

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

ORCHIDS PAPER PRODUCTS COMPANY

And

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

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

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING
BRIEF TO RESPONDENT'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

Respectfully Submitted by
William F. LeMaster
Julie Covell
Counsel for the General Counsel
National Labor Relations Board
Subregion 17
8600 Farley St. – Suite 100
Overland Park, KS 66212

Table of Contents

I. Overview1

II. Overview of Respondent’s Exceptions..... 1

III. GC’s Answers to Respondent’s Exceptions..... 2

 A. The CBA’s Management Rights Clause (Exception 1).....2

 B. Respondent’s Actions re. Temporary Employees (2-15, 50).....2

 C. Respondent’s Conversion of Lines 6 and 7 to Op-Tech Lines (16-20).....14

 D. Respondent’s Change of Health Insurance Provider (21-22)..... 16

 E. Respondent’s FRC Policy and Michael Besley (23-31)..... 18

 F. Respondent’s Changes to its Policy re. Union Activities (32-33)..... 25

 G. Respondent’s Independent 8(a)(1) Violations (34-49).....28

 1. 8/24/16 Conversation Between Dooley and Gann (34).....28

 2. 11/29/16 Conversation Between Dooley, Reed and Besley (35-37)..... 29

 3. December 2016 Conversation Between Blower, Foss and Reed (38).... 30

 4. 1/25/17 Conversation Between Dooley and Gann (39-41)..... 32

 5. February 2017 Conversation Between Blower, Foss and Reed (42)..... 34

 6. 2/8/17 Conversation Between Moss, Dooley, Reed and Montoya (43)...34

 7. 4/28/17 Conversation Between Moss, Reed and Russell (44-45).....35

 8. 5/5/17 Conversation Between Cochrell and Besley (46).....36

 9. 5/7/17 Conversation Between Besley, Rhodes and Keith (47).....37

 10. 5/25/17 Conversation Between Moss and Besley (48-49).....39

IV. Conclusion.....40

Table of Authorities

Advanced Installations, Inc., 257 NLRB 845 (1981) 39

AK Steel Corp., 324 NLRB 173 (1997).....23

Alta Vista Regional Hospital, 355 NLRB 265, 268 (2010) 13

Altercare of Wadsworth Center for Rehab., 355 NLRB 565, 573 (2010) 30, 37

Amoco Chemical Company, 328 NLRB 1220, 1221 (1999) 10, 27

Atlas Transit Mix Corp., 323 NLRB 1144, 1150 (1997)..... 29

Aztec Bus Lines, 289 NLRB 1021, 1036 (1988)..... 18

BFI Newby Island Recyclery (Browning-Ferris Industries of California), 362 NLRB No. 186 (2015) 5

Bowling Transportation, Inc., 336 NLRB 393, 393 (2001)..... 29

Browning-Ferris, 362 NLRB No. 186, slip op. (Aug. 27, 2015)..... 4,5

Castle Hill Health Care Center, 355 NLRB 1156, 1183 (2010) 23

Ciba-Geigy Pharmaceuticals Div., 264 NLRB 1013, 1017 (1982)..... 18

Cintas Corp. v. NLRB, 482 F.3d 463, 467-68 (DC Cir. 2007) 28

Connecticut Light Co., 196 NLRB 967 (1972), rev. 476 F.2d 1079 (2d Cir. 1973)..... 18

Flexsteel Industries, Inc. 311 NLRB 257 (1993)..... 33

Frontier Hotel & Casino, 323 NLRB 815, 816 (1997) 36

GHR Energy Corp., 294 NLRB 1011, 1048 (1989) 38

Great Lakes Steel, 236 NLRB 1033, 1037 (1978)..... 36

Greenfield Die & Mfg. Corp., 327 NLRB 237, 1–238 (1998)..... 31, 34

Independent Stations Co., 284 NLRB 394, 397 (1987)..... 28

Kinder-Care Learning Centers, 299 NLRB 1171, 1171-1172 (1990) 40

Kohler Mix Specialties, 332 NLRB 631, 632 (2000)..... 23

Lafayette Park Hotel, 326 NLRB 824, 828 (1998)..... 36

Litton Financial Printing v. NLRB, 501 U.S. 190, 198 (1991)..... 10

Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004) 26, 34

Mast-Advertising & Publishing, 304 NLRB 819 (1991) 12

Mediplex of Danbury, 314 NLRB 470, 472 (1994) 31

Minnesota Mining & Mfg. Co., 261 NLRB 27, 29 (1982), enfd. 711 F.2d 348 (D.C. Cir. 1983) 23

NDK Corp., 278 NLRB 1035 (1986)..... 16

Neff-Perkins Co., 315 NLRB 1229, 1229 fn. 2 (1994) 12

NLRB v. Scam Instrument Corp., 394 F.2d 884, 886-887 (7th Cir. 1968), cert. denied 393 U.S. 980 (1968) 10

Park ‘N Fly, Inc., 349 NLRB 132, 140 (2007)..... 40

Phoenix Transit System, 337 NLRB 510, 510 (2000) 12

Public Service Co. of Oklahoma, 334 NLRB 487, 489 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003)..... 23

Quality Bldg. Contractors, Inc., 342 NLRB 429, 430 (2004) 16

Rood Industries, 278 NLRB 160, 164 (1986)..... 33

S & I Transportation, Inc., 311 NLRB 1388, 1388 n.1, 1389-90 (1993) 18

Sam’s Club, 349 NLRB 1007, 1009 (2007)..... 30, 35, 37

Schrock Cabinet Co., 339 NLRB 182 (2003)..... 12

Scripps Memorial Hospital Encinitas, 347 NLRB 52 (2006)..... 30, 35, 37

Seiler Tank Truck Serv. Inc., 307 NLRB 1090, 1100 (1992) 18

<i>Southern Container, Inc.</i> , 330 NLRB 400, 400 n.3 (1999)	10, 27
<i>Southern Maryland Hosp. Ctr.</i> , 292 NLRB 1209, 1221 (1989)	36
<i>St. Pete Times Forum</i> , 342 NLRB 578, 588 (2004).....	31, 34
<i>Standard Dry Wall Products, Inc.</i> , 91 NLRB 544, 545 (1950)	16
<i>Tree of Life, Inc., d/b/a Gourmet Award Foods</i> , 336 NLRB 872, 874 (2001)	10
<i>Uniserv</i> , 351 NLRB 1361, 1361 n. 1, 1362 (2007).....	13
<i>Waco, Inc.</i> , 273 NLRB 746, 747-748	28
<i>Wright Line</i> , 251 NLRB 1083 (1980).....	12

I. Overview

This case is before the National Labor Relations Board (Board) based on a Consolidated Complaint alleging that Orchids Paper Products Company (Respondent) violated Sections 8(a)(1), (3), (5) and 8(d) of the National Labor Relations Act (Act). By Decision dated September 15, 2017, Administrative Law Judge Andrew S. Gollin (ALJ) concluded that Respondent violated the Act, as alleged in certain paragraphs of the General Counsel's Fifth Consolidated Complaint that issued on June 15, 2017. Following the ALJ's Decision, on October 13, 2017, Respondent filed timely exceptions wherein it argues that the ALJ made errors in reaching his findings. In accordance with Section 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel (GC) respectfully files this answering brief, and for the following reasons, submits that Respondent's exceptions are without merit.

II. Overview of Respondent's Exceptions

Respondent's Exceptions to the ALJ's Decision and its supporting brief raise the following areas of inquiry: Whether (1) the ALJ failed to adequately consider the Management Rights clause set forth in the parties' collective-bargaining agreement; (2) the ALJ erred in his findings related to Respondent's handling of "temporary" employees; (3) the ALJ erred in finding that Respondent unlawfully converted Lines 6 and 7 to Op-Tech Lines; (4) the ALJ erred in finding that Respondent unlawfully changed health care providers; (5) the ALJ erred in finding Respondent unlawfully incorporated and changed an flame resistant clothing (FRC) policy and unlawfully relied upon those changes to discipline Michael Besley; (6) the ALJ erred in unlawfully changing policies regarding union activities during working time; and (7) the ALJ erred in finding that Respondent engaged in multiple independent violations of Section 8(a)(1) of the Act through various communications with employees. For the reasons addressed below,

Respondent's exceptions are without merit.

III. GC's Responses to Respondent's Exceptions

A. The CBA's Management Rights Clause (Exception 1)

In a generalized manner, Respondent argues in its first exception that the ALJ erred in not quoting and failing to recognize the entire Management Rights provision in the parties' CBA. *R Brief at 1*.¹ Specifically, Respondent argues that the ALJ failed to quote the following, "[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 are not expressly contracted away by specific provisions of this Agreement are retained solely by the Company." *R Brief at 1, citing GC 2 at 2-3*. Respondent does not identify what portion of the Complaint or the ALJ's Decision it seeks to apply the Management Rights clause or in what manner it adequately permits the unlawful actions found by the ALJ under existing Board law. Respondent simply argues that the U.S. Court of Appeals for the District Court of Columbia has challenged the Board's position on the subject. Respondent fails to provide any argument that warrants reversal of any portion of the ALJ's Decision in this matter as it relates to the parties' Management Rights clause. For these reasons, Respondent's exception on that issue should be dismissed.

B. Respondent's Actions re. Temporary Employees (Exceptions 2-15, 50)

Respondent's arguments concerning the ALJ's conclusions regarding its handling of "temporary employees" fall under the following broad categories: (1) Respondent and People Source Staffing Professionals, LLC (People Source) were joint employers under Board law; and

¹ References will be denoted using the following abbreviations: Trial Transcript (T); GC's exhibits (GC), Respondent's exhibits (R), Joint exhibits (Jt), Respondent's Brief in Support of its Exceptions (R Brief followed by the applicable page number), and the ALJ's Decision (ALJD followed by page and line numbers).

(2) Respondent failed to abide by the terms of the parties' CBA by not providing 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)(1), (5) and Section 8(d) of the Act; and (3) Respondent terminated the assignments of temporary employees in violation of Sections 8(a)(1), (3), (5) and 8(d) of the Act. For the reasons set forth below, the record fully supported the ALJ's decision and Respondent's exceptions should be dismissed.

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

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

Respondent's Employee Handbook also identifies that employees are subject to a probationary period "the first sixty (60) calendar days" of their employment. *GC 24*. When the Union learned of what it deemed to be a violation of the parties' CBA, it submitted executed Union cards for the "permanent temps," which were ultimately rejected by Respondent. *T. 195-*

196, 199; GC 21. The parties met to discuss the matter. T. 49. Union Staff Representative Chad Vincent raised the issue and told Respondent that he was aware of employees at the facility who had worked past their probationary period and not been converted to full-time employment. Therefore they were not receiving the proper pay and benefits. T. 47. Site Manager Court Dooley took the position that Respondent could hire people from anywhere, a fact that Vincent did not dispute. However, he noted that once that individual had been at the facility for 60 days, they were covered under the CBA. T. 48. Vincent cited *Browning-Ferris*, 362 NLRB No. 186 (Aug. 27, 2015), a joint employer case, and advised that the case supported his position. He sought to work things out and did not want to tie matters up with an NLRB charge. T. 49.

On August 12, 2016, Vincent e-mailed Dooley to outline the Union's position that employees hired through a staffing agency have the same 60 day probationary period as those individuals hired off the street. GC 4. Vincent requested that those affected employees be made whole. By email dated August 16, 2016, Dooley rejected the Union's stance. GC 5. Dooley wrote that the workers in question were People Source employees, were never intended to become employees, were not performing bargaining unit work, and were not covered by the CBA. On the same date, Gann filed a grievance over Respondent's failure to convert those individuals. T. 53-54, 203; GC 10. Vincent also filed an unfair labor practice charge. T. 53-54. Vincent subsequently made requests for information in an effort to perform due diligence to support the Union's position that Respondent was working temporary employees for more than 60 days without converting them to full time. T. 57-58; GC 6, 8. After the Union contested Respondent's failure to convert these individuals, Respondent undisputedly ended the employment of those temporary employees. T. 60-62, 222.

About August 24, 2016, Gann filed another grievance when Respondent ended the

employment of its temporary employees, including those present for longer than 60 days. *T. 222; GC 11*. After doing so, Gann advised Court Dooley that Respondent needed to reinstate those individuals in lieu of Respondent's plan to hire new employees. *T. 222*. During this conversation, Dooley informed Gann that the reason Respondent ended the temporary employees' employment was because Gann had requested that Respondent do so. *T. 222-223*. At no point did Gann make this request, only that Respondent could not keep temporary employees longer than 60 days without hiring them. *T. 223*. As Respondent had employed temporary employees longer than 60 days, through the parties' grievance procedure, the Union sought to have Respondent make those individuals whole through reinstatement as unit employees and full backpay. *GC 10; GC 11*.

Respondent first argues that the ALJ erred in reaching the conclusion that Respondent and People Source constitute joint employers over the temporary employees. *R brief at 2-9*. As detailed by the ALJ, in *BFI Newby Island Recyclery (Browning-Ferris Industries of California)*, 362 NLRB No. 186 (2015), the Board established a two-part test to determine the existence of a joint employer relationship. "The initial inquiry is whether there is a common-law employment relationship with the employees in question." *Id. at slip op. 2*. If so, the question is "whether the putative joint employer possesses sufficient control over employee's essential terms and conditions of employment to permit meaningful collective bargaining." *Id.* The ALJ astutely noted:

"...the Board held that 'control' can now be direct, indirect, or even a reserved right to control, whether or not that right is ever exercised. Additionally, in defining essential terms and conditions of employment, the Board held it includes not only hiring, firing, discipline, supervision, direction and determining wages and hours, but it also includes dictating the number of workers to be supplied, controlling scheduling, seniority, overtime, and assigning work and determining the manner and method of how work is to be performed." *ALJD 21:5-10, citing Id.*

Contrary to Respondent's exceptions, the ALJ's conclusion that Respondent and People

Source constitute joint employers over the temporary employees was supported by the record. In February 2015, Respondent and People Source entered into a contract for People Source to provide labor when requested by Respondent. *Jt. 40, 41, 42*. People Source Senior Recruiter and Payroll Specialist Melanie McMains provided detailed testimony concerning the relationship between Respondent and People Source and the process followed for People Source to supply temporary employees to Respondent. *T. 855-916*. As found by the ALJ, the record established that Respondent must initiate a request for labor by identifying the number of employees necessary, shifts to work, start dates, type of assignment and how long the assignment is scheduled to last. *Id., GC 27, GC 28, GC 29, GC 30, GC 31*. Evidence presented at trial established that Respondent had a practice of specifically requesting employees by name. *GC 32, GC 33*. Carrie Bunnell and Jennifer Whisenhunt (Guinn) were both People Source referrals to Respondent and each provided undisputed testimony concerning their experience while employed Respondent's facility. *T. 146-164, 164-187*. The evidence established that Respondent had a practice of converting temporary employees into "permanent temps" resulting in the employee being assigned to one of Respondent's 12-hour rotating shifts (A-D) alongside bargaining unit employees. *T. 153, 171-172, 880*. Bunnell and Whisenhunt were both "permanent temps." They each testified that they received their day-to-day work instructions from leads or supervisors of Respondent. *T. 155-156, 163; T. 169-170*. As the ALJ noted, it was a supervisor for Respondent who informed Whisenhunt that she had converted to a "permanent temp" and also notified her when her assignment ended. *T. 155-156*.

Respondent controls when assignments end. *T. 841, 843-844, 883-884*. Respondent was the entity who communicated to People Source that it was terminating the assignments of the permanent temps at its facility and also the entity who subsequently told People Source that

future assignments could not extend beyond 59 days. *GC. 25, 26, 35, 36, 37, 38.*

Respondent is involved in ultimate payment of the wages of the People Source employees. The process starts with temporary employees utilizing a separate time clock at Respondent's facility that is furnished by People Source. *T. 867-868, 874.* Respondent then faxes the temporary employees' time cards to People Source on Mondays. *T. 869-870.* People Source then enters the time accrued into its payroll system. *T. 870.* Once the payroll process is completed, People Source then sends an invoice to Respondent for payment. *T. 875-876.*

In addition to the obvious control Respondent asserts over the temporary employees' terms and conditions of employment, the record provided significant evidence of similarities with respect to the "permanent temps" working at Respondent's facility and Respondent's full-time bargaining unit employees. Certain temporary employees were solicited to work more than limited stints or projects or assignments. These individuals were solicited and assigned to work on a designated full-time crew. As many of the witnesses who testified noted, Respondent's operation primarily utilizes four set crews (A, B, C, D) that each work alternating twelve hour shifts from 7:00 to 7:00. *T. 35, 153, 172, 842-843.* Employees on these shifts work a rotating four days on, four days off, four nights on, and four nights off. *T. 842-843.*² The record reflected that temporary employees became "permanent temps" when they were assigned to work with designated crews/shifts no differently than other bargaining unit employees. *T. 153, 156, 171-172; GC 30; GC 31; GC 32; GC 33.* The permanent temps also performed the same work as established bargaining unit employees. For example, Carrie Bunnell testified that she transitioned to a permanent temp in October 2015 when she was permanently assigned to work Respondent's 12-hour rotating "D" shift. *T. 171-172.* Once she converted to working on the "D"

² Not everyone at the converting facility works a rotating 12 hour schedule. For example, Jason Gann works in the warehouse and employees there work from 7 a.m. to 3 p.m. or 3 p.m. to 11 p.m. five days per week.

shift, Bunnell started to work a machine called the “robot” at the end of the production line to sort and stack product before it is sent to be mechanically wrapped and then onto a skid to be delivered into the warehouse. *T. 172-173*. This work was performed by temporary employees and Respondent’s employees alike. *T. 173-174*. At the time of Bunnell’s employment, Respondent operated approximately twelve lines and she had experience working on at least seven of them. *T. 167, 175*. Bunnell personally performed and witnessed other temporary employees working on production lines, packaging product and operating machinery on those lines no different than regular bargaining unit employees. *T. 175-176*. Bunnell was also personally assigned to perform janitorial work on occasion, such as cleaning the break room, restroom and offices. *T. 176*. Both temporary and permanent employees performed this function. *T. 176*. Permanent temp Jennifer Whisenhunt provided similar testimony. When she was assigned to a designated crew, she started working on production lines and performing tasks such as changing out the core machine and monitoring the line for bad product. *T. 153, 154*. Both tasks are also performed by bargaining unit employees. *T. 154*. Additionally, both women testified that when they became permanent temps assigned to designated crews, their jobs changed from doing cleaning and DRP’s to the tasks identified above. *T. 149, 153, 166, 172-173*. “Display Ready Products” (DRP) refers to removing product as it comes down the line and stacking it on a pallet. *T. 150, 167*. Although permanent temps transitioned from this type of work, the record reflected that both temporary and bargaining unit employees performed this function. *T. 151, 167-168*. In fact, Chris Montoya provided a recent example from February 6, 2017. On that date, Montoya was assigned to Line 4 but it was down. *T. 284-285*. Others assigned to Line 4 at the time included Darlene Russell (Line 4 Coordinator), William _____ (Line 4 Back Tender) and an unnamed temporary employee. *T. 285-286*. With their line down,

the group, along with Darla Reed, was ordered to the warehouse to do “DRP’s” for the rest of the day. *T.* 286-287. Respondent provided no evidence to contradict the consistent testimony offered by the General Counsel’s witnesses that established bargaining unit employees worked side by side with temporary employees performing the same work under the same supervision.³ The ALJ accurately rejected Respondent’s claim that temporary employees did not perform bargaining unit work:

“Respondent contends that these temporary employees do not become unit employees regardless of how long they work because they are not performing bargaining unit work. I reject this claim. These temporary employees perform DRP and cleaning work, but that work is also performed by unit employees. Additionally, the temporary employees who become permanent temps also are assigned to work on the production lines and other areas, and they perform some of the same tasks the unit employees perform.” *ALJD 22: fn 17.*

Contrary to Respondent’s attempts to distance itself from the direct control it asserts over the terms and conditions of employment of its temporary employees, the record established that Respondent controls the number of temporary employees referred, requests employees by name, designates their start and end dates, determines and pays their wages through payments to People Source, authorizes conversion to the status of permanent temps, and utilizes its own staff to supervise, guide and lead those individuals referred by People Source. The record contains no evidence that People Source maintains any presence at Respondent’s facility. In essence, Respondent takes the position that it allows individuals to perform work in its facility, on its equipment, on its lines, hand in hand with undisputed bargaining unit employees without any say or control over their daily work. The ALJ’s conclusion concerning joint employer status is clearly supported by the record and Respondent exceptions and corresponding arguments should be dismissed.

³ Each permanent temp testified to being supervised directly by Respondent’s employees.

In citing *Tree of Life, Inc., d/b/a Gourmet Award Foods*, 336 NLRB 872, 874 (2001), the ALJ accurately concluded that as a joint employer, Respondent had an obligation to apply the terms of the parties' CBA to those individuals within the bargaining unit. *ALJD 21: 8-10*. Under Section 8(a)(5) of the Act, it is unlawful for an employer "to refuse to bargain collectively with the representatives of his employees," and Section 8(d) of the Act specifies, inter alia, that "to bargain collectively is the performance of the mutual obligation of the employer and the representative of employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment...." *Litton Financial Printing v. NLRB*, 501 U.S. 190, 198 (1991). Under Section 8(a)(5) and 8(d), an employer is prohibited from modifying the terms and conditions of employment established by an existing CBA without obtaining the consent of the union. *Southern Container, Inc.*, 330 NLRB 400, 400 fn.3 (1999); *Amoco Chemical Company*, 328 NLRB 1220, 1221 (1999). Under the 8(d) mid-term modification doctrine, where "wages, hours, and other terms and conditions of employment" are identified in the CBA, no party to that contract is required "to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract." *NLRB v. Scam Instrument Corp.*, 394 F.2d 884, 886-887 (7th Cir. 1968), cert. denied 393 U.S. 980 (1968). Article 14, Section 2 and Article 16, Section 5 of the parties' CBA speak to the 60-day probationary period and this is reiterated in Respondent's employee handbook. *GC 2, p.9, p. 12; GC 24, p. 7*. Article 16, Section 5 specifically reads that employees retained after the end of the probationary period shall be given continuous service credit back to the date of hire. The undisputed record testimony is that the parties have historically utilized the 60-day probationary period as the time period after which Respondent

converts employees furnished by a third party (such as People Source). Full-time Respondent employees Jason Gann and Darla Reed and former full-time employee Chris Montoya each provided unrefuted testimony that they were referred to Respondent by a third party staffing company and worked in that capacity for 60 days. After their 60-day probationary period, they converted to full-time status with Respondent. *T. 191, 281-282, 298-299*. As noted by the ALJ, there is no dispute that the named discriminatees Aguilar, Bunnell, Glory, Scott and Whisenhunt each completed 60 days of employment and did not receive the pay and benefits outlined in the parties' CBA. *ALJD 22:19-20*.

Respondent argues in its exceptions that the ALJ erred in finding 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." *R brief at 9, citing ALJD 22:21-23:2*. Respondent argues that the ALJ disregarded Article 16, Section 7 of the contract, which gives Respondent the "exclusive right to determine whom its employees shall be and from source(s) they will be chosen outside of the bargaining unit" and that the 60 day probationary period set forth in Article 16, Section 5 does not apply to People Source employees. *R brief at 9-10*. Respondent also cites to its Recognition Clause (Article 4) for the proposition that the Union is the bargaining agent over Respondent's "employees," a classification that the temporary employees do not fall within. Respondent's arguments fail based on the clear finding of a joint employer relationship with People Source. As such, the record fully supported the ALJ's conclusion that Respondent failed to abide by the terms of the parties' CBA when it failed to grant contractual pay and benefits to temporary employees who finished their 60 days of employment, in violation of Section 8(a)(1), (5) and

8(d).

Respondent additionally excepts to the ALJ's conclusion that Respondent violated Section 8(a)(1), (5) and 8(d) when it terminated the assignments of those temporary employees without the Union's consent. *ALJD 23:7-21*. Article 6 of the CBA allows for an employee to be terminated for "just and reasonable cause." *GC 2, p. 2-3*. The ALJ correctly concluded that Respondent failed to possess "just and reasonable cause" or "lack of work" when it terminated the assignments of temporary employees. Although Court Dooley testified that Respondent was uncertain as to what the Union wanted it to do following its August 2016 meeting over the subject, any type of confusion that could have possibly existed was clarified by Chad Vincent's August 12, 2017 email wherein he outlined exactly what the Union expected under the terms of the parties' contract. Therefore, the record supports the ALJ's findings that Respondent failed to abide by Article 6, without the Union's consent, in violation of Sections 8(a)(1), (5) and 8(d) of the Act.

Furthermore, Respondent, through Court Dooley, admitted that the decision to terminate the assignment of the temporary employees was in direct response to the Union taking the position that the employees in question were covered by the parties' CBA and entitled to the compensation and benefits that come with that. *T. 814-815*. Where the conduct for which an employer claims to have acted is due to an employee's protected activity, the action in question violates the Act and no analysis pursuant to *Wright Line*, 251 NLRB 1083 (1980) is necessary. See *Neff-Perkins Co.*, 315 NLRB 1229, 1229 fn. 2 (1994); *Mast-Advertising & Publishing*, 304 NLRB 819 (1991); *Phoenix Transit System*, 337 NLRB 510, 510 (2000). The ALJ reached this same conclusion. *ALJD 23:23-28*, citing *Schrock Cabinet Co.*, 339 NLRB 182 (2003). Respondent argues in its exceptions that the ALJ erred because there is no evidence that the

temporary employees engaged in any activity protected by the Act. Respondent's argument is misguided. The question is not whether the temporary employees engaged in protected conduct. The protected activity in question is the Union's attempt to enforce the terms of the parties' CBA and this is unquestionably protected conduct. *Id.*

Lastly, Respondent excepts to 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." *R Brief at 20, citing ALJD 39:20-21; 42:41-42.* Respondent argues that the ALJ erred because the GC did not plead or introduce any evidence pertaining to other temporary employees other than the five (5) named individuals in the Amended Fifth Consolidated Complaint. *Id.* Respondent's exception is simply contrary to existing Board law and procedures. By its failure to convert employees consistent with the CBA and past practice, Respondent has failed and refused to bargain collectively and in good faith with the exclusive collective bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation of Section 8(a)(1) and (5) of the Act. Where an employer violates Section 8(a)(5) by unilaterally changing terms and conditions of employment, the Board orders the employer to restore the status quo ante by, among other things, reinstating and making whole discharged employees and rescinding discipline where the discharges or discipline resulted from the unlawful unilateral change. *Alta Vista Regional Hospital*, 355 NLRB 265, 268 (2010); *Uniserv*, 351 NLRB 1361, 1361 n. 1, 1362 (2007). The make-whole remedy applies to all employees affected by the unilateral change.

For the reasons addressed above, the ALJ's conclusions regarding Respondent's handling of the temporary employees was supported by the record and Respondent's exceptions should be dismissed.

**C. Respondent's Conversion of Lines 6 and 7 to Op-Tech Lines
(Exceptions 16-20)**

Respondent argues that the ALJ erred in concluding that Respondent violated Sections 8(a)(1), (5) and 8(d) by unilaterally converting Lines 6 and 7 to Op-Tech Lines without the Union's consent. *R brief at 21-24*. Respondent operates a number of production lines at its converting facility. Approximately six or seven years ago, Line 8 transitioned into an "Op Tech" line. *T. 386*. An Op Tech line is a line where operators perform all functions on the line, including its maintenance. *T. 73, 386, 833*. The parties' most recent CBA speaks to Respondent's limited ability to change an existing line into an Op Tech line. Article 37 (Line 8 and Any New Line) reads in relevant part: "After the successful startup of (Line 8), the company may entertain the idea to expand this opportunity to line 7 and/or line 6. The understanding is both parties will discuss *and must agree* before expanding cell concept to existing lines." *GC 2, p. 29*. (emphasis added). During the life of the 2012-2016 CBA, the parties agreed that Respondent's Line 9 would convert into an Op Tech line. *T. 74, 387*. As of August 2016, Lines 6 and 7 were standard operational lines that bargaining unit employees could bid into. *T. 74*. During a meeting between Respondent and the Union in early August 2016, then Plant Operations Manager Brian Merryman told the Union that he would like to discuss converting Lines 6 and 7 to Op Tech. *T. 73*. Merryman advised that Respondent was engaged in a large capital project to convert the lines and he wanted the Union to agree to their conversion. *T. 73*. Union Staff Representative Chad Vincent asked that Respondent email him a proposal and the Union would take a look at it. *T. 73*. By email dated October 7, 2016, Respondent's Site Manager Court Dooley emailed Respondent's proposal to Vincent and other Union officers. *T. 75, GC 14*. After the Union received Respondent's proposal, Local membership met to discuss the proposed changes and a

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

Consistent with the GC’s argument, the ALJ accurately found Article 37 to be unambiguous. Respondent provides no substance to justify overturning the ALJ’s decision concerning the clear language of the contract. Respondent only cites to the testimony by Site Manager Court Dooley that he allegedly contacted *former* Union officers over the matter. *R brief at 22-24*. As the ALJ accurately noted, the Board “prohibits the use of parol evidence to vary the unambiguous terms of a collective-bargaining agreement.” *ALJD at 24:25-27, citing NDK Corp.*,

278 NLRB 1035 (1986); See also *Quality Bldg. Contractors, Inc.*, 342 NLRB 429, 430 (2004). Moreover, the ALJ correctly concluded that Respondent failed to provide sufficient evidence that it previously discussed the conversion of Lines 6 and 7 with the Union and that the Union agreed to it. *ALJD at 24:29-34*. The only evidence proffered by Respondent was discussed by Court Dooley with *former* Union officers Montoya and Wright. *GC 16*. The ALJ did not credit Dooley and Respondent excepts to that credibility resolution. It is well settled that the Board attaches great weight to an administrative law judge's credibility findings and its policy is not to overrule the ALJ's credibility resolutions unless the clear preponderance of all relevant evidence shows those determinations are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950). The ALJ's credibility resolutions are fully supported and consistent with the record. For these reasons, Respondent's exception regarding its conversion of Lines 6 and 7 to Op-Tech lines should be dismissed.

D. Respondent's Change of Health Insurance Provider (Exceptions 21-22)

Respondent argues that the ALJ erred by finding that Respondent unlawfully unilaterally changed health insurance providers without providing notice and an opportunity to bargain with the Union in violation of Sections 8(a)(1) and (5) of the Act. *R Brief at 24-25*. For the reasons outlined below, Respondent's exception lacks merit.

Respondent's bargaining unit employees receive health care benefits and the general parameters of that coverage are identified in Article 24 of the parties' most recent CBA. *T. 85-86, 223; GC 2*. In September 2016, HR Manager Doug Moss started the process of looking into changing Respondent's then-current health insurance provided by Community Care. *T. 753*. In late October 2016, after interviewing brokers, Moss selected one to assist Respondent. *T. 753*. Moss received insurance costs from three competing providers in November and needed to roll

out the newly selected plans by January 1, 2017. *T. 758-759*. Moss selected United Health Care to replace Community Care and Respondent then held benefit open enrollment meetings with employees on December 15 and 16, 2016. *Jt. 28*. A few days prior to the meetings, Union Vice President Jason Gann learned of Respondent's decision to change insurance during an unrelated face to face conversation he had with Moss. *T. 224-225*. Moss told Gann he needed to attend one of the meetings as an employee and he informed Gann that Respondent was changing providers. *T. 224-225*. Moss advised that it would save employees money. Gann responded by asking whether it should be "part of our decision as to whether we change or not...it is the people is the one that pays their insurance." (sic) *T. 226*. Moss reiterated that it would be a money saver, especially if employees don't use tobacco. *T. 226*. Union President Michael Besley learned of the change in a similar manner. The day before the enrollment meetings, Moss informed Besley that the United Care representatives would be at the facility to sign employees up. *T. 393-394*. Prior to this conversation, Besley knew that Respondent was looking into possibly making changes, but nothing had been mentioned in months. *T. 394-395*. Besley responded to Moss by telling him that the changes needed to be discussed. *T. 395*. Moss declined, noting that Respondent was moving forward with the change, the new insurance provider was scheduled to come to the facility and "they already changed over." *T. 395-396*. Along with the rest of Respondent's employees, Gann and Besley attended an enrollment meeting on December 15 or 16, 2016. *T. 228-229, 396*. Information concerning the new health benefits was distributed to employees at those meetings. *T. 225, 396-398; GC 18, 19*. Given no choice, Gann and Besley both enrolled in the new insurance. Both men testified to the personal effect the change had on them. Gann and Besley provided first hand testimony on how copays increased for their prescriptions and office visits. *T. 233-234, 400-401*. For Gann's family, certain prescriptions

increased in cost by four to six dollars. *T. 234.*

Respondent disputes the ALJ's conclusion 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" in arguing that he disregarded whether the change in carrier constituted a "material, substantial, and significant" change. See *ALJD at 25:16-18*. Respondent argues that it adhered to Article 24 of the CBA which requires Respondent to pay 80% of employees' health plan while employees pay the remaining 20% and that its change in carriers did not result in substantial, material or significant changes. *R Brief 24, GC 2 at 15*. As the ALJ wrote, the identify of employees' health insurance provider is a mandatory subject of bargaining. *ALJD 25:16-18*, citing *Seiler Tank Truck Serv. Inc.*, 307 NLRB 1090, 1100 (1992); *Connecticut Light Co.*, 196 NLRB 967 (1972), rev. 476 F.2d 1079 (2d Cir. 1973); *Aztec Bus Lines*, 289 NLRB 1021, 1036 (1988). Additionally, as noted by the ALJ in his decision, Respondent does not dispute that it failed to give notice to the Union before changing carriers. *ALJD 25:12-14*. See *S & I Transportation, Inc.*, 311 NLRB 1388, 1388 n.1, 1389-90 (1993)(fait accompli notwithstanding fact employer met with union); *Ciba-Geigy Pharmaceuticals Div.*, 264 NLRB 1013, 1017 (1982). Both Gann and Besley provided first hand testimony on the monetary changes each experienced as a result of the change in provider. *T. 233-234, 400-401*. Contrary to Respondent's exceptions, the ALJ applied the appropriate case law in reaching his conclusion that Respondent admittedly failed to notify and bargain with the Union over a mandatory subject. For these reasons, Respondent's exceptions should be dismissed.

E. Respondent's FRC Policy and Michael Besley (Exceptions 23-31)

In its exceptions, Respondent argues that the ALJ erred in finding that it unlawfully unilaterally modified its newly implemented fire resistant clothing (FRC) policy and applied that

unlawful policy against Michael Besley in violation of the Act. For the reasons addressed below, Respondent's exceptions lack merit.

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

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

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

During the same May 5, 2017 meeting, Graham Darby told employees that Respondent was going to ease into the implementation of the new clothing requirement. *T. 418, 615*. However, Respondent then immediately engaged in a series of violative interactions with Besley concerning its implementation of the FRC policy. On the same day that Besley was issued his FRC is when Darby and Dooley, consecutively, harassed Besley about his not wearing safety glasses even though Besley had no recollection of being instructed to wear them and Respondent being unable to disclose when he had been told three times to do so. *T. 421-425*. On May 6, 2017, Besley again asked Maintenance Lead Rhodes about when maintenance was required to wear the FRC because he was receiving contradictory instructions. *T. 425-426*. Rhodes

reiterated his previous instruction that maintenance only needed to have the long-sleeved shirt and helmet ready should they need to enter an electrical cabinet. *T. 427*. However, as detailed below under Respondent's Exception 47, the following day is when Rhodes and Maintenance Planner Keith threatened to suspend Besley when they found him not wearing his FRC.

On May 15, 2017⁴, Respondent continued to single out Besley. On that date, Besley attended his shift change meeting at 6:50 a.m. *T. 435*. When the meeting concluded, Keith and Rhodes asked that Besley stay behind. *T. 436*. Keith and Rhodes are not typically present for this meeting. *T. 438*. Rhodes informed Besley that Darby had given the two supervisors instructions that if Besley did not have his FRC on during the meeting he was to be suspended pending an investigation. *T. 436*. Respondent had not previously told Besley that there was an issue with him being present at the shift change meeting in his street clothes. *T. 438*. Respondent took Besley's badge and escorted him out of the building.

On May 23, 2017, Besley was called back to Respondent's facility to meet with Doug Moss, Graham Darby and Union Vice President Jason Gann. *T. 439*. Darby handed Besley copies of Respondent's new shoe, clothing and FRC policies. *T. 441*. Darby informed Besley that his FRC, including shirt, pants and steel-toed shoes, should be worn at all times. *T. 443-444*. Darby also told Besley that he needed to be fully dressed when he arrived at the turnover meeting at 6:50 (a.m./p.m.). *T. 444*. Darby also told Besley that he wanted maintenance to wear the FRC at all times for uniformity so that everyone looked the same. *T. 445*. Respondent then turned its attention to its view that Besley had failed to properly document his time in Respondent's Computer Maintenance Management System (CMMS). *T. 447*. Any alleged CMMS violation was not disclosed to Besley when he was sent home on May 15. When he

⁴ Besley's subsequent discipline indicates that Besley failed to wear the proper PPE on May 15, 2017. *Jt. 32*

asked about that fact, Darby informed Besley that during an investigation, Respondent “can investigate anything.” *T. 451*. Ultimately, although Respondent back paid Besley for his time missed during his suspension, it issued him a written warning. *T. 442; Jt. 32*. Besley’s discipline notes that he refused to wear PPE as directed by management and he continues to improperly use the CMMS system. It also requires that Besley’s productivity rate be between 65-80% on a daily basis and that he should start performing his assigned duties within 15 minutes after his shift meeting. Both directives constituted new working conditions for Besley. *T. 461-463*.

The ALJ found that Respondent engaged in the following unlawful conduct regarding the implementation of its new FRC policy: (1) In May 2017, Respondent broadened the FRC policy when it announced that maintenance employees would be required to wear the FRC at all times while on duty, as opposed to when they were working within the arc flash boundaries in violation of Section 8(a)(1) and (5) of the Act; (2) on May 15, 2017, Respondent suspended Michael Besley because he failed to comply with the unilaterally implemented FRC policy requiring maintenance employees wear their FRC at all times while on duty in violation of Section 8(a)(1) and (5) of the Act; (3) on May 23, 2017, Respondent issued Besley a written warning for failing to comply with the same unilaterally implemented rule in violation of Section 8(a)(1) and (5) of the Act; and (4) on May 23, 2017, Respondent issued a written warning to Besley in retaliation for his protected concerted and union activities in violation of Section 8(a)(1) and (3) of the Act.

Regarding the unlawful implementation of the FRC policy, the ALJ accurately credited the consistent testimony of four witnesses that during the parties’ April 12, 2017 meeting at Rogers State University, the parties discussed the FRC policy and Court Dooley instructed employees that he did not see why maintenance employees would need to wear FRC other than

when they were working near electrical cabinets. *ALJD* 26:28-32. See *T. 108-109, 252, 323-324, 408*. Dooley never denied giving this instruction at the hearing. Respondent argues that the ALJ erred in concluding that Darby broadened the FRC policy because he was “consistent and clear throughout that FR clothing should be worn at all times.” *R brief at 28*. Respondent also argues that Besley had received clear directives from his supervisors, specifically Darby, Rhodes and Keith. *R Brief at 30*. Respondent’s argument is not supported by the record, as found by the ALJ, in that Respondent implemented the FRC policy with instructions that maintenance employees need not wear the clothing at all times and later unilaterally changed that policy. As the ALJ wrote, “The Board has held that work rules requiring the use of safety and personal protection equipment are mandatory subjects of bargaining.” *ALJD* 25:31-37, citing *Public Service Co. of Oklahoma*, 334 NLRB 487, 489 (2001), *enfd.* 318 F.3d 1173 (10th Cir. 2003) (“work and safety rules” are a mandatory subject of bargaining); *AK Steel Corp.*, 324 NLRB 173 (1997); See also *Castle Hill Health Care Center*, 355 NLRB 1156, 1183 (2010); *Kohler Mix Specialties*, 332 NLRB 631, 632 (2000); and *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 29 (1982), *enfd.* 711 F.2d 348 (D.C. Cir. 1983). As such, the ALJ accurately found that Respondent modified a mandatory subject of bargaining without notice to or bargaining with the Union. Respondent fails to provide an argument that justifies reversal of that decision.

Regarding the discipline issued to Besley on May 15, 2017 (suspension) and May 23, 2017 (written warning), Respondent simply contests the ALJ’s determination that the discipline is unlawful due to the unilateral implementation of the FRC policy. For the reasons set forth above, the ALJ’s decision regarding the FRC policy is supported by the record. As such, Respondent’s exception concerning Besley’s May 2017 discipline is without merit.

Lastly, Respondent disputes the ALJ’s determination that the remainder of the May 15

and May 23 discipline issued to Besley was unlawful and his conclusion 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.” *R brief at 32, citing ALJD 28:2-7.*

Respondent argues that such an analysis would prevent it from ever issuing discipline to Besley. Respondent’s argument lack substance and avoids the facts at hand. The record is clear that Respondent targeted Besley in comparison to the rest of the maintenance employees. Although Darby admitted that Respondent sought to ease its employees into the new FRC requirement, on the very same day Besley received his new uniform, twice Respondent chastised him for not wearing safety glasses and advised he was held to a higher standard because of his Union position. *T. 421-425.* Respondent then proceeded to give Besley differing answers on his obligation to wear the FRC. One day he was told one thing and the next he was told something else, yet Respondent threatened to suspend him when he was following the direct orders given by his immediate supervisor. Again, this all took place during Respondent’s “easing in process.”

Finally, the record established that Respondent piled on infractions in order to substantiate the discipline issued to Besley upon his return from suspension. When Besley was sent home, the only reason he was given was that he was not wearing his FRC at the changeover meeting. Yet when he returned, he was advised that he had committed CMMS infractions. Darby admitted the piling on effect when he advised Besley that Respondent can look into anything during the “pending investigation” period. As the ALJ noted, the evidence revealed that any alleged performance related issues Respondent had with Besley did not become problematic until Besley engaged in consistent Section 7 activity that Respondent objected to. *ALJD 27:44-28:9.* As detailed by the ALJ, the timing of Besley’s discipline in relationship to his protected concerted

and union activities...support that the warning was motivated by animus. *ALJD* 28:2-5.

Respondent also failed to provide evidence to show that it would have issued Besley discipline if he was not engaged in protected activities. As such, the ALJ accurately found that the culmination of the evidence supports a finding that Respondent singled Besley out by suspending him and issuing him written discipline in violation of Section 8(a)(1) and (3) of the Act.

**F. Respondent's Changes to its Policy Regarding Union Activities
(Exceptions 32-33)**

Respondent argues that the ALJ erred in finding 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." *R Brief at 34 citing ALJD 28:44-48*. Respondent also disputes the ALJ's finding that it modified the terms of Article 8, Section 5 of the parties' CBA by making blanket statements to Union officials that they were prohibited from discussing Union business regardless of whether they obtained supervisory permission. *R Brief at 34, citing ALJD 29:1-5*. Respondent supports its exceptions by arguing that the GC failed to identify "a single instance where any member of Orchids' management" (1) prevented an employee from conducting Union business when they had permission of a supervisor or (2) disciplined an employee for the same conduct. *R Brief at 35*. As detailed below, Respondent's exceptions are without merit.

Regarding the ALJ's finding that Respondent verbally promulgated a discriminatory rule 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, the record supports this conclusion. As detailed under Respondent's exceptions pertaining to the independent 8(a)(1) violations found by the ALJ below, about February 8, 2017, Court

Dooley and Doug Moss met with Chris Montoya, Darla Reed and Michael Besley for the purpose of notifying Montoya that he was suspended pending investigation over an allegation that he threatened a co-worker. Dooley also instructed Montoya that he was not permitted to go outside of his work area “to be talking and carrying on” during work time. *T. 316-317, 379-380.* His instruction was that such conduct could only occur during non-work time. *T. 316-317, 379-380.* Moss’s notes from this meeting additionally read that “Dooley explained to all present that all union activities were to be limited to ‘non-work time and non-work areas.’” *T. 761-764; Jt. 38.* Dooley’s instruction was repeated by another supervisor the following day when Process Specialist Foss approached Reed at her work station. *T. 318-319.* Foss told Reed and other employees that they are not allowed to leave their lines to talk to other employees. *T. 319-320.* The record is undisputed that prior to early February 2017, employees were not prohibited from leaving their work areas or from going to other work areas to engage their coworkers. *T. 317-318, 380-381.* Respondent’s promulgation of this rule was part of a pattern to restrict employees’ Section 7 rights to discuss Union related matters and matters concerning employees’ terms and conditions of employment. In *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-647 (2004), the Board set forth a two-step inquiry for determining whether a rule violates the Act. First, it will be unlawful if the rule explicitly restricts Section 7 activities. If the rule does not, it might still be unlawful if (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. Respondent’s rule was promulgated and communicated in direct response to employees engaged in protected activity, specifically, employees discussing matters related to the Union. Additionally, employees would reasonably interpret such a restriction as prohibiting them from engaging in Section 7 activity as

Respondent attempted to limit employees' ability to engage in discussions with each other and any subsequent attempt to do so now subjects employees to potential discipline. As such, the ALJ's conclusion regarding the new rule prohibiting Union discussion during work time was supported by the record.

Additionally, Article 8, Section 5 of the parties' CBA reads that Union business can be conducted during working hours with the permission of supervision. *GC 2, p. 5*. As detailed later in this brief under Respondent's exceptions 36, 37, 43, and 46, the record is filled with examples of incidents where Respondent communicated to Union officers that they were prohibited from engaging in Union business on the floor or during work time without exception. Furthermore, with respect to actual Union business, such as grievance investigations or filing, the undisputed record testimony is that the parties' past practice has been that it has been permitted to engage in such activity during work time. *T. 304, 376*. Respondent provided no evidence to the contrary.

Section 8(a)(5) and 8(d) prohibit an employer from modifying the terms and conditions of employment established by an existing CBA without obtaining the consent of the union. *Southern Container, Inc.*, 330 NLRB 400, 400 fn.3 (1999); *Amoco Chemical Company*, 328 NLRB 1220, 1221 (1999). First, the directives issued by Respondent below under Respondent's Independent 8(a)(1) Violations (Exceptions 34-49) involve basic Section 7 conversations that do not rise to any reasonable definition of Union business. Even if they did, Respondent's directives contradict the parties' interpretation and use of Article 8, Section 5. Union officers Darla Reed and Michael Besley each testified that employees have been allowed to engage in Union business and at the very least, such activity is permitted by the contract with supervisory permission. What Respondent did was create a flat prohibition against any type of Union business on the floor, regardless of contractual guidance or past practice. Respondent's modification of this term

and condition of employment constituted an unlawful mid-term modification under the Act. Respondent argues that the GC failed to provide evidence that management prevented an employee from conducting Union business when they had permission from a supervisor or that anyone was issued discipline for performing authorized Union business. A long history of Board law fails to support Respondent's position. See *Cintas Corp. v. NLRB*, 482 F.3d 463, 467-68 (DC Cir. 2007)(affirming that "the Board is under no obligation to consider" evidence of employer enforcement of overbroad work rule against Section 7 activity); *Waco, Inc.*, 273 NLRB 746, 747-748 (1984)(unlawful rule although no employee testified that it inhibited them from engaging in protected activity); *Independent Stations Co.*, 284 NLRB 394, 397 (1987). The ALJ's decision was supported by the record and for these reasons Respondent's exceptions should be dismissed.

G. Respondent's Independent 8(a)(1) Violations (Exceptions 34-49)

Respondent disputes the ALJ's findings that it violated Section 8(a)(1) of the Act through numerous unlawful statements it made to employees as set forth in the GC's Consolidated Complaint. For the reasons set forth below, Respondent's exceptions 34-49 should be dismissed.

1. 8/24/16 Conversation Between Dooley and Gann (Exception 34)

As discussed above, about August 16, 2016, Union Vice President Jason Gann filed a grievance over Respondent's failure to convert temporary employees who were employed at the facility for more than 60 days. *T. 53-54, 203; GC 10*. About August 24, 2016, Gann filed another grievance when Respondent ended the employment of its temporary employees, including those present for longer than 60 days. *T. 222; GC 11*. After doing so, Gann advised Respondent's Site Manager Court Dooley that he needed to reinstate those individuals in lieu of Respondent's plan to hire new employees. *T. 222*. During this conversation, Dooley informed Gann that the reason Respondent ended the temporary employees' employment was because Gann had requested that

Respondent do so. *T. 222-223*. Gann had not made that request, only that Respondent could not keep temporary employees longer than 60 days without hiring them. *T. 223*. As Respondent had employed temporary employees longer than 60 days, through the parties' grievance procedure, Gann and the Union sought to have Respondent make those individuals whole through reinstatement as unit employees with full backpay. *GC 10; GC 11*.

Gann testified that Court Dooley told him that Respondent rid itself of temporary employees present for longer than 60 days because the Union requested that it do so. As credibly testified to by Gann and Union Staff Representative Chad Vincent, and corroborated by the Union's grievances and Chad Vincent's August 12, 2016 email confirming the Union's position, the only request made by the Union was that the individuals who had worked at Respondent's facility for 60 days be reinstated and made whole. *T. 47, 62-63, 68, 70-71, 223; GC 4; GC 10; GC 11*. In defending his position, Dooley admitted that Respondent removed the temporary employees because the Union. The manner in which the Union did so was the parties' grievance procedure. When an employer tells an employee that it disciplined the employee or another employee because of union or protected concerted activity, it violates Section 8(a)(1). *Bowling Transportation, Inc.*, 336 NLRB 393, 393 (2001)(finding Section 8(a)(1) violation because employer told employees they were removed from the employer's property because they engaged in union and/or protected concerted activity); *Atlas Transit Mix Corp.*, 323 NLRB 1144, 1150 (1997). As such, the ALJ accurately concluded that when Dooley continued to blame the Union for the discharge of these employees, Respondent violated Section 8(a)(1) of the Act.

2. 11/29/16 Conversation Between Dooley, Reed and Besley (Exceptions 35-37)

The record established that on multiple occasions, Respondent sought to restrict employees' ability to engage in Section 7 activity and discuss Union related topics by

categorizing basic Section 7 discussion as impermissible “Union business.” In late November 2016,⁵ Court Dooley and HR Manager Doug Moss met with Local 1480 Recording Secretary Darla Reed and Local 1480 President Michael Besley in Dooley’s office. *T. 300-301*. Dooley accused Reed of harassing employees when on two occasions she discussed with employees an ongoing decertification effort by unit employees. *T. 301*. During the meeting, Dooley told Reed that employees “could not talk Union business on the floor” and that they only could do so on breaks. *T. 303*. Besley corroborated Reed’s testimony. *T. 374*.

Respondent’s restrictions concerning “union business” have not been limited to instances of grievance filing, grievance investigations or anything similar. Respondent has decided to interpret any conversation related to the Union or employees’ terms and conditions of employment as “union business” and such has unlawfully restricted employees’ Section 7 rights. Employees provided undisputed testimony that Respondent has historically permitted employees to discuss non-work topics during work time. *T. 303-304, 377-378*. As found by the ALJ, an employer may not limit union discussions when it otherwise allows employees to discuss non-work subjects or if it imposes the policy in response to union organizational activity. *See, e.g., Altercare of Wadsworth Center for Rehab., 355 NLRB 565, 573 (2010); Sam’s Club, 349 NLRB 1007, 1009 (2007); Scripps Memorial Hospital Encinitas, 347 NLRB 52 (2006)*. The ALJ’s ruling was consistent with Board law and Respondent’s exception is without merit.

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

After doing so in November 2016, Respondent continued to make similar harassment accusations toward Union officer Darla Reed without giving any context or details. In about

⁵ Darla Reed testified that the violation occurred “after Thanksgiving” 2016. *T. 300-301*. CPT ¶6(b)

December 2016, Process Specialists Brad Blower and Kelly Foss⁶ approached Reed on the floor and requested that she join them in the office. *T. 305-306*. Once there, both supervisors told Reed that she had been harassing people on the floor and it had to stop. They provided Reed with no details. *T. 306-307*. The ALJ accurately found that under the circumstances, “the vague accusations of harassment and instructions to stop could reasonably be interpreted as reaching protected – but unwelcome – union solicitation or activity.” *ALJD 30:30-32*. Respondent does not provide any explanation for its exception other than it was responding to a complaint and it did not take any adverse action against Reed. Respondent’s argument is contrary to clear, long established Board law that the test of the coerciveness of a statement does not hinge on the actual effect on an employee (i.e. discipline). When analyzing 8(a)(1) violations, the basic test is whether considering all of the circumstances, the employer’s conduct would reasonably tend to restrain, coerce, or interfere with employee rights provided under Section 7 of the Act. *Mediplex of Danbury*, 314 NLRB 470, 472 (1994). Here, as the ALJ found, Respondent violated Section 8(a)(1) of the Act by vaguely telling Reed that she had been harassing other employees. “Harassment” is an incredibly broad term, and the Board has taken a cautious approach in analyzing employers’ attempts to characterize protected activity in such a manner. *See, e.g., St. Pete Times Forum*, 342 NLRB 578, 588 (2004). If an employer offers employees no guidance about the nature of their misconduct, a blanket statement that they have been harassing employees has an overwhelming likelihood of chilling Section 7 activity. *See Greenfield Die & Mfg. Corp.*, 327 NLRB 237, 1–238 (1998). As such, Respondent’s exception should be dismissed.

⁶ Blower and Foss are admitted supervisors and agents. GC 1(UUU).

4. 1/25/17 Conversation Between Dooley and Gann (Exceptions 39-41)

In January 2017,⁷ Jason Gann served as a Union representative for employee Gabriel Cutler who was accused of being away from his line. *T. 237-238*. While serving in this capacity, Gann contested Respondent's position as he felt it contradicted the stance of Respondent's District Manager (and former plant manager) Eric Diring. *T. 239*. Gann called Diring and after being advised of the reason for the call, Diring asked to speak privately with one of the supervisors in the meeting. *T. 240-241*. Diring's response prompted Gann to tell Cutler that management were "liars" because he anticipated Diring "going back on his word." *T. 241*. Shortly after the meeting, Court Dooley called Gann and in a loud, angry tone, ordered Gann to his office with the instruction to bring representation. *T. 242-243*. Once in his office, Dooley told Gann that he did not like how Gann treated management in the Cutler meeting and he did not need to talk to management that way. *T. 244*. Gann defended himself by responding that he was a Union officer and if management raises their voices at him or gets "smart" with him, he can do the same. *T. 244*. Dooley then advised that Gann was being watched by people on the floor and they had reported that he had been doing Union business during company time. *T. 244-245*. When Gann questioned whether Dooley was having him watched. Dooley denied doing so, but reiterated that people had been reporting Gann doing Union business on company time. *T. 245*. Dooley then questioned whether Gann lets his supervisor know when he leaves his work area. *T. 245*. Gann's lead man, John Stafford, served as his representative in this meeting and confirmed that Gann tells him every time he leaves his work station. *T. 245-246*. The meeting concluded when Dooley reiterated that Gann should let someone know whenever he leaves his work station.

The ALJ found three violations within Dooley's interaction with Gann: (1) Dooley's

⁷ CPT ¶6(d-f)

blanket statement to Gann that he did not like the way that Gann treated his management during the Cutrer meeting and he was not going to treat his management that way would have a tendency to interfere with, restrain, or coerce employees in the exercise of their protected concerted and union activities; (2) Dooley created an impression of surveillance that Gann's protected union activities were under surveillance; and (3) Dooley created the impression that Gann's Union activities would be placed under greater scrutiny and therefore have a reasonable tendency to interfere with, restrain, or coerce him in acting as a union steward. *ALJD 30: 39-31: 37*. Again, Respondent argues that it did not take adverse action against Gann and it never directly told Gann that he was being watched. As previously addressed, actual adverse consequence is not an element of determining whether a statement is coercive. Regarding whether a statement constitutes an impression of surveillance, the Board's test is whether an employee would reasonably assume from the statement that their union activities have been placed under surveillance. *Flexsteel Industries, Inc.* 311 NLRB 257 (1993), citing *Rood Industries*, 278 NLRB 160, 164 (1986). As the ALJ accurately found, Dooley made it known that employees were watching Gann and reporting to management and that Dooley found the reports sufficiently significant to bring them to Gann's attention. Because a reasonable employee would not know how Dooley acquired information concerning Gann's Union activity, whether through supervision or by order of Respondent, a reasonable employee would assume from the statement that unlawful surveillance was taking place. Lastly, with respect to the ALJ's finding concerning Dooley prohibiting Gann from conducting Union business on the production floor, the record fully supports the ALJ's conclusion that in the context of Dooley's other unlawful statements to Gann during the same conversation, Gann would have a reasonable tendency to understand that his Union activities were under greater scrutiny and interfere with his role as a Union

representative. For these reasons, Respondent's exceptions lack merit.

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

Respondent repeated its conduct on about February 6, 2017, when Bradley Blower and Kelly Foss approached Darla Reed while she was on the production floor. *T. 307-309*. They reiterated the same general claim as they had in December that Reed had been on the floor harassing people again. When Reed disputed the accusation, the supervisors repeated their claim. *T. 309*. Neither Blower nor Foss gave Reed any details. *T. 309*. Consistent with Board law, and his earlier conclusion when Respondent engaged in the same unlawful conduct with Reed in December 2016, the ALJ found Respondent's vague accusations of harassment and its instructions to stop such that they could reasonably be interpreted as covering protected union solicitation or activity. *ALJD 31: 39-50. See, e.g., St. Pete Times Forum*, 342 NLRB 578, 588 (2004); *Greenfield Die & Mfg. Corp.*, 327 NLRB 237, 1-238 (1998); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Respondent does not dispute the details of what Blower and Foss communicated to Reed and argues, again, that she was not issued discipline and was not told she could not engage in Union activities during work hours or at the facility. *R brief at 39*. Through its arguments, Respondent fails to provide any justification for overturning existing Board law and in turn, the ALJ's conclusion.

6. 2/8/17 Conversation Between Moss and Dooley and Reed and Montoya (Exception 43)

On about February 8, 2017, Court Dooley and Doug Moss met with employee Chris Montoya and Union representatives Darla Reed and Mike Besley for the purpose of notifying Montoya that he was suspended pending an investigation of a complaint that had been made against him by a coworker. Dooley also instructed Montoya that he was not permitted to go outside of his work area "to be talking and carrying on" during work time. *T. 316-317, 379-380*.

The instruction was that such conduct could only occur during non-work time. *T.* 316-317, 379-380. Moss's notes from this meeting additionally read that "Dooley explained to all present that all union activities were to be limited to 'non-work time and non-work areas.'" *T.* 761-764; *Jt.* 38. The ALJ found that Dooley's broad statement prohibiting employees from discussing the Union while on the work floor on or on work time, while allowing other non-work related discussions violated Section 8(a)(1) of the Act. *ALJD* 32:37-39, citing *Sam's Club*, 349 NLRB 1007, 1009 (2007); *Scripps Memorial Hospital Encinitas*, 347 NLRB 52, 52 (2006). The ALJ's conclusion is consistent with Board law and the undisputed facts in this case. Respondent provides no justification for overturning the ALJ's decision.

7. 4/28/17 Conversation between Moss, Reed and Russell (Exceptions 44-45)

Respondent implemented several new policies concerning mandatory subjects of bargaining, including a clothing policy dictating what employees could and could not wear effective April 29, 2017. *Jt.* 10; *Jt.* 21. On various dates between April 10 and 28, 2017, Respondent held mandatory meetings where Doug Moss and Kris Thom gave employees training on the new clothing requirements. *Jt.* 12, #2496-2499. Darla Reed attended the meeting conducted on April 28, 2017.⁸ *T.* 325; *Jt.* 13, #2524. As of the date of this meeting, Reed was aware of some of the changes that would be implemented, including the requirement that employees were prohibited from wearing shorts and capris. *T.* 326. During the meeting, Reed questioned whether management would join employees on the floor and work with them while wearing jeans when it was 110 degrees. *T.* 327. After Reed asked this question, Moss ended the meeting. *T.* 327. Thirty minutes later, Moss called Reed and fellow meeting attendee Darlene Russell to his office. Moss accused Reed of singling him out with her question. *T.* 328. Reed

⁸ Although Reed's recollection was that the meeting took place on April 20, 2017, Respondent's sign in sheet shows she attended the meeting held on April 28, 2017. (*Jt.* 13, #2524).

denied doing so and reiterated her question. *T.* 329. Reed testified that in response, Moss said that “from here on out, if I had anything to say, I was to say it before the meeting or after the meeting, and I couldn’t say nothing during the meetings.” *T.* 328-329. According to Moss, he told Reed and Darlene Russell “if they had objections to the policies and they felt that strongly about it, if they wanted to cuss me or raise their voice at me to do so before or after the meeting in my office or in some other office but not to conduct themselves that way in a company meeting.” *ALJD* 32: 48-50, 33:1. The ALJ found that regardless of the version he credited, Moss issued an overbroad restriction to Reed and Russell concerning what they can say in future meetings. *ALJD* 33:1-4. As the ALJ noted, “The Board has found that an employer violates Section 8(a)(1) of the Act by maintaining rules that are so broad that they would reasonably be construed to limit protected criticism of the employer.” *ALJD* 33:4-6, citing *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998); *Southern Maryland Hosp. Ctr.*, 292 NLRB 1209, 1221 (1989); and *Great Lakes Steel*, 236 NLRB 1033, 1037 (1978). “An employer violates Section 8(a)(1) of the Act if its conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights.” *Frontier Hotel & Casino*, 323 NLRB 815, 816 (1997). In this instance, Moss’s prohibiting Reed and Russell from speaking during meetings is a blatant overbroad prohibition against her rights to engage in Section 7 activity. For these reasons, Respondent’s exceptions should be dismissed.

8. 5/5/17 Conversation Between Cochrell and Besley (Exception 46)

On May 5, 2017, employee Sean Teiger approached Union President Michael Besley while lines, including Teiger’s, were shut down. *T.* 383-384, 385. Teiger asked Besley to look at a written warning he received due to excessive attendance points. *T.* 383-384. The conversation lasted no longer than two or three minutes. *T.* 384. Besley observed Process Specialist Jeff

Cochrell⁹ approach Teiger. Teiger then told Besley that Cochrell had told him he could not do Union business on the floor on company time. *T.* 384. Besley then found Cochrell and explained that he could not prohibit employees from doing Union business on the floor. Cochrell responded that he was new in the position and was not aware of that. *T.* 385.

As addressed above, employees provided undisputed testimony that Respondent has historically permitted employees to discuss non-work topics during work time. *T.* 303-304, 377-378. As found by the ALJ, an employer may not limit union discussions when it otherwise allows employees to discuss non-work subjects or if it imposes the policy in response to union organizational activity. *ALJD* 33:21-36. *See, e.g., Altercare of Wadsworth Center for Rehab.*, 355 NLRB 565, 573 (2010); *Sam's Club*, 349 NLRB 1007, 1009 (2007); *Scripps Memorial Hospital Encinitas*, 347 NLRB 52 (2006). Respondent argues that Cochrell was a “newer employee” relying upon the parties’ CBA, which reads that supervisory permission is required if union business or investigation of grievances need to be conducted during working hours. Respondent’s argument provides no basis to overturn the ALJ’s finding that Respondent has unlawfully announced overbroad prohibitions repeatedly to its employees regarding topics related to the Union while allowing all other non-work topics to be discussed.

9. 5/7/17 Conversation Between Besley, Rhodes and Keith (Exception 47)

On May 5, 2017, Mike Besley and the rest of his shift maintenance crew received their unilaterally implemented fire resistant clothing (FRC) consisting of a long sleeve shirt and long pants. On May 6, 2017, Besley talked to Maintenance Lead Matt Rhodes to ask about the FRC. Specifically Besley asked if maintenance employees were required to wear the clothing at all times. *T.* 427. Rhodes responded in the negative, noting that maintenance employees “can have

⁹ Cochrell is an admitted supervisor and agent. GC 1(UUU).

the shirt ready with your helmet.” *T. 427*. Rhodes’ reply was the same position communicated by Respondent when it met with both locals on April 12, 2017. *T. 108-109, 252, 323-324, 408*. On May 7, 2017, Maintenance Planner Richard Keith approached Besley while Besley was still in his street clothes. Keith asked Besley about the location of his FR clothing. *T. 429*. When Keith asked if he was going to put them on, Besley responded that he did not know he needed to. *T. 429*. Keith then ordered Besley to his office. When the two reached the office, Rhodes was present. *T. 429*. After offered the opportunity, Besley requested that maintenance employee Cory Pendleton serve as his representative in the meeting. *T. 429*. Pendleton was not dressed in his FR clothing because the spelling of his name was wrong on his shirt. *T. 429-430*. Pendleton is not a member of the Union. When he arrived with Besley, Matt Rhodes asked if Pendleton was in the Union and when Pendleton confirmed that he was not, Rhodes asked Besley if he could still represent him. *T. 430*. Besley had no objection but then remembered Union Vice President Gann was in the building and requested that he join the meeting. *T. 431*. Once Gann was present, Rhodes told Besley that if he did not put on his uniform, Darby had given them instructions to suspend Besley until further investigation. *T. 431*. Besley reminded Rhodes of their conversation the prior day, and Rhodes responded by saying he was misinformed. Rhodes reiterated if Besley failed to put on his uniform he would be suspended. *T. 431*. Besley then complied because he had three junior mechanics on his shift and he was not going to leave them alone. *T. 432*.

Based on the ALJ’s conclusion above that Respondent modified its FRC policy to require that maintenance employees wear their FRC at all times while on duty without providing the Union with prior notice, Rhodes and Keith’s corresponding threat to discipline Besley for not complying with a unilaterally implemented rule violated Section 8(a)(1) of the Act. *ALJD 34:14-22, citing GHR Energy Corp.*, 294 NLRB 1011, 1048 (1989); *Advanced Installations, Inc.*, 257

NLRB 845 (1981). As Respondent's exceptions to the ALJ's finding regarding its unlawful modification of the FRC policy lacks merit, so does this corresponding exception.

10. 5/25/17 Conversation Between Moss and Besley (Exceptions 48-49)

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

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

The ALJ properly found that under the circumstances, where Respondent had unlawfully changed its FRC policy to require that employees wear the assigned clothing at all times, Moss's questioning of Besley and his continued "beating the pants thing to death" amounted to a threat

of unspecified reprisals. *ALJD 35:18-21*. “The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain, or coerce union or protected activities”. *Park ‘N Fly, Inc.*, 349 NLRB 132, 140 (2007). Respondent argues in its brief that the statement was appropriate because its FRC policy was implemented for safety reasons. Respondent’s exception fails to provide a valid reason to overturn the ALJ’s decision and should be dismissed.

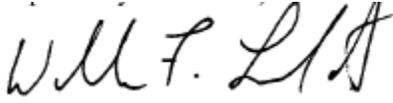
Additionally, the ALJ found that Moss violated Section 8(a)(1) when he instructed Besley not to report Respondent to OSHA. *ALJD 35:23-35*. The ALJ astutely noted that the Board has held that an employer cannot interfere with, restrain, or coerce employees in their concerted communications regarding matters affecting their employment with third parties such as governmental agencies. *Id.*, citing *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171-1172 (1990). That is exactly what Moss did regardless of the version credited. Respondent argues Moss did not threaten Besley, but simply requested that he contact management if he had a safety concern. Respondent’s argument seeks to split hairs and fails to provide any justification for a reversal of the ALJ’s decision and long existing Board precedent.

III. Conclusion

The General Counsel respectfully submits that for all of the reasons set forth above, Respondent’s exceptions are without merit and that the ALJ’s findings that Respondent violated Sections 8(a)(1), (3), (5) and 8(d) of the Act, as alleged, are supported by the record. The General Counsel requests that the Board affirm the ALJ’s recommended order.

Dated: October 26, 2017

Respectfully Submitted,



William F. LeMaster

William F. LeMaster
Julie M. Covell
Counsel for General Counsel