Oklahoma on June 20-22, 2017, and are addressed below.

## **I. Background**

At all material times, Respondent has conducted business from its operations located in Pryor, Oklahoma and has been engaged in the manufacture and the nonretail sale of paper products. GC 1(SSS, UUU).<sup>1</sup> Respondent operates a paper mill and converting facility at its Pryor location. *T. 34*. The United Steelworkers International Union (International) represents employees at both locations. *T. 33-34*. The mill and converting facility consist of two distinct locals operating under separate collective-bargaining agreements (CBA). *T. 33*. Local 930 represents approximately 85 employees at the paper mill while Local 1480 represents approximately 185 employees at the converting facility. *T. 34*. Although the International is the recognized bargaining representative, the locals act on the International's behalf in enforcing the respective collective bargaining agreements. *T. 34-35*.<sup>2</sup> The most recent CBA between Respondent and the Union was effective June 25, 2012 to June 25, 2016. *GC 2*. The parties agreed to extend the contract through the end of the year with a 2% wage increase. *GC 3*. As of the date of the hearing, the parties remained in negotiations for a successor agreement.

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<sup>1</sup> References will be denoted using the following abbreviations and followed by page numbers: Trial Transcript (T.); General Counsel's exhibits (GC); Respondent's exhibits (R); and Joint exhibits (Jt). Bates numbers will be indicated by "#" when necessary to identify relevant pages.

<sup>2</sup> As detailed in the General Counsel's Amended Fifth Consolidated Complaint, the bargaining unit in question in this matter is the unit employed at the converting facility. Hereafter, the International Union and Local 1480 will collectively be referred to as "the Union."

The record is undisputed that Respondent has a history of utilizing temporary employees at its converting facility. In fact, several current and former Union officers began their full-time employment with Respondent after completing their 60 day probationary period as a temporary employee. *T. 191, 298-299, 281-282*. During the relevant time period, Respondent used temporary employees referred by People Source Staffing Professionals (People Source). *Tr. 805-806; Jt. 40; Jt. 41; Jt. 42*. In August 2016, in advance of the parties' contract negotiations, Local 1480 Vice President Jason Gann (Gann) solicited employees to join the Union. *T. 193*. While doing so, he talked to several individuals referred by People Source who were considered "permanent temps"<sup>3</sup> and had worked at the facility for more than 60 days. *T. 193-194*. Article 16 (Movement of Personnel-Bidding), Section 5, of the CBA speaks to the probationary period at Respondent's converting facility:

New employees and those hired after a break in service shall be considered probationary employees for sixty (60) days following their date of hire. The retention or dismissal of probationary employees shall be in the sole judgment of the Company. An employee who is retained in the employ of the Company after the end of the probationary period shall be given continuous service credit back to the date of hire. *GC 2, page 12*.

Respondent's Employee Handbook also identifies that employees are subject to a probationary period "the first sixty (60) calendar days" of their employment. *GC 24*. When the Union learned of what it deemed to be a violation of the parties' CBA, it submitted executed Union cards for the "permanent temps," which were ultimately rejected by Respondent. *T. 195-196; GC 21*. On August 16, 2016, the Union filed a grievance over Respondent's failure to convert temporary employees to unit employees after 60 days of employment at Respondent's converting facility, consistent with the contract and past practice. *T. 203; GC 10*. What ensued following the Union's attempt to enforce the CBA with respect to these individuals consisted of

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<sup>3</sup> The record established that Respondent used temporary employees at its facility for longer than 60 days without converting those individuals to full-time employees. A subset of those individuals were referred to as "permanent temps" after they were assigned to one of several permanent rotating crews for Respondent.

Respondent's (1) complete and utter disregard for its bargaining obligations under the Act; (2) a systematic attempt to retaliate against the Union for its protected activities; and (3) interference with employees' Section 7 rights under the Act. As detailed below, Respondent disregarded its obligations under the Act in a number of ways, including but not limited to (1) retaliating by ending the employment of temporary employees, including permanent temps, because of protected activity and in contravention of its CBA; (2) unilaterally changing employees' terms and conditions of employment without agreement by the Union; (3) modifying the parties' CBA without agreement by the Union, (4) retaliating against Union officials because of Union activity; and (5) coercing and interfering with employees Section 7 rights.

## **II. Respondent's coercive actions in violation of Section 8(a)(1)**

### **A. Respondent told employees it discharged employees because the Union sought to include them in the bargaining unit.**

#### **1. Facts<sup>4</sup>**

About August 16, 2016, Gann filed a grievance over Respondent's failure to convert temporary employees who were employed at the facility for more than 60 days. *T. 53-54, 203; GC 10*. About August 24, 2016, Jason Gann filed another grievance when Respondent ended the employment of its temporary employees, including those present for longer than 60 days. *T. 222; GC 11*. After doing so, Gann advised Respondent's Site Manager Court Dooley (Dooley) that he needed to reinstate those individuals in lieu of Respondent's plan to hire new employees. *T. 222*. During this conversation, Dooley informed Gann that the reason Respondent ended the temporary employees' employment was because Gann had requested that Respondent do so. *T. 222-223*. At no point did Gann make this request, only that Respondent could not keep

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<sup>4</sup> CPT ¶6(a)

temporary employees longer than 60 days without hiring them. *T. 223*. As Respondent had employed temporary employees longer than 60 days, through the parties' grievance procedure, Gann and the Union sought to have Respondent make those individuals whole through reinstatement as unit employees and full backpay. *GC 10; GC 11*.

## **2. Legal analysis**

Gann testified the Dooley told him that Respondent rid itself of temporary employees present for longer than 60 days because the Union requested that it do so. As credibly testified to by Gann and Union Staff Representative Chad Vincent (Vincent), and corroborated by the Union's grievances, the only request made by the Union was that the individuals who had worked at Respondent's facility for 60 days be reinstated and made whole. *T. 47, 62-63, 68, 70-71, 223; GC 4; GC 10; GC 11*. In defending his position, Dooley admitted that Respondent removed the temporary employees because the Union sought to include them in the bargaining unit. The manner in which the Union did so was the parties' grievance procedure. When an employer tells an employee that it disciplined the employee or another employee because of union or protected concerted activity, it violates Section 8(a)(1). *Bowling Transportation, Inc.*, 336 NLRB 393, 393 (2001)(finding Section 8(a)(1) violation because employer told employees they were removed from the employer's property because they engaged in union and/or protected concerted activity); *Atlas Transit Mix Corp.*, 323 NLRB 1144, 1150 (1997).

### **B. Respondent prohibited employees from talking about the Union or Union business**

#### **1. Facts**

The record established that on multiple occasions, Respondent sought to restrict employees' ability to engage in Section 7 activity and discuss Union related topics by categorizing basic Section 7 discussion as impermissible "Union business." In late November

2016,<sup>5</sup> Dooley and HR Manager Doug Moss (Moss) met with Local 1480 Recording Secretary Darla Reed (Reed) and Local 1480 President Michael Besley (Besley) in Dooley's office. *T. 300-301*. Dooley accused Reed of harassing employees when on two occasions she discussed with employees an ongoing decertification effort by unit employees. *T. 301*. During the meeting, Dooley told Reed that employees "could not talk Union business on the floor" and that they only could do so on breaks. *T. 303*. Besley corroborated Reed's testimony. *T. 374*.

Another incident occurred in January 2017,<sup>6</sup> when Gann served as a Union representative for employee Gabriel Cutler who was accused of being away from his line. *T. 237-238*. While serving in this capacity, Gann contested Respondent's position as he felt it contradicted the stance of Respondent's District Manager (and former plant manager) Eric Diring. *T. 239*. Gann called Diring and after being advised of the reason for the call, Diring asked to speak privately with one of the supervisors in the meeting. *T. 240-241*. Diring's response prompted Gann to tell Cutler that management were "liars" because he anticipated Diring "going back on his word." *T. 241*. Shortly after the meeting, Dooley called Gann and in a loud, angry tone, ordered Gann to his office with the instruction to bring representation. *T. 242-243*. Once in his office, Dooley told Gann that he did not like how Gann treated management in the Cutler meeting and he did not need to talk to management that way. *T. 244*. Gann defended himself by responding that he was a Union officer and if management raises their voices at him or gets "smart" with him, he can do the same. *T. 244*. Dooley then advised that Gann was being watched by people on the floor and they had reported that he had been doing Union business during company time. *T. 244-245*. When Gann questioned whether Dooley was having him watched. Dooley denied doing so, but reiterated that people had been reporting Gann doing Union business on company

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<sup>5</sup> Darla Reed testified that the violation occurred "after Thanksgiving" 2016. *T. 300-301*. CPT ¶6(b)

<sup>6</sup> CPT ¶6(f)

time. *T. 245*. Dooley then questioned whether Gann lets his supervisor know when he leaves his work area. *T. 245*. Gann's lead man, John Stafford, served as his representative in this meeting and confirmed that Gann tells him every time he leaves his work station. *T. 245-246*. The meeting concluded when Dooley reiterated that Gann should let someone know whenever he leaves his work station.

On about February 8, 2017,<sup>7</sup> Dooley and Moss met with employee Chris Montoya (Montoya) and Union representatives Reed and Besley for the purpose of notifying Montoya that he was suspended pending an investigation of a complaint that had been made against him by a coworker. Dooley also instructed Montoya that he was not permitted to go outside of his work area "to be talking and carrying on" during work time. *T. 316-317, 379-380*. The instruction was that such conduct could only occur during non-work time. *T. 316-317, 379-380*. Moss's notes from this meeting additionally read that "Dooley explained to all present that all union activities were to be limited to 'non-work time and non-work areas.'" *T. 761-764; Jt. 38*.

On May 5, 2017,<sup>8</sup> employee Sean Teiger approached Besley while lines, including Teiger's, were shut down. *T. 383-384, 385*. Teiger asked Besley to look at a written warning he received due to excessive attendance points. *T. 383-384*. The conversation lasted no longer than two or three minutes. *T. 384*. Besley observed Process Specialist Jeff Cochrell<sup>9</sup> approach Teiger. Teiger then told Besley that Cochrell had told him he could not do Union business on the floor on company time. *T. 384*. Besley then found Cochrell and explained that he could not prohibit employees from doing Union business on the floor. Cochrell responded that he was new in the position and was not aware of that. *T. 385*.

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<sup>7</sup> CPT ¶6(j)

<sup>8</sup> CPT ¶6(l)

<sup>9</sup> Cochrell is an admitted supervisor and agent. GC 1(UUU).

## 2. Legal analysis

Employees provided undisputed testimony that Respondent has historically permitted employees to discuss non-work topics during work time. *T. 303-304, 377-378*. Generally, an employer may prohibit talk about a union during work periods if the prohibition also extends to all other subjects not associated or connected with work. *See Orval Kent Food Co.*, 278 NLRB 402, 407 (1986). An employer may not limit union discussions when it otherwise allows employees to discuss non-work subjects or if it imposes the policy in response to union organizational activity. *See, e.g., Altercare of Wadsworth Center for Rehab.*, 355 NLRB 565, 573 (2010). Respondent's restrictions above concerning "union business" have not been limited to instances of grievance filing, grievance investigations or anything similar. Respondent has decided to interpret any conversation related to the Union or employees' terms and conditions of employment as "union business" and such has unlawfully restricted employees' Section 7 rights.

### **C. Respondent coerced employees by accusing them of harassment because they engaged in protected activities.**

#### **1. Facts**

After Reed was initially brought into the office and told to stop harassing employees over issues related to a decertification effort, Respondent continued to make similar accusations but without giving any context or details to Respondent's claims. Around Christmas 2016<sup>10</sup>, Process Specialists Brad Blower (Blower) and Kelly Foss (Foss)<sup>11</sup> approached Reed on the floor and requested that she join them in the office. *T. 305-306*. Once there, both supervisors told Reed that she had been harassing people on the floor and it had to stop. They provided Reed with no details. *T. 306-307*.

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<sup>10</sup> CPT ¶6(c)

<sup>11</sup> Blower and Foss are admitted supervisors and agents. GC 1(UUU).

About February 6, 2017,<sup>12</sup> Blower and Foss approached Local 1480 Steward Montoya in the warehouse and told him they heard he had been harassing people. *T.* 287-288. Neither supervisor gave Montoya any details regarding the accusation other than the general claim. *T.* 288-289.

About February 6, 2017,<sup>13</sup> Blower and Foss approached Reed again while she was on the production floor. *T.* 307-309. They reiterated the same general claim as they had with Montoya the day before and with Reed in December that Reed had been on the floor harassing people again. When Reed disputed the accusation, the supervisors repeated their claim. *T.* 309. Neither Blower nor Foss gave Reed any details. *T.* 309.

## **2. Legal analysis**

Although the above-described incidents differ to some degree, they all share the same general theme: the Employer claiming that pro-union employees were harassing their coworkers. An employer violates Section 8(a)(1) when it uses or threatens to use its disciplinary procedures to target protected activities or otherwise seeks to interfere with employees' exercise of Section 7 rights. See, e.g., *Parkview Hospital, Inc.*, 343 NLRB 76, 81 (2004). Here, Respondent violated Section 8(a)(1) by repeatedly telling employees that they had been harassing other employees. "Harassment" is an incredibly broad term, and the Board has taken a cautious approach in analyzing employers' attempts to characterize protected activity in such a manner. See, e.g., *St. Pete Times Forum*, 342 NLRB 578, 588 (2004). Here, on various occasions Respondent accused current and former Union officers Montoya and Reed of harassing employees. Reed and to a lesser extent, Montoya, were all active Union officers and Respondent did not offer any specifics about the alleged harassing behavior. The Board has explained that an employer must, as a

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<sup>12</sup> CPT ¶6(g)

<sup>13</sup> CPT ¶6(h)

predicate for threatening to take disciplinary action against an employee engaged in Section 7 activity, demonstrate an objective basis for concluding that otherwise protected conduct constitutes a violation of its policies. If the employer offers employees no guidance about the nature of their misconduct, a blanket statement that they have been harassing employees has an overwhelming likelihood of chilling Section 7 activity. See *Greenfield Die & Mfg. Corp.*, 327 NLRB 237, 1–238 (1998). Respondent’s motives are magnified through its own witnesses’ testimony and internal correspondence. Process Specialists Blower and Foss and employee David Lawson testified concerning Lawson’s complaint that Montoya and Reed had allegedly harassed him. *T.* 688-689; 715-732; *R* 7; *Jt.*33-36. On February 6, 2017, at 2:52 p.m., Lawson emailed Blower complaining that Montoya and Reed harassed him by stating, “So they are having y’all clean paying our optech pay?” (sic) *R* 7. An Op Tech line is a specialized line where operators perform all functions on the line, including its maintenance. *T.* 73, 386, 833. As will be detailed later in this brief, Respondent unilaterally converted two of its lines (Lines 6 and 7) to Op Tech lines without the Union’s permission as required by the parties’ CBA. The Union contested Respondent’s actions and the change is set forth as an unlawful mid-term contract modification in Complaint Paragraph 14 of the General Counsel’s Amended Fifth Consolidated Complaint. GC 1 (SSS). Lawson had previously worked as a line lead and when he transitioned to an Op Tech line, he obtained a raise. *T.* 743-744. Op Tech pay is set forth in the CBA. *T.* 734; *GC* 2, *p.* 30. At 3:01 p.m., Lawson emailed Blower again noting that this was not the first time such an incident had occurred. *R* 8. Without talking to Lawson to get details of the incident and based solely off of Lawson’s emails, Blower and Foss approached Reed and Montoya with the instruction to stop harassing people. *T.* 719, 734. By 3:26 p.m., Blower had emailed himself a file memo summarizing his exchange with Reed and at 3:32 p.m. he did the same regarding

Montoya. *Jt. 33; Jt. 35.* Foss emailed himself similar memos at 3:30 p.m. and 3:39 p.m. *Jt. 34; Jt. 36.* In his email regarding Montoya, Blower wrote that after Montoya threatened to go to the CEO, he then “stormed off” to talk to Reed and Darlene Russell about Union business on company time. *Jt. 35.* However, on the stand, Blower conceded that he did not hear their conversation and only assumed that is what had taken place. *T. 736.* Yet, he wrote it as fact in his file memo. What the evidence outlined above proves is that in response to employees discussing matters related to the parties’ CBA (Op Tech pay), Respondent jumped at the opportunity to restrict employees from doing so under the guise that such conversation constituted harassment. To the extent Reed or Montoya were seeking to enforce or invoke a provision of the CBA, under the *Interboro* doctrine, this constitutes concerted activity, regardless of whether the employee turns out to have been correct in his or her belief that a right was violated. *See NLRB v. City Disposal Systems*, 465 U.S. 822, 8320-834 (1984); *Interboro Contractors*, 157 NLRB 1295 (1966). Even if they were not trying to enforce or invoke the CBA, at most Lawson’s version of what was said to him consisted of two employees asking another employee whether he was receiving premium pay to perform an ordinary task. Respondent’s actions here are only one example of it classifying standard Section 7 discussion as “Union business.” Respondent’s interpretation blatantly restricts and prohibits employees from engaging in Section 7 activity in violation of Section 8(a)(1) of the Act.

**D. Respondent told employees their protected union activities were disrespectful to management and created an impression among its employees their Union activities were under surveillance**

**1. Facts**

As discussed above under Section II.B, in January 2017<sup>14</sup>, Dooley ordered Gann to his office to chastise him over his conduct when he served as a Union representative during a

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<sup>14</sup> CPT ¶6(d)

meeting between HR Manager Moss, Process Specialist Blower and employee Cutler where Cutler was accused of being away from his work area. *T. 237-245*. Once in his office, Dooley told Gann that he did not like how Gann treated management during the Cutler meeting and advised that he was not to talk to management that way. *T. 244*. Dooley then advised that Gann was being watched by people on the floor and they had reported that he had been doing Union business during company time. *T. 244-245*.

## **2. Legal analysis**

Unquestionably, Gann was engaged in protected activity when he served as Cutler's Union representative and there is no evidence that Gann ever lost the protection of the Act during the meeting. Dooley's response, however, was both coercive and retaliatory. The Board considers the totality of circumstances in determining the reasonable tendency of a statement to be coercive. *KSM Industries*, 336 NLRB 133 (2001); *Mediplex of Danbury*, 314 NLRB 470, 471 (1994). The Board's test is an objective one. *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999); *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1<sup>st</sup> Cir. 1981) "[T]est of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed." *American Tissue Corp.*, 336 NLRB 435, 441 (2001), citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946). The undisputed record showed that as a result of Gann serving in his representative capacity, Dooley ordered him to his office with the instruction to bring a representative with him. In the course of angrily responding to Gann's protected activity, Dooley chastised Gann for how he performed his Union duties and by doing so, challenged his ability to serve in such a capacity in that meeting and future meetings. Under the totality of the circumstances, Gann and any other employee would

reasonably believe that future similar conduct would not be permitted and as such, Dooley unlawfully coerced Gann in violation of Section 8(a)(1) of the Act.

Additionally, Dooley's statements concerning Gann's Union activities served no purpose but to harass and instill a message to Gann that his protected activities were being watched by Respondent. Specifically, Dooley told Gann he was being watched by people on the floor and they had reported that he had been doing Union business during company time. *T. 244-245.* When Gann questioned whether Dooley was having him watched. Dooley denied doing so, but reiterated that people had been reporting Gann doing Union business on company time. *T. 245.* The test for impression of surveillance is whether an employee would reasonably assume from the statement that their union activities have been placed under surveillance. *Flexsteel Industries, Inc.* 311 NLRB 257 (1993), citing *Rood Industries*, 278 NLRB 160, 164 (1986). The standard is objective. *Quickway Transportation, Inc.*, 354 NLRB 560, 568 (2009), reaffd. 355 NLRB 678 (2010). Although Dooley denied having Gann watched, he made it known that employees were watching him and reporting to management and that Dooley found the reports sufficiently significant to bring them to Gann's attention. Because a reasonable employee would not know how Dooley acquired information concerning Gann's Union activity, whether through supervision or by order of Respondent, a reasonable employee would assume from the statement that unlawful surveillance was taking place. *Promedica Health Systems, Inc.*, 343 NLRB 1351, 1352 (2004).

**E. Respondent threatened termination following protected activity**

**1. Facts**

On February 6, 2017,<sup>15</sup> when Blower and Foss approached Montoya and generally accused him of harassing other employees, Montoya requested to face his accusers. *T. 288-289.*

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<sup>15</sup> CPT ¶6(i)

After Blower and Foss advised that the information was confidential, Montoya responded that he wanted to talk to the CEO and started walking to his office. *T. 289*. The conversation ended when Montoya was informed that the CEO was out of town. *T. 289*. The following day, Montoya was called to the office to meet with Blower and Foss. *T. 289-290*. Reed attended the meeting as Montoya's Union representative. *T. 289-290, 310-313*. During the meeting, Blower and Foss told Montoya that the way he spoke to them the day before was unacceptable and if he did it again, they would "walk him out." *T. 290, 312*.

## **2. Legal analysis**

As detailed above, Respondent accused Montoya of harassment following a complaint that he and Reed questioned another employee performing work on a line that was converted to an Op Tech line in violation of the contract. In response, Montoya sought to face his accuser and when denied that opportunity, sought to address the issue with upper management. Respondent presented no evidence that Montoya lost the protection of the Act. Yet it takes the position that it was justified for restricting Montoya's underlying Section 7 activity and when he questioned it, threatened him with termination as a result of the underlying protected activity. In doing so, Respondent coerced Montoya in violation of Section 8(a)(1) of the Act.

### **F. Respondent prohibited employees from talking at meetings**

#### **1. Facts**

As will be detailed later in this brief, Respondent unilaterally implemented several new policies concerning mandatory subjects of bargaining, including a clothing policy dictating what employees could and could not wear effective April 29, 2017. *Jt. 10; Jt. 21*. On various dates between April 10 and 28, 2017, Respondent held mandatory meetings where HR Manager Moss and Safety Lead Kris Thom gave employees training on the new clothing requirements. *Jt 12*,

#2496-2499. Reed attended the meeting conducted on April 28, 2017.<sup>16</sup> *T.* 325; *Jt.* 13, #2524. As of the date of this meeting, Reed was aware of some of the changes that would be implemented, including the requirement that employees were prohibited from wearing shorts and capris. *T.* 326. During the meeting, Reed questioned whether management would join employees on the floor and work with them while wearing jeans when it was 110 degrees. *T.* 327. After Reed asked this question, Moss ended the meeting. *T.* 327. Thirty minutes later, Moss called Reed to his office. Moss accused Reed of singling him out with her question. *T.* 328. Reed denied doing so and reiterated her question. *T.* 329. Reed testified that in response, Moss said that “from here on out, if I had anything to say, I was to say it before the meeting or after the meeting, and I couldn’t say nothing during the meetings.” *T.* 328-329.

## **2. Legal analysis**

“An employer violates Section 8(a)(1) of the Act if its conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights.” *Frontier Hotel & Casino*, 323 NLRB 815, 816 (1997). Reed credibly testified to what Moss told her and although denied by Moss, the restriction alleged is not made in a vacuum. The record is riddled with overbroad restrictions of employees’ rights to engage in Section 7 activity. In this instance, Moss’s prohibiting Reed from speaking during meetings is a blatant overbroad prohibition against her rights to engage in Section 7 activity.

### **G. Respondent told Union officers they are held to a higher standard**

#### **1. Facts**

As addressed later in this brief, Respondent unilaterally implemented several policies concerning what employees are required to wear and prohibited from wearing. On May 5,

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<sup>16</sup> CPT ¶6(k). Although Reed’s recollection was that the meeting took place on April 20, 2017, Respondent’s sign in sheet shows she attended the meeting held on April 28, 2017. (*Jt.* 13, #2524).

2017,<sup>17</sup> Maintenance Supervisor Graham Darby (Darby) asked maintenance employee and Local President Besley why he was not wearing safety glasses. *T. 421*. In the fourteen years Besley had worked for Respondent, there had been no requirement to wear safety glasses. *T. 421*. Darby then ordered Besley to his office where Darby gave Besley safety glasses and told him he needed to wear safety shields all the time. Darby also told Besley he had been given this instruction three times that day. *T. 422*. Besley undisputedly denied being given that instruction and Darby was unable to tell Besley who gave him those instructions. *T. 423-424*. Besley put on the safety glasses and started to return to work when seconds outside of Darby's office, he ran into Court Dooley. *T. 423*. Dooley instructed Besley to enter his office. *T. 423*. Once in his office, Dooley repeated the same instructions as Darby concerning safety glasses, reiterating that Besley had been told three times to wear his glasses. *T. 423-424*. As with Darby, Dooley could not tell Besley who had given those instructions. Dooley had not been present in any meetings with Besley that day. *T. 424-425*. Besley reminded Dooley that in the meeting earlier that day, Respondent had stated that it was not going to push the new clothing policies and employees would have the month of May to acclimate. *T. 425*. Dooley then told Besley that because he was Union President, he was held to a higher standard and that he should be a role model for employees. *T. 425*.

## **2. Legal analysis**

The Board has consistently held that union officers cannot be held to a higher standard because of the positions they hold. *See Hoffman Air & Filtration Systems*, 312 NLRB 349 (1993)(steward told he was held to a higher standard and expected to set an example for other employees); *Union Fork & Hoe Co.*, 241 NLRB 907 (1979). When Dooley told Besley that he was being singled out and held to a higher standard, Respondent violated Section 8(a)(1) of the

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<sup>17</sup> CPT ¶6(m)

Act.

**H. Respondent unlawfully threatened employees with suspension and interrogated employees**

**1. Facts**

On May 5, 2017, Besley and the rest of his shift maintenance crew received their fire resistant clothing (FRC) consisting of a long sleeve shirt and long pants. On May 6, 2017, Besley talked to Maintenance Lead Matt Rhodes (Rhodes) to ask about the FR clothing. Specifically Besley asked if maintenance employees were required to wear the clothing at all times. *T. 427*. Rhodes responded in the negative, noting that maintenance employees “can have the shirt ready with your helmet.” *T. 427*. Rhodes’ reply was the same position communicated by Respondent when it met with both locals on April 12, 2017. *T. 108-109, 252, 323-324, 408*. On May 7, 2017,<sup>18</sup> Maintenance Planner Richard Keith (Keith) approached Besley while Besley was still in his street clothes. Keith asked Besley about the location of his FR clothing. *T. 429*. When Keith asked if he was going to put them on, Besley responded that he did not know he needed to. *T. 429*. Keith then ordered Besley to his office. When the two reached the office, Rhodes was present. *T. 429*. After offered the opportunity, Besley requested that maintenance employee Cory Pendleton serve as his representative in the meeting. *T. 429*. Pendleton was not dressed in his FR clothing because the spelling of his name was wrong on his shirt. *T. 429-430*. Pendleton is not a member of the Union. When he arrived with Besley, Matt Rhodes asked if Pendleton was in the Union and when Pendleton confirmed that he was not, Rhodes asked Besley if he could still represent him. *T. 430*. Besley had no objection but then remembered Union Vice President Gann was in the building and requested that he join the meeting. *T. 431*. Once Gann was present, Rhodes told Besley that if he did not put on his uniform, Darby had given them instructions to

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<sup>18</sup> CPT ¶6(n) and (o)

suspend Besley until further investigation. *T. 431*. Besley reminded Rhodes of their conversation the prior day, and Rhodes responded by saying he was misinformed. Rhodes reiterated if Besley failed to put on his uniform he would be suspended. *T. 431*. Besley then complied because he had three junior mechanics on his shift and he was not going to leave them alone. *T. 432*.

## **2. Legal analysis**

Respondent's internal documents confirm Besley's account. Joint Exhibit 29 is a May 8, 2017 email from Keith to Darby wherein he wrote that Besley contested the requirement to wear FRC based on what had been discussed during Union negotiations and that Keith and Rhodes threatened Besley with suspension if he did not wear the FRC. Joint Exhibit 30 was identified as Rhodes's log wherein he identifies incidents, coachings, discipline, etc. for employees. *T. 692-693*. Rhodes' notes from his and Keith's May 7<sup>th</sup> meeting with Besley confirm that Besley was told he would be suspended if he did not comply and wear the FR clothing. *T. 693; Jt. 30, pgs. 7-9*. Regarding Respondent's threat to suspend Besley if he failed to put on his FR clothing, an employer cannot use an illegal, unilaterally imposed rule to discipline employees. *Hedison Mfg. Co.*, 249 NLRB 791, 810, 823 (1980). As set forth below, Respondent's implementation of its FRC policy was done unilaterally and without agreement by the Union. Rhodes' threat to discipline Besley for his failure to adhere to the unlawful policy is no less unlawful than its later decision to suspend Besley for the same conduct.

In addition to threatening Besley with discipline, Rhodes also unlawfully interrogated Pendleton. The test for determining whether an employer unlawfully interrogated an employee is whether, under all of the circumstances, the interrogation reasonably tends to restrain, coerce or interfere with the free exercise of rights guaranteed by the Act. *Pan-Oston Co.*, 336 NLRB 305, 307 (2001), citing *Rossmore House*, 269 NLRB 1176 (1984). The Board looks at 1) whether

there is a history of employer hostility to or discrimination against protected activity; 2) the nature of the information sought; 3) the identity of the questioner; 4) the place and method of interrogation; and 5) the truthfulness of the employee's reply. *Intertape Polymer Corp.*, 360 NLRB 957, 957 (2014). Here, Rhodes, a direct supervisor, in a closed door meeting, unnecessarily questioned the Union status of Pendleton as his Union status had no relevance to his ability to serve as Besley's representative. Rhodes' improper question falls in the midst of numerous unfair labor practices committed by Respondent before and after the incident in question. A balancing of the *Rossmore House* factors weighs in favor of finding that Rhodes questioning constituted coercive interrogation of an employee's Union affiliation.

**I. Respondent threatened employees with unspecified reprisals for engaging in union and/or protected concerted activities by questioning why they were pursuing Respondent's implementation of a new clothing policy and interfered with employees protected rights by instructing employees not to report Respondent to OSHA**

**1. Facts**

Following Respondent's unlawful implementation of its policy requiring all maintenance employees to wear FRC at all times, on May 15, 2017, Respondent suspended Local President Besley for violating the new policy. *T.* 435-438; *Jt.* 32.<sup>19</sup> On May 23, 2017, Respondent reinstated Besley. *T.* 439; *Jt.* 32. On May 25, 2017,<sup>20</sup> Besley was ordered to human resources to meet with H.R. Manager Moss, Maintenance Supervisor Darby, Maintenance Planner Keith, and Maintenance Lead Rhodes. *T.* 466. Darby questioned Besley about why he was wearing his new FR pants rolled up. Besley responded that his pants were too long. *T.* 467-468. In the course of discussing Besley's obligation to wear the new FR clothing, Moss asked Besley why he was "beating the pants thing to death asking people about them?" *T.* 470. Besley responded by

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<sup>19</sup> Besley's unlawful suspension will be discussed in more detail later in this brief.

<sup>20</sup> CPT ¶6(p) and (q)

reminding Moss he is the Union president and other people were wondering about it too. *T. 470.*

In December 2016, OSHA conducted an onsite review of Respondent's facilities as result of an anonymous complaint that had been made. *T.502-504; Jt. 1.* During the May 25, 2017 meeting, Moss told Besley, "Don't be calling OSHA on us." *T. 468.* In his testimony, Moss confirmed bringing up OSHA during this meeting. Moss admitted to instructing Besley that when there is a safety issue, he should come to management first and if that is unsuccessful, then he could then contact OSHA. *T. 769-770.*

## **2. Legal analysis**

Besley's testimony concerning Moss questioning why he was "beating the pants thing to death asking people about them," was not disputed by Respondent. Moss questioned Besley in the context of a meeting where Besley was instructed to have representation present and no more than a day or two removed from Besley's return from an unlawful suspension and unlawful discipline for reasons related to Respondent's unilateral implementation of its FR clothing policy. "The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain, or coerce union or protected activities". *Id.*; see also *Park 'N Fly, Inc.*, 349 NLRB 132, 140 (2007). Besley, as Local President, has every right under the Act to discuss, question and challenge issues related to employees' terms and conditions of employment. A reasonable employee in Besley's situation would be forced to interpret Moss's admonishment of Besley's continued Section 7 activity as a signal that it should be discontinued out of fear of continued discipline. Such coercion constitutes an independent violation of Section 8(a)(1).

Furthermore, regarding whether Moss prohibited Besley from contacting OSHA, his statement was unlawful regardless of who is credited. The Board has held that pre-authorization

requirements unduly interfere with employees' Section 7 rights to "improve terms and conditions of employment" by seeking assistance "outside the immediate employee-employer relationship." See *Eastex, Inc., v. NLRB*, 437 U.S. 556, 565–566, 569–570 (1978); *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007); *Handicabs, Inc.*, 318 NLRB 890, 896 (1995), *enfd.*, 95 F.3d 681 (8th Cir. 1996). Here, under Besley's version, Moss did not require pre-authorization first. He jumped straight to an outright unlawful prohibition against contacting a third party for assistance to address employees' terms and conditions of employment. See *Eastex, Inc.* 437 U.S. at 565. Under Moss's version, the Board has settled that broad "chain of command" rules violate the Act by preventing employees from discussing their labor issues with third parties. See *Trinity Protection Services, Inc.*, 357 NLRB 1382, 1382-83 (2011)(security contractor violated Section 8(a)(1) by informing employees they must follow a chain of command and could not discuss issues relating to their training with the Government); see also *Guardsmark, LLC*, 344 NLRB 809, 809 (2005), enforced in relevant part, 475 F.3d 369 (D.C. Cir. 2007).

### **III. Respondent's implementation of unlawful rules**

#### **A. Facts<sup>21</sup>**

In early February 2017, Respondent verbally promulgated and has since maintained an overly broad rule prohibiting employees from talking to employees from other departments except during non-work times. As detailed above, about February 8, 2017, Dooley and Moss met with Montoya, Reed and Besley for the purpose of notifying Montoya that he was suspended pending investigation over an allegation that he threatened a co-worker. Dooley also instructed Montoya that he was not permitted to go outside of his work area "to be talking and carrying on" during work time. *T. 316-317, 379-380*. His instruction was that such conduct could only occur during non-work time. *T. 316-317, 379-380*. Moss's notes from this meeting additionally read

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<sup>21</sup> CPT ¶7

that “Dooley explained to all present that all union activities were to be limited to ‘non-work time and non-work areas.’” *T. 761-764; Jt. 38*. Dooley’s instruction was repeated by another supervisor the following day when Process Specialist Foss approached Reed at her work station. *T. 318-319*. Foss told Reed and other employees that they are not allowed to leave their lines to talk to other employees. *T. 319-320*.

## **B. Legal analysis**

The record is undisputed that prior to early February 2017, employees were not prohibited from leaving their work areas or from going to other work areas to engage their coworkers. *T. 317-318, 380-381*. The pattern established above is one of Respondent seeking to restrict employees’ Section 7 rights to discuss Union related matters and matters concerning employees’ terms and conditions of employment. The rule prohibiting employees from leaving their work area was communicated to multiple employees in contravention to the practice that existed prior to February 2017. In *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-647 (2004), the Board set forth a two-step inquiry for determining whether a rule violates the Act. First, it will be unlawful if the rule explicitly restricts Section 7 activities. If the rule does not, it might still be unlawful if (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. Respondent’s rule was promulgated and communicated in direct response to employees engaged in protected activity, specifically, employees discussing matters related to the Union. Additionally, employees would reasonably interpret such a restriction as prohibiting them from engaging in Section 7 activity as Respondent attempted to limit employees’ ability to engage in discussions with each other and any subsequent attempt to do so now subjects employees to potential discipline. For these

reasons, Respondent's new rule that employees must remain in their work areas except during non-work time is violative of Section 8(a)(1).

#### **IV. Respondent unlawfully discharged employees**

##### **A. Facts**

In August 2016, once Jason Gann learned that Respondent was using temporary employees for longer than 60 days, he had those individuals sign Union authorization cards and he submitted them to Respondent. *T.195; GC 21*. Soon after, Respondent returned the cards and refused to accept them. *T. 199*. The parties then met to discuss the matter. *T. 49*. Union Representative Vincent raised the issue and told Respondent that he was aware of employees at the facility who had worked past their probationary period and not been converted to full-time employment. Therefore they were not receiving the proper pay and benefits. *T. 47*. Dooley took the position that Respondent could hire people from anywhere, a fact that Vincent did not dispute. However, he noted that once that individual had been at the facility for 60 days, they were covered under the CBA. *T. 48*. Vincent cited *Browning-Ferris*, 362 NLRB No. 186 (Aug. 27, 2015), a joint employer case, and advised that the case supported his position. He sought to work things out and did not want to tie matters up with an NLRB charge. *T. 49*.

On August 12, 2016, Vincent e-mailed Dooley to outline the Union's position that employees hired through a staffing agency have the same 60 day probationary period as those individuals hired off the street. *GC 4*. Vincent requested that those affected employees be made whole. By email dated August 16, 2016, Dooley rejected the Union's stance. *GC 5*. Dooley wrote that the workers in question were People Source employees, were never intended to become employees, were not performing bargaining unit work, and were not covered by the CBA. On the same date, Gann filed a grievance over Respondent's failure to convert those

individuals. *T. 203; GC 10*. Vincent also filed an unfair labor practice charge. *T. 53-54*. Vincent subsequently made requests for information in an effort to perform due diligence to support the Union's position that Respondent was working temporary employees for more than 60 days without converting them to full time. *T. 57-58; GC 6, 8*. After the Union contested Respondent's failure to convert these individuals, Respondent undisputedly ended the employment of those temporary employees. *T. 60-62, 222*. When the Union learned of this action, it filed a grievance arguing that Respondent must recall those individuals before hiring anyone else. *T. 63, 222; GC 11*. Gann then discussed Respondent's removal of the temporary employees with Dooley. *T. 221-223*. Dooley told Gann that he got rid of those employees because Gann had instructed him to do so. *T. 222-223*. Gann denied this, reiterating the Union's stance that the Union had requested that temporary employees be hired if kept after 60 days. *T. 223*. While Respondent's actions were being addressed through the grievance procedure and Board's processes, Gann reached a verbal agreement with Dooley that the work previously performed by the temporary employees would be covered by Respondent soliciting volunteers and if too few volunteered, Respondent would use temporary employees. *T. 203, 207*. However, Gann soon learned that Dooley failed to abide by that agreement when employees told Gann that Respondent had posted a document notifying employees they would be forced into performing overtime work if there were not enough volunteers. *T. 215-218; GC 22*. In a third step grievance meeting, Respondent proposed hiring the discarded temporary employees if they could pass a test. Respondent communicated this proposal on several occasions. *GC 12; GC 13*. The Union declined, taking the position that a test should not be required. *T. 68*. When Vincent rejected the proposal during the third step grievance meeting, Dooley turned to then Plant Operations Manager Brian Merryman and stated that instead of accepting volunteers to perform the vacant work, he would draft (or force) employee

into doing it. *T. 213.*

## **B. Legal analysis**

### **1. Respondent violated 8(a)(3) of the Act**

In his testimony, Dooley admitted that after the Union met with Respondent in August 2016 and took the position that temporary employees had been working in Respondent's facility for longer than 60 days and constituted Respondent's employees, he and Merryman made the decision to suspend the use of those employees. *T. 814-815.* Employees referred by People Source to Respondent have limited ways in which their employment at Respondent's facility can end. If they do not quit, their assignment must be ended and it is Respondent who makes that decision. *T. 841, 843-844, 883-884.* People Source does not send labor to Respondent without Respondent making a request. *T. 884.* Respondent makes the decision as to whether a People Source referral starts and ends employment at its facility. When Respondent suspended use of People Source labor in August 2016, it ended the employment of those individuals, including temporary employees who had worked longer than 60 days. Respondent admitted to the Union that it removed temporary employees from its facility as a result of the Union pursuing the issue through the grievance process. As Jason Gann testified, when he confronted Court Dooley about Respondent's reasoning, Dooley admitted that he did so because of the Union. In his testimony, Dooley cites ambiguity in the Union's position. *T. 814.* Such a position is not plausible when compared to the very specific and detailed email Vincent sent to Dooley on August 12, 2016. *GC 4.* In that email, Vincent very clearly laid out the Union's position that (1) all employees the company hired through a hiring agency or off the street have the same sixty day probationary period as defined by Articles 14 and 16 of the CBA; (2) any employee that was not made a permanent employee after their sixty day probationary period shall be made a permanent

employee; (3) those employees shall be given continuous service credit back to their hire date as set forth in Article 16, Section 5; (4) those employees will receive the correct pay in accordance with the CBA and be made whole for any loss of wages, holiday pay, benefits, etc. they did not receive as a result of Respondent's failure to convert them. *GC 4*. There is no ambiguity in the Union's position and Respondent's argument that it suspended use of those employees (i.e., rid itself of the temps who worked more than sixty days) is disingenuous. Where the conduct for which an employer claims to have acted is due to an employee's protected activity, the action in question violates the Act and no analysis pursuant to *Wright Line*, 251 NLRB 1083 (1980) is necessary. See *Neff-Perkins Co.*, 315 NLRB 1229, 1229 fn. 2 (1994); *Mast-Advertising & Publishing*, 304 NLRB 819 (1991); *Phoenix Transit System*, 337 NLRB 510, 510 (2000). Here, Dooley admitted to Gann that he discontinued the employment of the temporary employees in question because of the Union's pursuit of the issue and in doing so, Respondent ended the employment of those individuals in violation of Section 8(a)(3) of the Act..

Assuming *arguendo* that a *Wright Line* analysis was applicable in this case, the evidence weighs in favor of finding a violation. Under *Wright Line*, the GC must establish four elements by a preponderance of the evidence. First, the GC must show the existence of activity protected by the Act. The Union's pursuit to enforce the CBA is unquestionably protected. Second, the GC must prove that Respondent was aware that the employees had engaged in such activity. Respondent's knowledge of this is undisputed. Third, the GC must show that the alleged discriminatees suffered an adverse employment action. Again, this is undisputed. Lastly, the GC must establish a nexus between the protected activity and the adverse employment action. The evidence of animus in this case is substantial. Respondent has attempted to coerce and restrict employees from engaging in straight forward Section 7 activity, singled out Union officials and

supporters and disregarded basic bargaining obligations under the Act. Additionally, here timing speaks volumes. The Board has historically inferred animus based on the timing of events. See *Sears, Roebuck & Co*, 337 NLRB 443 (2002); *Masland Industries*, 311 NLRB 184, 197 (1993). Dooley fully admits that the decision to discontinue use of the temporary employees immediately followed the Union's pursuit of the issue. Under either analysis, Respondent violated the Act with its decision.

## **2. Respondent committed a mid-term modification of the CBA**

Under Section 8(a)(5) of the Act, it is unlawful for an employer “to refuse to bargain collectively with the representatives of his employees,” and Section 8(d) of the Act specifies, inter alia, that “to bargain collectively is the performance of the mutual obligation of the employer and the representative of employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment....” *Litton Financial Printing v. NLRB*, 501 U.S. 190, 198 (1991). Under Section 8(a)(5) and 8(d), an employer is prohibited from modifying the terms and conditions of employment established by an existing CBA without obtaining the consent of the union. *Southern Container, Inc.*, 330 NLRB 400, 400 fn.3 (1999); *Amoco Chemical Company*, 328 NLRB 1220, 1221 (1999). Under the 8(d) mid-term modification doctrine, where “wages, hours, and other terms and conditions of employment” are identified in the CBA, no party to that contract is required “to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.” *NLRB v. Scam Instrument Corp.*, 394 F.2d 884, 886-887 (7th Cir. 1968), cert. denied 393 U.S. 980 (1968). Article 14, Section 2 and Article 16, Section 5 of the parties' CBA speak to the 60-day probationary period and this is reiterated in Respondent's

employee handbook. *GC 2, p.9, p. 12; GC 24, p. 7.* Article 16, Section 5 specifically reads that employees retained after the end of the probationary period shall be given continuous service credit back to the date of hire. The undisputed record testimony is that the parties have historically utilized the 60-day probationary period as the time period after which Respondent converts employees furnished by a third party (such as People Source). Full-time Respondent employees Gann and Reed and former full-time employee Montoya each provided unrefuted testimony that they were referred to Respondent by a third party staffing company and worked in that capacity for 60 days. After their 60-day probationary period, they converted to full-time status with Respondent. *T. 191, 281-282, 298-299.* The record established that People Source has referred employees to work at Respondent's converting facility for more than the 60 day probationary period identified in the CBA. The individuals identified in the Amended Fifth Consolidated Complaint at Paragraph 8(a) constitute individuals the General Counsel was aware of prior to the hearing who worked at Respondent's facility for at least 60 days without being converted to full-time. *GC 1 (SSS).* Appendix A to this brief identifies the relevant records within General Counsel Exhibit 41 that show that John Aguilar, Carrie Bunnell, Brandon Glory, Rebecca Scott and Jennifer Whisenhunt (Guinn) worked at Respondent's facility for longer than 60 days without conversion. Through the Appendix, and underlying time cards and invoices provided by People Source to Orchids, it can clearly be seen that each of the named discriminatees worked significantly more than 60 days at Respondent's facility. Yet, Respondent failed to follow the CBA or the past practice established by the parties in converting these individuals following their probationary period.

Respondent does not dispute that temporary employees have worked at its facility for at least 60 days nor does it dispute that it rid itself of employees after the Union took issue with

Respondent's failure to convert. For example, in an email dated August 22, 2016, then Plant Operations Manager Brian Merryman emailed People Source Recruiting-Staffing Specialist Melanie McMains advising that the Union had filed a "cease and desist with regards to any temporary worker who works over 60 consecutive scheduled shifts" and that "in the future all temps assigned to Orchids Paper must work no more than 59 shifts in order to keep us aligned with the collective bargaining agreement." *GC 25; GC 26*. Merryman essentially concedes that Respondent has failed to abide by the CBA. Going forward, People Source began to follow the 60 day directive from Orchids and McMains admitted in her testimony that prior to these new instructions by Respondent, she did not keep track of whether a referral worked more or less than 60 days. *T. 882; GC 27*. Another example is set forth in an October 13, 2016 email from McMains where she noted the reason that Brandon Glory no longer worked at Orchids. *GC 35*. Specifically, McMains wrote that on September 9, 2016, Respondent's Warehouse Supervisor Earl Wright<sup>22</sup> called and stated that Glory "has too many hours and we have been told to let him go and find a replacement. From this point forward they cannot work more than 60 days." *GC 35*. At the hearing, Respondent focused its questioning in this area on the fact that employees referred by a third party are not "Respondent's employees." Such a distinction runs contrary to the undisputed past practice identified by General Counsel's witnesses. Respondent provided no evidence to contradict the established interpretation of the parties' CBA through past practice, bargaining or anything else. Furthermore, the record established a significant amount of similarities with respect to the "permanent temps" working at Respondent's facility and Respondent's full-time bargaining unit employees. Certain temporary employees were solicited to work more than limited stints or projects or assignments. These individuals were solicited and

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<sup>22</sup> McMains testified that Wright was one of many individuals who contacted People Source for labor on behalf of Respondent. *T. 862*. As the ALJ noted, at the very least, Wright constitutes an agent of Respondent under Section 2(13) of the Act. *T. 901*.

assigned to work on a designated full-time crew. As many of the witnesses who testified noted, Respondent's operation primarily utilizes four set crews (A, B, C, D) that each work alternating twelve hour shifts from 7:00 to 7:00. *T. 35, 153, 172, 842-843.* Employees on these shifts work a rotating four days on, four days off, four nights on, and four nights off. *T. 842-843.*<sup>23</sup> The record reflected that temporary employees became "permanent temps" when they were assigned to work with designated crews/shifts no differently than other bargaining unit employees. *T. 153, 156, 171-172; GC 30; GC 31; GC 32; GC 33.* The permanent temps also performed the same work as established bargaining unit employees. For example, Carrie Bunnell testified that she transitioned to a permanent temp in October 2015 when she was permanently assigned to work Respondent's 12-hour rotating "D" shift. *T. 171-172.* Once she converted to working on the "D" shift, Bunnell started to work a machine called the "robot" at the end of the production line to sort and stack product before it is sent to be mechanically wrapped and then onto a skid to be delivered into the warehouse. *T. 172-173.* This work was performed by temporary employees and Respondent's employees alike. *T. 173-174.* At the time of her Bunnell's employment, Respondent operated approximately twelve lines and she had experience working on at least seven of them. *T. 167, 175.* Bunnell personally performed and witnessed other temporary employees working on production lines, packaging product and operating machinery on those lines no different than regular bargaining unit employees. *T. 175-176.* Bunnell was also personally assigned to perform janitorial work on occasion, such as cleaning the break room, restroom and offices. *T. 176.* Both temporary and permanent employees performed this function. *T. 176.* Permanent temp Jennifer Whisenhunt (Guinn) provided similar testimony. When she was assigned to a designed crew, she started working on production lines and performing tasks such

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<sup>23</sup> Not everyone at the converting facility works a rotating 12 hour schedule. For example, Jason Gann works in the warehouse and employees there work from 7 a.m. to 3 p.m. or 3 p.m. to 11 p.m. five days per week.

as changing out the core machine and monitoring the line for bad product. *T. 153, 154.* Both tasks are also performed by bargaining unit employees. *T. 154.* Additionally, both women testified that when they became permanent temps assigned to designated crews, their jobs changed from doing cleaning and DRP's to the tasks identified above. *T. 149, 153, 166, 172-173.* "Display Ready Products" (DRP) refers to removing product as it comes down the line and stacking it on a pallet. *T. 150, 167.* Although permanent temps transitioned from this type of work, the record reflected that both temporary and bargaining unit employees performed this function. *T. 151, 167-168.* In fact, Chris Montoya provided a recent example from February 6, 2017. On that date, Montoya was assigned to Line 4 but it was down. *T. 284-285.* Others assigned to Line 4 at the time included Darlene Russell (Line 4 Coordinator), William \_\_\_\_\_ (Line 4 Back Tender) and an unnamed temporary employee. *T. 285-286.* With their line down, the group, along with Darla Reed, was ordered to the warehouse to do "DRP's" for the rest of the day. *T. 286-287.* Respondent provided no evidence to contradict the consistent testimony offered by the General Counsel's witnesses that established bargaining unit employees worked side by side with temporary employees performing the same work under the same supervision.<sup>24</sup>

By its failure to convert employees consistent with the CBA and past practice, Respondent has failed and refused to bargain collectively and in good faith with the exclusive collective bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1) and (5) of the Act. Where an employer violates Section 8(a)(5) by unilaterally changing terms and conditions of employment, the Board orders the employer to restore the status quo ante by, among other things, reinstating

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<sup>24</sup> Each permanent temp testified to being supervised directly by Respondent's employees..

and making whole discharged employees and rescinding discipline where the discharges or discipline resulted from the unlawful unilateral change. *Alta Vista Regional Hospital*, 355 NLRB 265, 268 (2010); *Uniserv*, 351 NLRB 1361, 1361 n. 1, 1362 (2007).

**V. Respondent withdrew from an agreement to perform work previously performed by temporary employees**

**A. Facts**

As detailed above, after Respondent removed temporary employees from its facility in August and September 2016, Court Dooley and Jason Gann entered into a verbal agreement wherein the parties agreed to solicit volunteers to perform the work previously performed by temporary employees and if the number of volunteers was insufficient, Respondent would utilize temporary employees. *T. 203, 207*. When the Union refused to agree to Respondent's grievance proposal that it would hire the temporary employees who had been removed if they passed a test, Dooley reneged on his verbal agreement with Gann by declaring and then acting on the statement that he would force employees to perform the work in question in lieu of soliciting volunteers.

**B. Legal analysis**

**1. 8(a)(3) retaliation**

Respondent's actions to renege on its agreement to use volunteers and then temporary employees to perform the work previously performed by the terminated temporary employees was directly tied to the Union's protected activity in its attempt to represent its bargaining unit. Gann credibly testified that Respondent took such action by way of a reaction made by Dooley in response to the Union's refusal to concede to Respondent's grievance proposal requiring temporary employees to take a test in order to convert to full-time status. Similar to Respondent's decision to discontinue use of temporary employees in response to the Union

pursuing its failure to convert through the grievance procedure, Respondent's renegeing on the verbal agreement with the Union to cover the overtime work that was created was equally violative.

## **2. 8(a)(5) unilateral change**

An employer's duty to bargain with the union representing its employees "encompasses the obligation to bargain over the following mandatory subjects— 'wages, hours, and other terms and conditions of employment....' *In re McClatchy Newspapers, Inc.*, 339 NLRB 1214, 1214 (2003). The Board has long held that overtime constitutes a mandatory subject of bargaining. *United Technologies Corp.*, 300 NLRB 902, 904 (1990). As credibly testified to by Jason Gann, Respondent and the Union had an agreement that Respondent would address the overtime work that existed as a result of its removal of the temporary employees by soliciting volunteers and then, if necessary, by using temporary employees. Respondent then took it upon itself to unilaterally veer from that agreement when it became angry with the Union and its refusal to concede to Respondent's wishes regarding continued use of temporary employees. Respondent communicated this anger through its unilateral change of the agreed upon method to address overtime for said work without agreement by the Union. Respondent's unilateral action related to a mandatory subject violated Section 8(a)(5) of the Act.

## **VI. Respondent unilaterally changed health insurance carriers**

### **A. Facts**

Respondent's bargaining unit employees receive health care benefits and the general parameters of that coverage are identified in Article 24 of the parties' most recent CBA. *T.* 85-86, 223; *GC* 2. In September 2016, HR Manager Moss started the process of looking into changing Respondent's then-current health insurance provided by Community Care. *T.* 753. In

late October 2016, after interviewing brokers, Moss selected one to assist Respondent. *T.* 753. Moss received insurance costs from three competing providers in November and needed to roll out the newly selected plans by January 1, 2017. *T.* 758-759. Moss selected United Health Care to replace Community Care and Respondent then held benefit open enrollment meetings with employees on December 15 and 16, 2016. *Jt.* 28. A few days prior to the meetings, Union Vice President Gann learned of Respondent's decision to change insurance during an unrelated face to face conversation he had with Moss. *T.* 224-225. Moss told Gann he needed to attend one of the meetings as an employee and he informed Gann that Respondent was changing providers. *T.* 224-225. Moss advised that it would save employees money. Gann responded by asking whether it should be "part of our decision as to whether we change or not...it is the people is the one that pays their insurance." (sic) *T.* 226. Moss reiterated that it would be a money saver, especially if employees don't use tobacco. *T.* 226. Union President Besley learned of the change in a similar manner. The day before the enrollment meetings, Moss informed Besley that the United Care representatives would be at the facility to sign employees up. *T.* 393-394. Prior to this conversation, Besley knew that Respondent was looking into possibly making changes, but nothing had been mentioned in months. *T.* 394-395. Besley responded to Moss by telling him that the changes needed to be discussed. *T.* 395. Moss declined, noting that Respondent was moving forward with the change, the new insurance provider was scheduled to come to the facility and "they already changed over." *T.* 395-396. Along with the rest of Respondent's employees, Gann and Besley attended an enrollment meeting on December 15 or 16, 2016. *T.* 228-229, 396. Information concerning the new health benefits was distributed to employees at those meetings. *T.* 225, 396-398; *GC* 18, 19. Given no choice, Gann and Besley both enrolled in the new insurance. Both men testified to the personal effect the change had on them. Employee

copays increased for their prescriptions and office visits. *T.* 233-234, 400-401. For Gann's family, certain prescriptions increased in cost by four to six dollars. *T.* 234.

## **B. Legal analysis**

To satisfy its duty to bargain over a change involving a mandatory subject of bargaining, an employer must give the union timely notice so as to allow a meaningful opportunity to bargain. *KGTV*, 355 NLRB 1283, 1284-85 (2010). Upon receipt of timely notice, the union must act with "due diligence" to request bargaining. *Id.* However, if the notice is not sufficiently in advance of implementation, or the objective evidence establishes that the employer has made its decision and has no intention of changing its mind, then the notice is nothing more than presentation of a "fait accompli," and the union is not required to request or pursue bargaining because it would be futile. See *S & I Transportation, Inc.*, 311 NLRB 1388, 1388 n.1, 1389-90 (1993)(fait accompli notwithstanding fact employer met with union). The Board will find a fait accompli where the union receives notice at the same time as the employees it represents. See *Ciba-Geigy Pharmaceuticals Div.*, 264 NLRB 1013, 1017 (1982); *S&I Transportation*, supra (employer announcement with definite terms directly to employees without consulting union).

Health insurance benefits are a mandatory subject of bargaining. *United Hospital Medical Center*, 317 NLRB 1279, 1282 (1995). Therefore, Respondent could not unilaterally implement changes to unit employees' health insurance benefits without bargaining to agreement or impasse with the Union or without the Union's "clear and unmistakable" waiver of its bargaining rights over the subject matter. *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). It is undisputed and readily admitted by Respondent that Moss researched the change to its health care provider and made the decision to change without any notice to or involvement by the Union. Respondent's notification to the

Union at the same time it notified the bargaining unit, providing no opportunity to bargain, constitutes *fait accompli* within the meaning of Board law. In providing notice in this manner, refusing to bargain, and implementing the change without agreement or waiver, Respondent unilaterally changed a mandatory subject of bargaining in violation of Section 8(a)(5) of the Act.

## **VII. Respondent unilaterally converted lines to Op Tech lines**

### **A. Facts**

Respondent's operates a number of production lines at its converting facility. Approximately six or seven years ago, Line 8 transitioned into an "Op Tech" line. *T. 386*. An Op Tech line is a line where operators perform all functions on the line, including its maintenance. *T. 73, 386, 833*. The parties' most recent CBA speaks to Respondent's limited ability to change an existing line into an Op Tech line. Article 37 (Line 8 and Any New Line) reads in relevant part: "After the successful startup of (Line 8), the company may entertain the idea to expand this opportunity to line 7 and/or line 6. The understanding is both parties will discuss *and must agree* before expanding cell concept to existing lines." *GC 2, p. 29*. (emphasis added). During the life of the 2012-2016 CBA, the parties agreed that Respondent's Line 9 would convert into an Op Tech line. *T. 74, 387*. As of August 2016, Lines 6 and 7 were standard operational lines that bargaining unit employees could bid into. *T. 74*. During a meeting between Respondent and the Union in early August 2016, Brian Merryman told the Union that he would like to discuss converting Lines 6 and 7 to Op Tech. *T. 73*. Merryman advised that Respondent was engaged in a large capital project to convert the lines and he wanted the Union to agree to their conversion. *T. 73*. Vincent asked that Respondent email him a proposal and the Union would take a look at it. *T. 73*. By email dated October 7, 2016, Dooley emailed Respondent's proposal to Vincent and other Union officers. *T. 75, GC 14*. After the Union received Respondent's proposal, Local

membership met to discuss the proposed changes and a majority of the membership did not support the conversion. *T. 75*. The membership was concerned about the effect it could have on the individuals working those lines. Specifically there are senior employees who have worked those lines for over thirty years and employees who have worked the same machine for that period of time would be out of their element performing different functions on a line. *T. 84*. In response, on October 17, 2016, Vincent replied to Dooley advising that the Union was not agreeable to transitioning Lines 6 and 7, but the Union would be open to discussing it during negotiations. *T. 76; GC 15*. On October 18, 2016, Dooley sent another email to Vincent informing him that upon his review of Article 37 and “interviewing past Union Committee members present at the last contract negotiation” the matter of transitioning has already been negotiated and agreed upon. *GC 16*. Dooley noted that “past committee members” Chris Montoya and Willa Wright agreed with Respondent’s position and the conversion of the lines would take effect on January 9, 2017. *GC 16*. On the same date, Vincent replied to Dooley reiterating that the Union disagreed with Respondent’s position, noting that Article 37 is clear. *T. 80-81; GC 17*. Vincent also threatened to take action if Respondent moved forward as planned. *GC 17*. Later that afternoon, Dooley repeated Respondent’s position and plan to convert Lines 6 and 7 as previously outlined. *GC 17*. Despite the Union’s objection, Respondent initiated conversion of Lines 6 and 7 in January 2017. *T. 83*.

### **B. Legal analysis**

Respondent’s failure to maintain the status quo set forth in Article 37 of the parties’ CBA falls under the same legal parameters regarding mid-term modifications identified above in Section III.B.2. The terms of Article 37 of the parties’ CBA are clear, and Respondent’s interpretation of the last sentence of the Article unconvincingly attempts to locate ambiguity

where none exists. Although Article 37 provides that Respondent “may entertain” expanding the Op-Tech concept to Lines 6 and 7, it also provides that the parties must agree before extending the concept to existing lines. There is no basis for concluding that parties intended the last sentence of Article 37 to apply only to existing lines other than lines 6 and 7. Respondent’s alleged reliance on the assurances of past Union committee members to justify its actions should be rejected because the Board does not permit the use of extrinsic evidence to contradict the terms of an unambiguous written agreement. *See Quality Bldg. Contractors, Inc.*, 342 NLRB 429, 430 (2004); *NDK Corp.*, 278 NLRB 1035 (1986); *NLRB. v. IBEW Local 11*, 772 F.2d 571, 575 (9th Cir. 1985). Respondent’s conversion of lines 6 and 7 to Op-Tech lines without the Union’s consent and contravention of Article 37 violates Sections 8(d) and 8(a)(5) of the Act.

## **VIII. Respondent unilaterally implemented shoes, clothing, and FRC policies**

### **A. Facts**

In December 2016, an OSHA representative appeared at Respondent’s facility with a list of seventeen (17) alleged infractions. *T. 502-504; Jt. 1*. On February 23, 2017, Respondent was notified of five confirmed infractions. *T. 508-509; Jt. 2*. The infractions were limited to one infraction related to combustible dust, three related to dangers to employees’ feet, and one related to Respondent’s failure to guard a machine that resulted in an injury to an employee’s foot. *T. 560-563; Jt. 2*. Respondent then contracted with Northeast Technology Center (NTC) to conduct a hazard assessment of its facility. *T.564-565; Jt. 7; Jt. 8*. The assessment took place on March 23, 2017. *T. 565*. Respondent then used NTC’s assessment recommendations in crafting new clothing and shoe policies regarding what employees could and could not wear at its converting facility. *T. 522, 581; Jt. 9; Jt. 10*. The clothing policy undisputedly prohibited

articles of clothing that were previously permitted and added new restrictions. *Jt. 9*. The shoe policy mandated that employees on the converting side wear steel toed shoes. *T. 110; Jt. 10*. Respondent's Safety Lead Kris Thom, Dooley and Moss collaboratively drafted the clothing and shoe policies. *T. 546-547*. Respondent did not include the Union in its decision to craft or implement these policies. *T. 568-569*. In fact, the Union was placed on notice of the intended changes at the same time as all other employees. On March 15, 2017, Thom emailed Respondent's supervisors instructing them to post an attached notice of mandatory meetings Respondent intended to hold with employees to introduce its new clothing and shoe policies. *Jt. 17*. Meetings were held for each crew on March 23, March 28, March 31 and April 4, 2017. *Jt. 17, #2474*. When it obtained notice of these changes, on April 4, 2017, the Union made a demand to bargain. *GC 23*. On April 12, 2017, at the Union's request, Respondent met with Chad Vincent and representatives of both local unions. One of the documents distributed at the meeting included a document titled "Operations Clothing Policy" and detailed appropriate and prohibited attire. *GC 20*. At this meeting, Respondent notified the Union that it had brought in a third party (NTC) to conduct a safety assessment following the OSHA violations, resulting in the creation of the clothing and shoe policies. *T. 98, 104-105; Jt. 9; Jt. 10*. The Union addressed Respondent's changes prohibiting shorts, leggings, cut-off shirts, hooded sweatshirts, etc. *T. 105*. The recommendations made by NTC were the only reasons provided by Respondent for the changes to employees' dress code. *T. 105*. During the meeting, since Respondent was mandating what employees could wear, the Union proposed Respondent provide shirts. *T. 253*. Following the meeting, the parties reached an agreement that Respondent would provide certain clothing for employees. *Jt. 26*. On April 29, 2017, Respondent went ahead and implemented its new clothing and shoe policies as initially drafted and communicated to employees beginning in

March 2017. *T. 550-551; GC 20; Jt. 9; Jt. 10; Jt. 21.*

In addition to its general clothing and shoe policies, Respondent also unilaterally implemented a flame resistant clothing (FRC) policy. Respondent initiated an Arc Flash Study by a third party, IPC Solutions, no later than early December 2016. *T. 596, 598, 657-658; R5; Jt. 27.* The study consisted of an independent review of Respondent's converting facility, including its equipment and electrical components. *Jt. 27.* About February 2017, Maintenance Engineering Manager Graham Darby initiated preparations for what he anticipated the study would reveal with respect to personal protective equipment that his maintenance employees should wear. *T. 665.* In about March 2017, Respondent hired Cintas to provide uniforms for its maintenance employees. *T. 666.* Maintenance employees were not previously required to wear any particular type of clothing. *T. 401, 407.* On various dates between late April and early May 2017, Respondent's maintenance employees were provided helmets, gloves and uniforms. *T. 666-667; Jt. 19; Jt. 20.* About April 2017, Respondent received the results of the Arc Flash Study. *T. 658; Jt. 27.* The study identified the recommended level of protective gear necessary to be worn relative to each electrical component inspected during the Arc Flash Study. *R 4.* When the newly required FR clothing was distributed, Respondent notified employees that it was going to take a relaxed approach to its implementation. *T. 618, 669.* Darby, along with Kris Thom, created the FRC Uniform Policy identified by *Jt. 11. T. 673-674.* The FRC uniform is defined as "a long-sleeved shirt/pant combination or coveralls that are made of flame resistant material and have a minimum arc rating of 8." *Jt. 11, #1917.*

Local President Besley is a maintenance journeyman and has worked for Respondent for fourteen years. *T. 369.* The first time he became aware that Respondent was considering the FRC policy was when he was going to be measured by Cintas for his uniform sometime in April

2017. *T. 403*. Besley was first notified of this mandatory requirement during a morning meeting by his supervisor, Matt Rhodes. *T. 404-405*. The FR clothing included a long sleeve shirt, pants, helmet and gloves. *T. 409, 418, 617; Jt. 11, #1917*. Rhodes told the men that they did not have to wear the clothing at all times; they only needed to have them ready if they went into an electrical cabinet. *T. 405-406*. This directive was repeated by Dooley at the labor management meeting at Rogers State University on April 12, 2017. *T. 108-109, 252, 323-324, 408*. However, Respondent soon changed this directive. In a meeting with D shift maintenance employees on May 5, 2017, Besley received his FR uniform. *T. 418-419; Jt. 20, #2566*. In between the April 12 and May 5 meetings, Besley heard from his bargaining unit that Respondent was requiring that maintenance wear the FR uniform at all times. *T. 419*. As a result, he asked Respondent. In response, Darby chastised Besley by noting he was the first to ask that question and he didn't understand why Besley was asking it. Contrary to Rhodes' instruction and the directive given by Dooley on April 12, Darby told Besley that maintenance employees had to wear the long-sleeved shirts and pants at all times. *T. 420*. As will be detailed later in this brief when addressing discipline Besley received related to new FR clothing policy, Respondent continues to take the position that maintenance employees had to wear the new uniform at all times.

## **B. Legal analysis**

Respondent's implementation of the shoe, clothing, and FRC policies is subject to the same legal parameters that govern unilateral changes as identified above in Section V.B. Like healthcare, a dress code is a mandatory subject of bargaining. *Public Service Co. of New Mexico*, 337 NLRB 193, 199-200 (2001); *St. Luke's Hospital*, 314 NLRB 434, 440 (1994); *United Technologies Corp.*, 286 NLRB 693, 694 (1987); *Valley Oil Co.*, 210 NLRB 370, 379 (1974). The record is clear that Respondent created and implemented its new shoe, clothing and FRC

policies without sufficient notice to, bargaining with, or agreement by the Union. Multiple Union officers testified that they received notice of the new policies at or around the same time as the rest of the bargaining unit. Under Board law, Respondent's notice to the Union about the shoe, clothing, and FRC policies was *fait accompli*, and as such, the unilateral implementation of these policies violates Section 8(a)(5) of the Act.

Respondent will argue that its policies were necessitated as a result of OSHA requirements. The record does not support this conclusion. The Board recognizes that employers' obligations under the Act must be harmonized with Federal regulations that mandate benefits or procedures that would otherwise be mandatory subjects of bargaining. Compare *Murphy Oil USA*, 286 NLRB 1039, 1039, 1042 (1987)(no violation where employer unilaterally implemented rule required by OSHA regulation prohibiting employees from eating near toxic chemicals) with *Foodway*, 234 NLRB 72, 76-77 (1978)(employer not excused from bargaining over stock purchase plan because of tax code provisions). However, the Board has consistently held that employers required by federal regulations to change their employees' terms and conditions of employment must still bargain over the aspects of those changes over which the employers retain discretion. See *Blue Circle Cement Co.*, 319 NLRB 954, 956, 958-59 (1995)(employer must bargain over alternative eating location where required by federal safety regulations to forbid employees from eating near toxic chemicals); *Dickerson-Chapman*, 313 NLRB 907, 942 (1994)(employer must bargain over selection of employees required by OSHA to be designated "competent persons" for worksite inspections); *Hanes Corp.*, 260 NLRB 557, 557, 561-63 (1982)(employer must bargain over discretionary aspects, such as brand and fit, of OSHA requirement to provide employees with respirators); *Trojan Yacht*, 319 NLRB 741, 743 (1995)(employer must bargain over which of available pension plan amendments it should adopt

to comply with tax statutes). In these cases, the Board ordered employers to rescind their unilateral implementation of the mandated rules and bargain over the areas of implementation over which the employers retained flexibility and discretion. Here, this is particularly necessary where absolute mandates did not exist. Respondent took the limited violations found by OSHA restricted to combustible dust, feet hazards and the protection of a single machine and ran with it in the form of three brand new dress code policies. Respondent paid a third party to conduct a safety assessment which resulted in recommendations on how to best provide a safe atmosphere at its converting facility. Respondent admits that at no point did it involve the Union in the assessment or the best way of going about adhering to the assessment. Respondent's anticipated defense of OSHA mandates and requirements is a red herring. No one disputes that an OSHA investigation occurred or that OSHA violations were found. However, neither of these facts relieved Respondent of its obligation to provide sufficient notice to the Union of the changes it intended to make as a result and to the extent there was clear discretion in how to improve safety measures at Respondent's facility, bargain with the Union over the best ways to go about that. Respondent had an obligation to then bargain with its employees' representative over the manner in which to follow the recommendations made by NTC. It failed to do so and on April 29, 2017, it went ahead with the implementation of its clothing and shoe policies in a manner inconsistent with Board law.

The same legal theory applies to Respondent's implementation of its FRC policy. Respondent had a third party conduct an assessment of its electrical components and the assessment provided recommendations on the PPE equipment employees should wear when working with those components. Darby testified that he took it upon himself to determine not only the scope of the PPE to be worn by employees but also the terms of wearing the PPE. He

never involved the Union. He never even notified the Union. *T. 678*. As with the shoes and clothing policies, Respondent presented the new FRC policy as a *fait accompli* to bargaining unit employees and Union officers simultaneously. Furthermore, to the extent that Respondent argues that it implemented the policy because it was mandatory, this too is not supported by the record. IPC Solution's Arc Flash Study reads that the National Fire Protection Association (NFPA) Standard 70E is "not adopted by OSHA and cannot be enforced by OSHA." *Jt. 27, #1851*. The recommendations made by IPC Solutions provide an outline for Respondent to make its converting facility safer. Respondent maintained the discretion as to (1) whether to abide by those recommendations and (2) how it would go about doing so. If Respondent chose not to follow IPC's recommendations, the failure to implement could only be used to show that Respondent did not take steps to minimize risks to employee safety. It could not be used to find a violation of NFPA 70E because there is no requirement to abide by NFPA 70E. Therefore, Respondent maintained the discretion and the time to negotiate with the Union about achieving the goals of NFPA 70E which in reality is a means to achieving the goal of employee safety. It chose not to do so. Additionally, the Arc Flash Study notes that equipment should be "field marked to warn employees of a potential arc flash hazard. The purpose of these field marks is to warn persons of the potential electrical hazards and identify the required PPE that must be worn *when operating* this equipment." *Jt. 27, #1849* (emphasis added). "When" a maintenance employee is operating equipment is subject to interpretation and further evidence of discretion that exists in interpreting IPC's recommendations. The same argument applies to the study language advising that a "qualified person must also wear PPE *within the restricted approach boundary* for protection from shock." *Jt. 27, #1855*. (emphasis added). Such rationale remains

consistent with Darby's admission on the stand that maintenance employees should be wearing PPE whenever they are *inside* an exposed area. *T. 620*. (emphasis added).

Assuming *arguendo* that any legal requirement obligated Respondent to require that maintenance employees wear PPE when engaged with electrical components, it went above and beyond that when it made the unilateral decision to require that the employees have to wear the FR uniform at all times. The obligation to bargain over mandatory subjects includes a duty to bargain about the 'effects' on employees of a management decision that is not itself subject to the bargaining obligation." See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679-682 (1981); *NLRB v. Litton Financial Printing Div.*, 893 F.2d 1128, 1133-1134 (9th Cir. 1990), *revd.* in part on other grounds 501 U.S. 190 (1991). This is particularly true here where the evidence suggests that Respondent broadened the scope of wearing PPE for aesthetics. The Operations Clothing Policy distributed during the April 12, 2017 labor management meeting speaks to Respondent's desire to present itself professionally. It reads, in part, "(Respondent) would like for the attire that employees wear to work to complement a workplace environment which is professionally operated, efficient, orderly, and pleasant." Darby admitted as much when Besley returned from his suspension and he told Besley that he wanted maintenance employees to wear the FRC at all times "for uniformity, for every – all the maintenance guys to look the same." *T. 445*.

Respondent had an obligation to bargain with the Union over the implementation of the FRC policy and the scope of employees wearing PPE. When it failed to do so, it violated Section 8(a)(5) of the Act.

**IX. Respondent modified the CBA by prohibiting employees from engaging in Union activities**

**A. Facts**

Article 8, Section 5 of the CBA reads that Union business can be conducted during working hours with the permission of supervision. *GC 2, p. 5*. As detailed above under Section II (B), on multiple occasions Respondent communicated to Union officers that they were prohibited from engaging in Union business on the floor or during work time. Regarding legitimate Union business, such as grievance investigations or filing, the undisputed record testimony is that the parties' past practice has been that it has been permitted to engage in such activity during work time. *T. 304, 376*. Respondent provided no evidence to the contrary.

**B. Legal Analysis**

As previously set forth in Section III.B.2, Section 8(a)(5) and 8(d) prohibit an employer from modifying the terms and conditions of employment established by an existing CBA without obtaining the consent of the union. First, the directives issued by Respondent in Section II (B) involve basic Section 7 conversations that do not rise to any reasonable definition of Union business. Even if they did, Respondent's directives contradict the parties' interpretation and use of Article 8, Section 5. Union officers Reed and Besley each testified that employees have been allowed to engage in Union business and at the very least, such activity is permitted by the contract with supervisory permission. What Respondent has now done is create a flat prohibition against any type of Union business on the floor, regardless of contractual guidance or past practice. Respondent's modification of this term and condition of employment constituted an unlawful mid-term modification under the Act.

## **X. Respondent unlawfully issued discipline to Michael Besley**

### **A. Facts**

As partially detailed above, Michael Besley was issued his FRC on May 5, 2017. During this meeting, Graham Darby told employees that Respondent was going to ease into the implementation of the new clothing requirement. *T. 418, 615*. However, Respondent then immediately engaged in a series of violative interactions with Besley concerning its implementation of the FRC policy. On the same day that Besley was issued his FRC is when Darby and Dooley, consecutively, harassed Besley about his not wearing safety glasses even though Besley had no recollection of being instructed to wear them and Respondent being unable to disclose when he had been told three times to do so. *T. 421-425*. On May 6, 2017, Besley again asked Maintenance Lead Rhodes about when maintenance was required to wear the FRC because he was receiving contradictory instructions. *T. 425-426*. Rhodes reiterated his previous instruction that maintenance only needed to have the long-sleeved shirt and helmet ready should they need to enter an electrical cabinet. *T. 427*. However, as detailed above, the following day is when Rhodes and Maintenance Planner Keith threatened to suspend Besley when they found him not wearing his FRC.

On May 15, 2017<sup>25</sup>, Respondent continued to single out Besley. On that date, Besley attended his shift change meeting at 6:50 a.m. *T. 435*. When the meeting concluded, Keith and Rhodes asked that Besley stay behind. *T. 436*. Keith and Rhodes are not typically present for this meeting. *T. 438*. Rhodes informed Besley that Darby had given the two supervisors instructions that if Besley did not have his FR clothing on during the meeting he was to be suspended pending an investigation. *T. 436*. Respondent had not previously told Besley that there was an

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<sup>25</sup> Besley's subsequent discipline indicates that Besley failed to wear the proper PPE on May 15, 2017. *Jt. 32*

issue with him being present at the shift change meeting in his street clothes. *T. 438*. Respondent took Besley's badge and escorted him out of the building.

On May 23, 2017, Besley was called back to Respondent's facility to meet with Doug Moss, Graham Darby and Jason Gann. *T. 439*. Darby handed Besley copies of Respondent's new shoe, clothing and FRC policies. *T. 441*. Darby informed Besley that his FRC, including shirt, pants and steel-toed shoes, should be worn at all times. *T. 443-444*. Darby also told Besley that he needed to be fully dressed when he arrived at the turnover meeting at 6:50 (a.m./p.m.). *T. 444*. Darby also told Besley that he wanted maintenance to wear the FRC at all times for uniformity so that everyone looked the same. *T. 445*. Respondent then turned its attention to its view that Besley had failed to properly document his time in Respondent's Computer Maintenance Management System (CMMS). *T. 447*. Any alleged CMMS violation was not disclosed to Besley when he was sent home on May 15. When he asked about that fact, Darby informed Besley that during an investigation, Respondent "can investigate anything." *T. 451*. Ultimately, although Respondent back paid Besley for his time missed during his suspension, it issued him a written warning. *T. 442; Jt. 32*. Besley's discipline notes that he refused to wear PPE as directed by management and he continues to improperly use the CMMS system. It also requires that Besley's productivity rate be between 65-80% on a daily basis and that he should start performing his assigned duties within 15 minutes after his shift meeting. Both directives constituted new working conditions for Besley. *T. 461-463*.

## **B. Legal analysis**

### **1. 8(a)(3) retaliation**

The record is clear that Respondent targeted Besley in comparison to the rest of the maintenance employees. Although Darby admitted that Respondent sought to ease its employees

into the new FRC requirement, on the very same day Besley received his new uniform, twice Respondent chastised him for not wearing safety glasses and advised he was held to a higher standard because of his Union position. Respondent then proceeded to give Besley differing answers on his obligation to wear the FRC. One day he was told one thing and the next he was told something else, yet Respondent threatened to suspend him when he was following the direct orders given by his immediate supervisor. Again, this all took place during Respondent's "easing in process." Finally, the record established that Respondent piled on infractions in order to substantiate the discipline issued to Besley upon his return from suspension. When Besley was sent home, the only reason he was given was that he was not wearing his FRC at the changeover meeting. Yet when he returned, he was advised that he had committed CMMS infractions. Darby admitted the piling on effect when he advised Besley that Respondent can look into anything during the "pending investigation" period. The culmination of the evidence supports a finding that Respondent singled Besley out by suspending him and issuing him written discipline in violation of Section 8(a)(3) of the Act.

## **2. 8(a)(5) discipline**

An employer cannot use an illegal, unilaterally imposed rule to discipline employees. *Hedison Mfg. Co.*, 249 NLRB 791, 810, 823 (1980). As detailed above, Respondent not only unlawfully implemented its FRC policy without notice to or agreement by the Union, but it unlawfully modified its policy by requiring that maintenance employees wear the FR clothing (both shirts and pants) at all times after initially taking the position that the FR shirts did not have to be worn at all times. Respondent is not permitted to use its unlawful implementation or subsequent change to that implementation as a basis for issuing discipline to an employee who allegedly violated the policy. Besley's discipline was a direct result of Respondent's unlawful

unilateral change and as such, violated the Act. *Ferguson Enterprises, Inc.*, 349 NLRB 617, 618-619 (2007)(employer ordered to rescind discipline imposed on driver pursuant to unilaterally implemented change).

**XI. Conclusion**

The General Counsel respectfully submits that for all of the reasons set forth above, Respondent violated Sections 8(a)(1), (3), (5) and 8(d) as detailed in the General Counsel's Amended Fifth Consolidated Complaint. The General Counsel's proposed Conclusions of Law, Remedy and Notice to Employees are attached as Appendix B.

Dated: July 31, 2017

Respectfully Submitted,



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William F. LeMaster and  
Julie Covell  
Counsel for the General Counsel



## APPENDIX A: Number of Shifts Worked January through September of 2016

Time cards to substantiate the number of shifts worked each month can be found at the Bates numbers listed in GC Exhibit 41. Shifts in January were calculated starting on January 22, 2016, which was sixty days before the beginning of the 10(b) period identified in Paragraph 13(a) of the Fifth Amended Complaint. No records were provided by Respondent for weeks ending January 31, April 17, and April 24, 2016. No times cards were provided for week ending February 7, 2016, except for John Aguilar; however, the Invoice for that week shows that Bunnell worked 48 hours, Glory worked 60 hours, and Scott worked 36 hours. (GC Ex. 41, Bates Number 703-4).

<b>John Aguilar</b>			11/20/2015 – 1/8/2017 (GC Ex. 34) <sup>1</sup>			<b>Carrie Bunnell</b>			9/21/2015 – 8/8/2016 (GC Ex. 36)		
Month	# of Shifts	Bates #	Month	# of Shifts	Bates #	Month	# of Shifts	Bates #	Month	# of Shifts	Bates #
January	2	691	January	1	691	January	1	691	January	1	691
February	14	705, 788, 776, 717	February	12	787, 777, 719, 738	February	12	787, 777, 719, 738	February	12	787, 777, 719, 738
March	15	740, 749, 815, 839, 866	March	15	738, 752, 811, 840, 865	March	15	738, 752, 811, 840, 865	March	15	738, 752, 811, 840, 865
April	7	874, 886	April	10	865,873,886	April	10	865,873,886	April	10	865,873,886
May	13	886, 908, 916, 934, 950, 963	May	16	907, 916, 933, 949	May	16	907, 916, 933, 949	May	16	907, 916, 933, 949
June	15	963, 977, 991, 997	June	15	962, 974, 989, 1000, 1014	June	15	962, 974, 989, 1000, 1014	June	15	962, 974, 989, 1000, 1014
July	12	1014,1032,1060, 1066	July	11	1034,1057, 1066,	July	11	1034,1057, 1066,	July	11	1034,1057, 1066,
August	8	1082, 1087,1109	August	0		August	0		August	0	
September	7	1109, 1117	September	0		September	0		September	0	
<b>Brandon Glory</b>			1/8/2016 – 9/9/2016 (GC Ex. 35)			<b>Rebecca Scott</b>			9/29/2015 – 8/14/2016 (GC Ex. 37)		
Month	# of Shifts	Bates #	Month	# of Shifts	Bates #	Month	# of Shifts	Bates #	Month	# of Shifts	Bates #
January	0		January	2	689	January	2	689	January	2	689
February	14	790, 783, 721, 742	February	11	786, 775, 724	February	11	786, 775, 724	February	11	786, 775, 724
March	25	742, 757, 819,843,869	March	14	734, 766, 812, 847, 868	March	14	734, 766, 812, 847, 868	March	14	734, 766, 812, 847, 868
April	12	869, 876, 888	April	7	878, 893	April	7	878, 893	April	7	878, 893
May	23	913, 920, 930,944,960	May	12	893, 912, 919, 935,951,964	May	12	893, 912, 919, 935,951,964	May	12	893, 912, 919, 935,951,964
June	18	960, 972, 991, 999, 1019	June	12	964, 972, 988, 1001	June	12	964, 972, 988, 1001	June	12	964, 972, 988, 1001
July	20	1019, 1038, 1053, 1068, 1079	July	12	1018, 1042,1055,1070,	July	12	1018, 1042,1055,1070,	July	12	1018, 1042,1055,1070,
August	23	1082,1087,1095,1097, 1110	August	7	1083, 1088	August	7	1083, 1088	August	7	1083, 1088
September	6	1110, 1119	September	0		September	0		September	0	
<b>Jennifer Whisenhunt (Guinn)</b>			3/7/2016 – 9/11/2016 (GC Ex. 38)								
Month	# of Shifts	Bates #									
March	12	770, 807									
April	5	894									
May	16	894, 910, 921, 937, 953									
June	18	965, 973, 993, 1001, 1013									
July	16	1013, 1038, 1054, 1071, 1080									
August	7	1083, 1089									
September	3	1125									

<sup>1</sup> Mr. Aguilar's stop date is an outlier because after Respondent began using temporary employees again the records show that Mr. Aguilar was occasionally called back to do work. See, e.g., GC Ex. 41 at 1159, 1166, 1171, 1176.

## APPENDIX B

### I. Proposed Conclusions of Law

1. Respondent, Orchids Paper Products Co. is an employer engaged in commerce within the meaning of Section 2(2), (6), and 7) of the Act.
2. The Union, United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. At all times since June 25, 2012, the Union has been the certified exclusive collective-bargaining representative, within the meaning of the Section 9(a) of the Act, of an appropriate unit of employees consisting of the following:

All full-time and regular part-time custodians, line coordinators, lift drivers, back tenders, core operators, machine operators, op techs, oilers, junior mechanics, journeyman mechanics, machinists, instrument techs, and lead persons employed by the Employer at the Pryor, Oklahoma Converting facility with the exception of executives, office, sales, clerical employees, professional employees, guards, watchmen, and supervisory employees as defined in the Labor Management Relations Act of 1947, as amended.

4. At all material times, the following individuals have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:
  - a. Court Dooley
  - b. Brian Merryman
  - c. Eric Diring
  - d. Doug Moss
  - e. Bradley Blower
  - f. Kelly Foss
  - g. Jeff Cochrell
  - h. Graham Darby
  - i. Matt Rhodes
  - j. Richard Keith
  - k. Kris Thom
5. At all material times, Earl Wright was an agent of Respondent within the meaning of Section 2(13) of the Act.
6. By, on or about August 24, 2016, telling employees that Respondent discharged because the Union sought to include them in the bargaining unit, Respondent, through Court Dooley, has violated Section 8(a)(1) of the Act.
7. By, on or about November 29, 2016, prohibiting employees from talking about the union or union business during working time or while on the work floor while permitting

employees to talk about other non-work related subjects, Respondent, through Court Dooley, has violated Section 8(a)(1) of the Act.

8. By, on or about December 16, 2016, coercing employees by accusing them of harassment because they engaged in union activity, Respondent, through Bradley Blower and Kelly Foss, has violated Section 8(a)(1) of the Act.
9. By, on or about January 25, 2017, telling employees that their union activities were disrespectful to management, Respondent, through Court Dooley, has violated Section 8(a)(1) of the Act.
10. By, on or about January 25, 2017, creating an impression of surveillance by telling employees that they were being watched and had been seen conducting union business on the production floor, Respondent, through Court Dooley, has violated Section 8(a)(1) of the Act.
11. By, on or about January 25, 2017, prohibiting employees from conducting union business on the production floor in contravention of the parties' collective-bargaining agreement, Respondent, through Court Dooley, has violated Section 8(a)(1) of the Act.
12. By, on or about February 6, 2017, coercing employees by accusing them of harassment because they engaged in union activities, Respondent, through Bradley Blower and Kelly Foss, has violated Section 8(a)(1) of the Act.
13. By, on or about February 7, 2017, coercing employees by accusing them of harassment because they engaged in union activities, Respondent, through Bradley Blower and Kelly Foss, has violated Section 8(a)(1) of the Act.
14. By, on or about February 7, 2017, threatening employees with termination because they engaged in union activities, Respondent, through Bradley Blower and Kelly Foss, has violated Section 8(a)(1) of the Act.
15. By, on or about February 8, 2017, prohibiting employees from talking about the union or union business during working time or while on the work floor while permitting employees to talk about other non-work related subjects, Respondent, through Court Dooley and Doug Moss, has violated Section 8(a)(1) of the Act.
16. By, on or about April 12, 2017, prohibiting union officers from speaking during meetings with the Employer and requiring that they only talk before or after the meetings, Respondent, through Doug Moss, has violated Section 8(a)(1) of the Act.
17. By, on or about May 5, 2017, prohibiting employees from conducting union business on the production floor in contravention of the parties' collective-bargaining agreement, Respondent, through Jeff Cochrell, has violated Section 8(a)(1) of the Act.
18. By, on or about May 5, 2017, telling union officers that they were held to a higher standard because of their union position, Respondent, through Court Dooley, has violated Section 8(a)(1) of the Act.
19. By, on or about May 7, 2017, threatening employees with suspension because of their union activities, Respondent, through Matt Rhodes, and Richard Keith, has violated Section 8(a)(1) of the Act.

20. By, on or about May 7, 2017, asking employees if they were Union members, Respondent, through Matt Rhodes, has violated Section 8(a)(1) of the Act.
21. By, on or about May 25, 2017, threatening employees with unspecified reprisals for continuing to ask questions about Respondent's implementation of a new clothing policy, Respondent, through Doug Moss, has violated Section 8(a)(1) of the Act.
22. By, on or about May 25, 2017, prohibiting employees from engaging in protected, concerted activities by instructing employees not to report Respondent to OSHA, Respondent, by Doug Moss, has violated Section 8(a)(1) of the Act.
23. By, on or about February 8 and 9, 2017, promulgating and maintaining an overly rule prohibiting employees from talking to employees from other departments except during non-work times, Respondent has violated Section 8(a)(1) of the Act.
24. By, on or about February 8 and 9, 2017, promulgating and maintaining a rule prohibiting employees from talking to employees from other departments except during non-work times in response to employees' union activities and to discourage its employees from forming, joining, or assisting the Union or engaging in other concerted activities, Respondent has violated Section 8(a)(1) of the Act.
25. By, on or about August 8, 2016 through September 11, 2016, terminating temporary employees Carrie Bunnell, Rebecca Scott, John Aguilar, Brandon Glory, and Jennifer Whisenhunt, because the Union sought to include them in the bargaining unit, Respondent has violated Section 8(a)(1) and (3) of the Act.
26. By, on or about September 7, 2016, withdrawing from an agreement with the Union to utilize volunteers and temporary employees to perform non-production overtime work, Respondent has violated Section 8(a)(1) and (3) of the Act.
27. By, on or about May 15, 2017, suspending Michael Besley because he engaged in union activities, Respondent has violated Section 8(a)(1) and (3) of the Act.
28. By, on or about May 23, 2017, disciplining Michael Besley because he engaged in union activities, Respondent has violated Section 8(a)(1) and (3) of the Act.
29. By, on or about September 7, 2017, withdrawing from an agreement with the Union to utilize volunteers and temporary employees to perform non-production overtime work without providing the Union notice and an opportunity to bargain, Respondent has violated Section 8(a)(1) and (5) of the Act.
30. By, on or about early December 2016, changing employees' health insurance without providing the Union notice and an opportunity to bargain, Respondent has violated Section 8(a)(1) and (5) of the Act.
31. By, on or about April 28, 2017, implementing a shoe policy for bargaining unit employees without providing the Union notice and an opportunity to bargain, Respondent has violated Section 8(a)(1) and (5) of the Act.
32. By, on or about April 28, 2017, implementing a clothing policy for bargaining unit employees without providing the Union notice and an opportunity to bargain, Respondent has violated Section 8(a)(1) and (5) of the Act.

33. By, on or about April 28, 2017, implementing a fire resistant clothing policy for bargaining unit employees without providing the Union notice and an opportunity to bargain, Respondent has violated Section 8(a)(1) and (5) of the Act and as a result of the unilateral change on May 15, 2017 unlawfully suspended Michael Besley and on May 23, 2017 unlawfully disciplined Michael Besley.
34. By, on or about March 22, 2016, failing to convert temporary employees to unit employees after 60 days as required by Article 16, Section 5 of the parties' collective-bargaining agreement, failing to credit those temporary employees for their continuous service from the date of hire, and failing to apply the terms of the collective-bargaining agreement to determine their wages and terms and conditions of employment without the Union's consent, Respondent has violated Sections 8(a)(1) and (5) and (d) of the Act. As a result of Respondent's unlawful action, Respondent failed to convert to unit positions John Aguilar, Carrie Bunnell, Brandon Glory, Rebecca Scott, and Jennifer Whisenhunt and other employees that may be identified after a review of Respondent's records.
35. By, on or about October 18, 2016, converting existing lines 6 and 7 to "Op Tech" lines without the Union's consent, Respondent has violated Sections 8(a)(1) and (5) and (d) of the Act.
36. By, on or about February 8, 2017, changing the policy to prohibit employees from engaging in any union activities during working time and on the work floor without the Union's consent, Respondent has violated Sections 8(a)(1) and (5) and (d) of the Act.
37. The above violations are unfair labor practices that affect commerce within the meaning of Section 2(6) and (7) of the Act.

## **II. Proposed Remedy**

Having found that Respondent engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and take certain affirmative action necessary to effectuate the Act's purposes.

The Respondent, having discriminatorily suspended and disciplined employee Michael Besley, shall withdraw from its files all references to the May 15, 2017 suspension and May 23, 2017 discipline of Michael Besley.

The Respondent, having discriminatorily terminated John Aguilar, Carrie Bunnell, Brandon Glory, Rebecca Scott, and Jennifer Whisenhunt, must offer each of them reinstatement and make each of them whole for any loss of earnings and benefits they suffered and reasonable consequential damages they incurred as a result of the discrimination against them from the date of the discrimination to the date of their reinstatement. The Respondent will also make each of them whole for all search-for-work and work related expenses in excess of whether the employees received interim earnings in excess of these expenses, or at all, during any given quarter or during the overall backpay period. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

The Respondent, having discriminatorily withdrawn from an agreement with the Union to utilize volunteers and temporary employees to perform non-production overtime work, must rescind, upon request, its withdrawal from this agreement.

The Respondent, having discriminatorily changed employees' health insurance, must rescind, upon request, the changes it made to employees' health insurance and make employees' whole for any losses they suffered as a result of the discrimination against them from the date of discrimination to the date the remedy is effectuated.

The Respondent, having discriminatorily implemented a shoe policy, a clothing policy, and a fire resistant clothing requirement, must rescind, upon request, these policies.

The Respondent must also bargain in good faith with the Union over the aforementioned mandatory subjects of bargaining.

The Respondent, having discriminatorily modified Article 16, Section 5 of the parties' collective-bargaining agreement without the Union's consent and, as a result, failed to convert temporary employees to unit employees after 60 days, failed to credit those temporary employees for their continuous service from the date of hire, and failed to apply the terms of the collective-bargaining agreement to determine their wages and terms and conditions of employment, must convert the following employees to unit positions, give each of them credit for their continuous service from the date of hire, make each of them whole for any loss of earnings and benefits they suffered and reasonable consequential damages they incurred as result of Respondent's unlawful conduct, and offer to each of them immediate and full reinstatement to unit positions: John Aguilar, Carrie Bunnell, Brandon Glory, Rebecca Scott, and Jennifer Whisenhunt and other employees that may be identified after a review of Respondent's records. The Respondent will also make each of them whole for all search-for-work and work related expenses in excess of whether the employees received interim earnings in excess of these expenses, or at all, during any given quarter or during the overall backpay period. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

The Respondent, having discriminatorily converted existing lines 6 and 7 to "Op Tech" lines without the Union's consent and in violation of the parties' collective-bargaining agreement, must, upon request, convert lines 6 and 7 back.

The Respondent, having discriminatorily implemented a policy prohibiting employees from engaging in any union activities during working time and on the work floor without the Union's consent and in violation of the parties' collective-bargaining agreement, must rescind this policy and abide by the parties' collective-bargaining agreement.

The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate John Aguilar,

Carrie Bunnell, Brandon Glory, Rebecca Scott, Jennifer Whisenhunt, and any other employee identified during the compliance period, for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than a year, *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

The Respondent will post the attached Notice to Employees in all places where Respondent normally posts notices and keep all Notices posted for 60 consecutive days.

The Respondent will hold a meeting or meetings, scheduled to ensure the widest possible attendance on each shift, at which a responsible management official of Respondent will read the Notice in English in the presence of a Board agent.

### **III. Proposed Notice to Employees**

#### PROPOSED NOTICE TO EMPLOYEES

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT, upon request, refuse to bargain in good faith with United Steelworkers of America (Union) as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All employees at the Pryor, Oklahoma, Converting facility with the exception of executives, office, sales, clerical, professional employees, guards, watchmen, and supervisory employees as defined in the Labor Management Relations Act of 1947, as amended.

WE WILL NOT accuse you of harassing other employees because you engage in union activities including opposing a decertification effort.

WE WILL NOT tell you that your lawful union and protected, concerted activities are disrespectful to management.

WE WILL NOT create the impression that we are watching your union or protected concerted activities.

WE WILL NOT threaten suspension, termination, or other unspecified reprisals because you engage in union or other protected, concerted activities.

WE WILL NOT tell employees that they have been fired because of the Union or because the Union filed a grievance seeking to include them in the bargaining unit.

WE WILL NOT tell employees that they are prohibited from discussing Union issues or Union business while on work time or while on the work floor.

WE WILL NOT prohibit you from conducting union business on the production floor in contravention of our collective-bargaining agreement with the Union.

WE WILL NOT prohibit employees from engaging in union activities by prohibiting them from speaking during meetings with management.

WE WILL NOT tell employees that they are held to a higher standard because of their position within the Union.

WE WILL NOT ask you if you are a member of the Union.

WE WILL NOT tell you cannot engage in union and other protected concerted activity such as reporting concerns to OSHA.

WE WILL NOT maintain a rule prohibiting you from talking to employees from other departments except during non-work times.

WE WILL NOT fire you because of your union membership or support, or because the Union filed a grievance seeking to include you in the unit.

WE WILL NOT discipline or suspend you because of your union membership or support or because you engaged in union activities.

WE WILL NOT fail and refuse to comply with the provisions of our collective-bargaining agreement with the Union concerning the status and retention of employees who have exceeded their 60-day probationary period.

WE WILL NOT fail and refuse to comply with the provisions of our collective-bargaining agreement with the Union concerning the conversion of existing manufacturing lines to “Op-Tech” lines without the Union’s agreement.

WE WILL NOT refuse to put into effect changes in wages, hours and working conditions that we have negotiated with the Union.

WE WILL NOT refuse to put into effect changes in wages, hours and working conditions that we have negotiated with the Union in retaliation for the Union filing a grievance seeking to include employees in the unit.

WE WILL NOT change bargaining unit employees' health insurance benefits or their health insurance plan without providing the Union with notice and an opportunity to bargain.

WE WILL NOT change policies regarding shoes, clothing, or fire resistant clothing without providing the Union with notice and an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL rescind the rule which prohibited you from talking to employees in other departments except during non-work time.

WE WILL, upon request, bargain in good faith with the Union as the exclusive collective-bargain representative of our unit employees.

WE WILL offer Carrie Bunnell, Rebecca Scott, John Aguilar, Brandon Glory, and Jennifer Whisenhunt and any other employees affected by our failure to convert employees who exceeded their 60-day probationary period immediate and full reinstatement to unit positions, without prejudice to their seniority or any other rights and/or privileges previously enjoyed.

WE WILL pay Carrie Bunnell, Rebecca Scott, John Aguilar, Brandon Glory, and Jennifer Whisenhunt for the wages and other benefits they lost because we terminated them.

WE WILL pay Carrie Bunnell, Rebecca Scott, John Aguilar, Brandon Glory, and Jennifer Whisenhunt any other employees affected by our failure to convert employees who exceeded their 60-day probationary period for the wages and other benefits they lost because we fired them.

WE WILL compensate Carrie Bunnell, Rebecca Scott, John Aguilar, Brandon Glory, and Jennifer Whisenhunt any other employees affected by our failure to convert employees who exceeded their 60-day probationary period for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate quarters.

WE WILL remove from our files all references to the discharge of Carrie Bunnell, Rebecca Scott, John Aguilar, Brandon Glory, and Jennifer Whisenhunt and WE WILL notify them in writing that this has been done and that the discharge will not be used against them in any way.

WE WILL abide by the terms of our collective-bargaining agreement concerning the status and retention of employees who have exceeded their 60-day probationary period, and will not change those terms without the agreement of the Union.

WE WILL abide by the terms of our collective-bargaining agreement concerning the performance of union business during working time, and will not change those terms without the agreement of the Union.

WE WILL abide by the terms of our collective-bargaining agreement requiring discussion and agreement with the Union prior to converting existing manufacturing lines to “Op-Tech” lines.

WE WILL, upon request of the Union, rescind our conversion of Lines 6 and 7 to “Op-Tech” lines and WE WILL notify the Union in writing that this has been done.

WE WILL, upon request of the Union, rescind changes to bargaining unit employees’ health insurance, and WE WILL notify the Union in writing that this has been done.

WE WE WILL, upon request of the Union, rescind changes to the shoe, clothing, and fire resistant policies, and WE WILL notify the Union in writing that this has been done.

WE WILL remove from our files all references to the May 15, 2017 suspension and May 23, 2017 discipline of Michael Besley, and WE WILL notify him in writing that this has been done and that the suspension and discipline will not be used against him in any way.

WE WILL implement the changes in overtime distribution that we negotiated with the Union.

Orchids Paper Products Co.