UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WYMAN GORDON PENNSYLVANIA LLC

and

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

Cases 04-CA-182126
04-CA-186281
04-CA-188990

CHARGING PARTY'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF

The Charging Party, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC ("Union" or "Charging Party"), submits this reply brief in response to the answering brief of Respondent Wyman Gordon Pennsylvania LLC ("Employer" or "Respondent") opposing the Union's Cross-Exceptions to the Decision and Recommended Order of the Administrative Law Judge in accordance with Section 102.46(e) of the National Labor Relation Board's Rules and Regulations.

First, the Respondent's answering brief inappropriately contests determinations by the judge to which no party properly excepted. The Respondent's answering brief challenges the judge's determination that it violated Sections 8(a)(1) and (5) by unilaterally failing to grant an established annual wage increase without giving the Union advance notice and an opportunity to bargain. It additionally challenges Judge Amchan's determination that the Respondent violated Sections 8(a)(1) and (5) by unilaterally discontinuing its practice of providing light duty work to injured employees. No party has asserted a valid exception to either of these determinations. Accordingly, the Employer has waived any objection to these determinations and cannot contest them for the first time in an answering brief. The Board disregards such improper argument and

strikes it from the record on motion by a party. The Union requests that the Board disregard the Respondent's argument on these points and moves that it be struck.

Second, the Respondent contends that the make-whole remedies sought in the Union's cross-exceptions are inappropriate because such remedies were not sought in the Union's post-hearing brief. This is inaccurate. The appropriate remedies for these unfair labor practices were discussed in the Union's post-hearing brief, in the post-hearing brief of the General Counsel, and at the hearing. Moreover, the Board is permitted to award even extraordinary remedies that parties did not seek before an ALJ. There is nothing preventing the Board from ordering its traditional, make-whole remedies in this case.

Third, the Employer argues that it was not shown that the employees whose names and purported signatures appear in Respondent Exhibit 2 (on which the Employer relied in withdrawing recognition from the Union) dated October 14, 2016, were actually aware that the Employer had sent home light duty employees. This argument lacks merit because the Board has specifically held that actual employee knowledge need not be shown under the Board's objective test assessing the causal relationship between unfair labor practices and employee disaffection. It further lacks merit because there is ample evidence that a determinative number of employees were aware of the Employer's unlawful unilateral change and purportedly signed Respondent Exhibit 2 before the October 26, 2016, message on which the judge improperly relied to find that this unfair labor practice did not taint the withdrawal of recognition, even setting aside the purported signatures dated October 14, 2016.

Fourth, the Employer inaccurately minimizes the extent of its refusal to bargain with the Union prior to its unlawful withdrawal of recognition. The judge properly found that the Employer failed to make proposals on a large number of vital subjects and that it took the

position that it would not bargain regarding matters it considered economic until the parties had reached agreement on all matters it deemed non-economic. This serious breach of the duty to bargain effectively precluded any agreement and, when considered together with the Employer's ongoing refusal to recognize and bargain with the Union and with the Employer's other unfair labor practices, requires a bargaining schedule to appropriately re-establish the bargaining relationship.

I. Respondent's untimely challenges to the judge's determinations that Respondent violated the Act should be disregarded and stricken.

The Respondent's answering brief challenges the judge's determinations that it violated Sections 8(a)(1) and (5) by (1) unilaterally failing to grant an established annual wage increase without giving the Union advance notice and an opportunity to bargain (R. Ans. Br. 1-5); and (2) unilaterally discontinuing its practice of providing light duty work to injured employees. (R. Ans. Br. 6-10). The Respondent waived these arguments by failing to properly except to the judge's determinations. Accordingly, the Union requests that the Employer's untimely challenges to these determinations be disregarded, and it moves that they be stricken.

The judge made the following determinations with respect to the Employer's failure to grant its established annual wage increase without providing advance notice and an opportunity to bargain. "Respondent had a practice of giving unit employees a wage increase on or about August 1 of each year," the amount of which "ranged from about 40 cents to 70 cents per hour." (ALJD 12). "Respondent failed to make the wage adjustment or notify the Union before the scheduled date of the recurring increase occurred." (ALJD 13). "[I]t violated Section 8(a)(5) and (1) as a result." (ALJD 13).

With respect to the Employer's unilateral discontinuation of its light duty practice, the judge determined that the Respondent had an established practice of providing light duty work to

employees on workers' compensation. (ALJD 13). On October 14, 2016, the Employer instructed all five employees assigned to light duty not to report to work. (ALJD 13). It did so without notifying the Union in advance or affording an opportunity to bargain. (ALJD 13). The Employer recalled the employees after the Union filed an unfair labor practice charge, but it did not adequately repudiate its violation. (ALJD 13).

The Respondent did not properly except to any of these findings, and no other party did so. Respondent's "Exception 2" alludes to the annual wage increase issue. However, this is a "bare exception," meaning that the Respondent presented no argument in support of it either in written exceptions or in its supporting brief. *W. Refining*, 366 NLRB No. 83, slip op. at 1 n.3 (2018). Thus, "in accordance with Sec. 102.46(a)(1)(ii) of the Board's Rules and Regulations" this bare exception "should be disregarded." *Id.*; *accord* 29 C.F.R. § 102.46(a)(1)(ii) ("Any exception which fails to comply with the foregoing requirements may be disregarded."). The Respondent's exceptions did not anywhere contest the judge's findings with respect to the light duty program.

A party may not contest a determination to which no exceptions were properly filed in its answering brief. *E.g.*, *Capitol Ford*, 343 NLRB 1058, 1059 n.5 (2004); *Teddi of Calif.*, 338 NLRB 1032, 1032 (2003); *Manno Elec.*, 321 NLRB 278, 278 n.10 (1996), *enf'd* 127 F.3d 34 (5th Cir. 1997). This result is plainly required by the Board's Rules and Regulations, including Section 102.46(f), which provides that "Matters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding;" Section 102.46(a)(1)(ii), which provides that "Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived;" and

Section 102.46(b)(2), which states that "The answering brief to the exceptions must be limited to the questions raised in the exceptions and in the brief in support."

The instant case is quite similar to *Capitol Ford*. As in this case, the General Counsel and the union there filed exceptions to the judge's remedy for certain unfair labor practices found by the judge. 343 NLRB at 1059. Although no party had filed exceptions to the finding that the employer had committed the unfair labor practices in question, the employer's answering brief asserted that it had not committed the unfair labor practices. *Id.* at 1059 n.5. The Board held that the employer's belated challenge was improper and declined to rule on the question of whether the employer had committed the unfair labor practices. *Id., citing* 29 C.F.R. § 102.46(d)(2) (now § 102.46(b)(2)). Here, too, no party has filed valid exceptions to the judge's findings that the Employer committed the unfair labor practices in question. It is only in its answering briefs, after the General Counsel and the Union have filed exceptions challenging the judge's remedies and his findings relating to the effect of these unfair labor practices (G.C. Exceptions 1-2 and 4-5; Union Exceptions 1-2 and 5-6), that the Respondent now contests the judge's conclusions regarding the underlying unfair labor practices. But Respondent's challenges are not properly before the Board. The only questions related to these unfair labor practices properly before the Board are those raised in the exceptions timely filed by the General Counsel and the Charging Party.

In view of the foregoing, the Union moves to strike those portions of the Respondent's answering brief relating to its belated challenges to the judge's determinations that it violated the Act by unilaterally failing to implement its established wage increase and by unilaterally discontinuing its light duty program, as well as its untimely challenges to the factual determinations underlying the judge's conclusions. *See Wilmington Fabricators, Inc.*, 332

NLRB 57, 57 n.1 (2000); *S.W. Security Equip. Corp.*, 262 NLRB 665, 665 n.1 (1982), *enf'd* 736 F.2d 1332 (9th Cir. 1984) (granting motion to strike portions of answering brief challenging determinations of judge to which no exceptions were filed).[1]

II. <u>The Board may grant traditional make-whole remedies irrespective of whether they were specifically sought.</u>

The Employer erroneously asserts that make-whole remedies were not specifically sought before the judge and that the Charging Party's request for such relief is "belated." (R. Ans. Br. 5, 11). This is incorrect both as a factual matter and as a legal matter. Both the Union and the General Counsel specifically discussed the appropriate remedy for the Company's unilateral failure to pay its established annual wage increase in their post-hearing briefs. (C.P. Post-Hearing Br. 36 n.17; G.C. Post-Hearing Br. 32-33). Both specifically noted the Respondent's failure to make whole all employees affected by the Respondent's unilateral discontinuation of its practice of offering light duty. (C.P. Post-Hearing Br. 23; G.C. Post-Hearing Br. 52). The post-hearing briefs also generally requested a make-whole remedy. (C.P. Post-Hearing Br. 71; G.C. Post-Hearing Br. 56). The General Counsel also noted at the hearing that it sought a general make-whole remedy. (Tr. 26).

Further, the Board has long recognized its power to grant remedies not specifically sought at the administrative hearing. *See Regency Serv. Carts, Inc.*, 345 NLRB 671, 676-677 (2005) ("[N]neither the General Counsel nor the Union requested [negotiation expenses] from the judge. However, they seek it before the Board and the Board is free to fashion a remedy designed so far as possible to restore the status quo ante."); *WestPac Elec., Inc.*, 321 NLRB 1322

[1] In particular, all of section "I" of Respondent's answering brief should be stricken (R. Ans. Br. 1-4); as should be the first paragraph of section "II" (R. Ans. Br. 4-5); subsections "A" and "B" of section "III" (R. Ans. Br. 6-9); the second and third sentences of the fourth paragraph of subsection "C" of section "III" (R. Ans. Br. 10); and the first paragraph of section "IV" (R. Ans. Br. 11).

(1996) (imposing reinstatement and backpay remedy despite lack of exceptions and stating "[i]t is well established that the Board has broad discretion in determining the appropriate remedies to dissipate the effects of unlawful conduct."). The make-whole remedies sought by the Union in its Exceptions 5 and 6 are traditional remedies entirely appropriate for the unfair labor practices found by the judge. "[T]he Board's standard remedy in Section 8(a)(5) cases involving unilateral changes resulting in losses to employees is to make whole any employee affected by the change." *Grand Rapids Press*, 325 NLRB 915, 916 (1998), *enfd.* 208 F.3d 214 (6th Cir. 2000); *see also Mission Foods*, 350 NLRB 336, 339 (2008) (ordering that employees be made whole for all losses suffered because of the employer's unlawful unilateral failure to grant established wage increase with a discretionary component); *Hyatt Regency Memphis*, 296 NLRB 259, 265 (1989), *enfd. in relevant part*, 939 F.2d 361 (6th Cir. 1991) (same).

III. Actual employee knowledge of unfair labor practices is not necessary to find that an employer's withdrawal of recognition was tainted, and a determinative number of purported signatures were dated between the Union's publication of the change and the message relied upon by the judge as dissipating its impact.

The Respondent incorrectly asserts that it would be error to conclude that its unlawful unilateral change to its light duty practice contributed to employee disaffection without evidence that employees whose names appear on Respondent Exhibit 2 next to the date October 14, 2016, actually knew about the Employer's unlawful change. (R. Ans. Br. 9-11). This is false. The Board has repeatedly held that actual knowledge of unfair labor practices need not be shown, so long as their "foreseeable tendency" was to weaken employee support for the Union. *Veritas Health Serv. v. NLRB*, 895 F.3d 69, 82 (D.C. Cir. 2018), *enf'g* 363 NLRB No. 108 (2016); *Wire Products Mfg. Corp.*, 326 NLRB 625, 627 n.13 (1998). The Respondent's action here had such a tendency.

Moreover, the Employer's focus on the purported signatures dated October 14, 2016, is nothing but a red herring. Even if the Respondent's incorrect view of the law were applied here, a determinative number of purported signatures are dated before the Union's October 26 message erroneously found by the judge to have mitigated the effects of the Respondent's unfair labor practice.

There is ample evidence that employees were aware of the employer's unilateral change after the Union's message regarding the unilateral change to employees dated October 16, 2016, (G.C. Ex. 6), and after five of their co-workers, including Union President Brian Collura, were out of the facility for three days. (ALJD 13). Five purported signatures on Respondent Exhibit 2 are dated October 19 and October 20. (R. Ex. 2). Two of the names associated with those purported signatures appear on the list of recipients of the Union's communications. (R. Ex. 2; G.C. Ex. 7). A third employee, Byron Filipkowski, was among the five employees actually affected by the Respondent's unlawful unilateral change.[2] (R. Ex. 2; Tr. 64). Three is a determinative number of purported signatures. The dates of those purported signatures are all between the Union's October 16 message to unit employees informing them of the change and the Union's October 26 message on which the judge erroneously relied to find that the Respondent's unlawful conduct did not taint the employee's purported disaffection. (ALJD 13).

[2] Respondent inexplicably asserts that only three employees were affected by its change to its light duty practice. (R. Ans. Br. 10). This directly contradicts the record (Tr. 64), and the ALJ's findings, to which no party excepted. (ALJD 13).

IV. **Respondent understates the extent of its refusal to bargain with the Union even before its unlawful withdrawal of recognition.**

In answering the Union's exception to the judge's failure to order the Respondent to bargain for a minimum of 24 hours per month and to submit monthly progress reports on bargaining, the Respondent improperly minimizes the gravity and extent of its refusal to bargain with the Union even before it withdrew recognition. (R. Ans. Br. 19-23).

Over the course of more than fourteen months of bargaining prior the Respondent's withdrawal of recognition, the Respondent concededly never took a position regarding employees' wages during the term of an agreement (Tr. 656); retirement benefits (Tr. 661); health benefits during the term of an agreement (Tr. 589-90; R. Ex. 53; R. Ex. 63); holidays (Tr. 649; R. Ex. 63); vacations (Tr. 648-649, 714-715); schedules (R. Ex. 63); and other mandatory subjects. Respondent failed to do so despite the Union's repeated requests for responses to its proposals on these subjects, which the Union had offered at the very first session. (G.C. Ex. 4; G.C. Ex. 27; G.C. Ex. 28; G.C. Ex. 29). Respondent conceded that it generally refused to bargain with the Union regarding subjects that it considered economic until the parties had reached agreement regarding all non-economic subjects, which never occurred. (Tr. 621-622, 656, 727-728).[3]

The Respondent's serious breach of its duty to bargain through these dilatory tactics, even before its withdrawal of recognition, means that the bargaining schedule remedy sought here is particularly appropriate. *See UPS Supply Chain Solutions, Inc.*, 366 NLRB No. 111, slip op. at 4 (2018) (imposing bargaining requirement of 24 hours per month where employer imposed unlawful condition on bargaining and refused to submit substantive counterproposals,

[3] The Respondent offered certain proposals relating to wages and health insurance on an interim basis only, to be effective while the parties bargained for an overall agreement. The Employer admitted that it never offered a position with respect to wages and health insurance to be effective during the term of the agreement. (Tr. 589-590, 656; R. Ex. 53; G.C. Ex. 32).

and cancelled bargaining sessions); *Kitsap Tenant Support Serv., Inc.*, 366 NLRB No. 98, slip op. at 23 (2018) (requiring 15 hours per week of bargaining to remedy dilatory tactics including refusal to provide relevant information and overall bad faith bargaining); *Prof'l Transp., Inc.*, 362 NLRB No. 60, slip op. at 3 (2015) (imposing bargaining requirement of 24 hours per month where the employer engaged in dilatory tactic of cancelling bargaining sessions).

V. Conclusion

For the foregoing reasons, the Union respectfully requests that the Board find merit to its exceptions, reject the Respondent's arguments against those exceptions, and strike those portions of the Respondent's answering brief contesting determinations of the judge to which no valid exceptions were filed.

Respectfully submitted,

Dated: November 21, 2018

/s/ Antonia Domingo

Antonia Domingo
Assistant General Counsel
60 Boulevard of the Allies, Room 807
Pittsburgh, PA 15222
Tel: 412-562-2284
adomingo@usw.org

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

CERTIFICATE OF SERVICE

This is to certify that a true copy of the Charging Party's Reply Brief to Respondent's Answering Brief was served via electronic mail this 21st day of November, 2018, upon

Director Dennis Walsh
Mark Kaltenbach
NLRB Region 6
615 Chestnut Street, Suite 710
Philadelphia, PA 19106
Dennis.Walsh@nlrb.gov
Mark.Kaltenbach@nlrb.gov

Lori Halber
Samantha Bononno
Rick Grimaldi
Fisher & Phillips LLP
150 N. Radnor Chester Road, Suite C300
Radnor, PA 19087
Lhalber@fisherphillips.com
Sbononno@fisherphillips.com
Rgrimaldi@fisherphillips.com

And by certified mail this 21st day of November, 2018, upon

Wyman Gordon Pennsylvania LLC
1141 Highway 315
Wilkes-Barre, PA 18702

*/s/ Antonia Domingo*_____
Antonia Domingo