

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES**

**TRIUMPH AEROSTRUCTURES, LLC,**

**and**

**Cases 16-CA-197912**

**LAWRENCE HAMM, an Individual,**

**and**

**16-CA-198055**

**RODNEY HORN, an Individual,**

**and**

**16-CA-198410**

**THOMAS SMITH, an Individual,**

**and**

**16-CA-198417**

**INTERNATIONAL UNION, UNITED  
AUTOMOBILE, AEROSPACE AND  
AGRICULTURAL WORKERS OF  
AMERICA, LOCAL 848,**

**CHARGING PARTY'S POST HEARING BRIEF  
TO THE ADMINISTRATIVE LAW JUDGE**

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International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Lodge 848, Charging Party, files its Post Hearing Brief to the Administrative Law Judge.

## **I. Statement of the Case**

Respondent, Triumph Aerostructures, LLC (*Triumph* or *Company*), a Delaware corporation, is a division of Triumph Group, an international supplier of aerospace and defense systems, components and structures based in Berwyn, Pennsylvania. Triumph is in the business of manufacturing aircraft components.

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Lodge 848 (*UAW* or *Union*) is the exclusive representative of a unit of production and maintenance workers. The Union represented a multi-facility bargaining unit of Triumph employees in the Dallas-Fort Worth area from 1968 until 2013 that included the Company's Jefferson Street facility in Dallas and its Marshall Street facility in Grand Prairie. In 2013, Respondent closed its Jefferson Street facility and opened a new facility in Red Oak, Texas. On January 13, 2014, Triumph recognized the Union as the exclusive bargaining representative of its production and maintenance employees at the Red Oak facility. In December 2014, the Regional Director issued a *Decision and Order* in case 16-UC-12495, finding that the employees of the Red Oak facility constituted an appropriate bargaining unit separate from the Marshall Street unit.

Triumph and the Union began negotiating a collective bargaining agreement (*CBA*) at Red Oak in May 2015, and the parties did not finalize an agreement until March 25, 2018. During that time there were no negotiated grievance procedures in place. The crux of this case is whether, while those contract negotiations were ongoing, Triumph violated the National Labor Relations Act (*Act*) on three separate occasions (1) when it failed to bargain with the Union to impasse over the layoff of twelve employees in its bond shop in April 2017, (2) when it failed to provide the

Union with notice and an opportunity to bargain prior to imposing discretionary discipline when it discharged Thomas Smith in November 2016, and (3) when it failed to provide the Union with notice and an opportunity to bargain prior to imposing discretionary discipline when it suspended Rodney Horn in April 2017.

With regard to Triumph's layoff of the bond shop employees, after Triumph notified the Union that it tentatively planned to layoff the twelve employees, the Union responded by requesting bargaining and information pertaining to employees who potentially were impacted. The parties then agreed to negotiate the proposed layoff during four sessions that were already scheduled for bargaining on other subjects on April 5, 6, 7, and 19, 2017. The parties exchanged proposals during these negotiations, with the Union maintaining its position that Triumph should use an alternative layoff mechanism that would allow the affected bond shop employees to remain employed at Red Oak in other jobs.

The first two of the four bargaining sessions were spent discussing a possible loan agreement that Triumph first proposed that would have allowed the affected bond shop employees to work in other Triumph job families during the planned period of reduced work. At the conclusion of the second bargaining session on April 6, however, Triumph abruptly withdrew its loan proposal without explanation and announced its intent to proceed with the layoffs. During the two remaining bargaining sessions, the Union continued to propose alternate solutions that would allow the bond shop employees to remain employed.

On April 18, the Union presented a written request to Triumph for evaluations of all bond shop employees, competencies used, and the identity of the evaluators, as well as those who contributed to the evaluations. Triumph did not provide the requested information until April 20, 2017.

By letter dated April 14, 2017, and also at the April 19 negotiation session, the Union continued to make proposals that would allow the impacted employees to maintain their employment, but Triumph rejected those proposals and informed the Union that it would carry out the layoff on April 21, 2017. The Union requested that the Triumph delay the layoff a few more days to allow for further negotiations, but the Company refused. Then, on April 20, 2017, the same day that the Company responded to the Union's April 14 information request, it informed the twelve employees that they would be laid off, then carried out the layoff the following day, April 21, 2017.

Absent a good-faith impasse in overall contract negotiations, an employer cannot implement unilateral changes. Here, Triumph violated Section 8(a)(5) and (1) of the Act by unilaterally implementing the April 21, 2017 layoffs without first bargaining to impasse. Triumph has the burden to prove an impasse had occurred, and the evidence demonstrates that the parties had not reached a point where they had exhausted their efforts to reach an agreement. The Union believed an agreement could be reached, but the Company nevertheless denied the Union's request for only a few more days to seek an agreement.

Further, there are many indicia of bad faith present in the negotiating process, including Triumph's abrupt and unexplained withdrawal of its proposal at the end of the second day of bargaining, the failure to produce information that the Union had requested, and, while insisting that the layoffs had to be carried out on April 21, the Union discovered at hearing that behind the scenes the Company was considering conducting the layoff in two phases, with the second not to occur until June 2017. It is thus clear that April 21 was not a critical end date.

With regard to the charges pertaining to the discretionary discipline of Thomas Smith and Rodney Horn, Triumph agrees that (absent a change in extant Board law) the allegations are

governed by the Board's decision in *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016), which provides a framework for assessing pre-discipline and post-discipline bargaining where there is no CBA in effect. Under *Total Security Management*, the employer in such a scenario is required to give the union notice and afford it an opportunity to bargain before imposing any *discretionary discipline* that results in suspension, demotion, or discharge of an employee in the bargaining unit represented by the union. In light of the fact that the parties have stipulated that the discipline in question was discretionary within the meaning of *Total Security Management* in both cases, and also that the Company did not give the Union pre-discipline notice, it is indisputable that the Company violated the Act. Moreover, the Company's defensive argument based on equitable estoppel is inapposite to this case.

This brief will first address Triumph's failure to bargain in good faith with respect to the April 2017 bond shop layoffs. Second, the brief will address Triumph's failure to give the requisite pre-discipline notice and opportunity to bargain with respect to Smith and Horn in violation of Section 8(a)(5).

## **II. Procedural History**

Three long-time Triumph employees, Mike Kindley, Larry Hamm, and Rodney Horn, filed unfair labor practice charges against the Company although they were not members of the negotiating committee. Tr. 148:1-11. The Union concluded that employees who were actually affected by the bond shop negotiations should file charges. Tr. 147:12-21. Moreover, the Union did not have any union representatives on site at Red Oak at the time. Tr. 209:13-210:7. Thomas Smith also filed his own charge.

Lawrence Hamm filed his original unfair labor practice charge in Case 16-CA-197912 on May 1, 2017. Ex. GC-1(a); Ex. GC-1(c). Rodney Horn filed his original unfair labor practice

charge in Case 16-CA-198055 on May 2, 2017. Ex. GC-1(c). Thomas Smith filed his original unfair labor practice charge in Case No.16-CA-198410 on May 8, 2017. Ex. GC-1(e). Michael Kindley filed his original unfair labor practice charge in Case No. 16-CA-198417 on May 8, 2017 [Ex. GC-1(f)], and the charge was amended on January 8, 2018, to substitute the UAW as the charging party. Ex. GC-1(i).

The Regional Director filed an *Order Consolidating Cases, Consolidated Complaint and Notice of Hearing* on January 29, 2018, consolidating the four cases and setting the matter for hearing on June 4, 2018. Ex. GC -1(k). Triumph filed *Respondent's Answer* on February 12, 2018. Ex. GC-1(m). The Regional Director filed an *Amended Order Consolidating Cases, Consolidated Complaint and Notice of Hearing* on January 29, 2018, and set the matter for hearing on June 4, 2018. Ex. GC -1(n). An order postponing the case indefinitely was filed on April 4, 2018. Ex. GC-1(p).

Triumph filed its *Respondent's Answer to Second Amended Complaint* on April 5, 2018. Ex. GC-1(r). The Regional Director filed an *Order Consolidating Cases, Second Amended Consolidated Complaint and Notice of Hearing* on January 2, 2019, and set the matter for hearing on April 22, 2019. Ex. GC -1(s). Triumph filed *Respondent's Second Amended Answer* on January 15, 2019. Ex. GC-1(u).

The hearing took place April 22 and 23, 2019 at Region 16 in Fort Worth, Texas before Administrative Law Judge Robert A. Ringler.

### **III. Statement of Facts**

The parties were able to streamline their presentation of the case through their *Joint Stipulations of Fact* [Jt. Ex. Z], which provides a timeline of many of the salient events giving rise

to the charges. The *Joint Stipulations of Fact* is set forth at length below for the Judge's convenience, followed by a summary of the testimony presented at the hearing.

**A. Joint Stipulations of Fact**

1. From 1968 until 2013, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, Local 848 ("Union") represented production and maintenance employees at Triumph Aerostructures, LLC's ("Respondent") (and its predecessors') facilities in a multi-facility bargaining unit that include its Jefferson Street facility in Dallas, Texas and its Marshall Street facility in Grand Prairie, Texas.
2. In 2013, Respondent decided to close its Jefferson Street facility and open a new facility in Red Oak, Texas.
3. On August 1, 2013, Respondent established and implemented initial terms and conditions of employment pertaining to employees at its Red Oak facility, which include disciplinary policies, including a code of conduct and progressive discipline policy, and policies relating to reductions in force based on performance evaluation. (Joint Ex. A).
4. In October 2013, Respondent started transferring bargaining unit employees to the Red Oak facility.
5. On January 13, 2014, Respondent recognized the Union as the exclusive bargaining representative of the production and maintenance employees at its Red Oak facility. (Joint Ex. A.1). In the recognition letter, Triumph offered to bargain for a new collective bargaining agreement to cover the Red Oak Facility.
6. In March 2014, Respondent permanently closed its Jefferson Street facility.
7. On March 5, 2014, Respondent provided information to the Union regarding disciplinary notices, warnings, or records at the Red Oak Facility on or after January 13, 2014. (Joint Ex. B). The Company also offered to bargain over discipline-related issues upon request, as described in the letter.
8. On April 1, 2014, Respondent sent the Union a letter attaching disciplinary actions issued against bargaining unit employees at the Red Oak facility since its March 5, 2014 correspondence. (Joint Ex. C). The letter stated "the Company remains open to discuss issued discipline and to bargain over an interim notification and/or grievance procedure for discipline." The Company also stated that "in the meantime the Company will continue to enforce the established terms and conditions of employment, including taking disciplinary action for violation of Company rules and procedures."
9. On May 18, 2015, Respondent and Union began negotiating their first collective bargaining agreement to cover bargaining unit employees at the Red Oak facility.

10. Between the Company's March 5, 2014 letter (Joint Ex. B) and November 13, 2016, the Union received approximately 30 letters from Triumph providing updates as to disciplinary actions issued at Red Oak, to include warnings, suspensions, and terminations.
11. On November 14, 2016, the Union sent Respondent a letter asserting that Triumph had "failed to notify and bargain over Discretionary Discipline" at Red Oak, and "demanding that all those affected be made whole and those employees in which the Company seeks to discipline be brought to the negotiating table for further discussion prior to imposing an further action." (Joint Ex. D).
12. On November 17, 2016, Respondent suspended its employee Thomas Smith, pending investigation, without contacting the Union about its decision at the time.
13. On November 29, 2016, without contacting the Union about its decision at the time, Respondent sent a letter to employee Thomas Smith, notifying him that he was terminated effective November 17, 2016.
14. Respondent's decision to terminate Thomas Smith was discretionary within the meaning set forth in *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016).
15. On December 12, 2016, Respondent responded to the Union's November 14, 2016 letter pertaining to employee discipline with a letter again requesting contact information for a Union representative to receive information regarding potential discretionary discipline, such as a suspension or termination. (Joint Ex. F).
16. On December 21, 2016, the Union sent Respondent a letter stating it was "prepared to bargain the disciplinary actions taken by the Company." The letter contained a chart of past disciplinary actions between May 24, 2016 and October 31, 2016, including suspensions and one termination. (Joint Ex. F).
17. On February 7, 2017, the parties met to bargain over employee discipline as proposed in the Union's December 1, 2016 letter. During that meeting, Respondent told the Union that it terminated Mr. Smith effective November 17, 2016, and provided relevant documentation.
18. On March 28, 2017, Respondent sent the Union a letter informing the Union of its tentative plans to reduce its Red Oak Facility bond shop headcount through the layoff of twelve bargaining unit employees effective (tentatively) April. 21, 2017. (Joint Ex. G).
19. In late 2016 and early 2017, Respondent experienced a decrease in anticipated orders from customers Bell and Gulfstream that impacted bond shop staffing needs, which triggered the business rationale for the March 28, 2017 letter (Joint Ex. G) and offer to bargain. The General Counsel does not allege that Respondent's business rationale failed to qualify as exigent circumstances such that Respondent had a duty to bargain to overall impasse or agreement with the Union on a collective bargaining agreement prior to making unilateral changes.

20. On March 30, 2017, the Union responded to Respondent's letter and requested dates for bargaining. (Joint Ex. H).
21. On March 30, 2017, the Union sent a request for information to Respondent. (Joint Ex. I).
22. On March 31, 2017, Respondent responded to the Union's March 30, 2017 information request and sought bargaining over the proposed layoff during upcoming dates already scheduled for bargaining other items. (Joint Ex. J).
23. On April 3, 2017, without contacting the Union about its decision at the time of the discipline, Respondent issued employee Rodney Horn a five-day suspension.
24. Respondent's decision to suspend Rodney Horn was discretionary within the meaning set forth in *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016).
25. On April 5, 2017, Respondent and the Union met for bargaining. During that bargaining session, Respondent provided the Union with a proposed Letter of Agreement that included a potential framework on internal loans that could provide for continued employment for those impacted by the planned bond shop headcount reduction. The framework included a provision under which up to 20 bond shop unit employees could be loaned to other departments rather than laid off from the Company. (Joint Ex. K).
26. On April 6, 2017, Respondent and the Union met for bargaining. During that bargaining session, the Union provided Respondent with a response to Respondent's April 5 proposed Letter of Agreement [Joint Ex. K] at about 11:04 a.m. (Joint Ex. L). Respondent provided a counterproposal at about 1:29 p.m. (Joint Exhibit M). The parties disagreed over whether the Company must accept volunteers for the loans, or could unilaterally select employees for loans.
27. On April 7, 2017, Respondent and the Union met for bargaining. During that bargaining session, the Union requested information about the employees hired into the assembly department since February, including their certifications, wage rate, and qualifications, which the parties discussed at the bargaining table. (Joint Exhibit N). At about 11:14 a.m., the Union made a new proposal regarding the proposed bond shop layoff focusing on offering employees transfers to the assembly department based on seniority, and grandfathering their compensation rates in assembly. (Joint Exhibit O). At about 11:35 pm., Respondent made a counterproposal on these issues to the Union. (Joint Exhibit P).
28. On April 14, 2017, the Union sent Respondent a letter rejecting the Respondent's April 7, 2017 counterproposal [Joint Exhibit P], withdrawing "its previous proposal," and making several new counterproposals on internal transfer and recall rights for those "affected by layoff." (Joint Ex. Q).
29. On April 18, 2017, the Union sent Respondent a letter requesting "all evaluations of Bond Shop and NDI employees, the competencies used, who evaluated each employee, and anyone else that had input on the ratings." (Joint Ex. R).

30. On April 19, 2017, Respondent and the Union met for bargaining. The Company rejected the Union's proposal contained in the April 14, 2016 letter. During that bargaining session, at about 1:15 p.m., the Union made a counter-proposal regarding the proposed bond shop layoff (Joint Ex. S). Respondent also rejected the Union's counter-proposal at the bargaining session. The Company informed the Union of its final decision to move forward on April 21, 2017 with its layoff plan for the bond shop. (Joint Ex. T).
31. On April 20, 2017, Respondent responded to the Union's April. 18, 2017 information request and included the bond shop employee rankings per the status quo layoff policy, which identified the bottom ranked unit employees scheduled for layoff from the bond shop on April 21, 2017. (Joint Ex. U).
32. On April 21, 2017, Respondent laid off the following employees from the bond shop at its Red Oak facility: Lawrence Hamm, Rodney Horn, Michael Kindley, Brent Davis, Samuel Holsworth, John Nguyen, Jose Magana, Jr., Antonio Cavazos, Le Nguyen, Richard Morris, Ricky Davis, and Curtis Burns.
33. The General Counsel does not allege that Respondent's April 21, 2017 layoff selection procedures involved the exercise of impermissibly broad discretion.
34. On May 4, 2017, Respondent sent the Union a regular update letter informing the Union about all bargaining unit employee disciplinary actions since April 3, 2017, including the suspension of Rodney Horn. (Joint Ex. V).
35. On May 26, 2017, the Union sent a letter to Respondent stating that "the Union stands ready to bargain an interim notification process for discipline or Red Oak bargaining unit employees." (Joint Ex. W).
36. On June 2, 2017, the Union and Respondent executed an Interim Discipline Notification for Red Oak Agreement that provided, in part, for the Respondent to notify the Local 848 President, International Representative, and the local union hall Executive Assistant by e-mail "should the Company determine a suspension, demotion, or termination is potentially warranted." (Joint Ex. X).
37. On May 25, 2018, the Employer and Union reached a collective bargaining agreement applicable to bargaining unit employees at the Red Oak facility (Joint Ex. Y).

**B. Summary of the Evidence**

The Counsel for the General Counsel called James Ducker and David Barker to testify in its case-in-chief. Respondent called Danielle Garrett and Eileen Rowe to testify in its case. The Counsel for the General Counsel recalled Barker in rebuttal.

## **1. Triumph's Corporate Structure and Red Oak Operations**

Danielle Garrett has worked for Triumph Group, Triumph Aerospace Structures Division since November 2004. Tr. 232:25-233:4. (The Company was previously Vought Aircraft Industries until Triumph purchased Vought in 2012. Tr. 233:5-11.) Garrett began her employment as a Labor Relations Specialist, then Human Resources Manager for Triumph's former Jefferson Street facility, and then she was the HR Manager for both Red Oak and Marshall Street. Tr. 233:12-18. Now, she is Senior Director of Labor Relations for all of the Triumph Aerospace Structures companies, which include facilities in Nashville, Tulsa, Red Oak, Marshall Street, Hawthorne, and Stuart Florida. Tr 233:12-21. She was on the executive team that made the decision to close the Jefferson Street plant due to lease issues and to build a new facility in Red Oak. Tr. 234:5-13. She was responsible for all human resources matters at Red Oak including staffing, establishing initial terms and conditions of employment, and bargaining with the Union, including negotiations for a first contract. Tr. 234:5-21.

When the Red Oak facility was opening, employees at the former Jefferson Street and the Marshall Street facilities who wanted to transfer to Red Oak had to bid on an open position. Tr. 237:2-5. The Company then interviewed and selected for transfer a substantial number of employees. Tr. 237:4-7. More than 500 employees transferred, including both hourly and salaried employees. Tr. 237:8-11.

Norm Porter, Manager of Human Resources at Red Oak, reported to Garrett. Tr. 246:8-21. He was responsible for the day-to-day labor relations at Red Oak, whereas Garrett oversaw Red Oak, Marshall Street, and some other plants. Tr. 246:8-21.

Eileen Rowe currently works for Bombardier Aerostructures at Red Oak, a facility that was formerly owned and operated by Triumph. Tr. 373:20-374:2. Prior to working for Bombardier,

Rowe worked for Triumph from December 2014 until February 6, 2019. Tr. 374:3-6. From December 2014 until September 2017, she was Triumph's bond shop manager before she moved to another area to broaden her experience. Tr. 374:9-20. As bond shop manager, her responsibilities included analyzing staffing levels and deciding what level of staffing was needed in the bond shop. Tr. 374:21-375:12. All of the managers at Red Oak and the Industrial Engineers would meet as an organization every Monday and review staffing, looking forward from three months to one year based on the volume of work they had; later the meeting was changed to biweekly. Tr. 375:9-18. The Program Office worked directly with the customers with regard to their specific contract terms, and Rowe was not involved in that process. Tr. 379:12-19.

Triumph's Red Oak facility is one rectangular building, and the work consists largely of assembly and bonding operations. Tr. 240:24-241:7, 242. The Company performs bonding operations on various programs for Bell and Gulfstream, assembly work on the Gulfstream G550 and V-22, and has "key operations largely to build large aircraft structure components." Tr. 241:3-11. Garrett testified that, because Triumph builds components for larger customers, its work is entirely dependent on the larger customers' orders, which is in turn directly tied to the end consumer. Tr. 241:16-23. The customers also set the flow and demand for product deliveries. Tr. 242:1-10.

The bond shop is located at the back of the facility, through the assembly area, housed in the *Cleaning Room*, where all of the bonding operations take place. Tr. 242:11-243:2. It is a self-contained room with separate ventilation and air conditioning that has to be maintained at a climate different than the rest of the facility. Tr. 243:3-7. The employees who work in the bond shop are in the "Bonder" classification with four different labor grades that exclusively perform bonding work. Tr. 243:8-13. The bargaining unit also has an assembly classification, which does assembly

work, painting, toolmaking, and maintenance. Tr. 243:14-19. The assembly shop is the area where parts of the aircraft are actually put together. Tr. 77:24-78:5. 5S is a group that performs various tasks designed to streamline work processes for efficiency which do not require a lot of skill. Tr. 76:20-77:8; 265:1-12, 342:9-343:25.

Garrett stated that the initial terms and conditions of employment for the bonder classification differ from those of other classifications, as related to the flow of work, or work assignments and scope. Tr. 243:20-24. The bond shop has its own cost data and performance trends, separate from assembly. Tr. 244:1-6. Whereas assembly work involves drilling and filling parts, bond shop work requires use of many different machines as well as a substantial amount of work by hand. It involves laying pieces, vacuuming them, then placing them into an autoclave, or giant oven. Tr. 244:7-18. After the components are “cooked,” they are trimmed and shaped, then go thorough NDI (Non-Destructive Inspection), then to assembly to go onto an aircraft. Tr. 77:9-23, 244:18-22; 405:23-407:4.

## **2. The Union’s Representation of the Red Oak Bargaining Unit**

Union witness James Ducker, who works as a toolmaker at Triumph’s Marshall Street facility, served as President of Local 848 from November 2014 to June 2017. Tr. 61:19-62:9. When Ducker became President, Local 848 represented four units: a Raytheon unit in Plano, a Lockheed unit in Grand Prairie, the Marshall Street facility, and the Red Oak facility. Tr. 62:21-25.

There was no contract in place at the Red Oak facility when Ducker took over, as bargaining for a CBA at Red Oak began in mid-2015. Tr. 63:1-7. As Union President, Ducker ran the day-to-day business of the union hall, chaired the Executive Board, and was on the negotiating team and grievance process for all four units. Tr. 63:8-12. His role on the negotiating team included participating in the Red Oak contract negotiations; the parties started negotiating in

April or May 2015 after the resolution of the Union's unit clarification petition and reached a comprehensive agreement at Red Oak [Jt. Ex. Y] approximately three years later in March 2018. Tr. 63:13-21; 238:20-240:20. The CBA is currently in effect at Red Oak. Tr. 240:21-23.

Union witness David Barker has been an International Representative for the UAW since November 1, 2015. Tr. 61:19-62:9. His main duties in that position are to negotiate contracts and participate in arbitrations for several bargaining units in a geographic area from Tulsa and Northern Oklahoma to the north, and Grand Prairie, Texas to the south, including Local 848. Tr. 174:13-175:4. Barker assumed responsibility for Red Oak from former International Representative Wendell Helms in approximately February 2016. Tr. 62:10-20.

In addition to Ducker, the Union's negotiating committee included Barker and unit employees Adam Rondon, Corey Gregg, Jimmy Ricks, Tommy Bulin, and Richard Guerra. Tr. 63:22-64:6. The negotiating team also included the note keeper, Lindsay Portier. Tr. 64:6-7. Triumph's negotiating committee for the Red Oak CBA included Garrett, Porter, Jorge Gil, a Human Resources representative, and Wendy Bailey, a Human Resources representative who served as note-taker. Tr. 64:8-24. During the contract negotiations, Ducker and Garrett had each other's cell phone number and e-mail address. Ducker and Garrett exchanged e-mails and, on occasion, text messages. Tr. 65:1-16.

### **3. Facts Regarding the Bond Shop Layoffs**

#### **a. Triumph's Status Quo Reduction in Force Policy**

Prior to the Company's recognition of the Union at Red Oak in January 2014, it implemented a status quo policy for reductions in force that was effective as of August 1, 2013. Tr. 235:3-11. Jt. Ex. I. The purpose of the *Reduction in Force* policy [Jt. Ex. I, pp. 2-4] was to provide guidelines for the layoff process. Jt. Ex. I. It included competencies associated with employee performance. Tr. 235:12-18. It was substantially similar to the non-represented layoff

policy that Triumph applied throughout its companies to salaried and other non-represented hourly employees. Tr. 235:3-9.

Also prior to transferring any employees to Red Oak, in August 2013 the Company adopted a Code of Conduct that was substantially similar to that applied at other Triumph facilities with some nuances that were unique to Red Oak. Jt. Ex. A, pp. 5-10. The Standards of Conduct applied to all employees and listed violations that would result in disciplinary action. Tr. 306:19-25. Also, the Company had status quo disciplinary procedures in place that were part of the employee handbook when Red Oak opened in 2013. Tr. 307:17-22; Jt. Ex. A, p. 10. These procedures included a progressive discipline system. Tr. 308:5-10; Jt. Ex. A, p. 10.

Triumph had informed the UAW that it had the RIF policy, which provided for the Company's use of performance rankings to reduce headcount. Tr. 110:1-111:21. The Union was also aware that the Company used competency ratings for annual evaluations and merit increases in wages. Tr. 111:22-112:22. Because the Company had no status quo loan policy in place, the only way for a loan policy to be implemented was through negotiations with the Union. Tr. 112:24-113; 193:18-24. Similarly, there was no status quo policy on transfer or recall rights. Tr. 113:6-10, 193:25-194:10.

Triumph refers to its status quo ranking method for layoffs based on a list of competencies as *rack and stack*, which does not include any consideration of seniority. Tr. 176:15-177:2. Before the bond shop layoffs in dispute, the parties addressed the *rack and stack* method in their first contract negotiations at Red Oak. Tr. 177:3-5. The Union was concerned with the method's subjective nature in that it omitted other qualities such as being a good team player or having good communication skills. Tr. 177:6-18.

The same competencies are used in the annual performance assessments at Red Oak, although employees are not comparatively racked for that purpose. Tr. 299:9-300:3. The same *rack and stack* competencies were also used previously in a 2015 Bond Shop layoff. Tr. 300:1-23.<sup>1</sup>

**b. On March 28, 2017, Triumph Notifies the Union of Its Intent to Lay Off Twelve Bond Shop Employees**

Rowe testified that at the beginning of April 2017, Blake Mansfield, an Industrial Engineer with whom she worked in the bond shop, provided her with a forecast showing that a reduction in head count in the bond shop was needed due to declining orders. Tr. 380:5-385:12; Ex. R-15. The forecast report reflected that at the time, the head count in the bond shop was approximately 98 employees. Tr. 383:3-17. Rowe testified that the report showed that by the end of April, the staffing demand was 80 employees for several months, then declining further thereafter. Tr. 5-12.

Rowe and Garrett discussed that there was not enough work in the bond shop for the total head count, and how a layoff should be handled under the circumstances when they had a Union but no labor contract. Tr. 245:7-21, 246:22-2, 385:16-19. Rowe first let Garrett know that the volume of work in the bond shop was not substantial, then after gathering more information, Rowe told Garrett that the excess head count could be as low as six or seven, or as high as fifteen. Tr. 247:2-7; 385:20-386:7.

Garrett informed Rowe that she would have to contact the Union, and the decision was made to notify the Union of the Company's intent to layoff twelve employees in the bond shop effective on April 21, 2017. Tr. 247:2-7; 386:8-11. According to Garrett, the April 21 date was

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<sup>1</sup> Counsel for the General Counsel and the Charging Party both objected to and requested a running objection to Garrett's testimony concerning the 2015 Bond Shop layoff at Red Oak as being irrelevant to the 2017 Bond Shop layoff at issue. Tr. 300:13-304:16. The Administrative Law Judge determined to allow some discussion of the 2015 Bond Shop Layoff for a "limited purpose" [Tr. 300:13-16] and as "background on what happened in the past" [Tr. 303:13-24]. Ultimately, the Administrative Law Judge cut off the Company's presentation of testimony and evidence on that topic, finding that sufficient background had been presented. Tr. 304:6-12. The Union renews its objections to any testimony or exhibits regarding the 2015 Bond Layoff as being wholly irrelevant to the present case.

chosen so as to build in time for the Company “to have the appropriate conversations” with the Union about the tentative layoff plans. Tr. 247:25-248:16. Rowe testified that she discussed April 21 as a possible layoff date because only 80 employees should have remained in the bond shop by the end of April according to the forecast. Tr. 387:5-11.

Triumph first notified the Union of its intent to layoff twelve employees in the bond shop at the Red Oak facility on March 28, 2017. Tr. 176:1-14; Jt. Ex. G. On that date, Porter sent Ducker and Barker a letter as “official notification to the Union” of the Company’s plan, including that the Company was considering April 21, 2017 as the date for the layoff. Tr. 66:15-67:15, 246:8-21; Jt. Ex. G. The Company indicated that the number of employees in the bond shop would be reduced by at least six and no more than 15 in the coming weeks. Jt. Ex. G. The range was chosen because at the time the Company sent the notice it was not sure how many employees would be included in the layoffs. Tr. 249:6-9.

The Union understood that when Triumph stated in its March 28 letter that it “intends to comply with the status quo layoff policy making layoff selections,” it referred to its *rack and stack* procedures as set forth in its status quo reduction in force policy of August 1, 2013, and that any bargaining that would occur would be over an alternative to those procedures. Tr. 192:5-193:17; Jt. Ex. A, Jt. Ex. G.

By letter dated March 30, 2017, Barker informed Porter that the Union accepted the opportunity to negotiate the anticipated layoffs and requested bargaining dates as soon as possible due to the time constraints the Company had imposed on the Union by its short notice. Tr. 67:16-68:7, 251:14-21; Jt. Ex. H. On the same date, March 30, Barker sent Porter a request for information regarding the layoffs, including for a list of bond shop employees in seniority order. Tr. 69:9-70:4; Jt. Ex. I.

Triumph and the UAW agreed to bargain over the proposed layoffs at the Hilton Garden Inn on April 5, 6, and 7 since the parties had previously scheduled merit increase negotiations on those dates. Tr. 70:5-18. According to Garrett, the parties had a total of nine days previously scheduled for bargaining in the month of April, and the Company's proposal was to change course and focus on the layoffs in the bond shop. Tr. 251:23-252:5.

The parties met in a conference room of the hotel. When they were not in joint session, the Company representatives remained in the conference room and the Union representatives conferred at a large conference table in the lobby. Tr. 268:21-269:8. It was common for the parties to caucus frequently in separate meetings. Tr. 339:4-11.

**c. The Company Provides an Incomplete Response to the Union's March 30 Information Request**

On March 31, 2017, Triumph provided an incomplete response to the Union's March 30, 2017 information request. Tr. 74:22-75:12. Jt. Ex. J. The response was incomplete in that it did not provide the requested segregated list of Red Oak unit employees who did not come from either Jefferson Street or Marshall Street, and also did not include requested attendance cards for all bond shop employees for the one-year period from April 1, 2016 to April 1, 2017. Tr. 75:13-22; Jt. Ex. J. The Company did not provide the requested time cards until April 19, 2017, the day before it had planned to notify the twelve employees of the layoff. Tr. 76:8-13.

Garrett testified as to what was involved in gathering the attendance cards. The Company kept the attendance cards for approximately 400 to 500 bargaining unit employees alphabetically, and one administrator records attendance by hand. Tr. 253:17-254:4, 19-24. Garrett stated that providing the cards would have required Triumph to review them to find the bond shop employees, make photocopies, and find those for the previous year and then follow the same procedure. Tr. 254:1-6. She viewed it as burdensome for management to go through that process given that the

Company had previously provided disciplinary records for attendance and that management would not consider attendance cards in determining the *rack and stack* factors. Tr. 254:6-9; 255:9-15. Instead, the Company decided to review the disciplinary records on file, which might include disciplinary actions imposed for attendance deficiencies. Tr. 255:16-256:11. Some of the absences noted on timecards might have been showed as excused elsewhere. Tr. 256:12-18. However, Garrett agreed on cross-examination that you could use the timecards to verify the date on which an employee was absent. Tr. 335:15-336:2.

#### **d. April 5 Bargaining Session**

At the first bargaining session on April 5, Ducker, the negotiating committee members, and note taker Lindsay Portier participated for the Union. Barker, International Representative, was unavailable because he had an emergency meeting out of state that day. Tr. 70:19-71:6; 177:19-178:4. Garrett, Porter, Bailey, and Gil participated for Triumph; Bailey and Gil took notes. Tr. 70:23-24, 258:1-259:7; Ex. R-4. The meeting began at either 9:17 or 9:18 a.m.<sup>2</sup> and concluded at 10:53 or 10:54 a.m. for a total meeting time of approximately one hour, 35 minutes, including caucus time. Tr. 262:6-13; Ex. GC-2; Ex. R-4.

After a brief discussion of 2017 merit increases for unit employees, the parties discussed Triumph's failure to provide the bond shop attendance cards that the Union had requested in its March 30, 2017 information request, and then at approximately 9:31 a.m. turned to a discussion of the proposed layoffs. Ex. GC-2, pp. 2-4.

Ducker recalled that the parties had discussed the possibility of reaching an agreement to loan the employees from the bond shop to different job families in order to keep them gainfully employed. Tr. 76:14-19. At 9:58 a.m., the Company presented to the Union a proposed letter

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<sup>2</sup> There is a one-minute discrepancy in the times recorded in the parties' bargaining notes. Ex. GC-2; Ex. R-4.

agreement for up to 20 employees to be loaned to other unit classifications for a period of up to six months without having their compensation altered, as follows:

04/05/11  
9:58a  
Hand-Delivered

**Letter of Agreement  
Red Oak Bond Shop Temporary Loans**

In as much as the Company tentatively planned to layoff approximately 12 bond shop employees at its Red Oak location on or about April 21, 2017, the Company and the Union have agreed to the following:

- In lieu of layoff, the Company may loan not more than 20 bond shop employees to other UAW job classifications and/or assignments associated with continuous improvement/lean activities for a period not to exceed six (6) months from the date of the instant agreement.
- Employees who are loaned will not have their compensation affected for the duration of the loan.
- The Company shall have the sole discretion to determine which individual bond shop employees shall be loaned outside of the bonding job classification.
- The Company shall have the sole discretion to determine the job assignments of loaned employees.
- Should an individual employee refuse to be loaned and/or refuse to perform the assigned tasks outside, the employee shall be deemed to voluntarily terminate his employment.

This agreement is specific to the facts and circumstances herein, and shall not be cited by either party as precedent setting.

Tr. 78:6-79:10; Jt. Ex. K.

Triumph's initial proposal provided for a loan of the laid off employees to other job classifications and also provided that the compensation of the transferred employees would not be affected for the duration of the loan. Jr. Ex. K. Garrett agreed that the intent was for the proposed loan agreement to be specific to the 5S job family. Tr. 339:13-340:8. At this point, the parties had not discussed loans to the assembly department, but only "loans to do 5S and some other things."

Tr. 340:6-17.

The Union responded to the proposal the following day, on April 6. Tr. 80:2-6. Ducker explained that the Union was not able to present a counter-proposal that same day because the parties had to adhere to a predetermined schedule for addressing discipline issues. Tr. 79:11-80

**c. April 6 Bargaining Session**

On April 6, the parties held a second bargaining session beginning at 9:07 a.m. Ducker, the bargaining committee, and Lindsay Portier were present for the Union; Garrett, Bailey and Gil represented the Company. Tr. 80:11-17. Barker, who had returned from his out-of-state trip earlier that morning, arrived at 11:03 a.m. Tr. 80:11-15; 178:5-22; Ex. GC-3, p. 3. Portier again took comprehensive bargaining notes of the second meeting. Tr. 80:18-82:2; Ex. GC-3.

The parties discussed the Company's incomplete response to the Union's March 30 information request. Ducker explained to Garrett that the timecards were needed to validate the disciplinary actions, or if the Company were to use an evaluation process, to verify that management was consistent in its evaluation of employees' attendance. Tr. 76:2-8. Soon after Barker arrived, at 11:04 a.m., the Union presented the Company with a counter-proposal to the Company's proposed letter agreement of the previous day:

04/06/17  
11:04a

**Union's Response to the Company's Proposed Letter of Agreement  
Red Oak Bond Shop Temporary Loans**

**April 6, 2017**

In as much as the Company tentatively planned to layoff approximately 12 bond shop employees at its Red Oak location on or about April 21, 2017, the Company and the Union have agreed to the following:

- In lieu of layoff, the Company may loan not more than 20 bond shop employees to other UAW job classifications and/or assignments associated with continuous improvement/lean activities for a period not to exceed six (6) months. If the need arises to increase the number, the parties will meet and mutually agree to adjust the number..
- Employees who are loaned will not have their compensation affected for the duration of the loan.
- The Company will seek volunteers to loan.
- The Company will make every attempt to place loaned employees into positions where they may have previous experience or may be successful.
- The Company will collaborate with the Union to satisfy these loans.
- Should an individual employee refuse to be loaned and/or refuse to perform the assigned tasks outside, the employee shall be laid off for a period not to exceed six (6) months from the date of the instant agreement.

This agreement is specific to the facts and circumstances herein, and shall not be cited by either party as precedent setting.

Tr. 82:18-83:15, Tr. 179:11-24; Jt. Ex. L.

Ducker explained that the Union's main concerns with Triumph's April 6 proposal were that the Company was going to use "rack and stack evaluations" as the method to select who would be laid off and that under the Company's proposal, an employee who refused to be loaned would be effectively terminating himself. Tr. 82:11-20. The Union concurred that a loan arrangement would be a good solution and wanted to work toward an agreement that would meet the needs of both parties. Tr. 82:18-25; 158:21-159:8. To that end, the Union's April 7 counterproposal provided that should an employee refuse to be loaned and refuse to perform assigned tasks outside the bond shop, he would be laid off for a period not to exceed six months from the date of the agreement, and further provided that the Company would seek volunteers for loaning, rather than make its own assignments for loan via "rack and stack." Tr. 83:11-24. The Union believed that using volunteers was a "win/win" because some managers did not know or understand what experience some of the employees had. Tr. 196:11-19.

The Union proposal also included a provision that the Company would make every effort to place loaned employees into positions "where they may have previous experience or may be successful." Tr. 83:25-84:4. When Garrett asked for a clarification as to what the UAW meant by putting employees in a position to be successful, the Union explained that an employee should not be put in a position where he did not have a chance to perform the job because of whatever limitations that he may have, but should instead be put in a job that he had the ability to perform so as to create a "win-win situation." Tr. 84:8-19. The Union proposed to make that happen by discussing such issues with the Company. Tr. 84:15-23.

Garrett testified that Triumph was opposed to seeking volunteers to loan because not all employees in the bond shop performed the same tasks even though they were in the same job family. Tr. 266:3-15. The Company wanted to loan employees who did not have active bond shop

work. Tr. 266:16-23. Garrett also stated that she did not view the Union's proposal to loan volunteers as covering situations where neither enough nor too many employees volunteered to be loaned. Tr. 267:8-16.

After less than 15 minutes of discussion of the Union's counterproposal, the parties took a caucus/lunch break, during which time the Union representatives discussed proposals among themselves. At 1:29 p.m., Garrett presented a new counterproposal to the Union's representatives in the hotel lobby, as follows:

4/6/17 walked to Union  
@ 1:29 pm

**Letter of Agreement  
Red Oak Bond Shop Temporary Loans**

In as much as the Company tentatively planned to layoff approximately 12 bond shop employees at its Red Oak location on or about April 21, 2017, the Company and the Union have agreed to the following:

- In lieu of layoff, the Company may loan not more than 20 bond shop employees to other UAW job classifications and/or assignments associated with continuous improvement/lean activities for a period not to exceed six (6) months from the date of the instant agreement.
- Employees who are loaned will not have their compensation affected for the duration of the loan.
- The Company shall have the sole discretion to determine which individual bond shop employees will be loaned outside of the bonding job classification.
- The Company shall have the sole discretion to determine the job assignments of loaned employees.
- Should the Union have concerns regarding a loaned employee(s) and/or the type of work said loaned employee(s) is assigned, the Company will meet with the Union to discuss such concerns in an attempt to reach mutual resolution.
- Should an individual employee refuse to be loaned and/or refuse to perform the assigned tasks outside, the employee shall be deemed to voluntarily terminate his employment.
- Should the need arise to increase the number of employees loaned out and/or the duration of the loan, the parties will meet to discuss the possibility of an increase of scope.

This agreement is specific to the facts and circumstances herein, and shall not be cited by either party as precedent setting.

Tr. 84:24-86:4, Tr. 179:25-180:25-181:5; Jt. Ex. M.

Notably, Triumph's April 6 counterproposal continued to provide for a loan of employees and that their compensation would not be affected for the duration of the loan. Jt. Ex. M. The proposal to maintain the employees' level of wages was significant because beginning wages in the assembly department was only \$13 to \$15 per hour. Tr. 164:8-13. Regarding selection,

Triumph's April 6 counterproposal provided for the Company to have sole discretion to determine which employees would be loaned out of the bond shop. Tr. 268:5-12; Ex. Jt.-M.

The Union liked some aspects of Triumph's 1:29 p.m. counter-proposal, including the terms that the Company was still willing to loan employees, the Company had made provision for the parties to meet and discuss concerns regarding job assignments, and that the Company had agreed to meet to discuss any possibility of an increase in the scope of the loan, whether by quantity of employees or duration. Tr. 86:19-87:6. The Union disagreed with the provision that employees would be considered to have voluntarily terminated if they refused their assignment, and the Union's representatives were still "trying to get past" the Company's selection of employees for loan in its sole discretion. Tr. 86:21-87:6; 159:9-22.

Garrett testified as to off-the-record conversations in which she told the Union's representatives that if they insisted on volunteers, she was doubtful that the loan proposal was going to work and she suggested that the parties focus on a different approach. Tr. 269:9-270:5.

Regarding Triumph's voluntary termination provision, the Union did not want to see employees put into a job only to find that they were either physically or intellectually unable to perform it, and then find themselves being forced to "voluntarily" terminate for that reason. Tr. 159:19-160:13. For example, an employee without drilling experience might be moved to a position where he had to perform a substantial amount of drilling activities, which Ducker noted required a talent for that type of work, as did riveting and bucking. Tr. 160:25-161:10. On the other hand, a bonder could probably adapt well to the sealing process and inspections, which required skills similar to those used in the bond shop. Tr. 161:4-15.

The Union representatives had discussed Triumph's 1:29 p.m. counterproposal among themselves for only 45 minutes when Garrett, Bailey, and Gil walked into the hotel lobby and

informed them that they had rescinded the employer's proposal. Tr. 87:7-21, 162:11-17; Ex. GC-3, p. 6. During that 45-minute period the Union representatives had discussed the proposal among themselves. They had exerted their best efforts into making the loan arrangement work and they believed that the parties were close to an agreement. Tr. 162:5-14; 181:8-14. However, after 45 minutes, Triumph's representatives advised the Union that they had made the decision to go forward and that twelve bond shop employees and three NDI employees<sup>3</sup> would be laid off, and that Garrett would state the Company's position on the record the following day once she was certain that the layoff would happen. Tr. 87:22-88:6; 107:23-108:10; 162:11-17. 181:15-182:12.

Early that morning Ducker had "absolutely felt like we could work something out." Tr. 160:14-17. Even that afternoon before the Company withdrew its proposal, he "still felt like there was the ability to continue to negotiate the loan." Tr. 160:18-24.

#### **f. April 7 Bargaining Session**

In the negotiation session of April 7, Barker, Ducker, the negotiating committee, and Portier represented the Union, and Garrett, Gil, and Bailey represented the Company. Tr. 88:8-15. Portier again took extensive bargaining notes. Tr. 88:16-89:19; Ex. GC-4. The meeting began at 10:50 a.m. and the parties discussed pay increases and the bond shop layoffs. Tr. 182:13-183:2.

After a brief period in which the parties passed wage proposals, at 10:55 a.m. the Union presented a request for certain information concerning unit employees that had been hired since February and had received skills training to obtain certifications to perform unit assembly work. Tr. 89:21-90:16; Jt. Ex. N; Ex. GC-4, p. 2. The Union sought the information because it knew that Triumph had moved some contractors from the bond shop into a training class and into assembly,

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<sup>3</sup> NDI refers to the Company's Non-Destructive Inspections Group. Although three employees in that group were originally slated to be laid off, the Company later changed its mind due to the fact that, owing to their high skills set, those employees were "very hard to come by." Tr. 285:12-22.

and with regard to the pending layoff, the Union planned to propose that bond shop employees be considered for those assembly positions instead of contractors. Tr. 90:17-91:3, 168:21-25, 183:3-184:5; Ex. GC-4, pp. 2-7; Jt. Ex. N. Although the parties engaged in an extensive discussion during the April 7 bargaining session as to why the UAW sought the information, Garrett never provided it, asserting that the Union did not have any right to information concerning the contractors. Tr. 91:4-5, 169:1-4; Ex. GC-4, pp. 2-7. Had the Union been informed that Triumph was transferring contractors from the bond shop to assembly, the Union would have made proposals to eliminate the contractors. Tr. 5-14. Garrett maintained, incredibly, that she was “confused” by the Union’s straightforward information request. Tr. 270:20-23. Immediately following the discussion of the Union’s April 7 request for information, at 11:14 a.m., the Union presented a new layoff proposal that included a “markup” revision of Triumph’s last proposal of April 6, which the Company had rescinded:

Union posted to Company  
on 04/07/17 @ 11:14am

Union's Response to the Company's Proposed Letter of Agreement  
Red Oak Bond Shop and NDI Temporary Loans Transfers

April 7, 2017

In as much as the Company tentatively planned to layoff approximately 12 bond shop in response to the Company notifying the Union on April 6, 2017 that it plans to lay off approximately 12 Bond Shop employees and approximately 3 NDI employees at its Red Oak location on or about April 21, 2017, the Company and the Union have agreed to the following:

- In lieu of layoff, the Company may loan not more than 20 bond shop employees to other UAW job classifications and/or assignments associated with continuous improvement/lean activities for a period not to exceed six (6) months. If the need arises to increase the number, the parties will meet and mutually agree to adjust the number.
- Employees who are loaned will not have their compensation affected for the duration of the loan.
- The Company will seek volunteers to loan.
- The Company will make every attempt to place loaned employees into positions where they may have previous experience or may be successful.
- The Company will collaborate with the Union to satisfy these loans.
- Should an individual employee refuse to be loaned and/or refuse to perform the assigned tasks outside, the employee shall be laid off for a period not to exceed six (6) months from the date of the instant agreement.
- In lieu of layoff, employees shall be selected in seniority order based off of job classification entry date.
- The low senior employees will be offered a transfer into the Assembly job classification. Affected employees will be placed into the four-week skills training Assembly class.
- Employees who are transferred from the Bond Shop job classification into the Assembly job classification will not have their compensation or seniority calculation date affected.

This agreement is specific to the facts and circumstances herein, and shall not be cited by either party as precedent setting.

Tr. 91:6-23; Ex. GC-4, p. 7; Jt. Ex. O.

Because Triumph had taken any potential loan arrangement off the table, the Union proposed transfer rights for the employees in an effort to progress towards an agreement. Tr. 91:6-15, 163:1-10, 184:6-23, 222:22-223:4; Jt. Ex. O. The Union viewed a loan as a temporary solution, and it hoped to facilitate a transfer of employees into other jobs by order of seniority while still retaining the rights to their previous jobs. Tr. 92:1-93:2. Because the UAW understood that Triumph was not willing to accept any arrangements based solely on seniority, and the Union disagreed with an unmodified *rack and stack* approach, the Union was searching for common ground with modified terms. Tr. 198:4-15.

Garrett testified that had the Union agreed Triumph could select the employees for loan, the Company still would have entertained that proposal. Tr. 10-16. She expressed the employer's view that the Union's April 7 proposal that called for employees to be moved out of the bond shop on the basis of seniority was unacceptable because the Company would have no control over who was selected for layoff. Tr. 272:17-273:6.

Garrett also addressed Triumph's opposition to the Union's proposal that the compensation of employees transferred from the bond shop to assembly not be affected. Tr. 274:1-275:3. She believed it to be inequitable for bond shop employees with no experience in assembly to continue making the \$39 per hour that bond shop employees earned. Tr. 274:7-15 The Company wanted a wage and skill assessments in order to offer the employees a wage reflective of their skills and experience. Tr. 274:16-21.

Garrett explained why the Company had not been opposed to locking in employee wage rates on a loan but had refused to accept locking in rates on a transfer to assembly. She testified that a loan was temporary in that an employee might be loaned to another department for a period up to six months, whereas a transfer to assembly was a permanent change from one job classification to another. Tr. 275:9-276:2. She stated that in a loan situation, an employee who was loaned would automatically return to the bond shop at the end of six months. Tr. 276:3-16.

After some discussion of the Union's proposal, Garrett stated that Triumph would take a look at the proposal and follow up with the Union that afternoon although management planned to conduct the layoff using the *rack and stack* methodology as established in the terms and conditions of employment. Before the negotiation session ended at 11:53 a.m., 39 minutes after the Union had presented its proposal, she stated that the Company would try to develop a proposal that

“addresses all of that to the best of our ability,” and then get back with the Union in the afternoon.  
Ex. GC-4, pp. 7-15.

At around 1:35 p.m., Barker, Corey Gregg, and Tommy Bulin had an off-the-record “sidebar discussion” with Garrett, at which time she hand-delivered the Company’s counteroffer to the Union’s proposal earlier in the day as follows:

4-7-17  
gave to Barker  
off Record

**Letter of Agreement  
Red Oak Bond Shop and NDI Layoffs**

In as much as the Company tentatively plans to lay off approximately 12 bond shop and approximately 3 NDI employees at its Red Oak location on or about April 21, 2017, the Company and the Union have agreed to the following:

- In lieu of processing layoffs under the initial terms and conditions of employment, which identifies a rack and stack process based upon certain competencies, the Company has agreed to utilize a modified rack and stack based upon competencies as proposed by the Union (competency assessment attached hereto).
- Layoffs shall be processed in accordance with the rack and stack scoring, based upon an employee’s overall performance rating, with the bottom rated employees laid off in inverse seniority order by job classification. Seniority shall be determined by the last date of hire.
- Employees, who are affected by layoff, may apply for an open assembly position at the Company’s Red Oak location. Any employee affected by layoff who applies for an open assembly position, shall be given an offer of employment for the appropriate assembly labor grade at an hourly rate of pay commensurate with said employee’s assembly and/or assembly inspection experience.
- Employees affected by layoff who apply and accept an offer for an assembly position will retain their seniority without a break in service.
- Employees who accept a position in assembly shall be on a probationary period for ninety (90) working days. Should the employee not meet expectations in assembly, the employee shall be terminated.
- Employees who are laid off from either the bond or NDI classification shall have no rights to re-enter the classification from which they were laid off.

This agreement is specific to the facts and circumstances herein, and shall not be cited by either party as precedent setting.

Tr. 93:3-23, 184:24-185:7; Ex. GC-4, p. 15; Jt. Ex. P.

Triumph’s new proposal focused transferring bond shop employees to the assembly classification. Tr. 277:15-278:1. The Company had no transfer procedures in place as part of its status quo layoff procedures. Tr. 278:2-11. Attached to the proposal was a *Competency Assessment*, or *rack and stack*, that management planned to use for the layoffs. Tr. 94:8-11; Jt.

Ex. P. The employer's proposal provided for evaluating and ranking the employees in the *rack and stack* procedure, and that the lowest rated employees would be laid off in order of seniority. Tr. 278:12-279:11.

Garrett testified about an off-the-record conversation she had with Barker about the modified *rack and stack* proposal. She asserted that Barker was not opposed to the modified "rack and stack" as he indicated that the Union would consider it. Tr. 281:3-8. She also recalled discussing with Barker her position on the issue of pay rates upon the transfer of employees to assembly; she claimed that Barker did "[n]ot really" have a response on that point. Tr. 281:9-282:3.

Barker described the sidebar conversation in which he received Triumph's April 7 counterproposal as a "brainstorming" session in which a lot of things were discussed. Tr. 185:2-12. Among other things, the parties to the sidebar conversation discussed ways to modify the Company's *rack and stack* procedure that would remove the subjectivity inherent in the procedure. Tr. 185:7-16. He explained that the Company's use of the *rack and stack* procedure was previously known to the Union since the subject had been discussed in contract negotiations since 2016, with the Union working since then to remove the subjectivity of the procedure and include factors that could be known, measured, and balanced. Tr. 185:17-186:5. Barker further explained that the "rack and stack" factors attached to the Company's April 7 counterproposal differed in that the number of so-called competencies had been substantially reduced and that some of the most subjective competencies had been removed. Tr. 186:6-12.

Barker further testified that the Union's concerns with the Company's April 7 counterproposal were focused on its provision that laid-off employees had no right to re-enter their former classification, and its provision that based seniority on "the last date of hire," which the Union construed as excluding years worked at the Jefferson Street facility. Tr. 186:19-187:

Triumph's August 7 proposal remained open at the end of the bargaining session. Tr. 15-22; Ex. Jt.-P. Garrett testified that the Company was still open to further negotiations at that point. Tr. 347:23-348:4.

**g. The Union's Interim Correspondence**

The parties did not meet again for another twelve days until April 19. Tr. 94:12-23. Although Barker was also involved in other negotiations in Tulsa that week, the Union's negotiating committee was available. Tr. 132:5-Tr.133:1. Garrett met with Barker and other UAW representatives in Tulsa, Oklahoma in previously scheduled contract negotiations on April 12, 13, and 14 (Wednesday, Thursday and Friday). Tr. 282:13-283:13, 283:1-13. She was in Dallas on Monday, April 10 and Tuesday, April 11, but Barker was not available on those dates. Tr. 282:13-283:13.

Despite not meeting with Triumph the week of August 10 to 14, the Union initiated correspondence between the April 7 and April 19 bargaining sessions in an effort to continue progressing in negotiations. Tr. 94:12-23; 134:23-135:7. By letter from Barker to Garrett dated April 14, 2017, the Union rejected the Company's open counterproposal from the April 7 meeting, offered suggestions regarding the handling of transfers, and proposed retirement incentives to reduce the amount of people in the bond shop:

The Union respectfully declines to accept the Company's most recent proposal concerning the Letter of Agreement for Red Oak bond shop and NDI layoffs dated April 7, 2017. The Union has also decided to withdraw its previous proposal concerning the modified rack and stack competencies with respect to the Letter of Agreement for Red Oak bond shop and NDI layoffs. The Union's position on discretionary discipline is still subject to negotiations and absent an Agreement, discretionary discipline in all forms shall not be used in any of these evaluations.

While the Union is wholeheartedly opposed to the rack and stack philosophy, it appears that the two parties might not reach an agreement concerning a layoff procedure in a timely manner for the bond shop layoffs that are upon us. In light of the time sensitivity of the issue in front of us, the Union would like to see the following:

- Offer some form of a plant-wide retirement incentive to reduce headcount in the bond shop.
- Employees who are affected by layoff may apply for an open assembly position at the Company's Red Oak location. Any employee affected by layoff who applies for an open assembly position shall be given an offer of employment at their current rate of pay.
- Employees affected by layoff who apply and accept an offer for an assembly position will retain their seniority and benefits without a break in service.
- Employees who accept a position in assembly shall be on a probationary period for ninety (90) working days. Should the employee not meet expectations in assembly based on skill alone, the employee shall be placed on indefinite layoff.

In the event that the bond shop has openings within the next 15 months, the following shall apply:

- Employees who are affected by layoff may apply for an open bond shop position at the Company's Red Oak location. Any employee affected by layoff who applies for an open bond shop position shall be given an offer of employment at the bond shop labor grade and hourly rate of pay that they held at the time of layoff.
- Employees affected by layoff who apply and accept an offer for a bond shop position will retain their seniority and benefits without a break in service.

Tr. 94:21-95:25; Jt. Ex. Q.

The letter signified the UAW's commitment to proceed with the bond shop negotiations since more than a week had elapsed by without any activity, and the Union wanted Triumph to consider other proposals. Tr. 95:25. For example, the Union intended to propose retirement incentives because the Company had successfully used such incentives on prior occasions to reduce the work force, and the Union believed this approach might reduce any need for bond shop layoffs. Tr. 95:16-25; 137:21-138:16, Tr. 188:12-23. Ducker testified that at that point, the Union representatives were "trying to think of everything that we could outside the box to give these people an opportunity to keep their job." Tr. 138:14-16.

Garrett testified that the Union's April 14 letter was confusing to her. Tr. 286:3-287:10. She viewed the letter as withdrawing discussions as to the *modified rack and stack* as well as about moving bond shop employees into assembly jobs. Tr. 286:17-22. She claimed that she did not understand what the Union meant when it said, "they would like to see the following," in that she

did not know whether the Union intended those terms as part of the bond shop negotiations, or just what they wanted to see “because it would be nice.” Tr. 287:3-10. She perceived the UAW’s April 14 correspondence to embody the same proposal the Union had made on April 7<sup>th</sup>, which Triumph had rejected. Tr. 287:11-288:4. She did not understand why the Union would want a “plant-wide retirement incentive” because you would not necessarily have any employees from the bond shop accept it, and management did not want to lose any employees in assembly, an area where the Company was hiring new personnel. Tr. 288:5-24. Garrett stated that the retirement incentive proposal was “kind of out in left field.” Tr. 288:23-24.

Further, in the interim period between the April 7 and April 19 bargaining sessions, the Union submitted another request for information to Triumph via e-mail on April 18, 2017. Tr. 96:1-7; Jt. Ex. R. The one-paragraph formal request was limited to “all evaluations of Bond Shop and NDI employees, the competencies used, who evaluated each employee, and anyone else that had input on the ratings.” Jt. Ex. R. Ducker explained that because the Company had planned to proceed with its employee evaluations via the *Competency Assessment*, the Union sought to ensure it knew how the process would be conducted and by whom. Tr. 96:4-19.

Triumph did not respond to the request for information until April 20, 2019, when the Company hand-delivered a letter to Ducker. Tr. 97:1-12; Jt. Ex. U. The employee ratings and competencies that were used in evaluations were attached, but the Company did not provide the evaluations that it used to determine those ratings. Tr. 97:13-22; Ex. Jt.-U.

#### **h. April 19 Bargaining Session**

When the parties next met for negotiations on April 19, Ducker, the negotiating committee, and Lindsay Portier were present for the Union, and Garrett, Bailey and Gil were present for the Company. Tr. 97:23-98:4; Ex. GC-5. Barker was unable to attend as he was in Tulsa dealing with

an emergency matter with another employer that was going to close its plant. Tr. 188:25-189:11 Ex. GC-5. Portier took comprehensive bargaining notes of the meeting, which began at 9:18 a.m. Tr. 98:5-99:11; Ex. GC-5.

Drucker began the meeting by asking for Triumph's response to the Union's April 14 proposal and its April 18 information request. Ex. GC-5. The Company produced the bond shop employee timecards that the Union had requested on March 30, then proceeded to discuss the status of the layoff negotiations. Tr. 99:13-20. Ex. GC-5, p. 2. Drucker made clear to the Company that the Union wanted to continue to bargain: "We discussed that we still wanted to continue to bargain, and it was important for us to try to help those people get a job or keep their job and that the union had another proposal for the company." Tr. 99:21-25.

The parties then expressed their understanding of where each stood in the negotiations, with the Company stating that it had not developed any new proposals because it was unsure as to the Union's position. Ex. GC -5, p. 7. In particular, Portier recorded in her notes Garrett's statement as to the Union's April 14 letter, "I did not understand what the letter meant other than we're not going to reach an agreement but we'd like you to do this – and rack and stack, can't have any part of it." Ex. GC-5, p. 7. The parties then discussed Garrett's purported confusion. Tr. 292:10-22; Ex. GC-5.

The parties recessed the meeting to caucus only 24 minutes after it commenced. The Union then developed another proposal which it presented to the Company when the parties reconvened the meeting at 1:14 p.m. The Union's proposal of April 19 is set forth below.

*Union passed to Company  
on 04/19/2017 @ 1:15 pm*

Union's Proposed Letter of Agreement Red Oak Bond Shop Layoff

April 19, 2017

In as much as the Company tentatively plans to lay off approximately 12 bond shop employees at its Red Oak location on or about April 21, 2017, the Company and the Union have agreed to the following:

- Employees within the bond shop who have been employed for less than forty-eight (48) months or who have transferred from another facility within the past forty-eight (48) months shall be evaluated and laid off under the initial terms and conditions of employment, excluding active discipline.
- Employees who are affected by layoff may apply for an open assembly position at the Company's Red Oak location. Any employee affected by layoff who applies for an open assembly position shall be given an offer of employment at their current rate of pay.
- Employees affected by layoff who apply and accept an offer for an assembly position will retain their seniority and benefits without a break in service.
- Employees who accept a position in assembly shall be on a probationary period for ninety (90) working days. Should the employee not meet expectations in assembly based on skill alone, the employee shall be placed on indefinite layoff.

In the event that the bond shop has openings within the next 15 months, the following shall apply:

- Employees who are affected by layoff may apply for an open bond shop position at the Company's Red Oak location. Any employee affected by layoff who applies for an open bond shop position shall be given an offer of employment at the bond shop labor grade and hourly rate of pay that they held at the time of layoff.
- Employees affected by layoff who apply and accept an offer for a bond shop position will retain their seniority and benefits without a break in service.

Tr. 100:1-10; Jt. Ex. S; Ex. GC-5, p. 8.

Ducker explained that although Triumph had never provided the information the UAW had requested on March 30 regarding which employees in the Red Oak bond shop had not been transferred from the Jefferson Street or Marshall Street facilities, the April 19 proposal was designed to ensure that any bond shop layoff would be applied to that group of employees, and not to any unit employees with the most longevity with Triumph who had transferred from either Jefferson Street or Marshall Street. Tr. 100:11-24. Moreover, the Union wanted to ensure that affected employees would have an opportunity to obtain assembly jobs since Triumph was hiring contractors for assembly jobs. Tr. 101:1-6.

The Union's April 19 proposal was the last proposal passed between the parties regarding the layoffs. Tr. 101:19-102:1. The parties discussed the proposal at the April 19 bargaining session, but Company's primary focus with regard to the proposal was on "the pay situation." Tr.

101:7-18. Whereas the Company was at one point willing to let bond shop employees transfer and still retain their hourly wage rates, as of April 19 management was not willing to let them keep the same pay rates. Tr. 101:7-18.

Garrett testified regarding her response to the Union's August 19 proposal, which she believed had already been considered and rejected. Tr. 297:6-9. She stated that the Union's first bullet point amounted to a layoff based on seniority, which the Company had already rejected. Tr. 294:10-295:16. She also believed that the Company had already rejected the Union's second bullet point, which would have permitted employees who moved into assembly jobs to retain their current pay rates. Tr. 295:17-296:7.

Garrett further testified that the last part of the Union's proposal called for recall rights for employees who were laid off and did not go into assembly, but Triumph would not extend any recall rights since they were not part of the initial terms and conditions of employment. Tr. 296:8-25. Her view was that recall rights could result in the Company being obligated to bring back poor performers, which was contrary to the *rack and stack* procedure. Tr. 296:25-297:5.

At the April 19 bargaining session, Garrett informed the Union's representatives of Triumph's decision to proceed with implementation of the bond shop layoff under the Company's initial provisions. Tr. 102:18-103:1. The Union asked the Company to delay the layoff in light of the fact that the parties had not had many negotiation meetings and that some of the meetings had included other subjects. Tr. 103:2-10. Ducker stated repeatedly throughout the meeting that the Union "really wanted the opportunity to continue to bargain." Tr. 140:9-14.

Although Garrett said that the Union had had one month to bargain, in fact the April 19 session was only the fourth bargaining session, and the Union "asked the company to be nice and give us more time." Tr. 103:4-10. Garrett responded that Triumph would not agree to more

meetings because “it wasn’t to their business needs.” Tr. 103:11-18. Garrett recalled responding that the Company was willing to discuss the matter further that day, but that management would notify affected employees the next day. Tr. 292:23-293:4. The Company never explained to the Union why the layoffs had to be carried out on April 21. Tr. 103:19-23; 104:11-22.

In the Company’s view, its representatives went into the April 19 meeting having made a modified proposal on the issue of employee selections for layoff that the Union had rejected. Tr. 293:12-15. Garrett believed that the parties had already discussed the seniority and transfer pay rates issues without reaching an agreement. Tr. 293:12-23.

The parties did not actually have one month to bargain any layoff issues as the negotiations were abbreviated and limited. Although Triumph notified the Union of the proposed layoffs on March 28, 2017, the Union received the notice on March 29 and responded to the Company on March 30. Tr. 105:17-106:3. Then, Triumph informed the Union that the parties could bargain over the layoff at the three previously-scheduled sessions April 5, 6 and 7, but then they could not meet again until April 19 since their representatives were out of town, so more than a week was not available for bargaining. Tr. 106:4-10. Of the four meetings of the parties with respect to the bond shop layoff, the primary focus of the first two meetings on April 5-6 was on other issues, and there was minimal discussion of the pending layoff. Tr. 106:20-107:3. Had Triumph delayed the layoff and given the UAW more time to negotiate, the Union would have had ample time to obtain sufficient information about the employees who were working in assembly and what tasks they were performing. Tr. 141:14-23.

Triumph had rejected all Union proposals at the end of the April 19 meeting. Tr. 141:4-8. The Union did not present another proposal because although Garrett did not use the term *impasse*, she had stated that “she was through” and there was not sufficient time to develop additional

proposals since the Company gave notice of layoffs to affected employees the next day. Tr. 141:24-142:3; 164:19-22. When the parties began the next round of negotiations the following week, Triumph declined to discuss the layoff because it had already occurred. Tr. 172:10-15. Although Barker was unable to attend the April 19 meeting, he was in contact with Union representatives and it was his understanding that the Company had made its decision and would not engage in further discussions regarding the layoff even though the Union kept introducing and exploring more alternatives. Tr. 189:10-23.

When asked on rebuttal if Triumph had ever presented the Union with a document or a proposal to avoid layoffs that the Company had characterized as a *last, best, and final offer* during the period of April 14 to April 19, Barker responded, “No. Absolutely not.” Tr. 10-15.

#### **i. Negotiations Timeline**

In summary, the evidence introduced at hearing reflects the following timeline of the entirety of the parties’ negotiations with regard to the bond shop layoffs from the time that Triumph Company gave notice of the layoffs on March 28, 2017 until it effected the layoffs on April 21, 2017:

March 28, 2017	Triumph first informed the Union of its tentative plan to layoff twelve employees in the Red Oak bond shop in 24 days on April 21, 2017. Jt. Ex. G.
March 29, 2017	The Union received and reviewed the Company’s notice. Tr. 105:17-106:3
March 30, 2017	The Union submitted an information request to Triumph. Jt. Ex. H.
March 31, 2017	The Company presented an incomplete response to the Union’s request for information, failing to provide the requested (1) segregated list of employees who had been hired at Red Oak who did not come from either Jefferson Street or Marshall Street, and (2) attendance cards for all bond shop employees for the one-year period from April 1, 2016 through April 1, 2017. Tr. 74:22-75:22; Jt. Ex. J.

- April 5 The parties' first negotiation session lasted a total of one hour, 35 minutes, approximately one hour of which was caucus time; much of the joint session was spent on bargaining unrelated wage proposals. Ex. GC-2. Triumph made a loan proposal including sole discretion in the Company and no effect on compensation, and the parties' discussed the Company's failure to provide a complete response to the Union's March 30 information request. Ex. GC-3.
- April 6 The parties' second bargaining meeting lasted a total of seven hours, 15 minutes, of which only approximately one hour, fifteen minutes was spent in joint session, and a portion of that joint session was spent in discussing unrelated wage proposals. The remaining six hours of the bargaining session were spent in caucus. Ex. GC-3. The Union made a counterproposal to the Company's April 5 proposal that included provision for loan volunteers, no effect on wage rate, and placing loaned employees into positions to be successful [Jt. Ex. L]. Later the same day the Company responded with a counteroffer to that proposal that included no effect on compensation, sole discretion in the Company, agreement to meet with Union regarding concerns as to loans [Jt. Ex. M]. However, at the end of the day, the Company announced that the proposal was rescinded and that management had made the decision to proceed with the permanent layoffs. Tr. 87:22-88:6, 107:23-108:10, 162:11-17, 81:15-182:12.
- April 7 The parties' third bargaining meeting lasted a total of two hours, 35 minutes on the record, less than half of which was spent in joint session, plus an off-the-record afternoon meeting. Ex. GC-4. The Union made a new request for information concerning CBU employees that had been hired since February and had received skills training to obtain certifications to perform CBU assembly work. The Union made a new proposal that did not involve a loan, but transfer to assembly based on seniority and no effect on compensation [Jt. Ex. O]. The Company countered off the record with a modified *rack and stack* proposal for transfer into assembly with pay rate commensurate with assembly skills. Jt. Ex. P.
- April 8-18 No bargaining meetings were held as Company representatives were unavailable.
- April 14 During the bargaining hiatus, the Union sent the Company a letter rejecting its April 7 proposal and also withdrawing the Union's April 7 proposal. Jt. Ex. Q. In the letter, the Union also noted that due to the time constraints, the parties may not reach an agreement on procedure before the layoffs, but puts forth several terms and

conditions that the Union would like to see implemented with regard to the layoffs, including retirement incentives. Jt. Ex. Q.

April 18                      Also during the hiatus, the Union made a one-paragraph formal information request to the Company for “all evaluations of Bond Shop and NDI employees, the competencies used, who evaluated each employee, and anyone else that had input on the ratings.” Jt. Ex. R.

April 19                      The parties’ fourth day of bargaining with regard to the layoffs lasted five hours, 12 minutes, only one hour, 40 minutes of which was spent in joint session. Ex. GC-5. Triumph provided the bond shop attendance cards that the Union had requested on March 30. The Company stated it could not respond to the Union’s letter of August 14 because it did not understand the Union’s position. The Union expressed its willingness to stay as long as it took to get an agreement. After a caucus, the Union presented another proposal that included a seniority component, ability to obtain employment in assembly at current pay rate, probationary period in assembly, and rehire into the bond shop in the event of openings within the next 15 months [Jt. Ex. S]. Nevertheless, the Company indicated that it would proceed with announcing the layoffs the following day. Tr. 141:234-142:3, 164:19-22.

April 20                      The Company informed affected employees of the layoffs.

April 21                      The bond shop layoffs were implemented. Tr. 104:23-105:4.

**j. Triumph Carries Out the Layoffs on April 20-21, 2017**

Triumph informed the twelve affected employees on April 20 and laid them off on April 21. Tr. 104:23-105:4. The layoff impacted only the bond shop as the Company had decided to retract the NDI layoffs because that management group did not want to lose their skilled employees. Tr. 105:1-8.

After the layoff was implemented, the Union obtained the attendance cards and *rack and stack* rankings that it had requested but had not received during negotiations. Tr. 304:22-305:3. The Union believed that the results of the *rack and stack* as used in the layoffs were inaccurate and inconsistent. Tr. 206:18-25. For example, the Union found that the Company had used the

attendance record of Michael Kindley in the *rack and stack* when he had no attendance deficiencies. Tr. 433:20-434:14. Barker understood that Ducker had brought this matter up to management and that they had discussed it. Tr. 434:9-22, 436:14-437:3. Barker believed other inconsistencies were found, but he could not then recall what they were. Tr. 12-22.

Barker concluded that Triumph had violated its bargaining obligations with respect to the bond shop layoffs. Tr. 206:9-13. He needed to be able to measure a *rack and stack* process in order to be open to it. Tr. 207:1-4. He recalled that the Union requested more information with regard to the Company's ranking of employees, but management responded that there was no reason to provide it because the ranking had already been completed Tr. 207:8-21.

Triumph never explained to Barker why the layoffs had to occur on April 21, 2017. Tr. 190:21-191:3. The Union never stopped negotiating up until the time the Company announced its final layoff decision. Tr. 191:13-16. Garrett stated that the timing of the layoff and the number of employees laid off were not her decisions, and her only role was to negotiate the outcome. Tr. 363:15-18. She made it clear to the Union that "absent any agreement or any further discussions that were going to be fruitful, that we were going to proceed with a [sic] April 21." Tr. 364:5-10.

The amount of work in the bond shop increased some months after the layoff and Triumph made offers to the twelve employees who had been laid off to return to work, although some employees declined the offer. Tr. 276:19-277:9. The Company presented these employment offers after the unfair labor practice charges had been filed.

Rowe testified that there was no substantial increase in overtime after the layoff, and the bond shop did not encounter any difficulties in meeting the customers' product demands. Tr. 394:15-395:1. She believed that twelve was the correct number of employees for the April 2017 layoff and that April 21 was the correct date to implement it. Tr. 396:5-12. On cross-examination,

however, Rowe admitted that following the layoffs, some bond shop employees were working seven days per week, including overtime, although Triumph did not meet the threshold for hiring more employees. Tr. 405:10-15, 409:6-21. Inexplicably, Rowe did not consider reducing overtime work in an effort to reduce the number of layoffs in April 2017. Tr. 403:3-405:8.

**k. Unbeknownst to the Union, Triumph Considers Conducting the Layoffs in Two Stages**

The Union discovered at hearing that during the course of the bargaining over the April 2017 layoff, Triumph was considering conducting the layoff in two stages, with implementation of the second stage as late as June, while representing to the Union throughout negotiations that business conditions made it necessary to lay off all 12 employees by April 21.

The evidence indicates that on April 7, the second negotiation session concerning the layoff, Garrett and Porter were planning to conduct the bond shop layoff in two stages, with the second stage being as late as June 2017:

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**From:** Porter, Norman H. <nporter@triumphgroup.com>  
**Sent:** Friday, April 7, 2017 1:07 PM  
**To:** Garrett, Danielle  
**Cc:** Rowe, Eileen M.; Baggett, Terry L.  
**Subject:** Bond #'s

Danielle  
Bond Shop Layoff Numbers:  
Seven (7) for April 21- if we get all our paperwork complete and clean by then any fulfil bargaining obligations  
Five (5) more in June – evaluated in Mid May to validate

**Norm**  
Work (972) 515-8276 ext. 2253  
Cell (817) 320-4477

Tr. 365:19-366:10; Ex. CP-1. Although the parties were engaged in negotiations at the time -- including a meeting on the date of Porter's e-mail to Garrett -- and discussing April 21 as the purported target date, Garrett admitted she did not inform the Union that management was

considering laying off some of the employees in June. Tr. 366:11-367:21. When asked why she never disclosed to the Union that there might be a two-stage layoff, Garrett said, “because that is not what I believed was going to happen.” Tr. 368:22-25. She stated that she did not know the source of Porter’s information and that she did not ask him about it even though he was her subordinate. Tr. 369:8-14.

Further, on April 13, 2017, at a time when the parties were in the midst of a 12-day bargaining hiatus, Blake Mansfield, Industrial Engineer, sent Rowe an e-mail with an attached head count analysis. Ex. GC-10. The e-mail reflects Mansfield’s recommendation that Triumph lay off nine full-time employees and two contractors. Ex. GC-10. Mansfield sent a follow-up e-mail to Rowe one hour and 17 minutes later in which he indicated that the Company was contemplating a two-step reduction in force as shown below.

---

**From:** Mansfield, Blake <bmansfield@triumphgroup.com>  
**Sent:** Thursday, April 13, 2017 2:20 PM  
**To:** Rowe, Eileen M.  
**Subject:** FW: RO Bond Shop (4-12-17).xlsx  
**Attachments:** RO Bond Shop (4-12-17).xlsx

**Follow Up Flag:** Follow up  
**Flag Status:** Completed

So I forgot to include below that the 9 you mentioned earlier as far as the rack and stack would work with this plan, plus the 2 contractors. Just tell Terry that we had to change an assumption in the 2= reduction in our original plan. Keep in mind that you went in there last Friday saying 2 rifs not 1, and the 2= one has a little wiggle room in it. I don't see why we couldn't make a reduction to the rif at this point.

## **Blake Mansfield**

Industrial Engineer  
Gulfstream P42 / Bond Shop  
(972)515-8276 ext. 0809

Ex. GC-10.<sup>4</sup> The e-mail also reflects that Triumph was considering a layoff of less than twelve people in the bond shop, and that two of them would be contractors rather than unit employees.

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<sup>4</sup> Regarding the person referred to as “Terry” in the e-mail, Garrett explained that Terry Baggett was the Bond Shop Director and Rowe was the Bond Shop Manager at that time. Tr. 361:17-23.

Asked about the e-mail, Garrett verified with Rowe that there were no contractors in the bond shop prior to implementing the bond shop layoff, but she did not know what happened to the two contractors referenced in the e-mail, which was sent only one week before twelve employees were notified of their layoff. Tr. 360:14-23. Garrett also testified that she had a discussion with Rowe as to whether the layoffs in the bond shop would be carried out as one reduction-in-force or whether there would be two separate reductions-in-force, based on timing and headcount patterns. Tr. 362:4-14. Garrett again admitted she never disclosed to the Union that management was considering conducting the layoff in two stages. Tr. 364:11-15.

When asked about the e-mail and its attached report, Rowe testified that the report reflects that on April 13, 2017, the number of bond shop employees was 96. Tr. 389:10-390:7. The report also showed comparison numbers as to how many employees was expected to be needed at various points in time, from which the Company ultimately determined to lay off 12 employees. Tr. 390:8-391:4. The data gave Rowe the information necessary for her to inform Human Resources that she needed to lay off twelve employees in the bond shop, with April 21 discussed as the implementation date. Tr. 391:1-7.

When asked why she had originally recommended that the layoff be conducted in two stages, Rowe stated that management had considered that approach because Triumph had anticipated receiving additional work orders from Northrup Grumman that never materialized, and also because “the morale and the concern of the employees in the shop would not have – we would not have been successful.” Tr. 401:13-402:5.

According to Garrett, a final decision that the layoff would be implemented April 21 was made a few days prior to that date, and Rowe was involved in the decision. Tr. 363:7-18.

## **I. The Union's April 28, 2017 Requests for Information**

The parties met for negotiations on their previously scheduled bargaining dates of April 20, 21, 26, 27 and 28. Tr. 297:25-298:20. Asked if the Company would have resumed discussions of the layoffs had the Union asked to do so, Garrett stated she would have considered a Union proposal if it “was different from the ones that they continued to pass across the table that the Company rejected.” Tr. 298:21-299:3. She believed that “to continue to discuss the very same things that we can't agree on, doesn't seem like a . . . useful exercise.” Tr. 299:1-3.

On April 28, 2017, the parties resumed negotiations for a first contract at the Red Oak facility. Tr. 417:9-15. Portier took contemporaneous notes of the meeting. Tr. 418:23-420:7; Ex. GC-11. The Union presented two requests for information to the Company, including a request for “TC-1's and day calls” and certain other specified attendance records, in addition to discipline information and records forming the basis of the rating in the layoff categories for each bond shop employee. Tr. 417:16-24; Ex. GC-13, GC-14. Garrett asked why the Union sought the requested information and expressed her view that it was not relevant. Tr. 417:25-418:6. The Union replied the information was relevant to the layoffs, and that Union representatives wanted to do “its checks and balances” to ensure the employees laid off actually had disciplinary records. Tr. 418:6-9. Moreover, because at least some of the relevant disciplinary actions was progressive in nature, the Union wanted to ensure that all necessary warnings had been given to affected employees. Tr. 418:6-20, 423:13-424:16.

In addition to fulfilling the UAW's representational duty to ensure that the layoffs were done correctly, the Union had a secondary purpose in learning how the *rack and stack* method of layoffs was implemented in order to understand how future layoffs would be administered under the first CBA. Tr. 423:13-424:16. Moreover, the Union sought to review information about certain

matters in addition to attendance records. Among other things, the Union wanted to know whether rejection tags that are placed on defective airplane parts were used in ranking any of the employees because on some occasions employees who had not made any mistakes were erroneously “tagged” for defective parts. Tr. 435:5-21.

Triumph replied that the layoffs had already occurred and that the requested information would not change the outcome, but the Union insisted it was entitled to the information that was used to determine which employees had been laid off in order to verify that the records were correct. Tr. 418:15-20. The parties engaged in extensive discussions over the information requests as is reflected in detail in Portier’s notes. Ex. GC-11.

Garrett responded to the Union’s information requests by letter to Barker dated May 2, 2017. Tr. 424:18-425:15; Ex. GC-14. She indicated some confusion with regard to the information request so Barker followed up with a clarification letter to her dated May 8, 2017. Tr. 425:16-426:22; Ex. GC-15. Barker did not recall ever receiving a response to the May 8 letter. Tr. 427:9.

In late April or May 2017,<sup>5</sup> Barker sent a letter to Garrett requesting discipline files for eleven of the laid off employees, asserting the Union’s belief “that disciplinary issues, which the Union had no opportunity to bargain, were a contributing factor to the layoff of some, if not all, of these employees.” Tr. 412:23-417:6; Ex. GC-12.

#### **4. The Smith and Horn Disciplinary Actions**

##### **a. The Company Sends Post Discipline Notices to the Union**

After Triumph recognized the UAW as exclusive representative of the unit on January 13, 2014, the Union requested information regarding disciplinary actions at the Red Oak facility. The

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<sup>5</sup> Although the letter is dated April 24, 2017, the parties debated whether the date should have been May 24, and the letter was admitted without deciding the date issue. Tr. 416:19-417:6. The confusion arose because a notation by the name of Rodney Horn on the list of employees for whom files were requested indicates that his information was “received 05/23/2017.” Ex. GC-12.

Company responded by a letter to Wendell Helms dated March 5, 2014, stating that it was available to discuss discipline. Tr. 308:11-309:5; Jt. Ex. B. As the Union had no official representatives in the Red Oak facility and the Union President was a Marshall Street employee, Triumph requested the name of a designated Union official with whom the Company could address disciplinary matters. Tr. 309:4-11.

By letter from Garrett to Helms dated April 1, 2014, Triumph requested that the Union identify a representative to discuss disciplinary issues, and she attached a list of disciplinary actions that had occurred since the March 5 correspondence. Tr. 309:12-23; Jt. Ex. C. Garrett also advised Helms that the Company would continue to enforce its established terms and conditions of employment, including taking disciplinary actions for violation of the Company's rules and procedures. Tr. 310:6-21.

Garrett asserted that the Union did not respond to her April 1, 2014 letter. Tr. 310:22-24. In months when disciplinary actions had been imposed, Triumph began sending monthly letters to Helms, and later Barker, and then Ducker, reiterating the request for a designated contact for discipline and offering to bargain over interim notification or grievance procedures for discipline. Tr. 310:25-314:6; Ex. R-10. The attachments to the Company's various letters regarding the disciplinary actions that had been imposed consisted of a copy of the forms that had been issued to the affected employees with regard to warnings, suspensions, or terminations. Tr. 313:23-314:3. This practice continued through May 4, 2017. Tr. 314:4-15; Ex. R-2, R-10.

When Ducker took over as President of Local 848 in 2014, first Helms and then Barker was the International Union Representative with whom Ducker worked. Tr. 62:4-20. Asked when he recalled first learning about the implementation of discipline at the Red Oak facility, Ducker

stated that Triumph sent Helms the discipline notices Helms informed Ducker when he had received them. Tr. 150:4-151:8.

Around the time that Barker succeeded Helms as an International Union Representative, Ducker assumed a larger role regarding disciplinary matters, and the Union requested the Company to notify Ducker of all disciplinary actions directly due to Barker's many other responsibilities. Tr. 151:9-20; 152:15-23. Thereafter, Triumph sent disciplinary notices directly to Ducker without any supporting information. Tr. 153:4-10.

Ducker began receiving disciplinary notices from the Company around April 2016. Tr. 152:24-153:3. In a letter to Barker dated April 7, 2016, Porter stated that the UAW had failed to designate a Union representative for the purpose of addressing disciplinary matters. Ex. R-2. Porter further stated that it "remains open to discuss issued discipline and to bargain over an interim notification and/or grievance procedure for discipline, at your availability." Ex. R-2. The Union verbally responded to the Company's April 7 letter. Tr. 216:21-217:5.

By letter from Barker to Garrett dated November 14, 2016, the Union addressed the Company's failure to notify the Union and bargain over discretionary discipline:

It has recently come to the Union's attention that you have failed to notify and bargain over Discretionary Discipline to the Employees/Members at the Triumph/Red Oak facility.

The Union is demanding that all those affected be made whole and those employees in which the Company seeks to discipline be brought to the negotiating table for further discussion prior to imposing any further action.

Tr. 189:24-190:5; Jt. Ex. D. The Board's August 26, 2016 decision in *Total Security Management* prompted Barker's decision to send the November 14 correspondence. Tr. 190:6-18. The Company had been notifying the Union of disciplinary actions after it had imposed such actions, but not beforehand. Tr. 190:6-18, 216:1-18.

Garrett responded to Barker's November 14 letter by letter dated December 12, 2016, in which she stated, among other things, that the Union had never responded to the Company's request to designate a representative who could receive and respond to discretionary discipline actions such as suspensions and terminations. Tr. 317:16-25; Jt. Ex. E. Barker testified that he disagreed with Garrett's assertion because the parties communicate frequently and management knew how to contact Ducker. Tr. 218:7-16. Barker observed that his style is to eliminate that type back and forth correspondence. "I wanted to come in, that's my style." Tr. 218:9-16. Although he could not recall to whom he spoke and exactly when, Barker was adamant that he had verbally informed management who to contact regarding disciplinary matters. Tr. 218:17-219:4.

By letter from Barker to Garrett dated December 21, 2016, the Union requested Triumph to bargain over all disciplinary actions taken by the Company over the preceding six months. Tr. 219:16-21, 319:7-18; Jt. Ex. F. In response to the letter, the Company provided information regarding the disciplinary matters and the parties bargained over disciplinary actions that had been imposed over the previous six months, including Thomas Smith's discipline. Tr. 220:2-14. Thereafter the parties conducted bargaining sessions to regarding discretionary disciplinary actions; these meetings usually involved Garrett and Ducker. Tr. 320:4-17.

#### **b. The Pre-Discipline Bargaining Agreement**

Ducker sent Garrett a letter dated May 26, 2017, giving "formal notification that the Union stands ready to bargain an interim notification process for discipline for Red Oak bargaining unit employees," and further stating that "[t]he Union is available for the entire day on June 1, 2017 and the first half of the day on June 2, 2017 to bargain these issues." Jt. Ex. W. This was the first time that the Union had requested pre-discipline bargaining. Tr. 21:7-25. Ducker sent the letter after learning from Barker that he had the right to request interim bargaining despite the fact that

the parties were negotiating a first contract. Tr. 155:8-20. Ducker previously had believed erroneously that pre-discipline agreement would not have been enforceable. Tr. 154:12-19.

Triumph responded by agreeing to meet and confer on June 1 and 2, 2017, at which time the parties reached agreement on an interim disciplinary notification process. Tr. 3-8. The parties entered into an *Interim Discipline Notification for Red Oak Agreement* dated June 2, 2017, which included pre-discipline notices and an opportunity to bargain discretionary disciplinary matters. Tr. 155:21-156:5, 322:3-15; Jt. Ex. X. The parties followed the interim agreement until the first CBA became effective effect on March 25, 2018. Tr. 322:16-20.

### **c. The Discharge of Thomas Smith**

Triumph notified Thomas Smith by letter dated November 29, 2016, that it had completed an investigation of his actions on or about November 4, 2016 and that he was discharged effective November 17, 2016, “due to workmanship and gross negligence in performing duties.” Tr. 323:8-324:11; Ex. R-11. Attached to the notice was a completed *Triumph Disciplinary Evaluation* form and a copy of an earlier notice of his suspension pending investigation. Tr. 323:11-18; Ex. R-11.

The Company never notified Ducker that management was considering terminating Smith’s employment before the decision was imposed. Tr. 65:17-66:5, 221:14-22. Garrett testified that she informed the Union about Smith’s discharge, but she did not know when that notification occurred; however, after her recollection was refreshed with meeting minutes, she admitted that the Company notified the Union after the disciplinary action had been taken around February 6, 2017. Tr. 324:13-25; Ex. R-12. Garrett stated that she had intended to discuss Smith’s suspension with Ducker at the Union’s request but Smith was discharged before the discussion occurred on February 6. Tr. 326:8-327:10.

The Company provided the Union with a complete file on Smith's discharge after the February 6 meeting. Tr. 327:2-14. The parties never met to bargain over Smith's discharge, but they had previously met to discuss the Company's suspension decision. Tr. 327:15-24. The parties never reached any sort of resolution concerning Smith's discharge. Tr. 327:25-238:8.

#### **d. The Suspension of Rodney Horn**

Triumph suspended Horn for five days without pay on April 3, 2017. Ex. R-13. Porter provided Barker with a copy of the suspension notice by letter dated May 4, 2017. Tr. 329:23-25, 330:4-17; Ex. R-14. The Company never notified Ducker or any other Union official that it was considering suspending Horn's employment before the disciplinary action was taken. Tr. 66:6-14.

The parties discussed the purported reasons for Horn's suspension as well as his prior disciplinary record. Tr. 330:18-24. Ducker requested a reduction of the suspension, but the parties did not reach an agreement. Tr. 330:22-331:1. After those discussions, the Union did not seek any additional bargaining with respect to Horn's suspension. Tr. 331:2-4.

### **IV. Argument and Authorities**

#### **A. Triumph Violated Sections 8(a)(5) and (1) of the Act by Failing to Bargain to Impasse Over the Bond Shop Layoffs**

It is, of course, unlawful for an employer to refuse to bargain collectively with the representative of its employees. 29 U.S.C. § 158(a)(5). An employer's unilateral changes that modify conditions of employment constitute a per se violation of Section 8(a)(5) and (1). *NLRB v. Katz*, 369 U.S. 736 (1962); *Gaylord Chemical Co.*, 358 NLRB 525, 528 (2012) (*Gaylord I*). See also *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991), quoting *Katz*, 369 U.S. at 741-45 (“[A]n employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment.”).

An employer is prohibited from making changes related to wages, hours, or other terms and conditions of employment without affording the exclusive representative notice and a meaningful opportunity to bargain. *Flambeau Airmold Corp.*, 334 NLRB 165 (2001); *Gaylord I*, 358 NLRB at 528. An employer's decision to lay off employees for economic reasons is unquestionably a mandatory subject of bargaining.

Where there is no collective bargaining agreement in effect and the parties are negotiating a first contract, generally an employer must maintain the status quo until the parties either agree on a contract or reach a good-faith impasse in their negotiations. An impasse exists only when "good-faith negotiations have exhausted the prospects of concluding an agreement and there is no realistic possibility that continuation of discussion would be fruitful." *Monmouth Care Ctr. v. NLRB*, 672 F.3d 1085, 1088 (D.C. Cir. 2012) (citations and internal quotation marks omitted).

In most cases an impasse is determined as to the contract negotiations as a whole, rather than on an issue-by-issue basis, except where the party claiming impasse on a single issue proves that the issue is "of such overriding importance" that "there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved." *CalMat Co.*, 331 NLRB 1084, 1097 (2000). In this case, there is no suggestion that the parties' overall CBA negotiations were at an impasse at any relevant time, nor is there any suggestion that the issue of the bond shop layoffs was of such "overriding importance" that unilateral action on the layoffs would have been justified in the absence of an overall contract impasse.

**1. With Limited Exceptions, When the Parties are Engaged in Contract Negotiations, an Employer Must Refrain from Implementing Changes**

Preliminarily, it is important to note that had Triumph objected to negotiating the bond shop layoff issue while first contract negotiations were ongoing, the Company would have had to wait until the parties completed their contract negotiations or bargained to an overall impasse

before making any changes in the bond shop. The reason is that where, as here, a proposal is submitted while the employer and the union are engaged in negotiations for a comprehensive labor contract, “an employer’s obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole.” *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). In *Bottom Line*, however, the Board recognized two limited exceptions to this general rule that constitute *extenuating circumstances*, including an exception “when economic exigencies compel prompt action.” *Id.*<sup>6</sup>

The Board addressed what constitutes an *economic exigency* under *Bottom Line* in *RBE Electronics of S.D., Inc.*, 320 NLRB 80 (1995). It noted that in cases subsequent to *Bottom Line*, the Board has characterized the economic exigency exception as requiring a “heavy burden,” and “as involving the existence of circumstances which require implementation at the time the action is taken or an economic business emergency that requires prompt action.” *Id.* at 81 (footnotes omitted). Moreover, “[a]bsent a dire financial emergency, the Board has held that economic events such as loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action.” *Id.* (footnotes omitted).

Further, in *RBE Electronics* the Board expanded the two *Bottom Line* exceptions to include situations where the employer is faced with “the exigencies of a situation requiring prompt action for which bargaining is appropriate.” *Id.* In such a case, an employer may satisfy its statutory obligation by providing the union with adequate notice and an opportunity to bargain. *Id.* at 82. However, the Board made clear that “not every change proposed for business reasons would meet

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<sup>6</sup> The other exception that constitutes *extenuating circumstances* is where the employer has made diligent and earnest efforts to engage in bargaining, but the union insists on continually avoiding or delaying bargaining. *Id.*

our *Bottom Line* limited exception.” *Id.* Rather, “the exception is limited only to those exigencies in which time is of the essence and which demand prompt action,” and the employer is required to show a need that the particular action be implemented promptly. *Id.* Moreover, to qualify, the employer must demonstrate that the exigency was caused by external events that were beyond the employer’s control and that were not reasonably foreseeable. *Id.* The amount of time and discussion required for the employer to meet its bargaining obligation is dependent on the exigencies of the particular situation. *Id.*

It is apparent that the bond shop layoff, a foreseeable and commonplace temporary decrease in production, did not in any way qualify as an exigent circumstance under Board law. It was not in any sense of the meaning a “dire” event, but rather was a garden variety and temporary maximization-of-profit issue, especially for an employer of the magnitude of Triumph. Indeed, the Company presented no evidence whatsoever that retaining the twelve bond shop employees would have had a significant adverse impact on profitability. The Company did not even consider reducing or eliminating a substantial amount of overtime work in the department in an effort to retain some or all of the affected employees. Nevertheless, despite the lack of exigent circumstances, the Union bargained diligently in good faith in order to protect all of the affected employees.

Similarly, Counsel for the General Counsel generously stipulated they do not allege that Triumph’s strained business rationale failed to qualify as exigent circumstances. Jt. Ex. Z, No. 19. These accommodations allowed the Company to proceed with bargaining the layoff issues without waiting until the conclusion of the parties’ first contract negotiations, whether by an overall impasse or by execution of a CBA. However, in analyzing Triumph’s failure to bargain the bond

shop layoff in good faith to impasse, the Company's implausible assertion of a dire emergency undermines the credibility of its arguments.

## **2. The Company Did Not Bargain to Impasse Before Unilaterally Implementing the Bond Shop Layoffs**

The Board has long defined impasse as a situation where “good-faith negotiations have exhausted the prospects of concluding an agreement.” *Dish Network Corporation*, 366 NLRB No. 119 (2018), citing *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enfd. sub. nom. Am. Federation Tel. & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). *See also Grosvenor Report*, 336 NLRB 613, 617 (2001) (“An impasse occurs whenever negotiations reach the point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless.”); *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5<sup>th</sup> Cir. 1982), citing *NLRB v. Powell Elec. Mfg. Co.*, 906 F.2d 1007, 1011 (5<sup>th</sup> Cir. 1990) (“Impasse is reached when ‘further discussion [is] futile . . . in view of all the circumstances of the bargaining.’”). Significantly, this futility requires that neither party is willing to compromise. *Huck Mfg.*, 693 F.2d at 1186. However, the duty of good-faith bargaining does not compel either party to agree to a proposal or require the making of a concession. *Carey Salt Co. v. NLRB*, 736 F.3d 405, 414 (2013).

Triumph, as the party asserting an impasse has occurred, has the burden of showing that an impasse existed when it implemented the unilateral change in question. *Quality Health Services of P.R., Inc. v. NLRB*, 873 F.3d 375, 376 (1<sup>st</sup> Cir. 2017); *Dish Network Corporation*, 366 NLRB No. 119 (2018). The Board uses a *totality of the circumstances* five-factor analysis to determine if there was an impasse including the bargaining history, whether the parties negotiated in good faith, the length of the negotiations, the importance of the issues over which there is disagreement, and the contemporaneous understanding of the parties regarding the status of negotiations. *Taft Broadcasting Co.*, 163 NLRB at 478; *Dish Network Corporation, supra*. Moreover, good-faith

bargaining is a “necessary precondition” to a finding of impasse for, without good faith, the negotiations are unlawful as is any impasse purportedly reached therein. *Id.*

It is apparent that Triumph has not established that an impasse occurred in this case because the totality of the circumstances compels a finding that the parties had not exhausted their prospects of concluding an agreement. And the evidence also demonstrates that the Company did not negotiate in good faith.

### **3. The *Taft* Factors and Totality of the Circumstances Analysis**

One strong *Taft* factor that weighs heavily in favor of finding that the parties were not at an impasse is the “contemporaneous understanding of the parties as to the status of the negotiations.” In this regard, the evidence conclusively shows that throughout the course of the negotiations over the layoffs up until the date that Triumph unilaterally terminated bargaining, the Union never believed that an agreement could not be reached and it was searching for solutions at all times. This understanding continued until Garrett notified the Union that the Company would proceed with implementation. Had the Company continued to negotiate, the Union certainly would have developed new and alternative proposals to avoid the layoffs, including proposals to do eliminate or reduce overtime in the bond shop, lay off all contractors first, and conduct any layoffs in phases (had the Union known that the Company was considering conducting the layoff in stages). Significantly, the Company never presented a proposal characterized as a *last, best and final offer* and it never declared the parties were at an impasse.

Another *Taft* factor weighing heavily against a finding of impasse is the abbreviated duration of the negotiations. The parties had only four days of meetings to address the bond shop layoffs, and the time actually spent discussing the various proposals with regard to the layoffs was truncated in the meetings that had been previously scheduled for bargaining over other matters.

Triumph refused the Union's request for additional time for negotiations although it never articulated any reason why the layoffs had to take place by April 21. The Company easily could have delayed the arbitrary layoff date for the additional three days that the Union had requested, especially in light of the fact that the parties' negotiations time was cut short because both Garrett and Barker were out of a town a substantial portion of the time between the proposed layoff announcement and April 21.

Perhaps the most significant factor weighing against a finding of impasse is the issue of whether Triumph ever negotiated in good faith. There are several indicators of the Company's bad faith in the negotiations process including:

- Triumph's failure or delay in producing documents that the Union reasonably requested, and its continual insistence that documents the Union requested were not relevant or that the information requests were moot because the unilateral action had already been taken
- The Company's abrupt withdrawal without explanation of its April 6 proposal only 45 minutes after it was presented when the parties were close to an agreement, and with the accompanying statement that the Company was going to proceed with the layoff on April 20-21 in accordance with the status quo procedures.
- The Company's insistence that it would not put off the layoffs for even a few days in order to allow adequate time for the parties to exhaust all bargaining efforts despite the fact that management's self-imposed April 21 deadline clearly was arbitrary, and despite the fact that the parties' had little available time for bargaining before the arbitrary deadline.
- At the same time that the Company was insisting that the April 21 immovable, its representatives were considering implementing the layoff in two stages, with the second stage not occurring until several weeks later in June.
- The Company offered employment to all affected employees after the unfair labor practice charges were filed, suddenly discovering that there was sufficient work for them in the bond shop after all.

Triumph's relentless resistance to the Union's reasonable requests for the documents it needed to properly evaluate the circumstances and formulate bargaining proposals is a strong indicator of bad faith. "An employer's duty to bargain includes a general duty to provide information needed by the bargaining representative in contract negotiations and administration."

*Southcoast Hosp. Group, Inc.*, 365 NLRB No. 100, Slip Op. at 22 (2017), quoting *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011). The “presumption is that the union acts in good faith when it requests information from an employer until the contrary is shown.” *Centinela Hospital Medical Center*, 363 NLRB No. 44 (2015). Generally, information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. *Southcoast Hosp. Group, Inc.*, 365 NLRB No. 100 at 22.

A fourth factor is the importance of issues over which there is disagreement. Although the parties differed in their negotiations with respect to issues of seniority versus rack and stack, pay rates upon transfer, and volunteers versus Triumph’s sole discretion to select employees for transfer, the parties were progressing toward a negotiated resolution that would include a combination of factors that would be acceptable to both sides. The open issues certainly were not insurmountable or even inordinately difficult.

As to the fifth and final factor, the parties’ bargaining history is somewhat neutral since there is little evidence in the record concerning this factor except for the fact that the parties have had a decades-long bargaining relationship.

In summary, Triumph’s sudden termination of the parties’ negotiations with respect to the bond shop layoffs was not the result of an impasse, but rather was an inevitable outcome where the employer merely engaged in surface bargaining for the sake of appearances. *See UAW-Daimler Chrysler Nat’l Training Ctr.*, 341 NLRB 431, 433 (2004) (when director told union the layoff was a “done deal,” he announced a *fait accompli* in attempt to avoid employer’s bargaining obligation); *Ciba-Geigy Pharms. Div.*, 264 NLRB 1013, 2017 (1982), *enfd.* 722 F.2d 1120 (3rd Cir. 1983) (employer’s admission that it was committed to implementation regardless of union response and

immediate implementation after union asked for time to study proposal constitutes *fait accompli*). Triumph's unlawful, unilateral conduct constituted a *fait accompli* that precluded bargaining to a valid impasse over layoffs. *See and cf. Times Union, Capital Newspapers Division of the Hearst Corp.*, 356 NLRB 1339 (2011).

**B. Under *Total Security Management*, Triumph Violated Section 8(a)(5) and (1) by Imposing Discretionary Discipline Against Smith and Horn without First Providing the Union with Notice and an Opportunity to Bargain**

An employer's unilateral changes that modify conditions of employment constitute a *per se* violation of Section 8(a)(5) and (1). *NLRB v. Katz*, *supra*; *Gaylord I*, *supra*. An employer is prohibited from making changes related to wages, hours, or other terms and conditions of employment without affording the certified representative notice and a meaningful opportunity to bargain. *Flambeau Airmold Corp.*, *supra*; *Gaylord I*, *supra*.

**1. Triumph Was Obligated to Bargain Over Discretionary Discipline Arising Before the CBA Was Negotiated**

At the time Triumph took disciplinary actions against Smith (discharge) and Horn (suspension), the Company had recognized the Union as the exclusive bargaining representative of the production and maintenance employees at the Red Oak facility, but the parties had not yet negotiated a comprehensive labor contract. The Board has held that under these circumstances, the employer is required to give the union notice and afford it an opportunity to bargain before imposing any *discretionary discipline* that results in suspension, demotion, or discharge of an employee in the unit represented by the union. *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016).<sup>7</sup> The rationale for the Board's decision in *Total Security Management* is that "[t]he imposition of discipline on individual employees alters their terms or conditions of

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<sup>7</sup> The Board's decision in *Total Security Management* revived the rule originally set out in *Alan Ritchey, Inc.*, 359 NLRB 369 (2012), which was invalidated on procedural grounds by the United States Supreme Court's decision in *NLRB v. Noel Canning*, 573 U.S. 513 (2014).

employment and implicates the duty to bargain if it is not controlled by preexisting, nondiscretionary employer policies or practices.” 364 NLRB No. 106, Slip op. at 3.

**2. Triumph’s Discipline Decisions Were Admittedly Discretionary, but the Company Failed to Give the Union Pre-Discipline Notice and an Opportunity to Bargain**

The parties’ stipulations establish Triumph’s violation of the Act under *Total Security Management* because in that (1) the employer’s disciplinary decisions as to both Smith and Horn were discretionary within the meaning of *Total Security Management* [Jt. Ex. Z, Nos. 14, 24] and (2) Triumph did not give the Union pre-discipline notice and an opportunity to bargain with regard to either decision [Jt. Ex. Z., Nos. 12-13, 23]. It is undisputed that no pre-discipline bargaining took place with respect to either discretionary decision.

**3. Triumph’s Equitable Estoppel Theory Is Without Merit**

Triumph does not contest that it failed to give the Union notice and an opportunity to bargain as required by *Total Security Management*. Instead, Triumph relies on a novel defensive theory that the UAW waived or is equitably estopped from seeking pre-discipline notice and bargaining in Smith and Horn’s cases because the Union did not demand to bargain over other unrelated disciplinary matters of which it received post-discipline notifications from the Company during the previous two years.

The Company’s argument lacks merit for several reasons. First, there is no evidence whatsoever to suggest that the Union intended to waive its right to demand pre-discipline notice and bargaining under *Total Security Management*. Instead, the evidence shows that soon after the Board issued its *Total Security Management* decision in August 2016, the Union promptly demanded in November 2016 that the Company bargain over discretionary discipline. Jt. Ex. D.

Although *Total Security Management* was not issued until August 2016, Triumph's counsel asserted in the employer's opening statement that the Union was aware of *Alan Ritchey* at the time of the Company's recognition of the Union in January 2014, yet did not request pre-discipline bargaining. This argument ignores the fact that in *Total Security Management*, the Board regarded viewed its holding as a "change in the law" that was to be applied only prospectively. 364 NLRB No. 106, Slip op. at 11-12, in light of the nullification of *Alan Ritchey*. Moreover, under *Total Security Management*, the employer must provide the union with notice and an opportunity to bargain after it has preliminarily decided to impose severe discipline. *Id.*, Slip op. at 8. The Board did not provide the employer with any discretion or latitude to fulfill this obligation only when the union has called a failure to bargain to the employer's attention.

There is no evidence that Triumph ever presented any pre-discipline notices to the Union with regard to Red Oak. The Company's form requests of the Union for the name of a contact person to discuss disciplinary issues was clearly posturing on management's part.

In any event, the issue is a red herring as Triumph indisputably knew who the International Union Representative and Local Union President. Indeed, the Company directed its many letters with *post-discipline* notices attached first to Helms, then to Barker, and then to Ducker. Barker testified without contradiction that he verbally responded to the post-discipline notices, and this testimony is corroborated by the fact that Ducker began receiving the post-discipline notices at about the same time.

Further, it is important to note that in the period of 2014 to 2016 the parties were embroiled in a unit clarification case, major unfair labor practice cases, and an arbitration to determine whether the Red Oak unit was part of the Marshall Street unit or whether the Red Oak unit was a separate unit with new terms and conditions of employment. As a strategic matter, the Union did

not respond to numerous notices from Triumph during this period because to do so would have undermined its legal and contractual position that the Marshall Street CBA applied to the unit employees at Red Oak.

In its opening statement, Triumph cited two cases in support of its equitable estoppel theory. The employer's counsel first cited *Manitowoc Ice, Inc.*, 344 NLRB 1222 (2005), which addressed certain principles of equitable estoppel that have no application in this case. "The gist of equitable estoppel is that a party who has by his statements or conduct, asserted a claim based on the assumption of the truth of certain facts, whereby he has obtained a benefit from another party, cannot later assert that those facts are not true if thereby the other party will be prejudiced." *Raymond Interior Systems*, 357 NLRB No. 193, 2187 (2011). Here, there is no evidence that the UAW made any representations to Triumph that caused the Company to change its position in any way such as might estop the Union, Smith or Horn from complaining of management's failure to give notice and an opportunity to bargain with respect to the discretionary disciplinary actions. At best, the Company has shown the Union did not respond in writing to inapposite *post-discipline notices*.

Triumph also cited *Windsor Redding Care Center*, 366 NLRB 127 (2018), which the Company referred to disingenuously as "a Total Security Management case," for the proposition that a union must make a specific request in order to engage in pre-discipline bargaining with respect to certain disciplinary matters. Tr. 48:21-49:8. However, that case is easily distinguishable because it is not governed by *Total Security Management*. In fact, the Board stated in a footnote that "[i]n adopting the judge's dismissal of the predisciplinary bargaining allegation, *we rely on the fact that, at the time of these events, the Respondent did not have a legal duty to bargain prior to imposing discipline,*" citing *Total Security Management. Id.*, Slip op. at 1 n. 3 (emphasis added).

The Administrative Law Judge's Decision in *Windsor*, which was issued in 2012, instead relied on prior law as set forth in *Fresno Bee* for the proposition that “[a]n employer does not have a general obligation to notify and bargain to impasse with the union before imposing discipline; however, an employer does have an obligation to bargain, upon request by the union, concerning discharge, discipline, or reinstatement of employees. *Id.* at 26, citing *Fresno Bee*, 337 NLRB 1161, 1187 (2002).

## **V. Conclusion**

For the foregoing reasons, the UAW respectfully requests the Administrative Law Judge to make appropriate findings of fact and conclusions of law and find that Respondent violated the Act as alleged in the Second Amended Consolidated Complaint. Accordingly, the Administrative Law Judge should order Respondent to cease and desist from its unlawful conduct, order the posting of a notice and distribution of the notice by electronic mail to all employees, and order a make-whole remedy, including back pay, for all employees adversely affected by Respondent's unlawful conduct. The UAW further seeks any and all other relief necessary to effectuate the purposes and policies of the Act.

Dated June 14, 2019.

Respectfully submitted,

/s/Rod Tanner  
**Rod Tanner**

**Certificate of Service**

The undersigned attorney for the Charging Party certifies that on June 14, 2019, he served a copy of the foregoing Charging Party’s Post Hearing Brief to the Administrative Law Judge on the parties via electronic mail.

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