

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

ORCHIDS PAPER PRODUCTS CO., And UNITED STEEL, PAPER & 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
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**RESPONDENT ORCHIDS PAPER PRODUCTS CO.'S BRIEF IN SUPPORT OF
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION**

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INTRODUCTION

This case involves several consolidated cases tried before Administrative Law Judge Andrew S. Gollin (“ALJ”) on June 20-22, 2017. The Amended Fifth Consolidated Complaint was based on unfair labor practice charges that the United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO (the “Union”) filed against Orchids Paper Products Company (“Orchids” or “Respondent”), between September 20, 2016, and June 2, 2017, alleging that Respondent violated Section 8(a)(1), (3), and (5) and Section 8(d) of the National Labor Relations Act (the “Act”).

Orchids takes exception to the ALJ’s September 15, 2017 Decision (the “ALJD”), including certain portions of the Findings of Fact and Legal Analysis, Conclusions of Law Nos. 4-26, the Proposed Remedy, and the Proposed Order. For the reasons set forth in Orchids’ Exceptions and this accompanying brief, the National Labor Relations Board (the “Board”) should not adopt the Decision and recommendations of the ALJ, but rather dismiss the Amended Fifth Consolidated Complaint in its entirety.

MANAGEMENT RIGHTS CLAUSE **(EXCEPTION 1)**

The ALJ’s factual findings in the Decision do not quote or consider the entire Management Rights provision in the CBA. Specifically, the ALJD does not quote the end of the Management Rights clause, which states that “[i]t is expressly understood and agreed that all rights heretofore exercised by the Company are inherent in the Company as owner of the business or is incident to the management, and those rights not expressly contracted away by specific provisions of this Agreement are retained solely by the Company.” *See* GC Ex. 2 at 2-3.

While the ALJ’s Decision wholly fails to recognize this provision, the U.S. Court of Appeals for the District Court of Columbia recently challenged this position taken by the Board, calling it a

“roguish form of nonacquiescence” and ordering the payment of the appeal costs. *Heartland Plymouth Court v. NLRB*, 838 F.3d 16 (D.C. Cir. 2016). A union may waive bargaining with respect to a particular condition of employment. *See Bath Iron Works Corp.*, 345 NLRB 499 (2005). Such a waiver is valid so long as it is clear and unmistakable. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). If the union fails to request bargaining, the union will have waived its right to bargain over the matter in question. *NLRB v. Okla. Fixture Co.*, 79 F.3d 1030, 1036-37 (10th Cir. 1996) (multiple quotations omitted). “A union cannot simply ignore its responsibility to initiate bargaining over subjects of concern and thereafter accuse the employer of violating its statutory duty to bargain.” *Id.* (quotation omitted); *see also Am. Diamond Tool, Inc.*, 306 NLRB 570, 571-72 (1992); *The Bohemian Club*, 351 NLRB 1065, 1067 (2007); *Talbert Manufacturing, Inc.*, 264 NLRB 1051, 1055 (1982); *KGTV*, 355 NLRB 1283 (2010).

PEOPLE SOURCE EMPLOYEES
(EXCEPTIONS 2-15, 50)

Orchids and People Source Were Not Joint Employers of People Source Employees within the Meaning of *Browning-Ferris Industries*. (Exceptions 2-9)

The ALJ erroneously applied the Board’s recent decision, *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015) (“*BFP*”), currently under appeal with the United States District Court for the District of Columbia. Based on this erroneous application, the ALJ erroneously concluded that Orchids was a joint employer with temporary staffing agency and previous co-Respondent People Source Staffing Professionals, LLC (“People Source”). ALJD at 20:40-21:16.¹

¹ References to the page(s) and line number(s) of the ALJ’s Decision dated September 15, 2017, are designated “ALJD,” references to the hearing transcript are designated “Tr.,” references to the General Counsel’s Exhibits are designated “GC Ex.,” references to the Joint Exhibits are designated “Jt Ex.,” and references to Respondent Orchids’ Exhibits are designated “R Ex.”

The ALJ presumed a joint employer relationship and failed to consider the context and circumstances of this case.

The burden of proving joint employer status rests with the General Counsel. *See BFI*, at 18. Under the standard set forth in *BFI*, two or more entities will be considered joint employers of a single work force if (1) there is a common law employment relationship between the employees in question, and (2) the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining. *See BFI*, at 2. The Board's decision in *BFI* clarified that "all of the incidents of the relationship must be assessed." *See BFI*, at 16.

In the present case, the ALJ concluded that "People Source recruits, interviews, screens, hires, and sets the wages and benefits for the employees it refers out." ALJD at 5:27-29. However, when applying the facts of the present case to those of *BFI*, the ALJ fails to refer to or even mention any of this testimony or evidence. In the present case, unlike in *BFI*, the unrefuted testimony established that Orchids did not impose any conditions on People Source's ability to hire People Source employees.

People Source recruits its employees in various ways, including on social media and by putting signs on roads near particular clients. People Source has never recruited employees to work at Orchids, either on social media or with signs near Orchids' facility. Tr. at 910-12. Applicants for employment with People Source submit People Source applications, not Orchids applications. Tr. at 158, 180, 911. People Source reviews the applications and interviews applicants for employment. During the interview, People Source asks applicants about their past jobs, general skill sets, qualifications, what type of job they are seeking, and their requested pay. People Source does not ask specific questions about clients (such as Orchids) during the interview. Orchids does not interview any People Source applicants for employment. Tr. at 807, 911-12. People Source conducts background checks and drug screens for its applicants for employment. Orchids does not conduct any background check or drug

screen for People Source employees. Tr. at 810, 915. Upon hiring an applicant as a People Source employee, People Source conducts an orientation for its new employees, completes onboarding paperwork, and provides the employees with a People Source employee handbook, not an Orchids' handbook. Tr. at 160, 808, 912-14.

People Source then places new employee on an assignment with one of its clients based on the employee's skills and experience and client needs. Tr. at 911. Orchids does not have the right to fire, suspend, or discipline People Source employees; only People Source has the ability to do so. Orchids does not have access to any People Source personnel records for People Source employees. Tr. at 809-10.

By contrast, Orchids hires its own employees. Individuals who have submitted a resume for a job with Orchids are interviewed by Orchids, then required to obtain at least a silver on a Work Keys test administered by WorkForce Oklahoma. Applicants must also pass a very basic mechanical aptitude test. After an applicant is selected for employment, Orchids then conducts a drug screening process and a background check. Tr. at 807. New employees of Orchids participate in a 3 to 4 day orientation process. This orientation process is not provided to the People Source employees. Tr. at 808.

This unrefuted testimony was not mentioned by the ALJ other than a single sentence on page 5 that concludes "People Source recruits, interviews, screens, hires, and sets the wages and benefits for the employees it refers out." This is dramatically different from *BFI*. In *BFI*, the client's agreement with the temporary agency outlined numerous hiring standards imposed by the client, on which the Board expressly relied in making its joint employer finding. Orchids did not impose any such hiring standards on People Source, but, as set forth above, relied on People Source to recruit, interview, screen, hire, and set the wages and benefits for the employees it refers out. .

Additionally, the ALJ's factual finding in the Decision that "Respondent also uses some of the temporary employees to work on production lines or in other areas of the facility, performing the same or similar tasks as the unit employees" does not consider the full testimony. ALJD at 5:38-39. *See also* ALJD at 22:n17. Specifically, it disregards testimony pertaining to the fact that the temporary workers did not have full access to the plant, but were restricted to the periphery. Tr. at 159, 169, 806, 809. People Source employees who were assigned to Orchids did not receive an Orchids' badge. Orchids' employees all have badges with RFID chips that they use to access the barrier guards for equipment. People Source employees were not able to access these areas, but were required to stay outside and not cross the doored enclosure. Tr. at 159, 169, 806, 809.

Similarly, the ALJ's factual finding in the Decision pertaining to who supervises the temporary workers and the level of supervision involved disregards any testimony from anyone other than the characterization of general statements made by the only two (2) temporary workers who testified at the hearing, Jennifer Whisenhunt ("Whisenhunt") and Carrie Bunnell ("Bunnell"). ALJD at 6:8-16, 21:35-43. Although it is the General Counsel's burden to establish a joint employer relationship, the ALJ's Decision states that "[t]he evidence is limited regarding who supervises the temporary employees and what that supervision involves." ALJD at 6:8-9, 21:36-38.

The ALJ's interpretation of the testimony of Whisenhunt and Bunnell, the two temporary workers called by the General Counsel to testify, mischaracterizes their testimony. When asked if someone was supervising her when performing DRP work, Whisenhunt answered "I'm sure there was, but they were never around." She then testified that if there was a problem on the line, she would go to one of the other temporary employees. Tr. at 152. When later asked by the General Counsel who supervised her work "after [she] became a permanent temp," Whisenhunt answered "I can't really say, because I am really not sure, but I know I was supposed to check in with Kelly after, Kelly or his wife."

Tr. at 154. When asked if anything changed during her employment, she testified “No. Nothing changed in me going into the building and clocking-in and clocking-out. Nothing changed. I mean, I would use go in – Kendra, Kendra is Kelly’s wife, anyway, I would usually go in there and ask her and she would tell me the same thing every day to do the same thing. Go around and sweep, check on the lines.” Tr. at 156. This testimony hardly supports the conclusion that Whisenhunt received “day-to-day work assignments and direction from lead persons or supervisors who worked at Orchids.” ALJD at 6:10-13, 21:38-41. Furthermore, Orchids’ employees are required to attend shift meetings, and People Source employees do not participate in shift meetings. Tr. at 808. Although it is the General Counsel’s burden to establish a joint employer relationship, the ALJ did not point to any testimony about any meaningful supervision by Orchids over the performance of work by People Source employees.

By contrast, in *BRI*, the client exercised significant control over certain processes used by employees of the temporary agency. For example, the client controlled certain speed levels and actually set specific productivity standards for the employees of the temporary agency. The client regularly interacted with the temporary workers before their daily breaks, had group meetings with the clients’ workers to discuss productivity issues, required drug tests of the temporary workers, and imposed requirements on how they should leave their work areas.

Next, the ALJ’s factual finding in the Decision pertaining to Orchids’ requests for replacement temporary workers from People Source mischaracterizes the exhibits. ALJD at 6:18-21, 21:25-29. *See also* GC Exs. 28-33. The General Counsel introduced a very few cherry-picked emails from the over 5,000 pages of documents provided by People Source. These emails request “replacements” for, primarily, People Source employees who do not show up for work. When Orchids requires temporary workers, one of its supervisors submits a work order to People Source that identifies the number of

employees needed, on what days, and at what times. *See* Tr. at 863-67. When Orchids requests a certain number of employees from People Source, Orchids uses that number of People Source employees, and Orchids asks People Source to have someone else come fill the spots if someone does not show up. This does not demonstrate that Orchids is regularly “replacing” People Source employees or exerting any sort of disciplinary authority over them.

This is drastically different than the requirements imposed in *BFI*. In *BFI*, the clients’ managers directly counseled the temporary workers for workplace performance problems. Orchids plays no role in counseling or otherwise disciplining People Source employees. In *BFI*, the client provided safety training for the temporary workers. There is no testimony that Orchids provides any such training to People Source employees. Moreover, in *BFI*, the client required the temporary workers to test its employees to determine that they meet the clients’ standard employee productivity benchmarks. There is no testimony that Orchids imposed any remotely similar requirement on the People Source employees. In *BFI*, the client also required the temporary workers to sign a written acknowledgement of the clients’ work rules. The testimony is clear in the present case that People Source employees are covered only by People Source’s work rules, not Orchids’ work rules.

Next, the ALJ’s factual finding in the Decision pertaining to the pay of the temporary workers mischaracterizes the testimony of the People Source representative who testified at the hearing, Melanie McMains (“McMains”), and erroneously concludes that “Respondent is involved in the temporary employees being paid.” ALJD at 6:23-27, 21:45-50. The ALJ’s Decision also erroneously states that “People Source calculates the hours worked and then sends the totals back to Respondent to verify that the employees worked the hours listed.” ALJD at 6:24-25, 21:48-49.

The unrefuted testimony was that People Source set up a time clock at Orchids’ facility for People Source employees who were assigned to Orchids, People Source employees use their own time

clock and their own time cards at Orchids, and this time clock is located in a different area of the facility than the time clock used by Orchids' employees. Tr. at 159-60, 180, 808, 867-68, 874. Upon receiving a transmission of its employees' time cards, McMains then testified that People Source enters the time for each of its employees into its payroll system and verifies the payroll, using a work week of Monday to Sunday for its employees. Tr. at 867-73. Payroll is then sent by People Source to its corporate office in Oklahoma City for another round of verification and administration of the funds to its employees. Tr. at 867-73. Orchids never pays People Source employees. Tr. at 159, 180, 808, 872-75.

Additionally, in this case, the ALJ downplays the fact that the General Counsel presented virtually no evidence that Orchids plays a significant role in determining employees' wages. People Source determines employees' pay rates, administers all payments, retains payroll records, and is solely responsible for providing and administering benefits. In contrast, the client in *BFI* explicitly prevented the temporary agency from paying their employees more than the client's employees performing comparable work and limited the pay rates for the temporary workers. In this case, the testimony shows the People Source employees were not performing comparable work, and there is no evidence that Orchids exerted any control over People Source or set any wage limitations of any kind on how much People Source pays its employees.

Ignoring virtually all of the foregoing factual differences between the present case and *BFI*, the General Counsel relies heavily upon a few cherry picked emails between Orchids and People Source and the testimony of two (2) of the five (5) People Source employees who worked at Orchids. Even with this limited testimony and evidence, the General Counsel is not able to meet its burden of establishing that the People Source employees were employees of Orchids. As the foregoing evidence makes clear, Orchids did not exercise the same degree of control that was exercised by the putative joint employer in *BFI*. Indeed, the relationship between Orchids and People Source in the present case

exemplifies “mere service under an agreement to accomplish results or to use care and skill in accomplishing results” which the Board declared in *BFI* is **not** “evidence of an employment, or joint-employment relationship.”

A. Orchids Did Not Fail to Adhere to the CBA as the People Source Employees Were Not Employees of Orchids. (Exceptions 10-11)

The ALJ’s factual findings in the Decision rely upon the fact that some of the People Source employees were assigned to the Orchids’ facility on a “permanent temporary” basis – to use the term used by People Source and its employees – as evidence of an employment relationship between Orchids and the People Source employees. The ALJ erroneously stated that “Respondent has presented no contract provisions, other than the provisions in Article 16 and Article 6 giving it the right to decide whom to hire, to support its claim that it had no obligation to apply the terms of the contract to those temporary employees once they completed the 60-day probationary period. ALJD at 22:21-23:2. Based on that incorrect statement, the ALJ then erroneously concluded that “Respondent failed to abide by the terms of the agreement by not providing the contractual pay or benefits to those temporary employees who completed their 60 days of employment, without the Union’s consent, in violation of Section 8(a)(5) and (1) and Section 8(d) of the Act. ALJD at 23:2-5.

This statement and conclusion disregard the parties’ agreement as provided in Article 16, Section 7 of the CBA, which gives Orchids the “exclusive right to determine whom its employees shall be and from source(s) they will be chosen outside of the bargaining unit.” Furthermore, the Recognition Clause in Article 4 of the CBA is clear that the Union is the “exclusive bargaining agent in respect to wages, hours, and conditions of employment for the Company’s **employees** at its Pryor, Oklahoma, Converting facility . . .” Thus, the CBA recognizes and applies to **employees** of Orchids, as determined in the exclusive discretion of Orchids. Moreover, it is Orchids’ exclusive right to determine who will and will not be an employee of Orchids, and therefore not a subject on which

Orchids is required to engage in bargaining with the Union. *See Columbia College Chicago v. N.L.R.B.*, 847 F.3d 547, 553-54 (7th Cir. 2017).

Similarly, the only CBA provisions that refer to the 60 day probationary period do not pertain to the People Source employees, as they are not “employees” under the CBA. Article 16, Section 5 provides that “[n]ew **employees** and those hired after a break in service shall be considered probationary employees for sixty (60) days following their date of hire. GC Ex. 2 at 12. 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.” Article 14, Section 2 provides that “In order to be entitled to pay for a particular holiday, an **employee**, in all cases, must have completed his/her probationary period of sixty (60) days.” GC Ex. 2 at 9. Therefore, the provisions of the CBA do not encompass anyone who is not, at a minimum, an employee.

B. Orchids’ Ending of the Temporary Assignments from People Source Did Not Violate Section 8(a)(5) and (1) and Section 8(d) of the Act. (Exceptions 12-14)

The ALJ’s legal analysis of Orchids’ ending of the temporary assignments from People Source mischaracterized and failed to provide the full account of the circumstances. For instance, the ALJ’s factual findings in the Decision disregard Union Staff Representative Chad Vincent’s behavior and actions at the beginning of and throughout this matter. ALJD at 7:4-20.

In late July 2016, Operations Manager Brian Merryman (“Merryman”) and Site Manager Court Dooley (“Dooley”) requested a meeting with the Union to discuss some Union matters. On August 4, 2016, Merryman and Dooley met with Union Staff Representative Chad Vincent (“Vincent”), Local Union President Michael Besley (“Besley”), and Local Union Vice-President Jason Gann (“Gann”). Tr. at 812-15. Orchids had recently terminated the employment of Carla Gritts (“Gritts”), its previous Human Resources Manager, and, during this meeting, Vincent told Merryman

and Dooley that Orchids had made a grave mistake in firing Gritts, implying that he was going to impose consequences for Orchids' decision. Tr. at 812.

Before Merryman or Dooley could raise any agenda items, Vincent raised the issue of People Source employees. Vincent told them that People Source employees were doing work that should be done by members of the bargaining unit. Tr. at 127, 813. Vincent was very agitated about this issue, and he pounded his fist on the table, saying it was his labor and his work, and he was over everything that occurred inside the facility, and his people should be doing the work. Vincent's comments were extremely confusing to Dooley, but Vincent "made it abundantly clear that he was very displeased with [Orchids'] use of temporary labor in the facility. That part was abundantly clear." Tr. at 813-14.

As a result of this meeting, Merryman and Dooley made a decision to suspend the use of all temporary employees until the matter was resolved. Orchids reached this decision "because the meeting and the demands of Vincent were very unclear, and they weren't exactly specified. But, again, he was very clear that he was extremely disappointed with the usage of the temporary labor, so Merryman and I made a decision until this matter was resolved we were going to suspend the usage to, you know, kind of un muddy the waters, you know, until we could work on a resolution to this." Tr. at 814-15. After the assignment at Orchids' ended, no one ever told People Source that they should fire any of the employees who had been assigned at Orchids, but rather was told that the People Source employees were no longer needed by Orchids. Tr. at 181, 817, 845-46, 914.

After Orchids suspended the use of the People Source employees, the work previously performed by the People Source employees still needed to be done. Dooley and Gann had a discussion about how the work should be accomplished. Gann testified that he said the People Source employees were doing work that should be done by the bargaining unit and talked about hanging a volunteer sheet to do the work that the People Source employees had been doing. Tr. at 202-04, 817-19. Dooley

offered to hang a sheet for volunteers to sign up for overtime, then draft any unfilled slots per the terms of the CBA. Gann told Dooley he thought this was a bad idea because people on the floor were not going to respond well to being drafted to stack DRPs on pallets. Tr. at 817-18. A volunteer sheet was posted on the personnel board for any Orchids employee to sign up for overtime to perform the work the People Source employees had been performing. Not a single employee of Orchids signed up for overtime. “Zero.” Orchids therefore began drafting for the overtime from the bottom of the seniority list, per the terms of the CBA. Tr. at 819-20.

On August 12, 2016, Vincent sent an email to Dooley addressing some “confusion as to the direction to go on probationary employees” and providing a “detailed explanation on how this issue should be resolved.” Tr. at 52; GC Ex. 4. The ALJ quoted the text of this email on pages 7 and 8 of the Decision, and – contrary to Dooley’s own testimony – erroneously concluded that this email resolved any confusion that Dooley may have had. ALJD at 23:16-17, 29:39-41. *See also* Tr. at 831-21. The ALJ’s conclusion is improper, as it is contrary to Dooley’s own testimony and his later communications with the Union. Dooley and Orchids consistently maintained that the People Source individuals were not employees of Orchids and that there was not a joint employment relationship.

Dooley responded on August 16, 2016, disagreeing with Vincent’s email and clarifying that these workers are employees of People Source, not Orchids, and thus are not covered by the CBA between Orchids and the Union. Tr. at 53; GC Ex. 5. On August 16, 2016, the Union submitted a grievance “on behalf of all the temps over the 60 day probation.” Orchids responded on August 18, 2016, stating that these workers are employees of People Source, not Orchids, and were not covered by the CBA or performing work that was covered by the CBA. Tr. at 53-54, 65-67; GC Ex. 10. On August 18, 2016, Vincent requested additional information about hiring of “employees” through a temporary agency. Tr. at 54-55; GC Ex. 6.

Because Orchids was not receiving any volunteers to do the work previously done by the People Source employees and had to draft for someone to do the work, Gann requested a meeting with Dooley, and, on August 24, 2016, submitted Grievance No. C19-16, stating that Orchids should recall the People Source employees before forcing overtime. Gann testified that Dooley told him the People Source employees identified were no longer at Orchids because “I had told him that they could not use temps. It was – told him he had to get rid of them.” Tr. at 65-67, 221-23, 820-22; GC Ex. 11.

At the meeting, Gann expressed that “the membership was unhappy with the drafting process by essentially people being forced to perform this task.” He requested that Orchids start using temporary labor again to perform these tasks because of the personal pressure he was receiving from the membership by those drafted to do the work. Dooley reiterated that until the appropriateness of the usage of temporary workers to perform the labor was resolved between Orchids and the Union, Orchids would only use its own employees to perform this work. Tr. at 221-23, 820-22. In response, Gann “stated that the Union did not care about these temps. That was his exact phrase. This is Chad’s deal, and he was not going to leave it along – he was a dog with a bone [sic].” Tr. at 821.

On August 25, 2016, Dooley responded to Vincent’s request for information – providing the requested information for nine (9) individuals that Orchids hired as its own employees in the past two (2) years who had previously worked for a temporary agency. Tr. at 54-56; GC Ex. 7. On September 5, 2016, Vincent sent another request for additional information. Dooley responded on September 12, 2016, stating that it did not have most of the requested documentation because it did not maintain files for the People Source employees. People Source maintained those files. Tr. at 58-60; GC Exs. 8-9.

On September 14, 2016, a third-step meeting was held on the grievances. Vincent, as well as the Union’s Local Officers, were present at this meeting. At this time, Orchids proposed to take the five (5) affected individuals through the standard hiring process and create a new job classification

under the CBA. Tr. at 66; GC Ex. 10. During this meeting, Vincent and the Union's Local Officers brought up for the first time that they had collected Union cards from the People Source employees. This was the first time that Dooley or Orchids' management heard about possible Union cards for these individuals. Tr. at 815-16.

On September 22, 2016, Orchids followed up with its proposal at the third-step meeting, and Diring sent an email to Vincent again reiterating willingness to negotiate bringing the People Source employees into the bargaining unit.

Orchids Paper Products is willing to negotiate bringing the work performed by the individuals provided to Orchids by our temporary agencies in to the bargaining unit. During the meeting on September 14, 2016, both sides presented an option for resolution but neither group offered alternate options that would settle the grievance. The two options I would like to propose that we discuss further are as follows

1. Develop a job classification and pay rate for the work performed by the provided temp labor. (both options will need this negotiated)
2. Develop a process on filling vacancies if said job classification individuals are on vacation, absent or additional support is needed. (both options will need this negotiated)
3. Impacted individuals can be offered full time employees
 - a. If the job classification is not in the seniority line of progression: Individuals will be hired immediately after passing a drug screen and background check
 - b. If the job classification is in the seniority line of progression: Individuals will be hired after successfully passing current hiring tests (work keys, Benton Mechanical) as well as after passing a drug screen and background check.

The reason for requiring the passing of the testing is to demonstrate the individuals have the skill sets necessary to be successful at the higher levels in the operating team. No back pay will be offered as this negotiation will have not develop a job classification and rate for this work that does not currently exist in our contract and provide a means for us to determine their opportunity for the line of progression.

Tr. at 67-68; GC Ex. 12.

In response to the continued dissatisfaction raised by Orchids employees, Gann met with Diring, and they reached a verbal agreement regarding the performance of the work previously performed by the People Source employees. Specifically, they agreed that Orchids would develop a process to allow its own employees to volunteer for these positions and, if the positions were not filled by volunteers, Orchids would resume using People Source employees to perform this work, but would not use them for more than 60 days. Tr. at 135, 221, 822-23.

As Orchids had not received a response to its proposal from the third-step meeting as detailed by Diring in his email, Dooley then followed up with another email to Vincent on October 4, 2016. In this email to Vincent, Dooley responded to the grievances, clarified the understanding between Diring and Gann to allow Orchids to resume using People Source if the positions were not filled by volunteers, and again made the offer from Diring's email proposing to create a new job classification. Tr. at 68-70; GC Ex. 13.

The ALJ erroneously found that "Respondent, therefore, failed to abide by Article 6 of the parties' agreement, without the Union's consent, in violation of Section 8(a)(5) and (1) and Section 8(d) of the Act. ALJD at 23:19-21. First, Orchids did not have an obligation to bargain over a decision that had no impact on the bargaining unit, such as the use of the People Source employees. To prove a Section 8(a)(5) failure to bargain violation, the General Counsel must prove that "the employer made a material and substantial change in a term of employment without negotiating with the union." *Pan American Grain Co., Inc.*, 351 NLRB 1412, n.9 (2007); *J&J Snack Foods*, 363 NLRB 21 (2015) (holding that even if the Board would consider the company's decision to act consistently with a past practice a "unilateral change," the Board has continued to adhere to the proposition that "the duty to bargain arises only if the changes are 'material, substantial and significant.'"). It is General Counsel's burden to prove that Orchids' use of People Source employees made a material and substantial change

to the bargaining unit. The decisions made by Orchids pertaining to the use of the People Source employees had no impact on the bargaining unit. “The board has long held that an employer is not obligated to bargain over changes so minimal that they lack such [a material, substantial, and significant] impact [on the bargaining unit.]” *The Toledo Blade Co.*, 343 NLRB 385, 388 (2004) (citation omitted); *see also Murphy Oil USA*, 286 NLRB 1039, 1041 (1987); *Coca Cola Bottling Works, Inc.*, 186 NLRB 1050, 1062 (1970).

In *General Electric*, 264 NLRB 56 (1982), a case where the issue was whether the company violated the Act by failing to bargain over permanently subcontracting out a portion of work previously done by a member of the bargaining unit – more extreme than the issues presented in this case – the company argued it did not violate the Act because there was little or no adverse impact on the bargaining unit. The Board dismissed the complaint in its entirety and did not find a violation of the Act as there was no demonstrable adverse impact on unit employees. *See also Professional Medical Transport*, 362 NLRB No. 19, slip op. at 13-14 (February 26, 2015) (dismissing Section 8(a)(5) claim as the employees were not adversely affected in a “material, substantial, and significant” way).

The ALJ did not address whether the use of the People Source employees by Orchids had any demonstrable negative impact on bargaining unit members. In fact, when Orchids ceased using the People Source employees and allowed members of the bargaining unit to volunteer for overtime for this work, not a single member of the bargaining unit volunteered to do the work that had been performed by People Source employees. Thus, in order for the work to be completed, and as it was Orchids’ understanding that Vincent claimed the work was covered by the CBA, Orchids had no option but to begin drafting members of the bargaining unit to perform the overtime work. Orchids did so in accordance with the terms of the CBA.

Further, even if Orchids had a duty to bargain over the effects of the use of temporary People Source workers on the bargaining unit, Orchids did in fact bargain with the Union on this issue in good faith. To determine whether an employer failed to bargain in good faith, the Board considers the employer's overall conduct from which "it must be decided whether the employer is lawfully engaged in hard bargaining . . . or unlawfully endeavoring to frustrate the possibility of arriving at any agreement." *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984) (citation omitted).

Here, the evidence shows that Orchids maintained a firm position that the People Source employees were not employees of Orchids. However, the evidence shows that Orchids was otherwise open to discussing proposals with the Union. Orchids met with the Union and sent several emails on the subject, making a proposal on multiple occasions to even create a new job classification under the CBA to hire the People Source employees. Orchids expressly invited the Union, several times, to present proposals for Orchids' consideration, but did not receive any proposals or any response to its proposal to create a new classification in the CBA and hire the People Source employees. Orchids also had several communications with the Union in response to information requests made by the Union. As such, in totality, the evidence in the record demonstrates that Orchids bargained with the Union in good faith with respect to the use (or lack thereof) of People Source employees.

C. Orchids' Ending of the Temporary Assignments from People Source Did Not Violate Section 8(a)(3) and (1) of the Act. (Exception 15)

The ALJ further erroneously found that "because Dooley acknowledged Respondent terminated the assignments of these five named employees in response to the Union asserting that such employees were covered by the parties' agreement and entitled to receive contractual pay and benefits, I find that those terminations were because of protected concerted and union activities, in violation of Section 8(a)(3) and (1) of the Act." ALJD at 23:23-27. The ALJ did not analyze the claim under Section 8(a)(3), but merely reached a single conclusion that a violation had occurred.

For a claim under Section 8(a)(3) of the Act, the General Counsel bears the initial burden of providing by a preponderance of the evidence that: (1) the employees as to whom the alleged violation was committed engaged in protected conduct; (2) the employer knew of the protected conduct; (3) the employer took an adverse employment action against the employees; and (4) the protected conduct was a motivating factor in the decision to take the adverse action. *Wright Line*, 251 NLRB 1083 (1980). The first element requires the General Counsel to prove that the employees as to whom the alleged violation was committed engaged in conduct protected by Section 7 of the Act.

In order to find that an employee has engaged in concerted activity, the Board requires that the activity “be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Meyers Indus., Inc.*, 281 NLRB 882, 885 (1986), *aff’d* 835 F.2d 1481 (D.C. Cir. 1987), *cert den* 487 U.S. 1205 (1988). With respect to the second *Wright Line* element, the Board requires proof that Orchids knew of the protected conduct. “Credible proof of ‘knowledge’” is a necessary part of the General Counsel’s threshold burden, and without it, the complaint cannot survive. *The Register Guard*, 344 NLRB 1142, 1145 (2005) (quoting *Tomatek, Inc.*, 333 NLRB 1350, 1355 (2001); *Stanford Linear Accelerator Center*, 328 NLRB 464, n.2 (1999) (“Without this knowledge, there is no basis for finding that there was a prima facie case for discriminatory conduct.”); *Mack’s Supermarkets, Inc.*, 288 NLRB 1082, 1101 (1988) (“Company knowledge of union activities is a ‘threshold question’ where a violation of Section 8(a)(3) of the Act is alleged, because it is a ‘fundamental prerequisite’ in establishing a discriminatory motivation.”) (citation omitted). As to the fourth element, absent direct evidence of discrimination, the General Counsel must establish a causal link between the protected activity and the adverse employment action by circumstantial evidence. *See, e.g., Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Peter Vitalie Co.*, 310 NLRB 865, 871 (1993). The nexus between the protected activity and the adverse employment action

must not be attenuated, but “must rest on something more than speculation and conjecture.” *Amcast Automotive of Ind., Inc.*, 348 NLRB 836, 839 (2006). *Sam’s Club, a Div. of Wal-Mart Stores, Inc. v. NLRB*, 173 F.3d 233, 242-43 (4th Cir. 1999).

Moreover, “[i]t is well established that in the absence of direct evidence [of anti-union animus], animus is not lightly to be inferred.” *CEC Chardon Elec.*, 302 NLRB 106, 107 (1991) (multiple citations omitted). In the absence of any proof of employer animus, it is irrelevant whether or not the employer would have taken the action in question in the absence of protected activity – the allegation must fail. *See, e.g., Upper Great Lakes Pilots, Inc.*, 311 NLRB 131, 136 (1993). “Although Respondent’s reasons for its actions are not free of doubt, the Board has observed that even when the record raises ‘substantial suspicions’ regarding employee discharges, the General Counsel is not relieved of ‘the burden of proving that Respondent acted with an illegal motive.’” *Yusuf Mohamed Excavation*, 283 NLRB 961, 962-64 (1987) (citing *Affiliated Hosp. Prods.*, 245 NLRB 703, n.1 (1979)); *see also CEC Chardon Elec.*, 302 NLRB at 107.

Only if the General Counsel meets its initial burden does the burden shift to the employer to rebut this showing by demonstrating a legitimate, nondiscriminatory motive for its actions. *See Upper Great Lakes Pilots, Inc.*, 311 NLRB at 136; *Wright Line*, 251 NLRB at 1089. To satisfy its burden, the employer must show “that the same action would have taken place even in the absence of the protected conduct.” *See Wright Line*, 251 NLRB at 1089. It is not for the trier of fact to evaluate whether or not the business reasons asserted by the employer make sound business sense. The employer need only show that it was honestly motivated by legitimate, nondiscriminatory business reasons. *See Ryder Distribution Resources, Inc.*, 311 NLRB 814, 816-17 (1993) (citing *NLRB v. Savoy Laundry*, 327 F.2d 370 (2d Cir. 1964), *enf’g in part* 137 NLRB 306 (1962)). The General Counsel

retains the ultimate burden of proving the elements of an unfair practice by a preponderance of the evidence. *See Wright Line*, 251 NLRB at 1088 n.11.

In the present case, the ALJ did not find that any of Orchids' supervisory employees knew that any of the five (5) People Source employees (Bunnell, Scott, Aguilar, Glory, or Whisenhunt) had engaged in protected activity. The ALJ also did not find any evidence of discriminatory animus by Orchids. There is absolutely no evidence that Orchids knew of any protected conduct by any of the five (5) listed People Source employees when it ceased using labor from People Source. In fact, Dooley testified that he did not hear about the People Source employees signing any Union cards for the Union until September 14, 2016, more than a month after Orchids stopped using them. Tr. at 815-16. Furthermore, Orchids actually made an offer to the Union to hire these individuals as Orchids' own employees. This is not indicative of the hostility required for a *prima facie* case of discrimination under Section 8(a)(3). The ALJ did not establish that Orchids knew any of the five (5) individuals signed Union cards when it ceased using them (in their mind, at the Union's request). Absent credible evidence showing not only that Orchids knew of the protected activity, but viewed it with hostility, *Tomatek, Inc.*, 333 NLRB at 1355, the General Counsel cannot establish a *prima facie* case of discrimination and the ALJ's conclusion was erroneous.

D. The ALJ Erroneously Expanded the Claims alleged in the Amended Fifth Consolidated Complaint to include Other Unidentified People Source Employees. (Exception 50)

In its Proposed Remedy and Proposed Order, the ALJ improperly expanded the claims alleged in the Amended Fifth Consolidated Complaint to include individuals other than the five (5) named individuals as temporary employees of Orchids. ALJD at 39:20-21, 42:41-42.

The General Counsel did not ever allege this claim involved more than the five (5) named People Source employees until referencing it during the Opening Statement at the hearing. Tr. at 13, 352-56, 917-18. The General Counsel did not introduce any evidence pertaining to any other People

Source employees during the hearing (and actually only even called 2 of the People Source employees for testimony). Furthermore, when asked by the ALJ about whether the General Counsel was now including other individuals in their claims, the General Counsel relied upon Paragraph 13(d) of the Amended Fifth Consolidated Complaint, which refers back to Paragraph 13(a) alleging Respondent discharged the five (5) specifically named individuals. Tr. at 917-18. To date, the General Counsel has not identified any other individuals. Orchids contends that the General Counsel did not plead or introduce any evidence pertaining to any People Source employees other than the five (5) named individuals (and not even all of them) and therefore contends that the ALJ improperly expanded the General Counsel's claims to include "other employees that may be identified after a review of Respondent's records."

CONVERSION OF LINES 6 AND 7 TO OP-TECH LINES
(EXCEPTIONS 16-20)

The ALJ's legal analysis pertaining to Article 37 of the CBA and the conversion of lines 6 and 7 to a High Performance System, or "Op-Tech" line, erroneously concludes that Article 37 of the CBA was unambiguous. ALJD at 24:24-25. Article 37 of the CBA states as follows:

Article 37 – LINE 8 AND ANY NEW LINE

This language is to outline the operation and requirements to staff a new line including hours of work, shifts, and pay.

- Op-techs will be expected to operate and conduct running maintenance on all pieces of equipment contained in the new line (line 8). They will also use lifts to supply paper and vitals to the line.
- Must be willing to work in a team based/ cell environment and work a rotating shift. Open to current employees through the bid process
- To be selected the senior qualified employee must:
 - Pass a qualifications test
 - Have work history reviewed which includes work history, attendance and demonstrated ability to achieve successful productivity and quality levels.
 - Must also have demonstrated the ability work well with others.
- Op-techs will be eligible for the maximum rate of pay only after they have demonstrated the required skills and the line is operating at an acceptable production rate.

- Op-techs must be able to demonstrate required skills in a timely manner or will be disqualified. Employees will be expected to progress in skills.
- **After the successful startup of the line, 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 Ex. 2 at 29 (emphasis added).

Orchids operates several rewinding production lines in its Converting facility. Lines 8 and 9 are newer High Performance Work System, or “Op-Tech” lines, that have a much higher production than the older lines as employees are able to flow to the work on the line as needed and not only trained on a single machine. Tr. at 73-74, 852-54. In order to increase production and lower the price point for its product, Orchids has been in the process of updating the older lines for several years – even before the last contract negotiation in early to mid-2012 with the new Line 8. There was discussion about upgrading Lines 6 and 7 to an “Op Tech” line with the Union’s Local Officers as early as the very beginning of 2016, and there was no pushback, but only some discussion about whether Orchids should grandfather those on the line with an opt-out provision or whether Orchids should empty the work cell and allow everyone to bid. Tr. at 825-26.

Orchids’ management initially thought the language in the CBA pertaining to the upgrade of Lines 6 and 7 to “Op-Tech” lines was ambiguous as the CBA specifically references Lines 6 and 7 and not any of the other older lines. Tr. at 274, 828. Thus, on August 4, 2016, Merryman told Vincent that he would like to discuss the process of converting Lines 6 and 7 to “Op-Tech” lines. Tr. at 73, 826-27. On October 7, 2016, Dooley sent a proposal to Vincent providing that pay rates would be standard with Op-Tech classifications and guidelines and providing a proposal to allow current line team members to stay on Lines 6 and 7 or to opt-out and move to Lines 1, 2, 4, or 5, the older lines. This proposal pertained the how the lines would be converted – e.g., open up for bidding by seniority, those on the lines remaining on them, etc. Tr. at 75, 827-28; GC Ex. 14. On October 17, 2016, Vincent

surprisingly responded and said simply that the Union was not agreeable at this time to transitioning Lines 6 and 7 to the Op-Tech system at all. Tr. at 77, 135-39; GC Ex. 15.

Upon receiving this response, Dooley learned from another management employee that Chris Montoya (“Montoya”), who was formerly a Local Union Committee Member and was involved in the 2012 negotiation for the CBA, said that Lines 6 and 7 had already been negotiated in 2012 in the negotiation of the previous contract. Upon learning this, and as he thought the language was ambiguous, Dooley reached out to Montoya, as well as Willa Wright (“Wright”), the Local Union President at the time of the last contract negotiations, to confirm.² Wright said that Lines 6 and 7 had been negotiated and reaffirmed that Montoya was correct. Tr. at 828-30. Thus, on October 18, 2016, Dooley responded to Vincent and stated that since this issue was previously negotiated and Lines 6 and 7 were included in the CBA, Orchids would effectively transition Lines 6 and 7 to the Op-Tech system beginning January 9, 2017, due to the timing of the capital project on Line 6. This response again provided the proposal about the process for the transition and requested input. Tr. at 77-78, 829-30; GC Ex. 16. Vincent did not respond to the proposed process, but only replied that the Union’s position was not changing and they were not in agreement. Tr. at 81-82; GC Ex. 17.

As the ALJ inexplicably concluded that the language was unambiguous (despite conflicting interpretations of Article 37 of the CBA as it pertains to lines 6 and 7), the ALJ fails to credit the testimony offered by Dooley regarding conversations he had with Wright and Montoya, Union

² In interpreting a collective bargaining agreement to evaluate the basis of an employer’s contractual defense, the Board gives controlling weight to the parties’ actual intent underlying the contractual language in question. To determine the parties’ intent, the Board examines both the contract language itself and relevant extrinsic evidence, such as a past practice of the parties in regard to the effectuation or implementation of the contract provision in question, or the bargaining history of the provision itself. *Mining Specialists, Inc.*, 314 NLRB 268, 268-69 (1994). To determine the parties’ intent, the Board examines both the contract language itself and relevant extrinsic evidence, such as past practice of the parties in regard to the effectuation or implementation of the contract provision in question, or the bargaining history of the provision itself. *Id.*

representatives who were part of the negotiation of the previous CBA – simply because Orchids did not call Ms. Wright or Mr. Montoya to testify at trial. ALJD at 24:29-32. The ALJ erroneously reached this conclusion even though Dooley immediately documented these conversations with Wright and Montoya in writing to the Union and even though the Union failed to offer **any** evidence to the contrary. *See* Tr. at 828-30; GC Exs. 16, 18. As an agreement was not required for Lines 6 and 7 under the terms of the CBA, the ALJ erroneously concluded that Orchids violated Section 8(a)(5) and (1) and Section 8(d) of the Act by failing to get the Union’s consent before converting Lines 6 and 7 to Op-Tech lines.

HEALTH INSURANCE
(EXCEPTIONS 21-22)

Article 24 of the CBA states, in part,

The Company cannot guarantee what type of coverage can be offered in the future. For that reason types of healthcare will not be specified. The Company will pay 80% and the employee will pay 20% of whatever plan the employee chooses or is available.

GC Ex. 2 at 15.

When Doug Moss (“Moss”) started at Orchids as Human Resources Manager on September 12, 2016, Orchids had outgrown its benefit plan and the current provider was proposing a 13% across-the-board increase from the previous year. Moss therefore immediately began looking for a new benefit package for Orchids. Tr. at 764, 773-75. A new broker who had experience in the union environment, Lockton Services, was retained. Lockton was directed to find a new medical plan and to “mirror or clone the most popular plan” provided by Orchids. Tr. at 774. Lockton provided several options, and upon reviewing them, Orchids identified United Healthcare (UMR) as its new plan. Premiums under the new plan were less than the 13% increase in the current plan, and the new plan expanded the network and eliminating the need for primary care physician referrals as any physician in network is now available to employees enrolled in the plan. Tr. at 776-80; GC Exs. 18-19.

Moss testified that he was only aware of one instance where the plan change caused any impact to an employee. In that case, he was made aware of a prescription that was higher than it was on the previous coverage, so he called the carrier and the employee's payment was changed the same as it was before. All copays remained the same as the previous plan. Tr. at 794. Orchids continued to pay 80% of the plan, and the employees paid 20%, deductibles and out of pocket maximums did not change, and Orchids continued its practice of reimbursing deductibles for employees. Tr. at 775, 780.

Orchids acted in compliance with Article 24 of the CBA. The ALJ misapplied Board precedent in concluding that "the identity of the employees' health insurance carrier is as much a mandatory subject of bargaining as is the level of benefits the employees employ" and disregarding whether it was a "material, substantial, and significant" change. ALJD at 25:16-18.

Orchids acknowledges that, as a general rule, "[p]ension and healthcare benefits are mandatory subjects of bargaining." *Oak Harbor Freight Lines, Inc. v. NLRB*, 855 F.3d 436, 438 (D.C. Cir. 2017) (citing *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157, 180 (1971)). Nevertheless, to constitute a violation of Section 8(a)(1) and 8(a)(5), "[t]he change unilaterally imposed must, initially, amount to 'a material, substantial, and a significant' one." *Id.* (quoting *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327); *Lindsay for & on behalf of NLRB v. Mike-sell's Potato Chip Co.*, 2017 WL 2311295 at *4; *Pub. Serv. Co. of New Mexico*, 843 F.3d 999, 1007 (D.C. Cir. 2016) (multiple citations omitted).

Given the lack of any material, substantial, or significant impact on the employees, and the language of Article 24 of the CBA, the ALJ erroneously found that "Respondent had an obligation to bargain over the change in carriers and the effects of that change, and that its failure or refusal to do so violations Section 8(a)(5) and (1) of the Act." ALJD at 25:20-22.

NEW FRC POLICY AND MICHAEL BESLEY
(EXCEPTIONS 23-31)

The ALJ erroneously found that Orchids, through Graham Darby, Maintenance Engineering Manager for Orchids, “broadened the FRC policy in May 2017 when he announced that maintenance employees would be required to wear their FR clothing at all times while they were on duty, as opposed to when they would be working within the flash boundaries,” a violation of Section 8(a)(5) and (1) of the Act. ALJD at 26:38-43. This was based on erroneous factual findings in the Decision that Dooley and Matt Rhodes gave Besley the impression that he would only need to wear the FR clothing when working near electrical cabinets. ALJD at 16:24-28, 16:36-39, 18:12-35, 26:30-34.

Darby has worked in maintenance for over 20 years and has been in similar positions to his role with Orchids for the past 12-15 years. His role for the last three companies he has worked for is to develop maintenance processes, procedures, and teams, particularly in light of more high-speed, highly electrical technical equipment. Tr. at 583-84, 602-03. Darby has significant experience with Arc Flash Studies and NFPA 70E, and he knew when he began at Orchids that Orchids needed to become compliant with NFPA 70E for safety reasons. Tr. at 587-90, 602-03.

During the separate August 2016 meeting with Merryman and Dooley, Vincent requested that the company address the Arc Flash, as it was his understanding that the law on Arc Flash was legally already supposed to have been implemented. Tr. at 141-44. Specifically, Vincent requested that Orchids “try to get compliant on that particular piece of the law,” which requires a bringing in a “third party” to do an evaluation of Arc Flash equipment. Tr. at 141-44.

According to Vincent, National Fire Protection Association 70E, or “NFPA 70E,” is a system administered by OSHA that refers to rating electrical cabinets and determining protective equipment to be worn while working on those machines based on the rating. In fact, lack of compliance with NFPA 70E was raised by OSHA in its December 2016 visit to Orchids. Tr. at 141-44; Jt Ex. 1. As an Arc Flash Study is a significant expense, at Darby’s request, Orchids approved a capital expenditure

request of \$82,000 in September 2016 to retain IPC Solutions to perform this Arc Flash Study. Tr. at 590-94; R Ex. 5. According to Darby, the electrical engineers with IPC were on-site at Orchids' Converting facility for about nine (9) weeks in late 2016 and early 2017, constantly walking through the plant taking readings, inspecting equipment, inspecting breakers, inspecting panels, obtaining information needed to be able to conduct the Arc Flash study. Tr. at 597-98, 658. The Arc Flash Study breaks out electrical components and provides every piece of equipment an Arc Flash rating, indicating what type of clothing is required based on the rating. Tr. at 599-606, 658-60; R Ex. 4. Arc flash rated clothing is coated with a material to protect any fire from burning and must be measured for each employee to ensure that it covers all exposed skin. Orchids hired Cintas to take the measurements and provide the flash retardant ("FR") clothing. Cintas began fitting the Maintenance employees at Orchids' Converting facility for the FR clothing around February 2017 based on the preliminary results of the Arc Flash Study. Tr. at 603-11. Maintenance employees at the Mill, where it is hotter than at the Converting facility, have been wearing the FR clothing for about five (5) years. Tr. at 656-66, 835-39.

Darby had meetings and trainings with each shift of Maintenance employees at Converting, and all Maintenance employees (including Besley) were issued FR clothing by Orchids. Besley received his FR clothing on May 3, 2017. Tr. at 613-18; Jt Exs. 19-20. These meetings were at the end of April and beginning May 2017, and Darby announced that there would be a one-month coaching time, then the FRC Policy would be effective June 1, 2017. Tr. at 616-21, 667. **Darby was clear throughout with all the Maintenance employees that the FR clothing should be worn at all times and did not make any exceptions.** Tr. at 420, 443, 616-21, 699, 705-06. Indeed, the OSHA Citation

specifically noted Orchids' failure to provide such clothing as a safety issue. *Jt Ex. 2.*³ The ALJ's conclusion that Darby broadened the policy and required FR clothing at all times (as opposed to just when they were working within arc flash boundaries) is erroneous as Darby, the Maintenance Manager, was consistent and clear throughout that the FR clothing should be worn at all times.

Richard Keith and Matt Rhodes are Maintenance Planners/Schedulers for Orchids. They report directly to Darby. Keith Winn, a member of the bargaining unit, is one of the maintenance shift leads – specifically, the shift lead for the “D” shift that includes Besley. *Tr. at 369, 416, 623, 691, 700-01, 795-96.*

Just days after receiving his FR clothing and participating in the training sessions on May 3, 2017, Besley was not wearing the FR clothing. On Saturday, May 6, 2017, at around 7:30 a.m., Richard Keith walked around and saw the Maintenance employees wearing the FR clothing. He saw Besley at about 8:15 a.m., and Besley was wearing his face shield (which was not required) and his FR pants but was not wearing his FR shirt. When asked why he was not wearing his FR shirt, Besley

³ The adoption of a new FRC policy by Orchids that complies with NFPA 70E was effectively mandated by OSHA as part of its abatement of the safety violations identified by OSHA. Although NFPA 70E is an industry standard, not expressly incorporated by reference in any regulation adopted by OSHA, “OSHA recommends that employers consult consensus standards such as NFPA 70E-2004 to identify safety measures that can be used to comply with or supplement the requirements of OSHA’s standards for preventing or protecting against arc-flash hazards.” *See* November 14, 2016 Letter of Interpretation. Further, as part of its enforcement of its own regulations regarding workplace safety, including the General Duty clause, OSHA acknowledges that the failure to comply with those industry safety standards embodied in NFPA 70E-2004 can result in citations for violation of OSHA’s own safety regulations, including the general duty clause. *Cf.* 29 CFR Part 1910, Subpart I, Enforcement Guidance for Personal Protective Equipment in General Industry; *see also* OSHA 3075 2002 (Revised), “Controlling Electrical Hazards” (“OSHA’s electrical standards are based on the National Fire Protection Association Standards NFPA 70, National Electric Code, and NFPA 70E, Electrical Safety Requirements for Employee Workplaces”). OSHA routinely cites employers for failing to comply with Arc Flash prevention standards found in NFPA 70E. Indeed, a failure to comply with NFPA 70E was one of the first alleged violations initially identified by OSHA in response to Orchids’ employee complaints about workplace safety. A unilateral change is not unlawful when that change is mandated by Federal law. *Exxon Shipping Co.*, 312 NLRB 566, 567-68 (1993); *Murphy Oil USA*, 286 NLRB 1039, 1042 (1987); *Standard Candy Co.*, 147 NLRB 1070, 1073 (1964).

told Keith that it did not fit. Keith said he would look into it on Monday and left. Tr. at 622-25, 702-04; Jt Ex. 29.

Around 11:00 a.m. later that morning on May 6, 2017, Matt Rhodes walked around and saw the Maintenance employees, with the exception of Besley, wearing their FR clothing. Another Maintenance employee, Corey Pendleton, did not have his Orchids' FR shirt on because Cintas (the company that had measured and was providing the shirts) had his shirt out for repair, but he was wearing an FR shirt on from his previous employer. When asked why he was not wearing his Orchids' FR shirt, Besley responded that Orchids and the Union had come to an agreement during negotiations that it would only be worn in an electrical cabinet. Rhodes had not heard that before as Darby had always consistently said it had to be worn at all times, but he did not challenge or respond to Besley as he was not part of the negotiations (as was Besley). Rather, Rhodes reminded him about the meeting a few days prior with Darby where Darby specifically said that the clothing was to be worn at all times. Unlike what he told Richard Keith, Besley did not mention anything about his shirt not fitting to Matt Rhodes. Jt Ex. 30 at 8.

Upon talking with each other and Darby, and hearing the conflicting stories from Besley, both Matt Rhodes and Richard Keith went back the following day, on Sunday, May 7, 2017. While working in the office early that morning, Rhodes and Keith saw Besley walk by without any FR clothing. They told him that he needed to put it on or there would be consequences. Besley responded with "That's fine, this is a great day for a bike ride." Thus, they asked if he wanted to get Union representation. Tr. at 696-97, 704-05; Jt Ex. 29; Jt Ex. 30 at 8. Besley said he did want Union representation and returned with Corey Pendleton. As Rhodes knew that a Steward was needed for Union representation, he asked Pendleton if he was a member of the Union. When Pendleton said no, Besley called Gann. Tr. at 697. Rhodes and Keith told Besley that he would be suspended if he did not wear the FR clothing. Besley

said, “That’s fine.” Gann then asked him, “How many teams of management have you seen go through this place? How long do you think this management will take before they are out of here? Why don’t you just put it on and we will fight it?” Besley then put the FR clothing on (including the face shield, which was not required to be worn at all times) and said he would do it so his crew would not be shorthanded. Tr. at 697-99, 704-05; Jt Ex. 30 at 8.

Despite these clear directives from his Darby, Rhodes and Keith, Besley decided that he was not going to wear the FR clothing. Tr. at 625-66. With the exception of fit issues, the **only** Maintenance employee who refused to wear the FR clothing was Besley. Tr. at 625, 699, 705-06. Besley was coming to work in normal street clothes, clocking in without changing into his FR clothing, attending the shift change meeting without FR clothing, then taking an excessively long time to change into his FR clothing before starting to work. After doing this for several days in a row – despite the clear directive from Orchids’ management – Besley was suspended on May 15, 2017. Tr. at 685; Jt Ex. 30, at 11; Jt Ex. 31.

Based on the erroneous conclusion that the FRC policy was unilaterally implemented, the ALJ held that the portion of Besley’s suspension (and subsequent written warning) pertaining to his failure to comply with the FRC policy was a violation of Section 8(a)(5) and (1) of the Act. ALJD at 27:7-12. Orchids contends that the portion of the suspension and written warning pertaining to Besley’s refusal to comply with the FRC policy was not a violation of Section 8(a)(5) and (1) of the Act as it was not unilaterally implemented, and as Darby consistently and clearly conveyed that the Arc Flash clothing was to be worn at all times by Converting employees.

The ALJ then turned to the other portions of the suspension and the written warning, and essentially held that Besley’s performance had been poor for so long that Orchids was now required to

tolerate it since Besley was the Local Union President and had engaged in protected concerted and union activities. ALJD at 28:2-9.

Since around September or October 2015, Orchids has used a newer Computer Maintenance Management System, or “CMMS,” to manage the effectiveness of its equipment. Employees have to log in to the CMMS system at the start of their shift to find their workload for the day, then they log in on different work orders of different pieces of equipment. Tr. at 626-34. Darby testified that he always received feedback from many of the other Maintenance employees that Besley could often not be found. Winn, a bargaining unit member and the shift lead on Besley’s shift, maintained a log of notes on his frustrations with Besley. Besley had previously received discipline for his work performance, being removed from his lead role in mid-2016. Tr. at 455-56, 475-80, 635-40; Jt Ex. 31; R Exs. 1-3. Now, as part of its investigation while Besley was suspended, Orchids pulled its CMMS records for Besley confirming the feedback that it received from other maintenance employees. The CMMS records showed that Besley would not log in at the beginning of his shift for much longer than the fifteen (15) minute window – in some cases, for 108 minutes, 87 minutes, 118 minutes, 67 minutes, 177 minutes, 87 minutes, etc., and showed inconsistent reporting. Based upon the complaints received by other employees as confirmed by a review of the CMMS records, Darby concluded that Besley was improperly utilizing the CMMS system and that his work production falls well below company expectations. Tr. at 636-53; R Ex. 6; Jt Ex. 32. There is no dispute that Besley was failing to properly log his time and work orders. ALJD at 19:7-8.

Thus, Besley was suspended four (4) work days, from May 15-23, 2017, and he was paid for that time. Upon returning from suspension on May 23, 2017, Besley met with Darby, Moss, and Gann, and was given a written warning set forth his performance expectations. This Employee Warning Notice listed several specific violations, including insubordination, falsification of records, and

violation of safe practices and safety rules. It also provided the results of the investigation, including the reports from the CMMS system. Tr. at 634-35, 653-56; Jt Ex. 32.

Besley refused, seemingly on principle, to abide by critical safety rules that had been discussed, posted, and discussed even more. Besley, as a senior member of the bargaining unit and the Local Union President, was used to doing whatever he wanted to do. Although the maintenance employees and bargaining unit members in Orchids' Mill, which was much hotter, had always worn the safe FRC attire, Besley did not want to wear the safe FRC attire as it was heavier and he did not want to be too hot. Tr. at 656-66, 835-38. Besley's supervisors provided him with multiple opportunities to comply with the requirements of NFPA 70E, and he blatantly refused to comply with his supervisors' directives and the NFPA 70E requirements.

Orchids contends that the ALJ's decision that "the timing of the suspension and the warning in relation to Besley's protected concerted and union activities, as well as Respondent's apparent tolerance of the infractions prior to the protected activities at issue, support that the warning was motivated by animus" is erroneous, as Orchids clearly had knowledge of Besley's role as Local Union President and in the current negotiations, but – applying that analysis – Orchids' hands would be tied and it would be unable to ever take any disciplinary action against Besley based on his poor performance because of his role and involvement with the Union. ALJD at 28:2-7.

Rather, Orchids contends that the General Counsel is unable to meet its *prima facie* burden as Besley's failure to wear proper clothing that was required by law is not protected concerted activity. Besley was acting solely on his own behalf and without the authority of any other employees. His actions were for his own personal benefit, which is not for his own personal benefit and not for any activity protection by Section 7. *See Meyers Indus., Inc.*, 281 NLRB 882, 887 (1986), *aff'd* 835 F.2d 1481 (D.C. Cir. 1987), *cert denied* 487 U.S. 1205 (1988).

Furthermore, even if the Board determines the General Counsel met its burden of showing employer knowledge of protected activity, there is simply no direct or circumstantial evidence of any animus relating to any purported protected concerted activity. Besley blatantly refused to wear the FR clothing despite receiving clear directions to do so. No employer can reasonably be expected to tolerate such misconduct. Darby, who was very familiar with the requirements of NFPA 70E and the failure to comply with Arc Flash requirements, and Thom, who was acutely aware of the potential for a return visit by OSHA, were very worried about the safety of employees and others. They both addressed these safety concerns in multiple employee forums where Besley was present. Besley's blatant refusal to wear safe clothing and his response to Orchids' clear directive was a major concern to both Darby and Thom, as well as others.

Upon suspending Besley for his refusal to wear proper protective clothing, conflicting stories, and disregard of his supervisors' directives, Darby then used the CMMS system to confirm information he received from other employees about Besley not performing work. *See, e.g.*, Jt Ex. 31. Upon reviewing the information in the CMMS system, Darby confirmed that Besley was improperly utilizing the CMMS system and that his work production fell well below company expectations. Tr. at 636-53; R Ex. 6; Jt Ex. 32. Based upon the entirety of the situation, Besley was given an Employee Warning Notice on May 23, 2017. Tr. at 634-35, 653-56; Jt Ex. 32.

Orchids had only legitimate, non-discriminatory reasons for disciplining Besley. He refused to follow safety rules and the directions of his supervisors. These are not trivial offenses. Such disregard for such simple safety rules could have had disastrous consequences. Orchids had no choice but to, at a minimum, discipline Besley and require him to act in a safe manner. Orchids undoubtedly had valid reasons to discipline Besley, and there is no evidence that any aspect of the decision was

based on animus toward Besley based on any protected activity. Rather, Besley likely had “nine lives” as Orchids was hesitant and overly cautious in any sort of disciplinary action against Besley.

Here, Darby was motivated only by his need to ensure that his maintenance employees follow instructions and properly abide by safety requirements. Besley’s refusal to follow his supervisor’s instructions and his refusal to wear safe clothing are completely inconsistent with these basic rules. Accordingly, his discipline was an appropriate business decision. For these reasons, Orchids takes exception to the ALJ’s finding that “the issuance of the written warning for failing to properly use CMMS and comply with escalation requirements was discriminatorily motivated, in violation of Section 8(a)(3) and (1) of the Act.” ALJD at 28:7-9.

“POLICY” REGARDING UNION ACTIVITIES DURING WORKING TIME
(EXCEPTIONS 32-33)

The ALJ erroneously concluded that “Respondent discriminatorily promulgated rules prohibiting Union officers or agents from talking to employees in other areas, except during non-work time, while allowing employees to discuss other, non-union related matters during work time, in violation of Section 8(a)(1) of the Act.” ALJD at 28:44-48. Likewise, the ALJ erroneously concluded that “Respondent unilaterally modified the terms of the parties’ agreement (Article 8, section 5) without the Union’s consent, by making these blanket statements to Union officers that they were prohibited from discussion Union business during work time or on the production floor, regardless of whether they obtained their supervisor’s permission, in violation of Section 8(a)(5) and (1) and Section 8(d) of the Act.” ALJD at 29:1-5.

Article 8, section 5 of the CBA states that “[i]t is expected that the officers and/or the shop steward will be away from their regular job assignment as little as possible. It is understood that if union business or investigation of grievances need to be conducted during working hours, supervisory permission must be obtained in any departments affected.”

The Decision of the ALJ relies upon the fact that employees are allowed to discuss sports and vacations while working to support the argument that this was a violation of the Act. However, the Decision of the ALJ blatantly ignores the fact that the General Counsel did not identify a single instance where any member of Orchids' management (1) prevented an employee from conducting Union business when they had the permission of a supervisor, or (2) disciplined any employee for performing authorized Union business.

Rather, as set forth in more detail in the following section, the only evidence in support of this claim is a few isolated statements whereby Orchids' management is either responding to complaints of harassment from other members of the bargaining unit (generally to Darla Reed or Chris Montoya) or having an employee perform his job (generally for Michael Besley).

INDEPENDENT SECTION 8(A)(1) VIOLATIONS **(EXCEPTIONS 34-49)**

I. August 24, 2016 Conversation Between Dooley and Gann (Exception 34)

The ALJ erroneously concluded that Dooley 's discussion with Gann about Orchids' ceasing usage of the temporary workers from People Source was a violation of Section 8(a)(1) of the Act. The ALJ contends to know what Dooley knew at the time, although the testimony does not support this assertion. The evidence demonstrates that Dooley continued to contend that the People Source workers were employees of People Source, and not Orchids. Initially, Vincent claimed the work performed by the temporary workers should be performed by members of the bargaining unit instead of the temporary workers. Thus, Orchids ceased using temporary workers. Vincent then claimed that the temporary workers should be employees of Orchids, to which Orchids disagreed. However, Orchids proposed creating a new classification under the CBA to include the temporary workers and bring them under the CBA, and Vincent refused to respond to this proposal. Therefore, Dooley's comment to Gann that the Union told Orchids to get rid of the temporary workers did not have any tendency to

interfere, restrain, or coerce employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

II. November 29, 2016 Conversation Between Dooley, Reed and Besley (Exceptions 35-37)

On November 15, 2016, Andrew Mason (“Mason”), an Op-Tech and member of the bargaining unit, provided a written complaint to Moss concerning Local Union Secretary Darla Reed (“Reed”). Specifically, Mason was concerned that Reed was trying to get people fired who were supporting decertification efforts at Orchids. Tr. at 756-60, 770-72; R Ex. 11. Shortly thereafter, around November 26, 2016, Moss received another complaint about Reed saying she was going to get everyone who signed the decertification petition fired as soon as she received the list – this time from Kade Robbins (“Robbins”), another member of the bargaining unit. Tr. at 732-33, 769-71; R Ex. 13. Moss investigated the complaints and, with Dooley, met with Reed to inform her about the complaints and reinforce that during worktime, she was to be in her work area conducting work, not going to different areas and trying to intimidate other employees. Dooley said he did not know if these statements had happened, but, if they had, he asked her to please discontinue it because they need to respect the rights of the individuals the same as he respected her rights. Reed was not disciplined or reprimanded. Tr. at 300-09, 769-73, 831-32.

Although Mason and Robbins complained to Orchids that Reed was harassing them or trying to get people who participated in Union decertification efforts fired, Orchids did not take any adverse action against Reed. Indeed, Orchids did not even tell Reed that she could not engage in such reprehensible behavior outside of work hours. Instead, as it would for any complaint of harassment, Orchids simply investigated and informed Reed of the complaints, with a Union representative present, and reminded her that during work hours she was not to go to other work areas to intimidate other employees. At no time did Orchids tell Reed that she could not engage in Union activities during work hours or in Orchids’ facility. Tr. at 732-33, 739-43, 756-60, 769-72, 833; R Exs. 7, 8, 11, 13.

As Dooley did not make a broad statement prohibiting employees from discussing the Union while on work time or on the work floor, but, rather, was merely responding to specific complaints of harassment by Reed, Orchids contends that the ALJ erroneously concluded that this violated Section 8(a)(1) of the Act.

III. December 2016 Conversation Between Blower, Foss and Reed (Exception 38)

Similarly, Bradley Blower (“Blower”) and Kelly Foss (“Foss”) met with Reed in December 2016 in direct response to another complaint of harassment. Tr. at 305-07. They asked her to not harass other employees, but did not take any adverse action against her. The ALJ erroneously concluded that “under these circumstances, the vague accusations of harassment and instructions to stop could reasonably be interpreted as reaching protected – but unwelcome – union solicitation or activity” in violation of Section 8(a)(1) of the Act. ALJD at 30:30-35.

IV. January 25, 2017 Conversation Between Dooley and Gann (Exceptions 39-41)

In January 2017, Moss and Blower met with Gabriel Cutler (“Cutler”), who had left his line and had been outside for over an hour. Gann was present with Cutler. Tr. at 235-39. Gann said that it was his understanding that employees did not have to be at their job as long as someone was in the spot running their machine. So, he called Diring, Orchids’ Vice President of Operations, and put him on speaker phone. With Diring on the phone, Gann called Orchids’ manager liars, or “f---ing liars.” Tr. at 235-42, 272-73. After the meeting, Dooley called Gann and asked to meet with him. Dooley and Moss met with Gann and John Stafford. Dooley told Gann that he did not need to talk to management employees as he did, but this statement was not because he was engaging in Union work, but only because of his actions during the meeting. Dooley never told any Gann, or anyone else, that he was being watched. Tr. at 243-46, 272-73, 832. Dooley also told Gann that he had received reports that Gann was leaving his workspace to do Union business when he was supposed to be working.

Dooley asked Gann to let someone know when he has to leave his workspace. Gann did not receive any discipline for any of his actions. Tr. at 243-46, 272-73.

Orchids contends that the ALJ erroneously found that Dooley violated Section 8(a)(1) when he (1) spoke with Gann about calling Orchids' managers "f---ing liars" on speaker phone after Orchids met with Cutler to discuss him being away from his line for over an hour, (2) told Gann that it was reported he was leaving his workplace to do Union business when he was supposed to be working, and (3) asked Gann to let someone know when he has to leave his workspace. Orchids did not take any adverse action against Gann or limit Gann's Union related activities, merely noting that he need not use profanity when talking with Orchids' management. No one told Gann or any other employee of Orchids that they were being watched.⁴ Further, the fact that Orchids asked Gann to let someone know if he was leaving his workspace to do Union work was not a limitation on Gann's freedom to exercise his rights under the Act but merely a request that he inform someone that he was leaving, consistent with the CBA, so that appropriate arrangements to complete any work during his absence could be made. Orchids did not take any adverse action against Gann for leaving his workspace. Tr. at 243-46, 272-73. Orchids contends that none of these statements constitute a violation of Section 8(a)(1) of the Act.

V. February 2017 Conversation Between Blower, Foss and Reed (Exception 42)

On February 6, 2017, David Lawson, an Op-Tech and member of the bargaining unit, sent two (2) emails to Brad Blower claiming that he felt like he was harassed by Reed and Chris Montoya.

⁴ The ALJ's reliance on *Stevens Creek Chrysler*, 353 NLRB 1294, 1296 (2009) and *Conley Trucking*, 349 NLRB 308, 315 (2007) is oversimplified, as they do not stand for a blanket proposition that any knowledge of Union activities constitutes surveillance. For instance, in *Stevens Creek Chrysler*, the Board contrasts this situation and states that "when an employer tells employees that it learned of their union activities from another employee, or when those activities are overt such that employees would not reasonably conclude that the employer learned of them through surveillance, the Board has found no violation."

Lawson testified that he had been harassed by Reed and Montoya on more than one occasion. Blower testified that this was not Lawson's first complaint about this, but was the only one he put in an email. Tr. at 718-22, 739-43; R Exs. 7-8. Blower and Foss met with Reed and told her they had reports she was harassing people on the floor and that, if it was true, to please stop. Reed was not disciplined or reprimanded. Tr. at 305-09, 687-89, 723-25; Jt Exs. 33-34.

Orchids investigated and informed Reed of the complaints, as it would any complaint of harassment. At no time did Blower or Foss tell Reed that she could not engage in Union activities during work hours or in Orchids' facility. Tr. at 732-33, 739-43, 756-60, 769-72; R Exs. 7, 8, 11, 13. The ALJ erroneously concluded that "under these circumstances, the vague accusations of harassment and instructions to stop could reasonably be interpreted as reaching protected – but unwelcome – union solicitation or activity" in violation of Section 8(a)(1) of the Act. ALJD at 31:47-50.

VI. Conversation Between Moss and Dooley and Reed and Montoya (Exception 43)

On February 7, 2017, Orchids received a statement from another employee and bargaining unit member, Johnnie Mason, who testified that Montoya came over to her and directed a threat to Mason and her family as a result of her husband's Facebook postings regarding the Union. Moss investigated the complaint, and Montoya's employment was ultimately terminated. Tr. at 313-14, 750-51, 780-85; Jt Ex. 38.

During the investigation of the incident, Dooley and Moss met with Montoya and Reed. The ALJ erroneously concluded that "Dooley's broad statement prohibiting employees from discussing the Union while on the work floor or on work time" was a violation of Section 8(a)(1) of the Act. ALJD at 32:37-39. Dooley was taking steps to ensure the safety of other employees and their families, not attempting to interfere with, restrain, or coerce Montoya in the exercise of his Section 7 rights in violation of Section 8(a)(1) of the Act.

VII. Conversation Between Moss and Reed and Russell (Exceptions 44-45)

As part of the implementation of new Clothing and Shoe policies, Orchids held several meetings with employees and provided several trainings. Tr. at 532-38; Jt Exs. 12-15; Jt Ex. 17. During one of the meetings conducted by Safety Lead Kris Thom (“Thom”) and Human Resources Manager Doug Moss (“Moss”), two employees, Darla Reed and Darlene Russell, began screaming at them using vulgarities in front of more than 30 other people. Moss ended the meeting and told Reed and Russell in a separate meeting that “if they had objections to the policies and they felt that strongly about it, if they wanted to cuss [him] or raise their voice at [him] to do so before the meeting or after the meeting in [his] office or in some other office but not to conduct themselves that way in a company meeting.” Tr. at 534-35, 539-42, 786-88.

The ALJ determined that this statement by Moss was overbroad and, thus, a violation of Section 8(a)(1) of the Act. Orchids contends that this statement was not a violation of Section 8(a)(1) of the Act attempting to interfere with, restrain, or coerce Reed and Russell in the exercise of their protected concerted and union activities, but rather was a statement made in response to the comments made by Reed and Russell when Moss was providing employee training.

VIII. Conversation Between Cochrell and Besley (Exception 46)

The ALJ erroneously concluded that Jeff Cochrell’s statement about “discussing Union business on the production floor on company time” was a violation of Section 8(a)(1) of the Act. ALJD at 33:35-36. Cochrell was a newer employee and was relying on Article 8, section 5 of the CBA that states “[i]t is expected that the officers and/or the shop steward will be away from their regular job assignment as little as possible. It is understood that if union business or investigation of grievances need to be conducted during working hours, supervisory permission must be obtained in any departments affected.” Orchids contends that this does not interfere with, restrain, or coerce employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act.

IX. May 7, 2017 Conversation Between Besley, Rhodes and Keith (Exception 47)

The circumstances surrounding the May 7, 2017 conversation are set forth in detail above with respect to the claims pertaining to Besley. For the same reasons as set forth above, Orchids contends that the ALJ erroneously concluded that Matt Rhodes and Richard Keith violated Section 8(a)(1) of the Act when they threatened Besley with suspension if he failed to wear his FR clothing.

X. May 25 Conversation Between Moss and Besley (Exceptions 48-49)

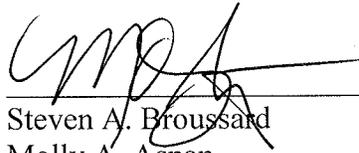
The ALJ erroneously concluded that Moss's question to Besley on May 25, 2017, as to why he was beating the pants thing to death amounted to a threat of unspecified reprisals. ALJD at 35:18-21. For the reasons set forth above, and as the FRC policy was implemented for safety reasons and for compliance with NFPA 70E, Orchids contends that this did not constitute a violation of Section 8(a)(1) of the Act.

Additionally, the ALJ erroneously concluded that Moss' statement to Besley about reporting safety issues to the company "unlawfully interfered with or restrained employees' right to engage in protected concerted activities of seeking outside assistance in matters relating to employees' terms and conditions of employment" and is a violation of Section 8(a)(1) of the Act. ALJD at 35:30-35. Rather, Moss told Besley that he should contact Thom, the Safety Manager, Darby, the Maintenance Engineering Manager, or himself if there is a safety issue in the plant so that they can address it immediately. He did not threaten Besley or tell him not to call OSHA. Tr. at 789-91. This is consistent with Article 256 of the CBA pertaining to Safety, which states that "[t]he Union and the Company will cooperate in assisting and maintaining the company's rules regarding health, safety, and sanitation." GC Ex. 2 at 16. As such, Moss was not interfering with, restraining or coercing employees in their concerted communications regarding matters affecting their employment with third parties, but rather was simply requesting that Besley contact Orchids' management responsible for safety if he had a safety concern.

WHEREFORE, for all the foregoing reasons, Respondent Orchids Paper Products Co. respectfully requests that the Board refuse to adopt the Decision and recommendations of the ALJ, but rather dismiss the Amended Fifth Consolidated Complaint in its entirety.

Respectfully submitted,

**HALL, ESTILL, HARDWICK, GABLE,
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CERTIFICATE OF SERVICE

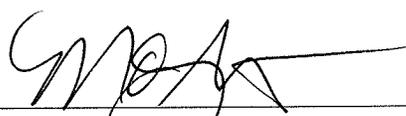
I, the undersigned, do hereby certify that on this 13th day of October, 2017, a true and correct copy of the above and foregoing document was filed electronically and sent by email to:

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