

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HARLEY-DAVIDSON MOTOR COMPANY, :

v. :

Case: 5-CA-183791

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, :
TYSON LODGE 175, DISTRICT 98 :

ANSWERING BRIEF TO EXCEPTIONS

Respondent Harley-Davidson Motor Company (“Harley-Davidson” or “Company”), by and through its undersigned counsel and pursuant to Section 102.46(b) of the Board’s Rules and Regulations herein responds to the General Counsel’s Exceptions and Supporting Brief, both of which were filed on August 8, 2017.

INTRODUCTION

Throughout this matter, the General Counsel has advanced but a single theory by which it is alleged that Harley-Davidson violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (“Act”), 29 U.S.C § 151 et. seq. with regard to its conduct toward the certified bargaining representative of its York, Pennsylvania production and maintenance employees, International Association Of Machinists And Aerospace Workers, Tyson Lodge 175, District 98 (“Union”). According to the General Counsel, the sole issue is whether Harley-Davidson engaged in good faith bargaining when, in August 2016, it proposed a voluntary separation incentive plan for employees represented by the Union or whether its announcement of that voluntary incentive plan was nothing more than informing the Union of *a fait accompli*.

General Counsel asserts that the announcement of the plan was nothing more than a *fait accompli* and therefore the Act was violated. Harley-Davidson has strenuously disagreed with the General Counsel's assertion and further has asserted that the underlying Complaint must be dismissed in its entirety.

On June 27, 2017, The Honorable Arthur J. Amchan ("ALJ") issued a Decision ("ALJ Decision")¹ in which he dismissed the Complaint, finding that Harley-Davidson did not violate the Act as alleged by the General Counsel. As is noted above, the General Counsel has filed exceptions to certain aspects of that Decision.

While certain of the exceptions submitted by the General Counsel arguably clarify minor issues in the record, the underlying assertions that the Decision is based on erroneous legal reasoning must be rejected: the record as a whole and the relevant legal principles support the finding that no bad faith bargaining occurred in conjunction with the Company's offer of a voluntary separation incentive plan in late 2016.

BRIEF FACTUAL HISTORY

The ALJ Decision accurately summarizes the Company's business, the parties' relationship and their relevant bargaining history prior to 2016. The Company manufactures motorcycles at several facilities, including York, Pennsylvania. (ALJD, p. 2). The Union has represented production and maintenance employees at the Company's York, Pennsylvania facility for many years. Id. As of May 2017, the bargaining unit consisted of about 1,000 employees. Id. The Company and the Union have negotiated multiple collective bargaining agreements that have created a two tier compensation system. Id. Employees hired prior to February 2010 are generally compensated better than those hired thereafter. Id.

¹ References to the ALJ Decision will be denoted as "ALJD".

The parties had a collective bargaining agreement that ran from 2010-2017. Id. In 2015, the parties agreed to engage in early negotiations that culminated in a new agreement with a term from February 1, 2016 to October 15, 2022. Id. As part of these negotiations, the Company and the Union agreed to an incentive that allowed employees who had achieved certain ages and/or levels of pension service to separate from employment and receive enhanced benefits. (Respondent Exhibit 2, 2016-2022 Collective Bargaining Agreement).

Also during these negotiations, the Company advised the Union of its plan to relocate certain bargaining unit work, Softail assembly, from York, Pennsylvania to its Kansas City, Missouri plant. (ALJD, p. 2; Zarilla, Tr. 35; Fisher, Tr. 114-116; Johansen Tr. 50). As Union President Brian Zarilla testified:

...back in October of 2015 when we met with the Company to bargain on a new collective bargaining agreement, the very first thing that Mike Fisher said to us in opening statement was that in model year '18, July of -- in July of 2017, all soft-tail productions that are currently performed at the plant were going to cease. We took that to mean that we were probably going to lose about 30 percent of our workforce in July of 2017.

(Zarilla, Tr. 35-36).

Thus, one of the goals of the incentive offered in 2015 was to begin to address expected overcapacity at the York plant that would exist in July 2017 by incenting employees to depart on a voluntary basis.

While these efforts were somewhat successful, it became apparent as early as Winter 2016 that further reduction of the York workforce might need to occur even before the anticipated relocation of the Softail assembly in July 2017. Michael Fisher, General Manager of Harley-Davidson's York operations, testified regarding this at hearing:

As we entered into 2016, our sales became much lower than what our forecast was, and we started our surge which was earlier testified. I believe it's the third week of January. But by mid-February, we could see that motorcycles weren't selling. The overall motorcycle -- for our facility, 70 percent, roughly 70 percent of the motorcycles we assemble get bought in the United States, and the entire

heavyweight motorcycle industry in the United States was shrinking in 2016, so overall sales for everyone was going down as well as Harley-Davidson.

(Fisher, Tr. 117).

Fisher testified that, around May 2016, he began to project a layoff of approximately 100 bargaining unit employees, and he shared these projections with Union leadership:

A. By end of May going into June, we saw what our prime sales season looked like. The new engine wasn't out yet but did not have belief that it was going to make -- since October, November, December is our slowest time of the year, didn't believe that was going to have a huge impact. And in June we started short-shifting the factory where we weren't running full production days. So the fact the current model was already growing in inventory and we were intentionally slowing down, I knew that there was going to have to be an across-the-board layoff.

Q. In May what was your best guess as to the likely impact size of a fall 2016 layoff?

A. My math, just a quick four function math on dry erase board said roughly 100 people.

Q. Did you communicate that estimate to Mr. Zarilla and the Union?

A. Later in the year, once I had a little more confidence in that, yes.

Q. When would that have been?

A. Definitely would have been in August, if not prior; definitely early August.

(Fisher, Tr. 121-122).²

Fisher's projection proved to be accurate. On August 29, 2016, he went to the office of the Union, which is located next to his office, to communicate the more precise plans to reduce the bargaining unit headcount. (ALJD, p. 2). Local Union President Brian Zarilla was not at work that day. (ALJD, p. 2). Fisher therefore spoke to Kermit Forbes, the

² The ALJ found that "there is a dispute as to whether the Union was advised of the lay-off prior to August 29. I need not resolve that dispute since the issue in this case only concerns the incentive plan; not the lay-off." (ALJD, p. 2). Nonetheless, the ALJ noted that "the record establishes that Respondent at least hinted to the Union that there might be lay-offs in 2016 prior to August 29. Fisher, for example, told the Union that Harley's motorcycle sales were not what the company had projected they would be." (ALJD, p. 2, fn. 1).

union's vice president, and David Staub, the union's chief steward. (ALJD, p. 2). Fisher told Forbes about an incentive plan the company would be offering to employees who chose to resign voluntarily. (ALJD, p. 2). This plan was being offered in conjunction with Respondent's plan to lay-off 102 employees from the York plant in the fall of 2016. (ALJD, p. 2).

Fisher told Forbes and Staub that the Company would be offering those employees who would be laid off a one-time \$15,000 incentive to resign, and that the Company would hold "town hall" meetings for all employees on August 31 to discuss the layoffs and the incentive plan. (ALJD, p.3).

The details of the incentive plan were contained in a proposed Memorandum of Understanding (MOU), G.C. Ex. 4. While there is a factual dispute as to when the Union received the final draft of the MOU³, the ALJ found that testimony of Union President Zarilla substantiated that he and the Union were very much familiar with the proposed terms of the incentive offer no later than August 30, when he returned to work and met with Fisher. (ALJD, p. 3; Zarilla, Tr. 31). The MOU set forth an incentive payment of \$15,000, available to regular Tier 1 employees impacted by the lay-off and who volunteered for termination by noon on September 16, 2016. (ALJD, p.3).

Consistent with his discussions with Union representatives Forbes, Staub and Zarilla, Fisher conducted six separate employee town meetings on August 31, 2016, during which he advised employees of the pending layoffs and the availability of a lump sum incentive offer to eligible employees who elected to resign. (ALJD, p.4). Union President Zarilla was present at all six town meetings. (Zarilla, Tr. 33).

³ As the ALJ noted, Mike Fisher testified that he gave a copy of this MOU to Forbes on August 29. Union officials deny this and state that they did not see the MOU until Thursday, September 1.

On Friday, September 2, 2016 (the day before Labor Day weekend), after the Company had shared the incentive offer with the Union and conducted town meetings with all employees, Union President Zarilla emailed a letter to Kyle Johansen, Respondent's Director of Business Services and Labor Relations, in which the Union now demanded to bargain over the incentive offer. (ALJD, p. 4). Specifically, Zarilla stated as follows:

Please be advised that IAM Local Lodge 175 is not in agreement with the voluntary separation incentives agreement that the Company has proposed, and we demand to bargain regarding this issue.

(GC Ex. 5, p. 1).

Johansen responded via email the same day, stating that he was willing to discuss the bargaining demand. (ALJD, p.4). Johansen and Zarilla had a telephone conversation on the morning of Tuesday, September 6 (the day after Labor Day). (ALJD, p. 4). Johansen followed up that conversation with an email stating that \$15,000 was all the Company was willing to offer as an incentive for voluntary resignation. (ALJD, p.4).

Following Zarilla's communication of the Union's "disagreement" with the offered incentive, between September 6, 2016 and the close of the incentive election window of September 16, 2016, Johansen offered at least three times to rescind the incentive offer if that was what the Union wished. (GC Ex. 6, 7). Instead of responding to Johnson's inquiry, the Union remained silent (other than filing the instant ULP charge on September 7) until September 15. (ALJD, p.5). On that date, Zarilla still did not answer the question, but rather stated as follows:

If this means you are going pull the incentive, then do what you have to do.

(GC Ex. 7, p. 3)

On September 23, 2016, after the incentive election window closed, and after the parties did confer and discuss alternative incentive offers, the Union finally took a position on the inquiry posed by Johansen and requested that the Company rescind the incentive offer.

(ALJD, p. 5). By that time, seven eligible employees elected to accept the incentive. (ALJD, p. 5). At that point, the Company declined the Union's request and honored the election made by these employees. (ALJD, p. 5).

ARGUMENT

The General Counsel Has Not Asserted Any Viable Basis to Reverse The ALJ Decision To Dismiss The Instant Complaint.

I. The General Counsel's Exceptions to Specific Factual Findings Made by the ALJ.

The General Counsel has excepted to a number of factual findings contained in the ALJ Decision. Each is reviewed below.

A. General Counsel Exception #1 Should Not Be Granted: The Record Evidence Supports the Language of the ALJ Decision.

The ALJ Decision contains the following findings, to which the General Counsel excepts only to the underlined language:

On August 29, 2016, Michael Fisher, the General Manager at the York plant, went to the office of the local union, which is located next to his office. Local Union President Brian Zarilla was not at work that day. Fisher spoke to Kermit Forbes, the union's vice president, and David Staub, the union's chief steward. Fisher told Forbes about an incentive plan the company would be offering to employees who chose to resign voluntarily. This plan was being offered in conjunction with Respondent's plan to lay-off 102 employees from the York plant in the fall of 2016.

The General Counsel asserts that the finding of fact should be updated "to indicate that the incentive plan was offered in conjunction with the Respondent's plan to lay off **up to** 102 employees." (GC Supporting Brief, p.12) (emphasis in original). The General Counsel's exception is based on the notion that employees who, in actuality, accepted the "incentive plan" and quit would reduce the number of employees who were actually laid off. While this may be mathematically true in hindsight, the ALJ Decision properly noted the Company's plan as of August 29 to reduce headcount in the bargaining unit by 102 people.

The record evidence shows that this plan was conveyed to the Union exactly as is stated in the ALJ Decision. Union Vice President Kermit Forbes testified as follows:

- Q. ...I want to focus right now and talk about when you first heard from Harley-Davidson about the layoffs that were to take place in the fall of 2016. Do you remember when that was?
- A. When Mike came over to me that Monday and said we're laying these people off.
- Q. Who is Mike?
- A. Mike Fisher, the plant manager.
- Q. You said Monday. Do you remember which Monday?
- A. August, I believe that's August 29th.
- Q. Is that 2016?
- A. Yes, ma'am.
- Q. Was that the first time you had heard anything about those layoffs?
- A. Yes, that we were laying off people. Yes, ma'am.
- Q. Did he say anything about what program, if any, Harley would offer to the employees?
- A. Are you asking me about the conversation that I had with him that day when he came into my office? If that's what you're asking --
- Q. That's what I'm asking.
- A. What he did is he came into my office. I heard what he said earlier. I'm going to -- I have a different recollection of what he said. He came into my office. He talked to me, and Dave Staub was in the office. **He explained to me that we were laying off 102 people.** They were doing an incentive package.

(Tr. 206-207) (emphasis supplied).

Union President Brian Zarilla testified similarly with regard to the Company's enunciated plan as of August 29:

- Q. Let's talk a little bit -- you mentioned things that have been going on in the last couple of weeks. I want to turn to talking about when you first heard

from Harley-Davidson about the layoffs that were supposed to take place or did take place in the fall of 2016. Do you remember when that was that you first heard about that?

A. When I first heard about it, it was August 29th.

Q. Tell me about what you heard and who you heard it from.

A. I was on vacation that day on August 29th. I was out of town, and I got a phone call from the union president in Tomahawk, Daren Ernst. He asked me -- apparently he had got the same message at the same time frame that Mr. Forbes got it, the message. So he had called me and said, hey, are you having layoffs in York; here's what's going on Tomahawk. As I was talking to Daren on the telephone, I got a phone call from Kermit Forbes. I dropped the phone call with Daren and then took the call from Kermit.

Q. What did Mr. Forbes tell you?

A. **He had said that Mike Fisher just came in the office and told him that they were going to be laying off 102 employees in the factory.** They were going to be offering a voluntary incentive package. They were going to be doing some line rate changes. And I believe it was he talked about the surge program.

(Tr. 26-27) (emphasis supplied).⁴

B. General Counsel Exception #2 Should Be Granted to Modify The ALJ Decision.

The ALJ Decision contains the following findings, to which the General Counsel excepts only to the underlined language:

Fisher told Forbes and Staub that Respondent would be offering those employees who would be laid off a one-time \$15,000 incentive to resign, Tr. 71, 221. He also told them that the company would hold "town hall" meetings for all employees on August 31 to discuss the layoffs and the incentive plan. Further, Fisher announced that Respondent would be slowing down the assembly line so that one motorcycle would be assembled in 90 seconds, rather than in 75 seconds. Forbes immediately called Union President Zarilla and recounted his conversation with Fisher.

⁴ Similarly, in their opening statements, both Counsel for the General Counsel and the Union's Counsel refer to the Company's **plan** as of August 29, 2017 to "eliminate 102 jobs at the York facility" (Tr. 9) and the "announcement by the Company that there would be 102 layoffs" (Tr. 11).

There is no dispute that, as part of its projected layoff of 102 employees, the Company advised the Union of its intent to offer a \$15,000 separation incentive. Again, Union President Brian Zarilla testified as follows:

- Q. Yet you would agree with me that on the 29th and the 30th and the 31st and the 1st, you knew that the Company was offering an incentive of \$15,000 lump sum, and that was the offer.
- A. That's correct. That's what Mr. -- that's what Mike Fisher explained to Kermit Forbes on the 29th, and that's what we talked about when he came over to my office on the 30th.

(Tr. 71). Union Chief Shop Steward similarly testified that, as of the August 29, 2017 communication with Michael Fisher, the Union was aware that the Company proposed to offer a \$15,000 incentive. (Tr. 221).

As such, to the extent that the General Counsel asserts that the ALJ Decision should be revised to indicate that *“Fisher told Forbes and Staub that Respondent would be offering a \$15,000 incentive to resign in conjunction with the layoff”*, such a finding would reflect the record evidence cited above. Such correction, however, has no impact on the ALJ's legal analysis.

C. General Counsel Exception #3 Should Not Be Granted: The Record Evidence Supports the Language of the ALJ Decision.

The ALJ Decision contains the following findings, to which the General Counsel excepts only to the underlined language:

On Friday, September 2, Zarilla sent a letter to Kyle Johansen, Respondent's director of business services and labor relations, demanding bargaining over the incentive program. Johansen works at corporate headquarters in Milwaukee. Zarilla also sent the letter to Johansen as an attachment to an email. Johansen responded via email the same day stating that he was willing to discuss the bargaining demand.

The General Counsel contends that the finding should be revised because Johansen did not specifically enunciate that he was “willing to discuss the Union's bargaining demand.”

(GC Supporting Brief, p. 14). The record evidence, however, supports the specific challenged text as set forth in the ALJ Decision.

Not until mid-day on the Friday before Labor Day weekend, September 2, 2016, did the Union pose any objection to the Company's intended offer of a separation incentive, beyond suggesting that the amount should have been greater. On that day, Union President Zarilla sent the following communication to Company representative Johansen:

Please be advised that IAM Local Lodge 175 is not in agreement with the voluntary separation incentives agreement that the Company has proposed, and we demand to bargain regarding this issue.

(GC Ex. 5, p. 1).

Within hours that same day, Johansen responded to Zarilla with the following e-mail:

Brian,

I am happy to discuss the incentives. I'll give you a call today at 2:00 p.m. EST if that works.

Thanks,
Kyle

(GC Ex. 5, p. 2) (emphasis supplied).

Within minutes of that e-mail, Zarilla responded to Johansen with the simple reply:

Is that something you want to negotiate?

(Id.).

Johansen, again, indicated his willingness to discuss the incentive with the following response: "I am willing to have a discussion with you in response to your letter." (Id.).

On the morning of the Tuesday following Labor Day weekend (September 6, 2016), Johansen and Zarilla did have a discussion with regard to the incentive. Johansen testified as to the specifics of this conversation:

It wasn't a very long conversation. Brian expressed his frustration and frankly disappointment in that there wasn't more. They had been waiting to see what we would be able to come up with in terms of aligning as a company, and he

felt like what we came up with, he expressed to me that you're not going to get a lot of people to take this; I think you could have done better. That was the extent of the conversation on the incentive. The rest of it was what would you like to do, do you want to talk, do you want -- you know, I'm more than willing to have a conversation whenever you guys want to have a conversation.

(Johansen, Tr. 170).⁵

In light of this evidence, how the General Counsel can assert that Company representative Johansen was unwilling as of September 2 to discuss the Union's bargaining demand made earlier the same day, or how there can be any insinuation that he didn't actually engage in such a discussion with Union President Zarilla, is puzzling.

D. General Counsel Exception #7 Should Not Be Granted: The Record Evidence Supports the Language of the ALJ Decision.

The ALJ Decision contains the following finding, to which the General Counsel excepts only to the underlined language:

The Union and General Counsel do not take issue with the statement in Kyle Johnson's September 6, 2016 email that Respondent had the right to cancel the incentive program and proceed with the lay-offs without it. Instead of responding to Johnson's inquiry, the Union remained silent (other than filing a ULP charge) until September 15 when it appears to have suggested that Respondent should cancel the incentive plan and proceed with the lay-offs without any incentive plan.

The General Counsel's exception obfuscates the specific finding made by the ALJ. The ALJ Decision does not contain a finding that there were no communications from the Union to the Company between September 6 and September 15 that related to the Company's separation offer. Rather, the narrow finding relates to whether the Union responded to a critical question posed by Company representative Johansen after (a) on September 2, 2016, the Union expressed its 'disagreement' with the Company's separation incentive offer; (b) on September 6, 2016 Johansen and Union President Zarilla discussed

⁵ Zarilla does not dispute that this conversation took place, but testified that he does not recall the specific contents of the conversation. (Zarilla, Tr. 47-48).

the Union's disagreement by telephone, and (c) following that discussion, Johansen stated that he could and would rescind the incentive if the Union so requested. On that request, there can be no doubt that the Union did remain silent, despite many entreaties from Johansen.

Following their September 6 conversation, Johansen sent an e-mail to Zarilla and other members of the Union leadership which stated as follows:

Brian,

This is a follow-up to our discussion this morning. I understand that the union would prefer a different approach than the \$15K voluntary separation incentive the Company is current offering. Unfortunately, the current \$15K voluntary incentive is all the Company is prepared to offer. As we discussed, the Company prefers to continue the process of seeking volunteers for the incentive and allowing employees to choose whether or not sign up for it. At the same time, the Company does not want a confrontation with the union over the incentive. To that end, we are seeking permission from the union to proceed with the current voluntary incentive that we have offered. However, if the union does not want the Company to proceed, we will withdraw the voluntary incentive offer, cancel the current process underway, and implement the layoffs as required under the CBA.

Please let me know the union's position by the close of business today. If I don't hear from you, I will assume that the union has granted permission for the Company to continue the voluntary separation incentive process currently underway.

Please give me a call if you have any questions.

Thanks,
Kyle

(GC Ex. 6, p. 1) (emphasis supplied).

Zarilla did not answer the question posed on September 6: rather he advised Johansen that he was "waiting to hear from [his] attorney on the matter" and would be in touch the following day. (GC Ex. 6, p. 3).

On September 7, 2016, Zarilla sent yet another communication to Johansen, presumably after consulting his counsel (GC Ex. 6, p. 9). Even in this communication, neither

the Union nor Zarilla took a specific position on whether the Company should retain or rescind the \$15,000 incentive program.

As such, on that same day, Johansen again attempted to clarify both the Union's position on the maintenance or rescission of the \$15,000 incentive, as well as express his willingness to discuss the incentive further with the Union. On September 7, 2016, at 4:42 p.m., Johansen sent an e-mail containing the following:

I remain ready and willing to talk to you and/or the Executive Board whenever you would like. I'm happy to arrange a conference call as early as tomorrow afternoon. Unfortunately, as I have previously communicated its unfeasible for me to travel to York, given the time constraints. If that's not your preference, Mike Fisher has agreed to participate and can meet with you and the Executive Board in person (I will participate on the phone) any time after 1:00 pm on September 13 and/or September 14.

In the interim, please advise as to what you would have the Company do with respect to the current voluntary incentive. Is it the Union's position that the incentive offer should be rescinded because it is viewed as inadequate or because the Union feels that the issue has not been fully bargained?

(GC Ex. 6, p. 10) (emphasis supplied).

Rather than taking a position on whether the \$15,000 incentive should be retained or rescinded, as the ALJ Decision properly noted, the Union elected to file an unfair labor practice charge on September 7, 2016. Additionally, Zarilla failed to respond to Johansen's offer for further discussions on either September 13 or 14, sending the following e-mail eight days later on September 15:

As evident by the charges we filed with the Department of Labor we feel that the York Voluntary Separation Agreement was not bargained with this Local, we are demanding that this be bargained. The act of you presenting an MOU to us that was not negotiated and wanting me to sign it does not mean the Union rejected the offer that was never bargained in the first place.

(GC Ex. 7, p. 1) (emphasis supplied).

Again, the Union continued to provide the Company with no stated position as to whether the Company should rescind the offer or maintain it. Indeed, though hardly a

paradigm of clarity, Zarilla's email actually implied that the Union had not rejected the Company's offer. As a result, that same day Johansen sent yet another e-mail to Zarilla in an attempt to clarify this position and discuss the Union's concerns at a mutually agreeable time:

Brian,

I'm confused. I've repeatedly offered to discuss the incentive and your demand to bargain, yet you have made almost no effort whatsoever (aside from a brief phone call) to speak to me about this matter. On September 2, I immediately responded to your initial demand to bargain by offering to speak with you. I even attempted to schedule a phone call that day at 2 pm, but you refused to take my call. I left you a voicemail, which was not returned until the next week. In every communication to you regarding this matter I have been clear that the Company is more than willing to discuss it. The fact is, you have been discussing the incentive with Mike Fisher and me for months. Further, you were informed about the current incentive *prior* to any communication to the bargaining unit, yet you waited until *after* the incentive was communicated to the workforce to send your initial demand to bargain.

In short, I've offered to make myself available for a discussion whenever you wanted – that offer still stands. I even offered a couple of dates that we could meet and included Mike Fisher so you could sit face-to-face with a Company representative to have these discussions, with me participating via phone. In response, I have only received e-mails/letters from you restating your demand to bargain. At the same time I've repeatedly offered to discuss this matter, I've also asked what the Union wants the Company to do with regard to the current incentive, given the time constraints. Does the Union want the Company to pull the incentive or does the Union want the Company to proceed with the current process? To date, I've never received an answer. Rather than answer this straightforward question, you've responded with additional letters/e-mails again restating your demand to bargain, as evident with your e-mail below, and filed an unfair labor practice charge with the National Labor Relations Board.

Once again, I am more than willing to discuss the incentive with you and/or any other union representative. Further, I'd ask that you provide an answer to the question of what the Union would have the Company do with respect to the current incentive – continue the process or pull the incentive.

I look forward to hearing from you.

(GC Ex. 7, p. 3) (emphasis supplied).

Even in response to this very direct request for a clarification of the Union's position, Zarilla did not provide an answer. His response was as follows:

Kyle,

With everybody being so pissed off around here, nobody talking to each other (Union & Management) for the past couple of weeks, there wasn't any conversation going on. Today was the first time that Mike and I have talked since September 1. If this is something that you are truly willing to bargain, then I will get my e-board together next Wednesday morning to talk with you over the issue . . . the Union does not accept the current incentive that does not include all members of this Local who are covered under the current CBA. If this means you are going pull the incentive, then do what you have to do.

(Id.) (emphasis supplied).

Clearly, the finding that the Union was silent in response to the very relevant and very critical question of whether it would like the Company to rescind the separation incentive offer or retain it while employees had an opportunity to consider whether to accept the offer is supported by incontrovertible record evidence.

E. General Counsel Exceptions #8 Should Not Be Granted: The Record Evidence Supports the Language of the ALJ Decision.

Based upon the finding that the Union did not respond to Johansen's offer to rescind the proposed separation incentive - - even as the parties could continue to discuss the issue - - the ALJ Decision contains the following additional finding, to which the General Counsel excepts:

Instead of responding to Johnson's inquiry, the Union remained silent (other than filing a ULP charge) until September 15 when it appears to have suggested that Respondent should cancel the incentive plan and proceed with the lay-offs without any incentive plan. Of course, by this time, Respondent and some employees had relied on the Union's silence to move forward with the incentive plan.

The General Counsel asserts that "the record offers no support" for this finding of reliance.

Evidence that the Company relied on the Union's silence and refusal to answer the specific question posed is very much evident in the record. Union President Zarilla testified that the Company communicated its offer of a separation incentive in writing to employees

beginning on September 1, 2016. (Zarilla, Tr. 42). As is noted in the above analysis of General Counsel Exception #7, the Company first offered to rescind the offer and engage the Union in further discussions on September 6, 2016. The Company had proposed that eligible employees could express their interest in the incentive on or before September 16, 2016. (GC Ex. 3, p.2). There is no dispute that, while awaiting an answer to Johansen's repeated requests for Union's position, the Company did not rescind the separation incentive offer, nor is there any record evidence contradicting Johansen's testimony that he had the authority to revoke or rescind the offer at any time (Johansen, Tr. 167-168). There also is no dispute that, during the election period - - while the Company retained the incentive offer as it awaited the Union's position - - seven bargaining unit employees elected to take the incentive. (Zarilla, Tr. 51-52).

On September 21, 2016, after the election window had closed the Union finally took a position on whether the Company should revoke the incentive plan that had been offered on September 1, 2016. On that date, Union President Zarilla asked Johansen to "please confirm the Company's incentive offer has been Discontinued and Rescinded as to members of our bargaining unit Local 175." (GC Ex. 8, p.1). Johansen responded with the following e-mail that same day:

Brian,

I disagree with your assessment of our bargaining over this issue. Without belaboring the point, the Company not agreeing to have some type of pension-style incentive or to double the amount of money included in the current incentive is not bad faith bargaining.

Moreover, I never told you that the Company would rescind the current incentive unless the Union agreed to its implementation. On the contrary, during our discussions this week I clearly stated that the Company's preference was to keep the current incentive in place. We even discussed my previous e-mails where I had asked the Union if it wished for the Company to proceed with the current incentive or revoke it and that I had never received a response to that question.

At this point, the Company has no plans to revoke the current incentive – the process is complete and a number of employees have volunteered to accept it.

If you'd like to discuss further, please let me know.

(GC Ex. 8, p. 2) (emphasis supplied).

As such there is ample evidence that the Company, by its conduct “relied on the Union’s silence to move forward with the incentive plan”. The plan remained available while the Union failed to take a position. The fact that seven bargaining unit employees elected to take the offer while it remained open - - and while the Union failed to answer Johansen’s inquiry - - further shows that employees relied on the Union’s silence.

II. The General Counsel’s Exceptions Relating to the ALJ’s Purported Failure to Make Specific Factual Findings.

A. General Counsel Exception #18 Should Not Be Granted: The Record Evidence Does Not Support His Contention that, Between October 2015 and August 29, 2016, the Parties’ Discussions About Future Voluntary Incentive Plans were Exclusively Related to A Mid-2017 Layoff.

The *fait accompli* bad faith bargaining theory advocated by General Counsel is premised upon the notions that (1) the Company presented a separation incentive to the Union on a Monday without any prior notice or discussion, (2) then disclosed the incentive to bargaining unit employees on a Wednesday, and (3) then refused to bargain over, or consider modification of, its position any time thereafter. While it is true that the specific incentive offer was presented to the Union on Monday, August 29, 2016, this was not the beginning of the parties’ discussion and bargaining over the issue. The credible testimony in this matter clearly shows that the parties began discussing the potential for a separation incentive almost contemporaneously with their realization that Fall 2016 layoffs were likely, and that this realization occurred early in the Second Quarter of 2016. As such, the General Counsel’s suggested finding in Exception #18 should not be granted.

As is noted above, Mike Fisher testified that trends continued to be poor as 2016 progressed such that layoffs in York even prior to the relocation of Softail production in 2017 became more of a reality:

Q. When did your view of this being an ongoing concern translate in your mind to likely layoffs in 2016?

A. By the end of March.

Q. Did you communicate that belief with the Union leadership?

A. I did.

Q. Can you give us some ideas of how you did that, when you did that, and with whom you did that?

A. General conversation. One of the documents that was presented earlier had about a March employer report date. That's when I officially asked HR to give me a report and with ages in seniority. I started looking. At the time, what I couldn't say was when and I couldn't say what the impact was, but I knew that we were not going to hit our production. We weren't going to hit our production plan, in which case something was going to happen in the factory.

(Fisher, Tr. 119).

Fisher testified that, around May 2016, he began to project a layoff of approximately 100 bargaining unit employees based on the trends, and he again shared these projections with Union leadership. (Fisher, Tr. 121-122). Fisher testified that, as he and the Union continued to communicate about the increasing probability for significant layoffs occurring in the fall of 2016, their discussions included the possibility of the Company offering an incentive for the people who would be impacted:

Q. Did your discussions with the Union about a likely layoff in the fall of 2016, even before quantified, ever involve the Union talking to you about potential incentives that would be supplied to people impacted by that layoff?

A. Yes.

Q. When did those discussions commence?

- A. Definitely in July and the beginning of August.
- Q. With whom were those discussions taking place?
- A. Predominantly Brian Zarilla, but on several occasions it was with Brian and Kermit Forbes.

(Fisher, Tr. 122-123).

Union President Zarilla and Vice President Forbes both deny that there was any discussion of production related layoffs or the potential for related incentives during the summer of 2016, or at any time whatsoever before Monday, August 29, 2016. (Zarilla, Tr. 28-29; Forbes, Tr. 206). They deny any such discussions occurred despite acknowledging that Fisher had an office right next to their office; that during 2016 the doors of their respective offices were generally “open”; and that Fisher would walk by the Union office many times a day and they would communicate frequently. (Zarilla, Tr. 25).⁶ They deny any such discussions occurred despite acknowledging that the Company shared its plan to relocate Softail assembly from York to Kansas City nearly two years prior to that expected move. They deny any such discussions occurred despite the uncontroverted testimony of Kyle Johansen, Harley-Davidson’s Director of Labor and Employment Relations, that similar discussions of likely layoffs and potential incentives were occurring at multiple Harley-Davidson sites and/or

⁶ Fisher also testified regarding the frequency of his meeting and communication with Zarilla and the Union:

- Q. Mr. Zarilla testified as to his term of office as president, which I believe was the last 2 years.
- A. Yes.
- Q. During that period of time, is it fair to say that you speak with him almost every business day?
- A. Almost typically, yes.
- Q. Do you have a typical routine when you speak to him, first thing in the morning, during the course of the day where you have a check-in meeting with him at all or just discussion?
- A. Every Monday morning, my second meeting of the week. My first one is the health and safety review of employees in the factory. My second meeting is with Brian and the human resource director. It's our second meeting of the week on Monday mornings, and as well every Tuesday morning at 6:30 a.m., he and I have a planned touch-base where we meet a half hour.

(Fisher, Tr. 111-112).

with multiple Union officers beyond Zarilla and Forbes throughout the spring and summer of 2016.⁷

Fisher and Johansen both testified that, throughout the spring and summer of 2016, Zarilla approached them on multiple occasions to suggest that Harley-Davidson offer another retirement incentive in which employees not otherwise eligible for standard retirement would receive credit so that they would obtain a greater benefit. These suggestions came with increased frequency after Fisher confirmed and estimated the likely breadth of a 2016 layoff. (Fisher, Tr. 123-124; Johansen Tr. 158-161). In fact, Fisher testified as follows:

Q. During that time you had how many conversations with Mr. Zarilla about incentives, their desire to have incentives attaching to the fall of 2016 layoff?

A. They were frequent.

Q. Can you give us an idea of how many?

A. I don't believe that there was a week that went by we didn't have some conversation of did I know anything. He and I specifically -- I floated past him would a \$10,000 incentive, what would that mean? His feedback was maybe someone has remaining of a car loan they could pay off, but it's not going to make a big difference for them. So we had ongoing dialogue of what a good incentive would be.

(Fisher, Tr. 129).

While much of these discussions were oral, Zarilla cannot deny that he sent an email to Johansen on August 25, 2016 - - just four days before August 29 (i.e. the date on which

⁷ Johansen testified as follows:

Q. Any idea when that transition really came to -- when the transition and the focus moved from the general to the very specific 2016 layoffs?

A. That occurred late to early -- late Q2. I was having discussions with all of our union presidents at the same time on this topic. All of them were concerned about the scope or the scale of layoffs. All of them were interested in if there would be impacts to the bargaining unit, would the Company be open or willing to offer some type of incentive to offset the impact? These conversations occurred with increasing frequency across our represented union leadership. It was not just Mr. Zarilla. It was conversations with all of our union leaders at various degrees.

(Johansen, Tr. 160-161).

the Company advised the Union of its layoff related severance offer). This email substantiates that there was active discussion of possible incentives relating to the layoff, and that the Union was even suggesting a framework for an incentive. Specifically, the e-mail from Zarilla to Johansen reads as follows:

You know I was talking about the penalty for early retirement prior to 62 and not having 30 years of service . . . I know that you don't call it a penalty, but if you would bump up by 3 years the age and service time, you may get a whole lot of people to jump on the bandwagon and take the incentive to retire.

(Respondent Ex. 3).⁸

Johansen provided context for this email and its temporal proximity to the Company's actual offer of a layoff-related separation incentive just days later. The email followed an in-person discussion between Zarilla and Johansen that occurred in Milwaukee, Wisconsin sometime earlier during the week of August 22, and following a retirement planning committee meeting to which all Union presidents were invited. Johansen testified as follows:

- Q. Now can you take us through that conversation that you had with Mr. Zarilla?
- A. So during -- as the meeting was closing, Brian asked if I would have a minute to talk about incentives. I said yes. We were on the 7th floor of our corporate headquarters. He and I had a conversation about beginning a pension type incentive that he felt would be much more effective than anything that we had previously contemplated or discussed, and it had to do with the granting years of service, getting people the 30 years and out, and those types of things. I told him that I did not believe that pension incentives were in the cards, and at that point we had not made a decision as a company whether we would offer incentives related to the layoff, but I had hoped that we would be getting to a decision soon.

⁸ Zarilla suggests that this offer, made in such close proximity to the week in which layoffs were announced to employees and an incentive was offered, had no relationship to the 2016 layoffs, but rather related exclusively to the expected July 2017 Softail relocation. Like his assertions that he was never apprised of the possibility of layoffs until August 29, 2016, Zarilla's characterization of the email is not credible. Indeed the credible testimony of Michael Fisher was that the parties had been discussing layoffs and potential incentives for weeks. Moreover, Fisher testified that he even disclosed the exact size of the layoff—102 bargaining unit employees-- to Zarilla and Forbes earlier in the week of August 22 and just before Zarilla spoke with and then sent the email to Johansen. (Fisher, Tr. 128). Such timing clearly shows that Zarilla's incentive proposals were relating to the upcoming layoff, and that he was very much aware of the layoff.

- Q. I believe Mr. Zarilla's testimony is that any communication with that email or prior meeting was all about soft-tail in 2017. Would you agree with that?
- A. No. I believe that the discussion that we had following our retirement planning committee meeting was specifically geared towards the pending layoffs. At that point in time, there was no question about if there would be [layoffs] but how many, and all of the union presidents were waiting official word as to the scope.
- Q. And the incentive as well, if any --
- A. And whether or not the Company would offer an incentive outside of Kansas City again.⁹

(Johansen, Tr. 163-164).

In order to justify the suggested finding proposed by Exception #18, the General Counsel must rely on the testimony of Union witnesses Zarilla and Forbes that attempts to paint a picture of the Union being wholly unaware of the potential for the 2016 layoff until Forbes' discussion with Fisher on August 29, 2016, and must contend that the contrary testimony of Fisher and Johansen is not credible. To be blunt, the testimony of Zarilla and Forbes on these issues is self-serving and not capable of belief. The undisputed testimony illustrates a tradition of open and frequent communication between Union leadership, Harley-Davidson York leadership and Harley-Davidson's corporate Director of Labor Relations. This was evident on a day-to-day basis. Moreover, it was evident in the Company's disclosure of the plan for a Softail relocation nearly two years prior to it likely occurring and at a time when the Company had no obligation to display such candor. As Union President Zarilla testified, the relocation of Softail would significantly reduce the bargaining unit at York - - he estimated that the workforce of more than 700 full time bargaining unit employees and more than 100

⁹ As was noted in the record, in its 2011 collective bargaining negotiations for the Kansas City plant, the Company previously agreed to a particular incentive that would cover any layoffs that might occur there in 2016. (Johansen, Tr. 165).

long term casuals would be reduced by 30%. (Zarilla, Tr. 19, 30). Stated differently, the Union witnesses would assert that the Company would voluntarily disclose information regarding what the Union estimated to be the potential permanent loss of 200-250 jobs due to a relocation of work to another plant nearly two years before it would occur, but would be secretive and non-communicative regarding an economic layoff of 100 until immediately prior to it occurring.

As is noted above, Zarilla must acknowledge that, in August 2016, he did propose a framework for potential separation incentives in writing (the August 25, 2016 email to Johansen). His assertion that this communication and all incentive based discussion in 2016 related exclusively to the Softail relocation and not the pending 2016 layoff only can make logical sense if one accepts the Union's theory that the Company was secretive with respect to the 2016 layoffs. When that assertion is rejected, there can be no doubt that the Company and the Union discussed separation incentives attendant to the 2016 layoff well before August 29.¹⁰

B. General Counsel Exceptions #19, #20 and #21 Should Not Be Granted: The Record Evidence Does Not Support the Findings Advocated by The General Counsel.

In Exceptions #19-21, the General Counsel attempts to buttress his *fait accompli* theory by asserting that the ALJ Decision be supplemented to include findings of fact that would paint the Union as unaware of the specific terms of the Company's proposed incentive

¹⁰ The lack of specific formal, written proposals on the issue of incentives does not mean that the parties were not bargaining on the issue throughout 2016 - - both as to Softail relocation and the 2016 layoffs. As Michael Fisher testified, such informal bargaining was "not unusual". That's why the offices are side by side, so that we can have these dialogues before we face the entire workforce, both on behalf of the Union and as well as behalf of the Company." (Fisher, Tr. 130). Indeed, Zarilla would have to acknowledge this style of bargaining exists between the Company and the Union. His testimony is replete with the suggestion that the parties were discussing incentives throughout 2016, albeit from his perspective only with respect to the 2017 Softail relocation. Yet there is but one written documentation of any discussions. In short, the parties' bargaining cadence clearly is not one that always involves formal back-and-forth written proposals.

offer until September 1, 2016. Once again the record evidence does not support such findings. Nevertheless, some context for the timing of the Company's disclosure of the specific incentive offer is relevant in assessing the impropriety of the General Counsel's suggested factual findings and the lack of credible record evidence to support them.

Company representative Johansen testified that, as of late August 2016, there was no certainty that the Company would offer any incentive in conjunction with the Fall 2016 layoffs at York or any impacted Company facility: it was not required to do so under the terms of any collective bargaining agreement other than the agreement covering Kansas City operations. (Johansen, Tr. 163-164). Moreover, the Company had, just 10 months earlier, agreed to a voluntary separation package at York and the 'take rate' was lower than the Company expected. (Johansen, Tr. 156).

It was not until Friday, August 26, 2016, that the Company determined that it would offer any type of separation incentive. (Johansen, Tr. 164). As of that date, the Company concluded that, while not interested in proposing another voluntary incentive that would involve pension credits or variations to the pension plan, it would present the Union a cash incentive proposal. (Johansen, Tr. 164-165).

The General Counsel seeks a specific finding that "Johansen directed other Respondent officials not to share information about the 2016 layoff or voluntary separation incentive plan until those plans were finalized. (Exception #19). This is not accurate. There is ample evidence that the parties were discussing the pending layoff at York for months prior to August 29, 2016. (See § II.A above). Additionally, as soon as the Company quantified the exact size of the layoff, Mike Fisher shared this information with the Union:

- Q. So when Mr. Zarilla testifies that he and the union leadership were surprised by the announcement on Monday the 29th that there would be layoffs, your reaction to that?

- A. It doesn't make sense to me. The factory wasn't surprised. They didn't know the date. They didn't know the amount. They knew an impact was coming. And I had even had a conversation prior to going on vacation in August, the Ocean City, Maryland beach week, a cheap weekend, that I told Brian and Kermit specifically it's 102, it will be in October, and I said I don't know what incentives are available, but I will find out I believe while I was out on vacation, and in fact, I did.
- Q. When was your vacation?
- A. It would have been the Thursday and Friday before the notification, so the Thursday and Friday before October 29th, whatever that is, 25th, 26th -- August, excuse me, August of 2016.
- Q. Again, just to make sure we have the timeline, prior to your vacation, the week before the Monday meeting --
- A. Yes.
- Q. -- with Mr. Forbes, you advised Mr. Zarilla and Mr. Forbes of the precise size of the layoff?
- A. In their office, with the door closed, had a sheet of paper in my hand of some notes I had, and I told them what the exact impact was going to be.

(Fisher, Tr. 128).

The sole document referenced by the General Counsel in support of Exception #19 is an email from Kyle Johansen to other Company representatives that was sent at 4:48 PM on Friday August 26, 2016 - - at the close of business on the same day that the Company determined that it would offer any incentive - - and contained draft MOUs relating to the proposed incentive. While Johansen asked the recipients to keep the documents within the email distribution, that request in no way related to the pending layoff, as General Counsel suggests. (GC Ex. 11). Moreover, the MOU was shared with Union representatives at the York plant and the Company's Tomahawk, Wisconsin plant on the very next business day:

Monday August 29, 2016.¹¹ At the York plant, Michael Fisher specifically communicated the Company's proposed incentive to Union Vice President, Kermit Forbes. Fisher testified as follows:

Q. How did you present this to the Union?

A. When I came in Monday the 29th, Brian was not in.

Q. Mr. Zarilla was not –

A. Mr. Zarilla was not in. I was told that he called off. So I had Kermit Forbes come over to my office, told him what was occurring as far as the \$15,000 incentive, the time window, the fact we would be doing a town hall, and I handed him this.

Q. You are certain that you handed Mr. Forbes what's been marked as General Counsel 4 [the draft Memorandum of Understanding]?

A. I am certain I handed it to him. I do not know what he did with it.

Q. Did he have any questions of you at that time?

A. Not questions as I recall. Definitely said that they were hoping for more.

Q. Mr. Forbes said that they were hoping for more?

A. Mr. Forbes. And he said he'd pass it along to Mr. Zarilla.

(Fisher, Tr. 131-132).¹²

¹¹ Johansen testified that only the York and Tomahawk plants were offered the cash incentive because, other than the Kansas City plant (which has a negotiated incentive in the 2011 collective bargaining agreement), these were the only plants that would have layoffs. (Johansen, Tr. 165).

¹² As with their contention that they were completely unaware of the possibility of a layoff, Union witnesses Zarilla and Forbes assert that they did not receive a copy of the Memorandum of Understanding that outlined the incentive offer from the Company on August 29, 2016. (Zarilla, Tr. 28; Forbes, Tr. 207). While this testimony is no more credible than their assertions that there were no discussions of layoffs or layoff-related incentives during the summer of 2016, Mr. Zarilla's admits that he was very much aware of the specifics of the Company's offer as of August 29. Zarilla specifically testified that he knew as of August 29 that the Company was offering a \$15,000 lump sum incentive. (Zarilla, Tr. 71). Forbes also testified that Fisher communicated that the offer was a \$15,000 lump sum, and that he passed this information on to Zarilla. (Forbes, Tr. 221). Zarilla also testified that, immediately following his debrief with Forbes, "he started to think about how is it that we were offering an incentive package and the incentive package was only good to certain type of individuals working in the factory." (Zarilla, Tr. 29).

III. The General Counsel's Exceptions to the ALJ's Legal Conclusions.

The remainder of the General Counsel's objections relate to the ALJ's determination that the Company did not violate Sections 8(a)(1) and 8(a)(5) as alleged. The General Counsel concedes that, pursuant to Article 8 of the parties' agreement, the Company had the right to make the determination that it would lay off 102 employees in the fall of 2016, due to production trends. (GC Supporting Brief, p. 20). The General Counsel only challenges the Company's right "to unilaterally implement a separation incentive plan for employees to voluntarily and permanently terminate their employment" in conjunction with the layoff. (GC Supporting Brief, p. 21). The General Counsel also asserts that the Company's offer was a "fait accompli".

Any assessment of the General Counsel's two assertions must recognize the following: **the Company had no obligation, contractually or otherwise, to offer any incentive whatsoever in conjunction with the planned Fall 2016 layoffs.** Additionally, any assessment of the Company's decision to propose such an incentive to the Union and then to disclose the offer to eligible employees during the week of August 29 must recognize the following: the disclosure occurred before the Union indicated its disagreement with the offer. After the disclosure was made and the Company then received the Union's September 2, 2016 notice of their disagreement, the Company repeatedly offered to rescind the offer and to confer with the Union to discuss the incentive.

Thus, the issue here can be viewed as binary:

- The Company had no obligation to offer an incentive.
- Upon becoming aware of the Union's disagreement with the offer that had already been made, the Company could have remedied the issue completely by rescinding the offer and offered to do just that.

A. Any Assessment of the Company's Flexibility in its Position Must Recognize That the Company Had No Obligation to Offer Any Incentive Relating to the 2016 Layoffs.

As is noted above, *fait accompli* bad faith bargaining can exist “[w]here notice is given shortly prior to implementation of the change because of a lack of intent to alter [a] position...” Gannett Co., 333 NLRB 355 (2001). Thus, an assessment of a parties' flexibility after notice is given and a demand for bargaining is made can be critical.

Cases involving a *fait accompli* theory generally are based on an employer's proposed change of an existing benefit and the union's subsequent request to bargain. In Ohio Energy Corp., 362 NLRB No. 88 (2015), for example, the employer sought to make changes to its existing employee service recognition program to, among other things, recognize employees at ten-year intervals rather than at the then current five-year intervals. The employer provided notice of the proposed change on September 18, 2012. The Board found that the union did make a timely request to bargain, but that the employer did not communicate with the union on the issue prior to its implementation on January 1, 2013. Under those circumstances, the Board found that the employer's conduct was nothing more than the presentation of a *fait accompli* to the union because the employer proceeded as announced and never responded to the union's request to bargain.

Similarly, in Pontiac Osteopathic Hospital, 336 NLRB 1021 (2001), the employer advised the Union on December 8, 1999 of its intention to change its paid time off benefits and procedures effective January 2, 2000. While some of the changes were beneficial to employees, some were viewed negatively, such as requiring the use of paid time off on occasions where previously employees were permitted to take unpaid time. In light of the timing between notice of the proposed change of the benefit and the employer's refusal to bargain, the Board found that the employer did, in fact, present the union with a *fait accompli*.

In this matter, the credible evidence shows that the Union was requesting to bargain with the Company over the possibility of offering an incentive attendant to the layoff when the Company had no obligation to offer any benefit.¹³ Unlike Ohio Energy and Pontiac, this does not represent an instance where the Company was proposing to change an existing benefit or term or condition of employment; rather the Union was requesting that the Company agree to create a new benefit. For weeks and months, the credible testimony shows the Union proposing a new benefit and the Company being unwilling to commit to doing so. Not until August 29, 2016 - - weeks after the Union started to propose an incentive - - did the Company offer one.

The relevance of this distinction cannot be missed. Had the Company never made the August 29 offer, there could be no contention of bad faith bargaining under a *fait accompli* theory. Similarly, see, e.g., Electrical Workers Local 47 v. NLRB 927 F.2d 635 (D.C. Cir. 1991) (Where company had no obligation to bargain over anything other than wages in reopener, the failure to make proposals on other issues could not be viewed as bad faith bargaining.) The fact that the Company ultimately did make an offer on a topic on which it had no obligation to bargain also cannot be viewed as bad faith bargaining. The Company's ultimate decision to make an offer cannot be used to ignore the parties' weeks of discussion of the topic in an effort to suggest that the Union had no meaningful opportunity to bargain.

¹³ Union President Zarilla's asserted belief that the Company did have such an obligation (Zarilla, Tr. 73-74) has no basis in law or in the parties' collective bargaining agreement.

B. The Issue of the Union's Waiver of Rights, as Found by the ALJ, is a Narrow One: Did the Union Waive its Right to Object to the Company's Maintenance of the Incentive Offer By its Failure to Advise the Company of its Position?

The relevant issue to any claim of bad faith bargaining in this matter, therefore requires an assessment of the Union's responsibility for the fact that the Company did not rescind the incentive offer after receiving the Union's notice of disagreement and request to bargain.

As is noted throughout the record evidence, despite multiple requests, the Union failed and refused to respond to the Company's offer to return to what would have been the status quo under the collective bargaining agreement: conducting the planned layoffs without any incentive offer. In fact, at one juncture, the Union even stated that it had not rejected the offer, thereby suggesting that the Company should not rescind it. (GC Ex. 7, p. 3).¹⁴

The General Counsel expends significant effort focusing on whether the Union waived the right to bargain over the offer of any incentive program under the multiple tests applied by the Board and Courts for consideration of broad waiver of the right too bargain over wages, benefits or terms and conditions of employment. The relevant issues are much narrower, and the ALJ properly recognized this. The relevant issues are (a) whether the Union waived the right to object to the Company's failure to rescind the incentive program prior to the disclosure to bargaining unit employees on September 1 and (b) subsequently failing to answer the simple question posed to it on multiple occasions by the Company: *do you want us to retract the offer?*

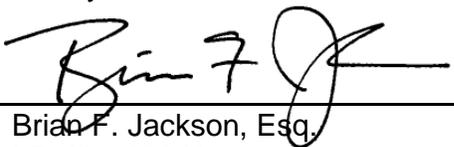
The ALJ's recognition of this very narrow issue, and its serving as one basis for the dismissal of the Complaint, is indisputable. His findings relative to this issue are as follows:

¹⁴ Of course, had the Company rescinded the offer of an incentive after the Union filed its unfair labor practice charge on September 7, 2016, the Union certainly would have asserted a violation of Section 8(a)(3) of the Act.

- The Union and General Counsel do not take issue with the statement in Kyle Johnson's September 6, 2016 email that Respondent had the right to cancel the incentive program and proceed with the lay-offs without it.
- Instead of responding to Johnson's inquiry, the Union remained silent (other than filing a ULP charge) until September 15 when it appears to have suggested that Respondent should cancel the incentive plan and proceed with the lay-offs without any incentive plan.
- Of course, by this time, Respondent and some employees had relied on the Union's silence to move forward with the incentive plan.
- [The Union's] failure to respond to Johansen's September 6 email until September 15 also waived any rights it would have had to bargain over the incentive plan.

WHEREFORE, Harley-Davidson Motor Company respectfully requests that the Complaint be dismissed in its entirety.

Respectfully submitted,

By: 

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Date: September 5, 2017

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HARLEY-DAVIDSON MOTOR COMPANY, :

v. :

Case: 5-CA-183791

INTERNATIONAL ASSOCIATION OF :
MACHINISTS AND AEROSPACE WORKERS, :
TYSON LODGE 175, DISTRICT 98 :

CERTIFICATE OF SERVICE

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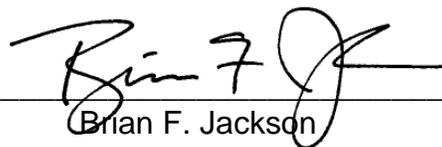
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