

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

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HUBER SPECIALTY HYDRATES, LLC	*	
	*	
and	*	Case 15-CA-168733
	*	
UNITED STEEL WORKERS, LOCAL 4880	*	
	*	
and	*	Cases 15-CA-177324
	*	15-CA-179549
BRANDON HARMON, an Individual	*	
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**COUNSEL FOR THE GENERAL COUNSEL’S  
ANSWERING BRIEF TO RESPONDENT’S EXCEPTIONS TO  
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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

Jacqueline Rau, Counsel for the General Counsel in the above case, submits this answering brief to Respondent’s exceptions to the decision of the Administrative Law Judge.

**I. STATEMENT OF THE CASE**

Administrative Law Judge (ALJ) Christine E. Dibble presided over the hearing on April 6 and 7, 2017 in Little Rock, Arkansas. On January 29, 2018, ALJ Dibble issued her Decision and Order (ALJD) in this case (JD-07-18). ALJ Dibble determined that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain collectively with the United Steel Workers, Local 4880 (the Union) regarding changes to the attendance policy.<sup>1</sup> ALJ Dibble dismissed the allegation that Respondent violated Section 8(a)(1) by prohibiting employees from discussing grievances with other employees, and the allegation that Respondent violated Section 8(a)(1) and 8(a)(3) of the Act by disciplining its employee Brandon Harmon for engaging in protected concerted activities and union activities. On March 16, 2018, Respondent filed exceptions to the ALJ’s Decision (Respondent’s Exceptions), excepting to the ALJ’s findings of fact, inferences, and conclusions of law relating to the 8(a)(1) and 8(a)(5) allegation that Respondent failed and refused to bargain collectively with the Union regarding changes to the attendance policy, and filed a brief in support of their exceptions (Respondent’s Brief).<sup>2</sup>

Respondent raised sixteen exceptions to the ALJ’s Decision. Pursuant to the National Labor Relations Board’s (the Board’s) Rules and Regulations § 102.46(d)(1), Counsel for the General

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<sup>1</sup> References to the Exhibits of the General Counsel, Respondent, and to Joint Exhibits are designated as “GCX-#,” “RX-#,” and “JX-#” respectively, with the corresponding number for the exhibit. References to the transcript are designated as “Tr. at #,” with the corresponding page number. References to ALJ Dibble’s decision are referred to as ALJD, with the corresponding page number.

<sup>2</sup> Respondent failed to serve the Union, although it is a party to the case, with either its exceptions or its brief in support of exceptions pursuant to the Board’s Rules and Regulations § 102.46(h).

Counsel (General Counsel) submits this Answering Brief to Respondent's Exceptions, which addresses each of Respondent's exceptions.

## **II. STATEMENT OF FACTS**

### **A. BARGAINING HISTORY**

Hourly employees at Respondent's facility are represented by the United Steel Workers, Local 4880 (the Union), which has continuously represented employees at the facility for several decades. (Tr. at 25; Tr. at 182). The parties have a current collective bargaining agreement, which went into effect on March 1, 2015 and expires on March 1, 2020. (JX-1). The collective bargaining agreement contains a management rights clause under Article IV, which states:

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

The parties' previous collective bargaining agreement, operative from April 1, 2012 until March 1, 2015, contained the same language in the management rights clause except for the last sentence. (RX-5). The previous collective bargaining agreement's management rights clause contained the sentence "[t]he Company will continue to apply the existing Employee policy book," which the parties omitted in the current collective bargaining agreement. (RX-5). The parties discussed the elimination of that sentence during contract bargaining. A specific reference to the policy book was unnecessary because as Union President Albany Bailey, who

served on the Union's negotiating committee, testified, Respondent told the Union that it did not foresee any changes to any policies. (Tr. at 79).

During bargaining, the Union proposed including the attendance policy in the collective bargaining agreement itself. (Tr. at 84). The Union and Almatris, the previous employer at the facility, bargained the attendance policy separately from the collective bargaining agreement in 2009. (Tr. at 28). Respondent and the Union continued to adhere to the previously negotiated attendance policy. (Tr. at 28; 83). Ultimately, the Union withdrew its proposal to incorporate the attendance policy into the collective bargaining agreement. The Union specifically told Respondent during bargaining that any changes to the attendance policy require bargaining even if not included in the collective bargaining agreement itself because attendance is a mandatory subject of bargaining. (Tr. at 295-296; GCX-26). Keeping the attendance policy apart from the collective bargaining agreement is consistent with other policies affecting the terms and conditions of employment, including the corrective action discipline policy. (JX-10).

## **B. TIMELINE OF RELEVANT EVENTS**

The ALJ's decision outlines the timeline of relevant events, appropriately relying on undisputed testimony and joint exhibits. (ALJD at 5-7).

On December 17, 2015, the Union and Respondent had a Central Committee meeting. (JX-4; JX-5; Tr. at 29; Tr. at 90; ALJD at 5).<sup>3</sup> Pursuant to the collective bargaining agreement, the parties meet monthly at Central Committee meetings to discuss issues at the facility. (JX-1; Tr. at 29; Tr. at 90). The December 17, 2015 Central Committee meeting was attended by Union President Albany Bailey, Union Vice President Christian, Union Representative Oscar Murdock,

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<sup>3</sup> The ALJ properly relied upon Christian and Bailey's corroborated testimony regarding this meeting. Although called by Respondent to testify, neither Parker nor Smith testified to the December 17, 2015 Central Committee meeting. (Tr. at 173-200; Tr. at 240-250).

Respondent's Human Resources Manager Jessica Rowan, Respondent's Plant Manager Frank Viguerie, Respondent's Facility Manager Travas Parker, and Respondent's Back End Process Engineer Jason Smith. (Tr. at 30). At the meeting, Human Resources Manager Rowan gave the Union representatives a draft copy of a new attendance policy. (JX-3; Tr. at 31; Tr. at 91). Upon receipt of the changed policy, both Union officers Bailey and Christian immediately protested the significant and material changes in the policy. Bailey objected to the drastic decrease in the number of occurrences (days absent from the facility) that an employee could receive before discharge, from twelve (12) occurrences to eight (8) occurrences. (Tr. at 32-33; Tr. at 52; Tr. at 92). Christian questioned whether employees who already had nine (9) occurrences, now more than the allowable number of occurrences before discharge under Respondent's new policy, would be adversely impacted by the changes. (Tr. at 92; Tr. at 103). The Union told Respondent that it could not agree to the new attendance policy without seeking feedback from the Union's membership. (Tr. at 34; Tr. at 54; Tr. at 92; ALJD at 5). After discussing its new terms, Human Resources Manager Rowan told the Union that Respondent intended to implement the changes to the attendance policy. (Tr. at 263). Although Rowan asked for the Union's input on the policy, she testified that she intended to implement a new attendance policy on January 1, 2016 regardless of the Union's position or whether or not she received any further input from the Union. (Tr. at 289; GCX-7).

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

About a half hour later, on January 5, 2016, Union President Bailey sent an e-mail entitled, “Cease and Desist/Attendance Policy” to Human Resources Manager Rowan, Facilities Manager Parker, and Back End Process Engineer Smith. Bailey also copied Union Vice President Christian and United Steel Workers Staff Representative Michael Martin on the e-mail. (JX-6(b); ALJD at 6). In his e-mail, Bailey demanded Respondent cease from implementing the attendance policy until the parties had bargained. Bailey also requested Respondent contact Staff Representative Martin to bargain. (ALJD at 6; JX-6(b)).

On January 13, 2016, Facilities Manager Parker called Union President Bailey into his office to discuss Bailey’s e-mail demanding to bargain over changes to the attendance policy.<sup>4</sup> (Tr. at 36). Bailey met with Parker and Human Resources Manager Rowan. Rowan complained that Bailey’s e-mail was more assertive than normal. (Tr. at 37). Parker told Bailey that Respondent had the right to implement policies. (Tr. at 37-38). Bailey replied that “everything was subject to bargaining and the grievance process.” (Tr. at 38).

On January 13, 2016, Human Resources Manager Rowan responded to Union President Bailey’s e-mail and specifically cited the management rights clause as justification for Respondent’s position that it was not required to bargain over the changes to the attendance policy. (ALJD at 6; JX-6(b)). Rowan informed Bailey that the attendance policy will be effective February 1, 2016, but she would be glad to consider the Union’s input. (JX-6(b)). Less than an hour later, on January 13, 2016, Union President Bailey responded to Human Resources Manager Rowan’s e-mail and reiterated the Union’s demand to bargain. (ALJD at 6; JX-6(b)).

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<sup>4</sup> In crediting this conversation, the ALJ properly relied on Bailey’s undisputed testimony, which was supported by a reference in Rowan’s January 14, 2016 e-mail. Rowan did not testify about the conversation although she referenced the conversation in her January 14, 2016 e-mail and despite Respondent calling her to testify. (Tr. at 254-294; JX-6(b)). Similarly, Parker did not testify to the conversation with Bailey, although Respondent called him to testify. (Tr. at 173-200).

On January 14, 2016, Human Resources Manager Rowan responded to Union President Bailey's e-mail, and informed him "[t]he management rights clause is a clear and unmistakable waiver of the company's obligation to bargain over adopting policies. It provides a specific process for providing the union with a week of time to provide any input and the right after implementation to grieve." (ALJD at 6; JX-6(b)). Rowan also provided the Union with an additional week to submit any concerns or input regarding the attendance policy. (JX-6(b)).

About an hour later, on January 14, 2016, Union President Bailey responded to Human Resources Manager Rowan's e-mail and refuted Respondent's argument that collective bargaining agreement waived Respondent's obligation to bargain. (ALJD at 6; JX-6(b)). Bailey, once again, demanded Respondent cease any unilateral change or implementation of the attendance policy until the parties could bargain. (JX-6(b)).

On January 14, 2016, Union Vice President Christian filed a grievance over the Respondent's announced changes to the attendance policy. (ALJD at 6; JX-7; Tr. at 93). In the grievance, the Union requested that Respondent refrain from making any changes to the existing attendance policy without "explicit agreement between the Union and the [C]ompany." (JX-7). Respondent never responded to the Union's grievance. (JX-7; Tr. at 93).

On January 20, 2016, the Union and Respondent had another monthly Central Committee meeting.<sup>5</sup> (ALJD at 6-7). Although the attendance policy was not on the agenda, Human Resources Manager Rowan told Union President Bailey that the Company had taken the Union's input into consideration and had further revised the attendance policy presented to the Union on December 17, 2015. (Tr. at 39). Rowan did not tell Bailey exactly how Respondent had changed

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<sup>5</sup> The ALJ properly relied on Bailey's undisputed testimony. Rowan testified that the January 20, 2016 Central Committee meeting occurred, but did not testify to the content of the meeting. (Tr. at 265). Parker did not testify to the January 20, 2016 Central Committee meeting although Respondent called him to testify. (Tr. at 173-200).

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

On January 28, 2016, the parties met at the third step of the grievance and arbitration procedure on several unrelated grievances. (Tr. at 40; ALJD at 7). Union representatives Bailey, Christian, and Martin (United Steel Workers Staff Representative) met with Respondent's representatives Rowan and Parker. (Tr. at 40-41). At the start of the meeting, Martin asked Respondent's representatives if they were ready to start bargaining over the attendance policy as the Union requested in Bailey's January 14, 2016 e-mail. (Tr. at 40-41; Tr. at 96; Tr. at 266; Tr. at 291). Rowan said, "No." (Tr. at 41). Martin informed Respondent that if they did not bargain with the Union over the changes to the attendance policy, the Union would file a charge with the Board. (Tr. at 41; Tr. at 96-97). Rowan and Parker nodded in acknowledgment of Martin's statement, but still did not agree to any bargaining with the Union. (Tr. at 41).

Rowan admitted that in this meeting, "the Union continued to state that they wanted to bargain over the attendance policy." (Tr. at 266). However, although the Union demanded bargaining, Rowan testified that Respondent's position was that the collective bargaining agreement gave it the right to implement the policy without bargaining. (Tr. at 291).

After the meeting, Rowan pulled Bailey aside and asked him if he would like to see the final draft of the attendance policy. (Tr. at 41). Rowan told him that she planned to implement the policy on February 1, 2016 and showed Bailey a copy of the new attendance policy with her handwritten final changes on the policy. (Tr. at 41-42). Prior to their conversation, Bailey had

never seen that version of the attendance policy, and he never saw the finalized version until Respondent implemented the policy on February 1, 2016. (Tr. at 42).

On February 1, 2016, Respondent implemented the new attendance policy for all hourly employees at the facility. (JX-8; JX-9; Tr. at 42-43). Respondent gave each employee a copy of the new policy. (Tr. at 42; Tr. at 98). Respondent's changes to the attendance policy that it implemented on February 1, 2016 remains in effect at Respondent's Bauxite, Arkansas facility. (Tr. at 43; Tr. at 98). The Union never agreed to the implemented attendance policy nor did they ever see the finalized version of the policy before Respondent distributed it to all bargaining unit employees. (Tr. at 44; Tr. at 99).

### **III. ARGUMENT**

#### **A. RESPONDENT FAILED TO BARGAIN WITH THE UNION OVER CHANGES TO THE ATTENDANCE POLICY(EXCEPTIONS 1-3, 11-12)**

**Respondent's Exception 1: Respondent excepts to the ALJ's finding that Respondent did not respond to the January 14 grievance filed by the Union, on the ground that this finding is not supported by the record.**

**General Counsel's Answer 1: ALJ's finding that Respondent did not respond to the Union's January 14 grievance is supported by the record.**

The ALJ properly determined that Respondent did not respond to the Union's January 14, 2016 grievance. (ALJD at 6). Union Vice President Christian testified that Respondent did not respond to the Union's grievance. (Tr. at 93). Christian's testimony was undisputed. The ALJ relied on Christian's undisputed testimony regarding the Union's grievance to determine that Respondent never responded to the grievance. None of Respondent's witnesses testified that any officers or agents of Respondent responded to the Union's grievance at any point. Further, all testimony concerning grievance meetings clearly specifies that the parties discussed the attendance policy after they were done discussing grievances. The grievance meetings did not concern the attendance policy. (Tr. at 41; Tr. at 94; Tr. at 95; Tr. at 96; Tr. at 108). The ALJ's

determination that Respondent did not respond to the Union's January 14, 2016 grievance is well supported by the record evidence.

**Respondent's Exception 2: Respondent excepts to the ALJ's finding that Respondent unilaterally changed its attendance policy without providing the Union with an opportunity to bargain on the grounds that this finding is not supported by the record and is erroneous as a matter of law.**

**General Counsel's Answer 2: ALJ's finding that Respondent unilaterally changed its attendance policy without providing the Union with an opportunity to bargain is supported by the record evidence and as a matter of law.**

**Respondent's Exception 3: Respondent excepts to the ALJ's finding that Respondent admitted that the changes to the attendance policy were "unilateral" in nature, on the ground that this finding is not supported by the record.**

**General Counsel's Answer 3: ALJ's finding that Respondent admitted that the changes to the attendance policy are unilateral in nature is supported by the record.**

**Respondent's Exception 11: Respondent excepts to the ALJ's finding that Respondent violated Section 8(a)(1) and (5) of the Act when it unilaterally changed the attendance policy without first bargaining over the changes with the Union on the grounds that this finding is not supported by the record and is erroneous as a matter of law.**

**General Counsel's Answer 11: ALJ's finding that Respondent violated Section 8(a)(1) and (5) of the Act is supported by the record and as a matter of law.**

**Respondent's Exception 12: Respondent excepts to conclusion of law number 3 that Respondent has violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain collectively with the Union regarding changes to the attendance policy on the grounds that this conclusion is not supported by the record and is erroneous as a matter of law.**

**General Counsel's Answer 12: ALJ's finding that Respondent has violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain collectively with the Union regarding changes to the attendance policy on the grounds conclusion is supported by the record and is erroneous as a matter of law.**

The ALJ's determination that Respondent unilaterally changed its attendance policy without providing the Union an opportunity to bargain is well supported by Board precedent. (ALJD at 11). An employer may not change the terms and conditions of employment of represented employees without providing their representative with prior notice and an

opportunity to bargain. (ALJD at 10-11). *N.L.R.B. v. Katz*, 369 U.S. 736, 743 (1962); *Litton Fin. Printing Div. v. N.L.R.B.*, 501 U.S. 190, 198 (1991); *Lawrence Livermore Nat'l Sec., LLC*, 357 NLRB 203, 205 (2011). In order to establish that an employer's unilateral action violated the Act, the change must be material and involve a mandatory subject of bargaining. *San Juan Teachers Ass'n.*, 355 NLRB 172, 175 (2010). Here, the ALJ properly concluded that Respondent's unilateral action of enacting an attendance policy without first bargaining with the Union violated the Act. (ALJD at 11-12).

First, it is undisputed that Respondent's changes to the attendance policy were "material, substantial and significant." The ALJ found, and Respondent has not excepted to her finding, that "the unilateral change to [Respondent's] attendance policy, and the implementation of the revised attendance policy are material, substantial and significant." (ALJD at 12). See *Womac Indus.*, 238 NLRB 43 (1978) (the "initiation of new or more stringent rules with respect to absenteeism" are a significant change); see also *Murphy Diesel Co.*, 184 NLRB 757, 763 (1970), *enf'd* 454 F.2d 303 (7th Cir. 1971) (employer's creation of a specified limit of absences after which discipline would be taken where no such limit existed before was a significant change); *Ciba-Geigy Pharm. Div.*, 264 NLRB 1013, 1016 (1982) (change in progression of discipline associated with absences leading to discipline a significant change).

Second, although Respondent excepts to the ALJ's finding that its unilateral change to the attendance policy is a mandatory subject of bargaining, Respondent admitted as much its Answer to the Consolidated Complaint. (Exception 3). In the Consolidated Complaint, the General Counsel alleged that the "subjects set forth above in paragraph 8 [attendance] relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory

subjects for the purposes of collective bargaining.” (GCX-1(m) at 9(a)). Respondent admitted that this allegation was true. (GCX-1(s); GCX-1(t)). Nonetheless, the ALJ properly determined that the attendance policy was a mandatory subject of bargaining. Mandatory subjects of bargaining include “wages, hours, and other terms and conditions of employment.” 29 U.S.C. § 158(d). The Board has long held that attendance policies fall within the definition of “terms and conditions of employment.” See *Ciba-Geigy Pharm. Div.*, 264 NLRB 1013, 1016 (1982) enf’d 722 F.2d 1120 (3d Cir. 1983); (attendance rules are “unquestionably mandatory subjects of bargaining”); *Dorsey Trailers*, 327 NLRB 835, 835 fn. 26 (1999) enf’d in relevant part 233 F.3d 831 (4th Cir. 2000) (“An employer’s attendance policy has long been held to be a mandatory subject of bargaining.”).

Third, the record evidence fully establishes that the Union was not provided with an opportunity to bargain over Respondent’s new attendance policy.<sup>6</sup> (ALJD at 11). On January 5, 2016, the Union made a formal demand in writing to Respondent to bargain over the changes to the attendance policy, a mandatory subject of bargaining. (JX-6(b)). The Union requested bargaining in writing on two additional occasions and verbally requested bargaining on four separate occasions. (JX-6(b); Tr. at 38; Tr. at 39; Tr. at 44; Tr. at 94; Tr. at 96; Tr. at 98). However, Respondent continued to deny the Union’s bargaining request and insist that the language of the collective bargaining agreement waived its bargaining obligation. (JX-6(b); Tr. at 41; Tr. at 96; Tr. at 266; Tr. at 291). During the last meeting between the parties, on January 28, 2016, when the Union yet again, requested bargaining over the attendance policy, Human Resources Manager Rowan flatly denied bargaining and told the Union that she would implement a revised attendance policy on February 1, 2016. (Tr. at 41). The Union did not even

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<sup>6</sup> See *supra* at Timeline of Relevant Events, page 3.

see the finalized attendance policy before Respondent implemented it. (Tr. at 44; Tr. at 99). In every instance that the Union demanded bargaining, Respondent refused and told the Union that the collective bargaining agreement allowed it to implement the attendance policy. Based on these facts, the ALJ found that the Union was not provided with an opportunity to bargain. (ALJD at 11). By implementing the attendance policy, a mandatory subject of bargaining, without bargaining with the Union, the ALJ properly determined that Respondent violated Section 8(a)(5) of the Act. (ALJD at 11). *N.L.R.B. v. Katz*, 369 U.S. 736, 743 (1962); *Litton Fin. Printing Div. v. N.L.R.B.*, 501 U.S. 190, 198 (1991).

**B. ALJ PROPERLY DETERMINED THAT THE PARTIES' COLLECTIVE BARGAINING AGREEMENT DOES NOT WAIVE RESPONDENT'S BARGAINING OBLIGATION (EXCEPTIONS 6-7, 10)**

**Respondent's Exception 6:** Respondent excepts to ALJ's finding and/or conclusion that Respondent's reliance on *Provena* is misplaced because management rights clause lacks the specificity of the *Provena* clause on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law.

**General Counsel's Answer 6:** ALJ properly determined that Respondent's reliance on *Provena* is misplaced as a matter of law.

**Respondent's Exception 7:** Respondent excepts to ALJ's discussion and analysis of *Provena* and finding and/or conclusion that the language in the management rights clause at issue is far too vague and general to support a finding that by agreeing to the clause the Union had clearly and unmistakably waived its right to bargain over attendance issues on the ground that the ALJ misconstrued *Provena* and her finding and/or conclusion is not supported by the record and is erroneous as a matter of law.

**General Counsel's Answer 7:** ALJ properly determined that the management rights clause at issue is too vague and general to support a finding that by agreeing to the clause the Union had clearly and unmistakably waived its right to bargain over attendance issues.

**Respondent's Exception 10:** Respondent excepts to ALJ's finding that the evidence is insufficient to find that the Union explicitly waived its rights with full intent to release its interest in the matter on the grounds that this finding is not supported by the record and is erroneous as a matter of law.

**General Counsel’s Answer 10: ALJ properly determined that the evidence was insufficient to find that the Union explicitly waived its rights with full intent to release its interest in the matter.**

Respondent argues that the Board’s decision in *Provena St. Joseph Medical Center* supports its position that the collective bargaining agreement waives its bargaining obligation. (Respondent’s Brief at 17-19). However, as the ALJ found, Respondent’s reliance on *Provena* is misplaced. (ALJD at 14). In *Provena*, the management rights clause in the parties’ collective bargaining agreement gave the employer the right to “*change reporting practices and procedures and/or to introduce new or improved ones*”; “to make and enforce rules of conduct”; and “to suspend, discipline, and discharge employees.” *Provena St. Joseph Med. Ctr.*, 350 NLRB 808, 815 (2007) (emphasis added). The Board determined that by agreeing to that combination of provisions in the management rights clause, the union waived its right to demand bargaining over the implementation of a new attendance policy. Conversely, here, unlike *Provena*, the management rights clause lacks any language specifically referencing attendance, e.g., “change reporting practices and procedures.” *Id.* Here, the management rights clause in the parties’ collective bargaining agreement authorizes Respondent to “adopt reasonable rules and policies.” (JX-1). There is no specific reference to attendance in the management rights clause. (JX-1). Consequently, as the ALJ found the language in the management rights clause is “far too vague and general to support a finding that by agreeing to the clause the Union had clearly and unmistakably waived its right to bargain over attendance issues.” (ALJD at 16).

In all communications with the Union, Respondent specifically cited the parties’ management rights clause as giving it the authority to make changes to the parties’ separately bargained attendance policy. (JX-6(a); JX-6(b)). However, in its post-hearing brief to the ALJ and in its brief on exceptions to the Board, Respondent also argues that the provision in the

collective bargaining agreement entitled “Hours of Work” also gives it the authority to make unilateral changes with regard to attendance. (Respondent’s Brief at 18). Under Article X, “Hours of Work,” the parties’ collective bargaining agreement authorized Respondent to “[c]onsistent with business needs, [...] adopt and modify from time to time shift starting and ending times, starting and quitting times for individual employees, and meal and break periods.” (JX-1). Yet, similarly to the management rights clause, the “Hours of Work” provision of the parties’ collective bargaining agreement contains no reference to attendance or absenteeism, or ensuing discipline. (JX-1). Therefore, unlike the specific authorization in *Provena*’s management right clause to change reporting practices and procedures, the parties’ “Hours of Work” provision in the collective bargaining agreement does not contain a specific authorization. (JX-1). The parties’ “Hours of Work” provision exclusively pertains to individual employees’ schedules, which is not at issue here.

As the ALJ noted, Board precedent states that a party’s bargaining obligation is only waived by contractual language if the language is a “clear and unmistakable waiver.” (ALJD at 11). See *Allison Corp.*, 330 NLRB 1363, 1365 (2000); *N.L.R.B. v. C&C Plywood*, 385 U.S. 421 (1967); *Metro. Edison Co. v. N.L.R.B.*, 460 U.S. 693, 708 (1983). The “clear and unmistakable waiver” standard, which was endorsed by the Supreme Court, requires bargaining partners to “unequivocally and specifically express their mutual intention to permit unilateral employment action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply.” *Provena St. Joseph Med. Ctr.*, 350 NLRB 808, 811 (2007). The Board has held that in order to find a waiver based on contractual language, the language must be “sufficiently specific.” *Johnson-Bateman Co.*, 295 NLRB 180, 189 (1989).

The ALJ, relying on Board precedent, properly determined that the collective bargaining agreement’s language that granted Respondent the right to “adopt reasonable rules and policies” was insufficient to meet the “clear and unmistakable” waiver standard and waive Respondent’s bargaining obligation. (ALJD at 15). See *Dorsey Trailers, Inc.*, 327 NLRB 835, 836 (1999) *enfd* in relevant part 233 F.3d 831 (4th Cir. 2000) (management rights clause referencing “reasonable rules, not in conflict with this agreement” was too vague to waive union’s right to bargain over changes to attendance policy); *Graymont PA, Inc.*, 364 NLRB No. 37 (2016) (management rights clause affording the employer “sole and exclusive right to [...] to discipline and discharge for just cause, [and] to adopt and enforce rules and regulations and policies and procedures” lacked specificity to constitute a “clear and unmistakable waiver”); *Murtis Taylor Human Serv.*, 360 NLRB 546, 549 (2014) (management rights clause referencing employer’s right to “make and alter from time to time reasonable rules and regulations [...] to be observed by employees” was too vague to waive the union’s right to bargain over the new requirement that employees sign notes of administrative interviews to attest to the notes’ veracity); *Windstream Corp.*, 352 NLRB 44, 50 (2008), *aff’d* and incorporated by reference 355 NLRB 406 (2010) (management rights clause referencing employer’s right to “establish reasonable rules and regulations” did not amount to a waiver of the union’s right to bargain over changes in the level of discipline the employer could impose for work rule violations); *Hi-Tech Cable Corp.*, 309 NLRB 3, 4 (1992) *enfd per curiam* 25 F.3d 1044 (5th Cir. 1994) (management rights clause referencing employer’s right to make, change, and enforce reasonable rules lacked the requisite specificity to constitute a waiver of the union’s right to bargain over the employer’s implementation of a no-tobacco rule). Similarly, here, Respondent’s management rights clause lacks an “unequivocal and specific expression of the parties’ mutual intent to permit unilateral employer action” and there is no

basis for finding a waiver of Respondent's bargaining obligation. *Graymont PA, Inc.*, 364 NLRB No. 37.

Further, the ALJ properly dismissed Respondent's attempt to combine different sections of the collective bargaining agreement to support its argument as "disingenuous since Respondent admitted that its refusal to bargain was based solely on the management rights clause." (ALJD at 15). During litigation, the respondent in *Graymont PA* argued that an additional contractual provision, which gave it the right to "set and establish standards of performance for employees" clearly and unmistakably waived the union's right to bargain when read in conjunction with the management rights clause. However, the Board summarily dismissed this argument as respondent's "post hoc rationalization for its conduct." *Graymont PA*, 364 NLRB No. 37 (2016). The Board noted that respondent's letter to the union made no mention of any other contractual provision than the management rights clause justifying its conduct. *Id.* Further, the additional contractual provision still made no specific reference to absenteeism or progressive discipline. Similarly, here, in all communications with the Union, Respondent cited the management rights clause as giving it the authority to make a unilateral change. (JX-6(b)). Consequently, Respondent's references to the "Hours of Work" provision of the collective bargaining agreement are a *post hoc* rationalization to justify its unlawful conduct.

### C. ALJ APPLIED THE CORRECT LEGAL STANDARD (EXCEPTIONS 4-5)

**Respondent's Exception 4: Respondent excepts to the ALJ's refusal to adopt and apply the contract coverage analysis applied by the United States District Court of Appeals for the District of Columbia Circuit, as well as other circuit courts, on the ground that this is the correct analysis that best furthers the policies of the Act and should be adopted by the Board.**

**General Counsel's Answer 4: ALJ properly rejected the contract coverage analysis and applied the correct legal standard under Board precedent.**

The ALJ properly applied the “clear and unmistakable” waiver standard to determine that the parties’ collective bargaining agreement did not constitute a waiver to bargain. Although Respondent urges adoption of the contract coverage approach, the ALJ properly rejected it because the Board has expressly disavowed the “contract coverage” approach, which is utilized in a minority of circuit courts, in favor of the longstanding “clear and unmistakable” waiver standard. (Respondent’s Brief at 21-25; ALJD at 12-13). *Provena St. Joseph Med. Ctr.*, 350 NLRB 808 (2007). See also *N.L.R.B. v. C & C Plywood*, 385 U.S. 421 (1967) (Supreme Court affirms the “clear and unmistakable” waiver standard); *Metro. Edison Co. v. N.L.R.B.*, 460 U.S. 693 (1983) (“[W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is ‘explicitly stated.’”). The Board determined that the “contract coverage” standard is less desirable than the well-established “clear and unmistakable” waiver standard because the “contract coverage” standard “would very likely complicate the collective-bargaining process and increase the likelihood of labor disputes.” *Provena St. Joseph Med. Ctr.*, 350 NLRB at 813. Further, the “contract coverage” standard fails to adequately ensure that statutory rights are only relinquished in a deliberate and obvious manner. *Id.* Accordingly, for policy reasons, and based on existing Board precedent, the ALJ properly declined to adopt the “contract coverage” standard.

**Respondent's Exception 5: Respondent excepts to ALJ's findings and conclusions that the clear and unmistakable waiver standard is applicable in this case, that Respondent's reliance on *Howard Industries* and *Ingham* is misplaced, and that *Howard Industries* and *Ingham* clearly apply a different analysis when the contract establishes explicit procedural steps to be followed before policy or rule changes are made.**

**General Counsel's Answer 5: ALJ properly considered Board precedent and applied the clear and unmistakable waiver standard.**

The ALJ properly rejected Respondent's argument that the "clear and unmistakable waiver" standard is inapplicable in this case. Instead, Respondent argues *Howard Industries* is controlling. (Exception 5; Respondent's Brief at 12-15). However, the ALJ carefully considered Respondent's argument in her decision, and properly rejected it. (ALJD at 13-14). In *Howard Industries*, the parties agreed to a specific procedure that applied when the employer wanted to change an existing policy, create a new policy or modify job performance standards in their collective bargaining agreement. *Howard Indus.*, 365 NLRB No. 4 (2016). The collective bargaining agreement at issue in that case stated, in part:

[I]f the Company wishes to change an existing policy, create a new policy, or modify job performance standards that affect the bargaining unit, advance written notice will be provided to the Union via email. If the Union wishes to negotiate over the changes, it will notify the Company in writing within ten (10) calendar days of receipt of the notification. If the Union does not serve written notification of a desire to negotiate over the policy or policy change, the Company may implement the change and the Union *waives any arbitration or other legal remedies concerning the creation or modification of the policy.* (emphasis added).

The employer provided the union with notice that it wanted to change the parties' Christmas Gifts Policy. *Id.* When the union did not respond after eleven days, the employer implemented the new policy. *Id.* The ALJ noted under Board precedent, the clear and unmistakable waiver standard normally applied; however, the ALJ found that the parties created a specific procedure for implementing new policies and the union clearly and unmistakably

waived its right to bargain over the changes. *Id.* Accordingly, the ALJ failed to find a violation, and the Board affirmed. *Id.* However, here, there is no language in the management rights' clause of the contract, which Respondent cited as giving it the authority to implement the attendance policy, or any other provision of the contract where the Union waived its right to bargain over mandatory terms and conditions of employment. Accordingly, here, unlike in *Howard Industries*, the clear and unmistakable waiver standard applies. The management rights clause failed to clear and unmistakably waive the parties' right to bargain, and Respondent had an obligation to bargain with the Union over the attendance policy.

Respondent also argues that the Board held in *Ingham Regional Medical Center* that an employer's compliance with the procedural steps of the contract waives its obligation to bargain. (Exception 5; Respondent's Brief at 15 -16). However, as the ALJ noted, "*Ingham* stands in stark contrast to Respondent's position." (ALJD at 13). In *Ingham*, contrary to Respondent's assertions, the Board applied the clear and unmistakable waiver standard. The parties' collective bargaining agreement contained a management rights clause, which gave the employer the right to "use outside assistance or engage independent contractors to perform any of the Employer's operations or phases thereof (subcontracting)." *Ingham Reg'l Med. Ctr.*, 342 NLRB 1259, 1260 (2004). Additionally, the collective bargaining agreement had a specific provision on subcontracting which reserved the employer's "right to enter into affiliation and merger agreements and to subcontract work normally performed by bargaining unit employees." *Id.* The Board found that the language of the collective bargaining agreement provided a clear and unmistakable waiver of the employer's right to subcontract as the language was clear. The Board noted that the remaining provisions of the contract discussing the procedural requirements when the employer decided to subcontract only specify the parameters within which the employer must

follow after it makes its decision. Unlike *Ingham*, which specifically refers to subcontracting in the language of its contract, there is no similar language in the parties' contract specifically referring to attendance. Consequently, Respondent's management rights clause lacks the specificity to waive Respondent's bargaining obligation, and Respondent was required to bargain with the Union over the changes to the attendance policy.

**D. ALJ PROPERLY DETERMINED THE PARTIES' BARGAINING HISTORY DOES NOT WAIVE RESPONDENT'S BARGAINING OBLIGATION (EXCEPTIONS 8-9)**

**Respondent's Exception 8: Respondent excepts to ALJ's finding that the bargaining history of the parties does not establish that the Union waived its right to bargain over the new attendance policy on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law.**

**General Counsel's Answer 8: ALJ's finding that the bargaining history of the parties does not establish that the Union waived its right to bargain over the new attendance policy is supported by the record and as a matter of law.**

**Respondent's Exception 9: Respondent excepts to ALJ's finding that the Union's agreement to withdraw, during the 2015 contract negotiations, its demand to have the attendance policy incorporated into the CBA and its agreement to delete the last sentence of the management rights clause in the prior contract are likewise insufficient to prove that the parties' bargaining history shows that the union waived its right to bargain over the new attendance policy, on the grounds that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law.**

**General Counsel's Answer 9: ALJ's finding that the Union's agreement to withdraw, during the 2015 contract negotiations, its demand to have the attendance policy incorporated into the CBA and its agreement to delete the last sentence of the management rights clause in the prior contract are likewise insufficient to prove that the parties' bargaining history shows that the union waived its right to bargain over the new attendance policy is supported by the record and as a matter of law.**

The ALJ found that the Union never consciously yielded or clearly and unmistakably waived its interest in regard to bargaining about the attendance policy. (ALJD at 15). This determination is supported by the record evidence. After the Union withdrew its proposal to include the attendance policy in the collective bargaining agreement, Union President Bailey

testified that United Steel Workers Representative Martin informed Respondent “it shouldn’t matter if [the attendance policy] is in the CBA or not because it’s a mandatory subject of bargaining.” (Tr. at 296). Bailey’s testimony is corroborated by his bargaining notes, which he took contemporaneously as the parties discussed the matter. (Tr. at 296-298; GX-26). Further, Bailey undisputedly testified that Respondent assured the Union that it did not foresee any changes to any policies. (Tr. at 79). *See, e.g., Merillat Indus., Inc.*, 252 NLRB 784, 785 (1980) (union did not waive its right to bargain over new absentee rules where “neither the wording of the clause itself, nor any other evidence, suggest[ed] that by agreeing to the management rights clause . . . the [u]nion waived its right to bargain” about the subject). Therefore, the ALJ properly determined that the Union’s decision to withdraw its proposal is insufficient to show that the Union waived its right to bargain over the new attendance policy. (ALJD at 16). The record evidence and legal authority supports the ALJ’s determination that the parties’ bargaining history did not waive Respondent’s obligation to bargain with the Union over the new attendance policy.

Similarly, the ALJ properly dismissed Respondent’s argument that the Union waived its right to bargain over the attendance policy by agreeing to Respondent’s implementation of other policies. (Exception 9). At some point during this collective bargaining agreement or the previous agreement, Respondent implemented a new cell phone policy, shoe policy, and tobacco policy. (Tr. at 80). The Union did not choose to bargain over those policies as the Union found the new policies advantageous to employees. (Tr. at 80). The Union is not required to seek bargaining when it is in agreement with the changes. As the ALJ noted, “the Board has consistently held that prior acceptance of an employer’s unilateral actions on a specific issue generally does not, without more, establish that the union waived its right to bargain over future action by the employer in that matter.” *See Ciba-Geigy Pharm. Div.*, 264 NLRB at 1017 (union’s

acquiescence in employer's past unilateral changes in other plant rules does not constitute waiver by union of right to bargain about employer's implementation of a new plant rule); *Murphy Diesel Co.*, 184 NLRB 757, 763 (1970), *enf'd* 454 F.2d 303 (7th Cir. 1971) (union's prior acceptance of the employer's unilateral promulgation of written work rules on, among other subjects, lateness and absenteeism did not constitute a relinquishment of the union's right to bargain about the employer's subsequent unilateral promulgation of substantially modified, stricter rules concerning lateness and absenteeism); *N.L.R.B. v. Miller Brewing Co.*, 408 F.2d 12, 15 (9th Cir. 1969) (a right previously waived is not necessarily lost forever).

#### **E. ALJ'S REMEDY AND ORDER WERE APPROPRIATE (EXCEPTIONS 13-16)**

**Respondent's Exception 13: Respondent's excepts to the conclusion of law number 5 that this violation is an unfair labor practice that affects commerce within the meaning of Section 2(6) and (7) of the Act, on the ground that this finding and/or conclusion is not supported by the record and is erroneous as a matter of law.**

**General Counsel's Answer 13: The ALJ's determination is supported by the record evidence and as a matter of law.**

The ALJ found that Respondent's violations of the Act affected commerce within the meaning of Section 2(6) and (7) of the Act. (ALJD at 22). Respondent admitted in its Answer to the Consolidated Complaint at all material times, it "has been an employer engaged in commerce within the meaning of Section 2(2), (6), (7) of the Act." (GCX-1(m); GCX-1(t)). Therefore, by committing unfair labor practices, Respondent affected commerce within the meaning of Section 2(6) and (7) of the Act. See *N.L.R.B. v. C.H. Cross*, 346 F.2d 165 (4th Cir. 1965), *cert denied*, 382 U.S. 918 (1965) (Board empowered to rely on general jurisdictional rules and not required to determine commerce was affected by a particular employer); *N.L.R.B. v. Suburban Lumber Co.*, 121 F.2d 829 (3d 1941), *cert. denied*, 314 U.S. 693 (1941) ("[T]he word affect under subsection (7) has the widest conceivable scope").

**Respondent's Exception 14: Respondent excepts to the Remedy, on the grounds that no violation of the Act occurred.**

**General Counsel's Answer 14: ALJ's Remedy is appropriate as a matter of law.**

**Respondent's Exception 15: Respondent excepts to the Remedy, which speaks in terms of discrimination, on the grounds that no discrimination (8(a)(3)) violation was pled or found.**

**General Counsel's Answer 15: ALJ's Remedy is appropriate as a matter of law.**

**Respondent's Exception 16: Respondent excepts to the Order on the ground that no violation of the Act occurred.**

**General Counsel's Answer 16: ALJ's Order is appropriate as a matter of law.**

Since the ALJ found that Respondent committed unfair labor practices, the ALJ found that the appropriate remedy is to 1) rescind any and all unilateral changes to the attendance policy; 2) rescind any discipline issued in accordance with the policy change; 3) bargain on request with the Union about the attendance policy; and 4) make whole any employees who have been disciplined as a result of the changed attendance policy. (ALJD at 22). The ALJ issued an Order consistent with her remedy. (ALJD at 22). The ALJ's Remedy and Order are proper and consistent with orders issued by the Board involving the unilateral changes to mandatory terms of employment. See *Dorsey Trailers*, 327 NLRB 835 (1999) (order to rescind attendance policy, reinstate prior attendance policy, and make unit employees whole); *Graymont PA*, 364 NLRB No. 37 (2016) (order to rescind changes, restore status quo, rescind any discipline associated with the changes and make whole affected employees). Accordingly, the ALJ's Remedy and Order are consistent with Board precedent and remedies the underlying unfair labor practices and should be adopted in its entirety.

#### IV. CONCLUSION

For the reasons discussed above, the General Counsel submits that the record evidence supports the ALJ's decision, and requires a finding that Respondent violated Section 8(a)(5) as alleged. The General Counsel respectfully requests Respondent be ordered to rescind any and all unilateral changes made to the attendance policy, and rescind any discipline issued in accordance with the policy. Respondent should be required to post an appropriate Notice to Employees to remedy all of its unlawful conduct and to take any other action deemed proper by the National Labor Relations Board to fully remedy Respondent's unlawful conduct.

Dated at Little Rock, Arkansas this 29<sup>th</sup> day of March, 2018.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2018, a copy of Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Board was electronically filed via NLRB E-Filing system with the Office of the Executive Secretary.

I further certify that on March 29, 2018, a copy of Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Board was served by e-mail, or U.S. mail, as noted below, on the following:

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