

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

EXXONMOBIL RESEARCH &
ENGINEERING CO., INC.,

Respondent,

and

INDEPENDENT LABORATORY
EMPLOYEES' UNION, INC.,

Charging Party.

CASE NOS. 22-CA-218903
22-CA-223073
22-CA-232016

BRIEF IN SUPPORT OF THE EMPLOYER'S EXCEPTIONS

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BRIEF IN SUPPORT OF THE EMPLOYER'S EXCEPTIONS

Pursuant to Rule 102.46 of the National Labor Relations Board's ("Board") Rules and Regulations, ExxonMobil Research and Engineering Co., Inc. ("Employer," "Company," or "Respondent") files its Brief in Support of its Exceptions to the June 12, 2019 Decision of Administrative Law Judge Michael A. Rosas' ("ALJ") ("Decision"). This unfair labor practice proceeding was initiated by Independent Laboratory Employees Union, Inc. ("Union"). Because the Employer and Union are still negotiating a successor collective bargaining agreement ("CBA"), Respondent respectfully requests the Board consider these exceptions on an expedited basis.

I. STATEMENT OF THE CASE

On February 21, 2019, Counsel for the General Counsel ("General Counsel") issued an Order Consolidating Cases, First Amended Complaint and Notice of Hearing alleging the Company violated Sections 8(a)(1) and (5) of the National Labor Relations Act (the "Act").

A hearing was held on March 19, 2019. On June 12, 2019, the ALJ issued his Decision dismissing General Counsel's allegations that: (1) the Company intruded into the Union's ratification process; (2) insisted on bargaining non-economic issues to conclusion before discussing economics; (3) proposed a side letter concerning arbitration repugnant to the Act; and (4) foreshadowed impasse in bad faith.

The ALJ found the Company violated Section 8(a)(5) of the Act by: (1) failing to bargain in good faith concerning personal time; (2) making material changes to its employee performance appraisal system – an allegation wholly unrelated to the instant round of negotiations; (3) dealing directly with employees by virtue of an Employee Information Bulletin ("EIB") concerning a ratification vote; (4) conditioning agreement on contracting out unit employees' work, which the ALJ incredibly found was a permissive subject of bargaining; and (5) overall bad faith bargaining.

The ALJ also concluded the Company violated Section 8(a)(1) of the Act by: (1) failing to bargain in good faith concerning personal time; (2) disparaging the Union's leadership on June 29, 2018 and September 28, 2018; and (3) promising unit employees eight weeks of PPTO if they withdrew from Union representation.

The Company submits the ALJ's findings of violation are not properly based in law or fact and the Complaint should be dismissed in its entirety.

II. THE COMPANY'S POSITION CONCERNING THE QUESTIONS INVOLVED AND TO BE ARGUED

The Company and Union bargained 23 full days between May 7, 2018 and the date of the hearing, reaching agreement on approximately 90 percent of topics discussed. JE 1-20; Tr. 126.¹ Although the ALJ correctly dismissed many allegations, the following findings of violations should be reversed:

- First, the ALJ erroneously concluded contracting is a permissive subject of bargaining because it purportedly affects unit scope. The ALJ's shocking finding is directly contrary to Supreme Court authority and Board precedent, and must be reversed. Moreover, the record belies the ALJ's finding that the Company unlawfully conditioned agreement on its contracting proposal. D.39-40. (Exceptions 1, 4, 38-40, 47).
- Second, the ALJ incorrectly found the Company unlawfully refused to bargain over personal time in retaliation for previously filed prior unfair labor practice charges. However, the bargaining transcripts unequivocally reflect the Company discussed personal time *ad nauseum*. The Company would not agree to the Union's personal time proposals;

¹ References to "JE" are to Joint Exhibits. References to "Tr." are to the transcript. References to "GCX" are to General Counsel's exhibits. References to "RE" are to Employer exhibits. References to "D. ___" are to the ALJ's Decision.

however but saying “no” is not a refusal to bargain. The Company raised the prior unfair labor practice charges (along with other issues) in response to the Union’s repeated insistence that the Company leave personal time to supervisor discretion. In doing so, the Company made clear it did not wish to expose itself to challenges of inconsistency, not because of any retaliatory intent. JE 5, pg. 85; JE 13, pgs. 65-67. The ALJ’s finding reads Section 8(d) out of the Act – the law does not require either party to agree to any proposal or make any concession. D.34. (Exceptions 13-18, 43).

- Third, the ALJ found the Company “disparaged and denigrated” the Union during negotiations on June 29, 2018 and in a September 28, 2018 email summarizing the prior day’s bargaining. GCX 31. The ALJ overstepped his authority because neither the Complaint, nor General Counsel’s Response to Respondent’s Motion for a Bill of Particulars, asserted Respondent engaged in any disparaging or denigrating conduct on June 29, 2018. Further, the ALJ contradicted his earlier finding that the Company’s conduct on June 29, 2018 was lawful. Additionally, the ALJ ignored that the Union President conceded the September 28, 2018 email was truthful and accurate and, thus, was protected by Section 8(c) of the Act. D.34-35. (Exceptions 19-26, 44).
- Fourth, the ALJ improperly found the Company, in a July 3, 2018 email, dealt directly with bargaining unit employees. To the extent the email could be interpreted to promise some sort of benefit or to circumvent the Union (it vaguely stated “it is expected that Union members be provided reasonable time away from work to meet and vote”), the Company promptly retracted its statement, explained it did not intend to directly deal, and affirmed its commitment to comply with the Act. GCX 24; GCX 30. Further, the ALJ’s decision materially misquoted the email to suggest the Company engaged in coercive conduct by

saying it “expected” the Union to take the matter to a vote, which it did not do; to the contrary, the portion at issue read: “If and when the ILEU brings the Company’s last, best, and final offer for a vote, it is expected that Union members be provided reasonable time away from work to meet and vote.” (Emphasis added). D.32-33. (Exceptions 5-12, 22, 42).

- Fifth, the ALJ incorrectly ruled the Company unlawfully promised employees eight weeks of Paid Parental Time Off (“PPTO”) if they withdrew from the Union. The ALJ cherry-picked one exasperated comment from a nearly 2,000 page transcript out of context. JE 15, pg. 113. In context, this comment was sarcastic, not a bribe, and, further, was an accurate reflection that all non-union employees receive PPTO. The Company repeatedly explained it would bargain over PPTO. In fact, the Company offered one week of PPTO, the same amount or more than other bargaining units had accepted. Tr. 316. Moreover, this comment was made to the Union Executive Board, not rank and file employees, and simply was not coercive or taken seriously under the circumstances. D.37-38. (Exceptions 34-37, 46).
- Sixth, the ALJ improperly found the Company unilaterally changed its performance evaluation process. The ALJ ignored that revisions were neither material, nor substantial such that bargaining was required. Dispositively, the ALJ found the Union clearly and unmistakably waived its right to bargain over the changes. Despite this finding, the ALJ found the waiver to be a nullity because, in his mistaken view, the Company presented the Union a “fait accompli.” The record evidence belies this conclusion and the Company had a sound arguable basis for concluding it had satisfied its obligations to discuss revisions with the Union. GCX 2, pg. 58; D.35-37. (Exceptions 2-3, 27-33, 45).

- Finally, the ALJ found the Company engaged in overall bad faith bargaining. However, this finding is predicated upon the erroneous findings described above. As a result, the totality of the circumstances do not demonstrate any untoward conduct justifying such a finding. D.41. (Exceptions 41, 48).

III. BACKGROUND FACTS CONCERNING THE COMPANY AND CLINTON²

The Company has a long history of collaborative labor relations and respect for collective bargaining rights, both as a corporation and throughout the history of the Clinton site.

A. ExxonMobil Labor Relations

ExxonMobil is party to 25 United States collective bargaining agreements. Tr. 303. Virtually all of ExxonMobil's bargaining relationships have existed for 30 years or more, with the vast majority collaborative, productive, and "very strong." Tr. 304. ExxonMobil has never had a strike or lockout, nor has it declared impasse in contract bargaining. Tr. 304. The Company's Americas Labor Relations Manager, Jay Davis, is aware of only two NLRB complaints during his 16-year tenure, one the present dispute. Tr. 304. In fact, Mr. Davis is aware of only two charges of bad faith bargaining, the present charge and another that was dismissed. Tr. 304.³

B. Background Concerning The 2018 Clinton Negotiations

ExxonMobil's Research and Engineering Technology Center ("Clinton") is located in Clinton, New Jersey. Clinton supports 432 laboratories, 92 pilot plants and 850 offices, and provides Research and Development support for ExxonMobil's three main businesses:

² Additional facts are provided in Argument sections responsive to specific allegations.

³ The Company's bargaining team consists of lead negotiator Russ Giglio, R&D Business Advisor and Department Head of Business Support; Lyndsey Naquin, Human Resources and Labor Advisor; and a management team consisting of Don O'Rourke, Rob Lucchesi, Andy Lafountain, Brandon Weldon, Kathy Edwards, and Gary Fafard. JE 1-20.

Downstream, Chemical, and Upstream. GCX 22, pg. 6. The Union represents over 200 of Clinton's employees. Approximately 80 percent of the bargaining unit are research techs. GCX 22, pg.6.

Heading into Clinton's 2018 bargaining, ExxonMobil had taken significant measures to remain competitive in difficult industry conditions. ExxonMobil is a commodity business and, as such, is not immune to market conditions. Tr. 312. Among other things, ExxonMobil recently sold two refineries, most of its retail fuels business, and a number of pipeline assets. Tr. 312. ExxonMobil has also consolidated various business units to its central campus in Houston. Tr. 312.

The research unit has not been immune to pressures. ExxonMobil closed an upstream research site and consolidated it at the Houston campus and consolidated its two other research sites, Clinton and Paulsboro, New Jersey. Tr. 312. ExxonMobil could have moved the Paulsboro and Clinton work to Houston or overseas, but, in 2018, instead consolidated the work at Clinton. Tr. 312. Between the Paulsboro move and other new projects, ExxonMobil has invested tens of millions of dollars in Clinton. Tr. 310.

With the Paulsboro move, the Company voluntarily added roughly 50 transferred employees to the 165-employee Clinton bargaining unit. This includes approximately 15 auto mechanics the Company offered to add during bargaining. Tr. 213-214, 219, 312; JE 34. By contrast, and as detailed below, the Company's contracting proposals would, at most, result in 13 positions being contracted. Tr. 219, 226-27. The Company's investment in Clinton and addition of employees belie any claim of a strategy to "bust" or marginalize the Union, or to insist on contracting proposals "repugnant to the Act."

Mr. Davis testified the Company did not intend to "bargain aggressively," and did not expect negotiations to be difficult. Tr. 305. Indeed, past Clinton negotiations have not been contentious, and the Company did not intend to propose significant restructuring of the agreement.

Tr. 305. However, as a capital heavy business, ExxonMobil is conservative and focuses on long-term competitiveness. Tr. 311. As such, ExxonMobil considers the total cost and long-term impact of each bargained benefits package. Tr. 311. ExxonMobil is not the highest-paying employer but pays competitively, focuses on attracting and retaining employees, and rewards employees over the long term.⁴ This long-term approach has enabled ExxonMobil to attract and retain employees and avoid mass layoffs and other extreme measures in difficult times. Tr. 306. In light of these considerations, the Company's primary objective heading into Clinton negotiations was to be fair, reach an agreement, and remain competitive in the marketplace. Tr. 310.

On April 16, 2018,⁵ prior to the June 1 expiration date, Mr. Giglio sent to Mr. Myers proposed ground rules and seven meeting dates. GCX 17, pg. 3-6. On April 23, Mr. Myers agreed with the proposed dates. GCX 17, pg. 7-9. On May 7, bargaining commenced. JE 1, pg. 1. While Mr. Myers testified seven proposed meetings was consistent with the parties' past negotiations, the parties ultimately met 23 times, in full-day meetings, between May 7 and the hearing. JE 1-20.⁶

Unfortunately, as detailed below, there were early signs negotiations were not going to proceed as smoothly as hoped or as they historically had. The Union presented 34 proposals on day one. Tr. 305; JE 22. Negotiations were further complicated when, in late May, the parties

⁴ ExxonMobil's exceedingly generous benefits play a significant role. At Clinton, these include, among other things, a defined benefit Pension, 401(k) with 100% Company match, Retiree Medical, Life Insurance, Company Medical, Disability, Alcohol and Drug Treatment and Aftercare, up to six weeks Paid Vacation, and 13 Paid Holidays. Tr. 305-06, 311.

⁵ Additional date references are 2018 unless otherwise indicated.

⁶ The bargaining sessions were held on May 7, May 14, May 16, May 21, May 24, May 25, May 29, May 31, June 4, June 5, June 8, June 19, June 25, June 29, July 8, July 19, July 26, September 4, September 27, November 29, January 16, February 28, and March 14. JE 1-20; Tr. 126.

received an arbitration award on contracting rights under the predecessor CBA. Tr. 305; GCX 22. However, it was not until June that the Union derailed negotiations by rejecting out of hand the Company's compromise contracting proposal and "countering" with regressive proposals far beyond even the most strained interpretation of the arbitrator's award.

C. ExxonMobil's Record of Good Faith Bargaining at Clinton During The 2018 Negotiations

The Company's good faith bargaining efforts are evidenced by the fact that, during 23 full-day sessions, the parties reached agreement on nearly all issues. Even before bargaining, the parties reached agreement on four "clean-up items." Tr. 126. The Union offered various iterations of 34 proposals. JE 22. Thirty-one of those proposals have been resolved. Tr. 129. The Company initially made only five proposals. JE 21. At the time of the hearing, two were fully resolved and the Union acknowledged the parties were "close" to resolving a third. Tr. 127. The parties have also reached agreement on eleven side letters. Tr. 128. In total, the parties have resolved approximately 49 of 54 items discussed. Tr. 129. Outstanding items include contracting, personal time, paid parental time off ("PPTO"), the United Way Day⁷ and wages. As to wages, Mr. Myers admitted the Company's offer is consistent with increases in past negotiations. Tr. 154-155. Mr. Myers also admitted the Company never refused to meet, "wanted an agreement," and always emphasized it "was there to negotiate." Tr. 141, 206.

⁷ United Way Day is a fundraising incentive for ExxonMobil employees. Employees who meet their fundraising goals are rewarded with a paid day off of work. The Company and Union have agreed to United Way Day, contingent upon agreement as a whole. Tr. 129.

D. Contracting Negotiations and the May 25 Arbitration Award.

These otherwise fruitful negotiations took an unfortunate turn following the May 25 award issued by Arbitrator Joyce Klein concerning a 2016 grievance challenging the Company's ability to permanently contract certain work. GCX 22. The Company took the position, based on Article 18 of the CBA and its long-standing practice, that contracting rights were limited only in that contracting could not cause layoffs. Tr. 216; GCX 2, pg. 52-53. However, the arbitrator applied a "unit erosion" theory and ruled that, irrespective of layoffs, the Company could not permanently contract jobs. GCX 22, pg. 20-21. Permanent contracting does not refer to duration. It means filling a position with a contractor only when an employee leaves the Company, so no employees lose their jobs due to contracting. GCX 22, pg. 19. It does not change unit scope or require the Company to use contractors for any duration. GCX 22; Tr. 275. The award did not limit the Company's rights on temporary contracting. Temporary contracting also does not refer to duration. Rather, it means contracting to manage peaks and valleys in workload without affecting existing unit positions even if employees leave the Company. JE 17, pg. 90, 107; JE 13, pg. 6-24.

1. The Parties' Positions Prior to Arbitrator Klein's Award

Prior to the award, the Company submitted only one proposal on contracting, to eliminate a side letter which required the parties to discuss contracting where the contract value exceeded \$50,000. JE 21, pg. 3. The Union agreed to this proposal, noting the side letter presented an excessive administrative burden for both parties. JE 21, pg. 3; JE 1, pg. 6, 23.

By contrast, the Union immediately sought to significantly restrict the Company's contracting rights. JE 22, pg. 29. The Union proposed adding a percent limit on the number of contracted individuals, as well as limiting the tenure of any contracted individual to no more than six months. Tr. 216-17; JE 22, pg. 29. This proposal was significantly more restrictive than the language contained in the expiring CBA, which, in pertinent part, provided only that:

The Company may let independent contractors.

[D]uring any period of time when an independent contractor is performing work of a type customarily performed by employees and employees qualified to perform such work together with all of the equipment necessary in the performance of such work are available in the Company facilities, the Company may not because of lack of work demote or lay off any employee(s) qualified to perform the contracted work.

GCX 2, pg. 52. The CBA had no percentage or tenure limitations. GCX 2, pg. 52-53. The Union's proposal also was significantly more restrictive than the award issued a few weeks later, as the award focused solely on permanent contracting (contracting positions only through attrition) moving forward. The Company rejected these proposals. JE 2, pg. 59; JE 3, pg. 131.

2. *The Parties' Positions Following the Arbitration Award*

The Company was surprised by the award, as it contravened the clearly delineated rights under the CBA and past practice. Tr. 313; GCX 2, pg. 52-53. In addition, the Company had not used contracting to reduce the size of the unit. Rather, the number of contracted "non-core" positions was matched or exceeded by increases in "core" positions, such as research techs. GCX 22, pg. 6. Further, all contracting had been done through attrition, not by displacing current employees. In the days following the award, Mr. Davis spent significant time working with the Clinton team to determine how to address contracting. Tr. 313. The team ultimately focused on two options. Tr. 313. The first was to negotiate language giving the Company the clear and unmistakable right to contract work as necessary. Tr. 273, 313. The second was to carefully consider the needs of the Clinton facility and develop a narrow proposal focusing only on the "bare minimum" contracting needed to manage operations. Tr. 273, 314. The Company elected the latter option because it wished to reach agreement with the Union. Tr. 314-15.

The Company presented its contracting proposal in a side bar on May 31. Tr. 86, 217; JE 34. The proposal was less "aggressive" than contracting language in other ExxonMobil

agreements, and was far from the full scope of rights the Clinton team wished to obtain. Tr. 314. The bargaining team, however, agreed to this approach as it felt the proposal would elicit a positive response from the Union and, ultimately, clear the pathway to agreement. Tr. 315. To this end, the Company also presented its proposal in a side letter because it thought a more flexible, non-contractual side letter would be more palatable to the Union. Tr. 315.

The proposal was narrow and included provisions exceedingly favorable to the Union. It included an agreement not to appeal or challenge the May 25 award, which the Union had already indicated it wished to let stand. Tr. 217-18; JE 34. The Company further proposed the ability to contract only through attrition (i.e., “permanently” contract) materials, trades, graphics and admin tech positions, occupied by only 13 of the 200-plus post-Paulsboro transfer bargaining unit employees. Tr. 219, 226-27; JE 34. That is, the Company agreed **not** to displace any current employee. Tr. 219, 226-27; JE 34. Further, the Company agreed it would not (1) increase the current level of contracting of wastewater treatment operators or utility operators or (2) permanently contract any other position, including research techs, which are the vast majority of the bargaining unit. Tr. 219; JE 34. Consistent with Arbitrator Klein’s award, the proposal was prospective only. Finally, to offset the 13 positions the Company would have the right to contract through attrition, the Company proposed adding to the bargaining unit 10-15 auto mechanics from Paulsboro. Tr. 219; JE 34. This was in addition to approximately 50 Paulsboro positions the Company had already voluntarily added to the unit. The Company was careful to address Union concerns, and it is not surprising Mr. Myers believed the Company’s proposal evidenced a desire to reach agreement. Tr. 141.

It initially appeared the Company’s optimism was warranted and its compromise-oriented, narrowly-tailored proposal would “pay off” because the Union responded favorably in the May 31

meeting. In fact, the two bargaining committees socialized over drinks that evening. Tr. 278. The Union was supposed to present a counterproposal at the next meeting which the Company believed would largely mirror the Company's proposal. Based on the strong progress during this meeting and over drinks, the Company believed the parties were very close to reaching closure on a collective bargaining agreement. Tr. 278-279.

Unfortunately, at the next meeting on June 4, the Union acted as if the prior meeting had not occurred, rejecting out of hand the Company's proposal. JE 37, pg. 1; JE 10, pg. 7. The Union effectively stopped negotiating and completely backtracked from items to which the parties had agreed on May 31. Tr. 279. A Union counter was not forthcoming, and bargaining abruptly deteriorated. Even though far from true, Mr. Myers attacked the Company's proposal as "attempting to go back to the conditions back before [the Union] won the arbitration." Tr. 222.

Regrettably, the Union's negotiation efforts continued to diminish after the June 4 meeting. As the Company attempted to move forward, the Union repeatedly refused to agree to terms the Company believed were previously resolved⁸ and ultimately offered only a regressive counterproposal on contracting, which it then withdrew. Tr. 279; JE 46. For the next three months, the parties made no progress on contracting. In fact, given the Union's regressive proposals, the parties went backwards. In addition, the Union refused to meet the entire month of August despite the Company offering seven meeting dates. Tr. 137.

⁸ The Union's unwillingness to acknowledge prior agreements extended into the hearing. For example, Mr. Myers testified he did not believe the parties reached agreement on the "United Way Day" proposal. Tr. 128. Only when confronted with his own transcribed statements did Mr. Myers acknowledge the Union's agreement to discontinue the United Way Day. Tr. 129. This is only one example of the Union's frustrating bargaining tactics following the May 31 session.

E. Negotiations Stall; Company Presents LBFO but Continues to Bargain

The Union's obstinacy on contracting was not the only problem. Although between mid-May and late June the Company presented multiple enhanced counterproposals, the parties made virtually no progress. Despite 14 full-day meetings through late June, the parties remained far apart on all primary outstanding items – wages, PPTO, personal time, and contracting. While both parties testified they were not at impasse and neither had declared impasse, the parties dug in their heels on key issues and had become “broken records” explaining their respective positions.

Accordingly, on June 29, the Company presented an LBFO. JE 42. In sum, the LBFO's economic package far exceeded the parties' prior two agreements and included a \$5,000 ratification bonus and one week of PPTO. JE 42, pg. 1, 10. The Company sought no economic concessions, leaving intact its generous benefits package which includes, among other things, a defined-benefit Pension, 401(k) with 100 percent Company match, Company Medical, Retiree Medical, Paid Vacation up to six weeks, Disability, 13 Paid Holidays, and Alcohol and Drug Treatment and Aftercare. Tr. 306; JE 42; GCX 2.

The Company gave the Union until July 11 to ratify the offer and encouraged the Union to hold a vote. JE 14, pg. 6. Importantly, the Company made clear it would continue to bargain in good faith regardless. JE 14, pg. 14-15. In fact, during the June 29 meeting, the parties agreed to meet again on July 9. JE 14, pg. 14-15. In the July 9 meeting, the Company emphasized it would continue to bargain even if the Union or employees rejected the offer. JE 15, pg. 128. The Union did not take the offer to a vote and instead held a strike authorization vote. JE 16, pg. 73. Nonetheless, the Company continued to meet and bargain in good faith.

Unfortunately, the parties met only once more (July 26) before September, as the Union refused to meet in August despite the Company's offer of seven meeting dates. Tr. 137.

IV. THE COMPANY DID NOT VIOLATE THE ACT

The ALJ ignored the most basic tenet of Section 8(d) of the Act: the duty to bargain in good faith “does not compel either party to agree to a proposal or require the making of a concession.” Here, the Company tried mightily to reach agreement. The Company made numerous concessions and asked little in return. Indeed, the parties resolved over 90 percent of issues raised. Tr. 129. Even Mr. Myers conceded he believed “[t]he Company wanted an agreement.” Tr. 141. He also conceded the Company never refused to meet and always emphasized it was there to bargain. Tr. 206. Inexplicably, however, the ALJ found violations unsupported by fact and law. As shown below, the ALJ erred in failing to dismiss the Complaint in its entirety.

A. The Company Did Not Condition Agreement On A Permissive Subject of Bargaining

Defying over 55 years of Supreme Court and Board precedent, the ALJ astonishingly concluded the Company’s contracting proposal was a permissive subject of bargaining. Additionally, the ALJ disregarded the record to find the Company unlawfully conditioned agreement on this topic.

1. The ALJ Erroneously Found Contracting to be a Permissive Subject of Bargaining

Contracting bargaining unit work is a mandatory bargaining subject, period, and has been since the United States Supreme Court decided Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964). Indeed, in Fibreboard, the Supreme Court found contracting to be mandatory, even though the employer proposed to subcontract the *entire bargaining unit*.

Here, the Company submitted a narrow proposal to preserve only the contracting rights it viewed as necessary to focus on its core business, and repeatedly revised its proposal in an effort to reach agreement. JE 34, JE 36, JE 38, JE 42, JE 44, JE 49. The Company’s proposal allowed the Company to “permanently” contract positions. In addition, no employees would ever be

displaced by contractors. Again, “permanent” does not concern duration but rather, means the Company may retain contractors only as employees in those few positions leave the Company. Tr. 272-273; GCX 22, pg. 5-6. Finally, the proposal actually prohibited the Company from permanently contracting the vast majority of positions.

The Company’s proposal is in stark contrast to the proposals in Fibreboard and the Board cases discussed below in which the employers proposed contracting (and immediately displacing) much or all of a bargaining unit.

Regardless, however, a proposal allowing an employer to contract specific positions is not permissive, no matter how broad in scope. The ALJ was plain wrong on clear and long-settled labor law.

Contrary to the ALJ’s finding, Fibreboard did not hold that contracting changes unit scope, and the Company’s proposal would not change unit scope. As the ALJ and General Counsel acknowledged, and as Mr. Giglio made clear, any ExxonMobil employee now or in the future filling contracted positions would be in the bargaining unit. GCX 22, pg. 19; Tr. 275. That is, while the Company would have the right to contract to third parties positions vacated through attrition, the positions would remain in the unit if filled in the future by ExxonMobil employees. There is no authority to support the ALJ’s finding that a proposal of this nature alters unit scope and is permissive. In fact, under the ALJ’s reasoning, every contracting proposal would alter unit scope. The law has been the opposite for over 50 years. Again, in Fibreboard, the employer proposed contracting an entire bargaining unit. The Supreme Court found the employer’s proposal lawful and a mandatory subject of bargaining.

Incredibly, the ALJ found the Company erroneously relied upon Fibreboard to argue its contracting proposal is mandatory. The ALJ then castigated the Company for citing Fibreboard. However, Fibreboard is clear:

To hold, as the Board has done, that contracting out is a **mandatory subject of collective bargaining** would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace. Id. at 211. (Emphasis added).

The ALJ ignored this clear holding and then misread the following passage from Fibreboard to find the **opposite** of what the case actually held:

We are thus not expanding the scope of mandatory bargaining to hold, **as we do now**, that the type of ‘contracting out’ involved in this case -- the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment -- is a statutory subject of collective bargaining under § 8 (d). D.40:1-5; citing Id. at 215. (Emphasis added).

The ALJ committed egregious error in somehow interpreting this passage as stating contracting is not a mandatory subject of bargaining, when, in fact, it (and the rest of the decision) holds the opposite. The ALJ also failed to understand that the issue in Fibreboard was whether contracting was a mandatory subject of bargaining or a managerial exercise which is not germane to bargaining at all (either on a mandatory or permissive basis). As the concurrence explained:

The question posed is whether the particular decision sought to be made unilaterally by the employer in this case is a subject of mandatory collective bargaining within the statutory phrase ‘terms and conditions of employment.’ That is all the Court decides. **The Court most assuredly does not decide that every managerial decision which necessarily terminates an individual’s employment is subject to the duty to bargain. Nor does the Court decide that subcontracting decisions are as a general matter subject to that duty.** The Court holds no more than that this employer’s decision to subcontract this work, involving ‘the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment,’ is subject to the duty to bargain collectively. Id. at 218. (Emphasis added).

Notably, the Board has followed this principle even in non-contracting cases. See e.g. General Motors Corp., 191 NLRB 951 (1971)(relying upon same Fiberboard passage and finding no bargaining obligation, in connection with selling decision).

The ALJ did not cite any Board case to support his conclusion that contracting work is a permissive subject or that it changes unit scope, because there are no such cases. To the contrary, the Board has consistently held that contracting is, at most, a mandatory bargaining subject. In doing so, the Board has rejected the argument that an employer seeking complete flexibility to assign work outside the unit is a change in unit scope and therefore a permissive subject of bargaining. See, e.g., Batavia Newspapers Corp., 311 NLRB 477, 478-480 (1993). Indeed, in Hill-Rom, 297 NLRB 351, 358 (1989), enf'd. denied, 957 F.2d 454 (7th Cir. 1992)⁹, the Board noted “the employer’s right to effect such a lawfully motivated transfer [of work outside the bargaining unit] after impasse is not negated by a showing that upon such a transfer, a job classification within the unit will have no incumbents and, therefore, will be dormant at best.” Id. (Emphasis added, internal citations omitted). The Board explained:

So long as the work has unquestionably been transferred outside the bargaining unit (the transfer of such work to an outside contractor being the clearest such situation ...), the employer’s right to transfer such work, and thereafter to refuse recognition as to the employees newly performing it, is unaffected by the nonmandatory bargaining status of unit scope or composition. Id. at 358.

See also Mid-State Ready Mix, 307 NLRB 809 (1992)(ALJ and Board relying on Fibreboard in holding that replacing unit employees with contractors and others is a mandatory subject).

⁹ The United States Court of Appeals for the Seventh Circuit ultimately held the employer lawfully transferred the work in question and that there was no unlawful alteration of the bargaining unit. Id. at 458-459. The ALJ cited the background of the Court of Appeals’ decision but then ignored its holding.

Indeed, dozens of Board cases have found partial contracting proposals to be mandatory, including the contracting of individual job classifications. See e.g. Hill-Rom; Presbyterian University Hospital, 320 NLRB 122, 123-124 (1995); Civic Motor Inns, 300 NLRB 774, 775-776 (1990). Incredibly, the ALJ did not cite any of these cases.

Here, again, the Company's proposal gave the Company the right to contract positions filled by only 13 employees, and only after they left under their own volition and with no displacements. The proposal also expressly prohibited the Company from contracting the vast majority of the unit. The Company's proposals were exceedingly narrow, but they would have been mandatory subjects of bargaining regardless, and the Company was privileged to press them to impasse which, of course, it did not do. Finally, the side letter does not propose removing classifications from the CBA, and Mr. Giglio made clear that any current or future employees in those positions would be bargaining unit employees. JE 19, pg. 36-37. Thus, this finding evidences the ALJ's clear error and warrants summary reversal.

2. *The ALJ's Finding That The Company Conditioned Agreement On A Permissive Subject Deprives Respondent Of Its Due Process Rights And Is Belied By The Record*

The ALJ's finding that Respondent conditioned agreement on a permissive subject – which, as illustrated below is belied by the record – was predicated upon a theory General Counsel never asserted in her Complaint. Thus, the ALJ violated Respondent's due process rights by finding a violation on this ground and is precluded from doing so. The fundamental elements of procedural due process are notice and an opportunity to be heard. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). To satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed. Bendix Corp. v. FTC, 450 F.2d 534, 542 (6th Cir. 1971). “[A]n agency may not change theories in midstream without giving respondents reasonable notice of the change.” Id.

(quoting Rodale Press v. FTC, 407 F.2d 1252, 1256 (D.C. Cir. 1968); Lamar Central Outdoor, 343 NLRB 261, 265 (2004).

In determining whether a respondent's due process rights were violated, the Board has considered the scope of the Complaint, and any representations by the General Counsel concerning the theory of violation, as well as the differences between the theory litigated and the judge's theory. See generally Sierra Bullets, LLC, 340 NLRB 242, 242-243 (2003) (violation based on broader theory improper and violates due process when General Counsel expressly litigated case on narrow theory); Quickway Transportation, Inc., 354 NLRB 560 (2009), abrogated on other grounds by New Process Steel v. NLRB, 560 U.S. 674 (2010) (improper finding in discharge case where General Counsel failed to advance the theory for the discharge relied upon by the ALJ).

Here, even a liberal reading of the Complaint could not support the notion that General Counsel pled Respondent conditioned agreement on a permissive subject of bargaining. Rather, the theory was limited to "threatening impasse," an allegation the ALJ expressly rejected. D.40:46-47; 41:1-5. Regardless, such a theory is wholly without merit. In Smurfit Stone, 357 NLRB 1732, 1735-1736 (2011), the Board applied a "conditioned on agreement" exception to the impasse standard in permissive subject cases, but it is exceedingly narrow. The threshold question is whether the proposing party declares a specific ultimatum and condition precedent, such as any agreement must contain the permissive subject. Then, the Board requires that (1) the opposing party clearly and repeatedly reject or refuse to bargain over the permissive subject, (2) the proposing party ceases bargaining or continues to "condition agreement on" the permissive subjects, and (3) the permissive subjects are primary points of dispute. See also Laredo Packing, 254 NLRB 1, 19 (1983); Rite Aid of New York, 02-CA-160384, 2016 NLRB LEXIS 847, at *53-54 (ALJ Steven Davis Nov. 30, 2016).

The Company did not come close to “conditioning agreement on” permissive subjects. It is “well established that a party ‘ha[s] a right to present, even repeatedly, a demand concerning a non-mandatory subject of bargaining, so long as it does not posit the matter as an ultimatum.’” Rite Aid of New York, 2016 NLRB LEXIS 847, at *55 quoting ILA v. NLRB, 277 F.2d 681, 683 (D.C. Cir. 1996); Detroit Newspaper Agency, 327 NLRB 799, 800 (1999). Here: (1) the Company never presented an ultimatum or declared it would not sign a contract without its exact contracting proposal; (2) the Union did not refuse to negotiate this subject; (3) the Company did not cease bargaining or pull its entire proposal once the Union objected to the contracting proposals; and (4) the parties continued to bargain and still are doing so. At best, Mr. Giglio emphasized that contracting (a mandatory subject) was of critical importance to the Company. See e.g. JE 15, pgs. 51, 62; JE 16, pgs. 113-114; JE 17, pgs. 19-21, 38; JE 18, pg. 17; JE 19, pgs. 8, 17-18. Of course, contracting is not a permissive subject in the first place.

B. The ALJ Erroneously Found the Company Refused to Bargain Over Personal Time and That Such Refusal was Retaliatory

The ALJ next erred by finding the Company violated Sections 8(a)(1) and (5) by refusing to bargain over personal time in retaliation for the Union filing prior unfair labor practice charges. D.34:13-42. A review of the transcripts refutes this claim and shows the ALJ improperly read out of the Act Section 8(d), which explicitly states that the duty to bargain in good faith “does not compel either party to agree to a proposal or require the making of a concession.”

The parties’ positions on personal time relate back to two 2016 unfair labor practice charges. GCX 25; GCX 28. Before then, supervisors had discretion to grant personal time, leading to a “very problematic system” where supervisors inconsistently enforced the policy. Tr. 178; 264. The Union filed a charge claiming a supervisor refused personal time in retaliation for Union actions. GCX 25. When the Company addressed its practices to ensure consistency, the Union

filed a charge in November 2016, accusing the Company of revising its practices in retaliation for the prior charge. Tr. 177-78; GCX 28.

Omitted from the ALJ's analysis is that Region 22 dismissed the charge, concluding the change "announced by the Employer in September 2016 was part of the Employer's strategy to achieve consistency in administering the contract." Tr. 178-80; GCX 29. The Office of Appeals denied the Union's appeal, finding the Company revised its policy to "promote consistency in its grants of discretionary paid use." Tr. 178; GCX 29.

Despite prevailing in the unfair labor practice proceeding, the Company learned valuable lessons. Mr. Myers admitted the Company emphasized the same interest in consistency during the instant bargaining. Tr. 180. The ALJ ignored that it was only in response to the Union's modified proposal to vest supervisors with discretion that the Company expressed concern that any discretionary language "could result in legal challenges," and that the Company did not wish to burden supervision with tracking leave requests to ensure consistency. Tr. 180, 265; JE 5, pg. 85; JE 13, pg. 65-67. The Company made this abundantly clear, which the ALJ ignored. For example, on July 8, when Mr. Myers asked Ms. Edwards if, as a supervisor, she desired discretion to award or deny personal time, Ms. Edwards stated that she did not, explaining:

The issue becomes, what I give you and what [another supervisor gives another employee] may be slightly different, and I know you are claiming that you are not going to file a lawsuit or an unfair labor practice, but there is going to be some instance when you guys are going to get angry at us for not being consistent. So unless we write down every single case and what the parameters are around it, it will never be the same.

JE 15, pg. 78. When Mr. Myers explained supervisors could reduce disparities by tracking employee absences, Ms. Edwards responded this was unfeasible, as it required supervisors "to keep track of how often I gave this particular person time away from work and how many hours and how many appointments they weren't able to get." JE 15, pg. 81. Later, Mr. Giglio referenced

Ms. Edwards's comments as summarizing the Company's concerns, noting it went "back to the issue that we had that was resolved after the Union filed a ULP and was resolved in 2016." JE 15, pg. 85. Contrary to the ALJ's finding, Mr. Giglio did not reference the prior charge as a basis for retaliation, but as evidence of the ambiguities and disputes the Company desired to avoid.

Indeed, Mr. Myers conceded the Company repeatedly explained that it was to the mutual benefit of both parties to reduce ambiguity where possible. Tr. 180-181; 335-36. While the parties may have had differing opinions, the Company never refused to bargain over personal time. Tr. 265-66. To the contrary, by the September 4 session, Mr. Myers recognized the parties "have been through this a lot, but the Company has made their stance, but this is ludicrous that you would treat your employees this way." JE 17, pg. 18 (emphasis added). This candid summary reveals the true status of personal time negotiations: the matter was repeatedly and consistently negotiated, the Company made its position clear, and the Union simply did not like that position.

Later, during the September 4 session, Mr. Myers asked whether the Company was refusing to give personal time due to the prior charge. Mr. Giglio again clarified: "No, because you expect everything to be perfect" and the Company was concerned about meeting those expectations. Tr. 181; JE 17, pg. 46. In fact, during a discussion of concerns over ambiguity, Mr. Myers gave credence to the Company's fear of discretion; he acidly noted "[t]he Company has proven time and again that if it is not written [the Company is] going to try to screw us over if [it] can." Tr. 181; JE 17, pg. 45.¹⁰

¹⁰ Mr. Myers made such accusations more than once, later stating "[T]ime and time again, if there is any way [the Company] can weasel out of something, you do." JE 17, pg. 48. Mr. Myers went out of his way to emphasize that this reputation was earned, if not by Mr. Giglio, then "by the Company as a whole." JE 17, pg. 48.

On November 29, the twentieth session, the parties were still discussing personal time. Mr. Giglio again emphasized the Union's proposal was unacceptable due to the ambiguity and supervisory discretion implicated, noting the issue was addressed in a prior ULP. JE 19, pg. 6, 22-23, 32. In short, the Company had no intent to punish the Union; it simply did not trust each supervisor to administer the program in a manner which would avoid challenges. Tr. 265-66.

The ALJ, General Counsel, and the Union obviously do not approve of the Company rejecting the Union's personal time proposals. However, saying "no" is not a refusal to bargain. Section 8(d) of the Act states the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession." A party has a right to say "no," even if the party's recalcitrance stalls negotiations. The ALJ's finding effectively reads 8(d) out of the Act.

The Board has recognized it is not unlawful for an employer to take a certain position based upon lessons learned from past experiences. In Bulk Transport Service, 267 NLRB 65 (1983), the Board affirmed an ALJ's decision which held an employer lawfully terminated an individual as a byproduct of "lessons learned" from other employees' grievances, specifically avoiding paying two people to perform the same job. The ALJ found that rationale, and not a grievance an individual filed, was the motivation for his termination. The ALJ remarked:

It was the latter grievances, those of the drivers, that brought forcefully home to Respondent the absurdity of paying for a yardman to perform work for which drivers already were being paid. General Counsel confuses the economic lessons learned by Respondent from those driver grievances with a motive on its part to punish charging party for having pursued a grievance.... Id. at 66.

This authority applies with equal force to the present case. Here, the Company discussed personal time *ad nauseum*. JE 17, pg. 120. However, it would not agree to discretionary language, which could lead to challenges of inconsistent or discriminatory application. Contrary to the ALJ's incorrect finding, the Company's reference to the prior charges was not retaliatory (which would

be a very foolish thing to admit in front of a court reporter), but as an example of the pitfalls of inconsistency. There is a major difference between retaliating based on a charge (unlawful) and trying to avoid circumstances that led to a charge (which is what occurred here and is lawful). As such, this allegation should be dismissed.

C. The Company Did Not “Disparage and Denigrate the Union”

The ALJ ruled the Company unlawfully disparaged the Union on June 29 and September 28. D.34:44-47-D.35-1-39. As an initial matter, the ALJ’s finding concerning any purported misconduct on June 29 deprives the Company of due process because it goes beyond the scope of the Complaint and General Counsel’s response to Respondent’s Bill of Particulars. GCX 1. See Point IV(A)(2), supra. In fact, the Complaint explicitly is limited to alleging the Company “disparaged and denigrated the Union” on September 28. Regardless, a review of the Company’s statements on both dates confirms the Company was providing accurate information which did not unlawfully disparage or denigrate the Union.

1. June 29, 2018

According to the ALJ, “[a]t the June 29 bargaining session, the Company said that the Union began to act regressively and stated that Myers was poorly representing bargaining unit members.” D.35:23-25. The ALJ misstates the record. Although Mr. Giglio lawfully described the Union’s regressive positioning concerning contracting, he never said Mr. Myers was “poorly representing bargaining unit members.” Rather, Mr. Giglio encouraged the Union to submit the LBFO for a ratification vote and otherwise expressed his lawful opinion of the status of negotiations. Further, the ALJ ignores the facts that Mr. Giglio’s comments during this meeting were not made to rank and file “employees.” Rather, Mr. Giglio was addressing the Executive Board of an independent union in an attempt to encourage him to accept the Company’s proposals. JE 14. Mr. Giglio stated:

Remember, Mike, you're an elected official representing 144 people. Think about the vast majority of these people who will be getting a \$5,000 ratification bonus and significantly better wage treatment than they've gotten in the past several agreements. You're not just here to represent a small faction, maybe those 13 core jobs, that's not what you're representing. You're representing 144 people. All of whom – including those 13 jobs because we're not putting anybody out – those would be filled through attrition or vacancy. We made that real clear. That's why I wanted to make contracting now real clear. If you seriously think about this, and if you look at the terms that we put out here this is a really good offer. This is actually an outstanding offer. So for you to sit there and say you're not going to recommend it to your constituency, I hope you have a conversation with your constituency because I think they're going to say: Man, are you wrong, and maybe we elected the wrong guy.

As an elected official I would think and I would hope you find it incumbent upon yourself to go seek out your constituents and see how they feel about this offer because we're certainly going to tell them about it. JE 14, pp. at 15-16.

2. September 28, 2018

The ALJ further found the Company denigrated the Union in a September 28 Employee Information Bulletin. GCX 31; D.35:25-27. These findings also are without basis in law or fact. Following the Company's May 31 contracting proposal, the parties exchanged multiple proposals. Both parties formatted proposals in "redlined" revisions to the Company's side letter. JE 35, pg. 2-3; JE 36, pg. 2-3; JE 38, pg. 3-4; JE 40, pg. 1; JE 41, pg. 2; JE 42, pg. 7; JE 43, pg. 2; JE 44; pg. 7; JE 45, pg. 2. While the Union previously followed this formatting, on September 27 it offered a regressive proposal in a different format which did not track the side letter the parties had been discussing for months. JE 46, pg. 2. Mr. Giglio saw this deviation and requested time to review the proposal to compare it to the Company's last proposal. JE 18, pg. 10-11; Tr. 118.

Following a break and an unproductive sidebar, Mr. Giglio noted his disappointment with the Union's departure from the agreed upon format. JE 18, pg. 13. Mr. Giglio stated:

So what we find disappointing is that we had early on agreed to a standardized format for proposals and counterproposals, specifically that the latest proposal that would be on the table, if there was going to be a counterproposal to that, we would take that existing proposal, line out what you don't like, and add in and highlight language that you would prefer to see from your point of view. We were provided

today, this morning, ostensibly called a counterproposal, an extremely regressive piece of correspondence. Specifically C2 [contracting]. The C2 alleged counterproposal that we were provided was based on language in the Collective Bargaining Agreement that expired on June 1. It totally ignored the Company's July 19 proposal. That is absolutely unacceptable. JE 18, pg. 13-14.

Mr. Giglio further noted that, only ten days prior, he sent an email to Mr. Myers and Mr. Fredrickson reminding them of the agreed-to format. JE 18, pg. 15. In fact, Mr. Myers admitted at the hearing that formatting had been an issue on a number of occasions. Tr. 236-37.

Mr. Myers was "extremely frustrated" by Giglio's comments. Tr. 118. In response, he impulsively and childishly "withdrew the whole proposal from the bargaining table." Tr. 118; JE 18, pg. 21. When Mr. Giglio asked what Mr. Myers proposed the parties do next, Mr. Myers responded, "Think about when we can meet next." JE 18, pg. 24. At that point, Ms. Naquin said the Company would prefer to continue negotiating and "be productive this afternoon and not waste all of our time." The parties agreed to caucus. JE 18, pg. 27.

Upon returning from lunch, Mr. Myers texted Ms. Naquin the Union was leaving for the day. Tr. 118-19. However, the agreed-upon ground rules provided the parties would stay until 5:00 p.m. for each bargaining session. GCX 17-19. Ms. Naquin texted Mr. Myers the Company did not agree to an early end, and instead wished to continue negotiations. Tr. 118-19; GCX 17-19. Despite receiving the text, the Union left without responding. Tr. 139.

The Company EIB distributed the next day accurately described these events. GCX 31. While the Union may be embarrassed by its unproductive and childish conduct, the Company had the right under Section 8(c) to accurately describe that conduct to employees. That description was accurate and exercised with restraint. GCX 31, pg. 2.

Indeed, in his testimony, Mr. Myers conceded every sentence in the EIB was true:

- Despite the Company offering seven days to meet in August, not one meeting was held. Tr. 135-36; GCX 31, pg. 1.

- The nineteenth bargaining session was held on Thursday, September 27, 2018. Tr. 136; GCX 31, pg. 1.
- While Mr. Myers attempted to claim the Union responded to the Company's contracting proposal, he did not deny the Union withdrew its counterproposal only moments after making it. Tr. 137. Thus, Mr. Myers admitted that at the time of the EIB, the Union had no counterproposal on the table. Tr. 138; GCX 31, pg. 2.
- Mr. Myers admitted the Union violated the ground rules when it left early and rebuffed Company efforts to continue bargaining. Tr. 139; GCX 31, pg. 2.
- Finally, the parties did not make progress in the September 27 session and, at the time of the EIB, had not scheduled their next bargaining session. Tr. 140; GCX 31, pg. 2. Indeed, at the conclusion of the session, the Union withdrew its proposal altogether. JE 18, pg. 21. This, clearly, was not progress.

Ms. Naquin likewise confirmed the EIB did not contain any inaccuracies and that the Union's September 27 contracting proposal did not counter the Company's offer. Tr. 247; JE 46, pg. 2. Ms. Naquin testified without contradiction the parties had been discussing contracting for several sessions, and both had used the Company's revised side letter as a reference point for over two months. Tr. 246-47; JE 35, pg. 2-3; JE 36, pg. 2-3; JE 38, pg. 3-4; JE 40, pg. 1; JE 41, pg. 2; JE 42, pg. 7; JE 43, pg. 2; JE 44; pg. 7; JE 45, pg. 2. However, the Union's September 27 counter was created from whole cloth, in no way responsive to the side letter. Tr. 247; JE 46, pg. 2.

3. Discussion

Section 8(c) of the Act allows for truthful representations concerning bargaining, including a description of where there has been a breakdown of negotiations. In Procter & Gamble Manufacturing Co., 160 NLRB 334 (1966), the Board held "[t]he fact that an employer chooses to inform employees of the status of negotiations, or of proposals previously made to the Union, **or of its version of a breakdown in negotiations will not alone establish a failure to bargain in good faith.**" Id. at 340 (Emphasis added). As such, the Board held the employer did not violate

the Act when it “merely presented (1) information on the status of negotiations; (2) explanations of positions previously advanced by the Company to the Union either at the bargaining table or in connection with the disposition of grievances; (3) refutation of inflammatory charges openly made by the Union; and (4) criticism of bargaining strategy and certain related tactics of the union leadership, which were the asserted reasons for the inability to reach agreement.” Id.

Further, the Board has found Section 8(c) allows employer communications “criticizing the Union’s demands and tactics” because “employees ought to be fully informed as to all issues relevant to collective-bargaining negotiations and the parties’ positions as to those issues.” See United Technologies Corp., 274 NLRB 1069, 1074 (1985), enf’d. sub nom. NLRB v. Pratt & Whitney, 789 F.2d 129 (2d Cir. 1986). Thus, “an employer may criticize, disparage, or denigrate a union without running afoul of Section 8(a)(1) provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees.” Children’s Ctr. for Behavior Dev., 347 NLRB 35, 36 (2006). The Board recognizes that employees are able to discern multiple points of view. See e.g. Optica Lee Borinquen Inc., 307 NLRB 705, 708-709 (1992), enf’d. mem. 991 F.2d 786 (1st Cir. 1993).

In Children’s Ctr., the employer disseminated a memo to employees which exhibited its negative opinion of the union’s actions. Id. at 36. Reversing an ALJ, the Board held all General Counsel proved was the employer “expressed an unfavorable opinion about the Union, its positions, and its actions.” Id. In the Board’s eyes, that was not enough because there was no evidence the communication: (1) suggested union activity was futile; (2) contained any explicit or implicit threats; (3) or was harassing to interfere with employees’ rights. See also Erickson’s Inc., 366 NLRB No. 171 (2018).

Here, the record belies the ALJ's conclusions. The ALJ ignored that Mr. Giglio's statements on June 29 were prefaced in aspirational terms, such as "I hope" and "I think." JE 14. Thus, even if Mr. Giglio's comments could be construed as critical of Mr. Myers, they were nothing more than lawful expressions of opinion (and, as noted above, outside the scope of the Complaint). Moreover, the comments were made to the Union Executive Board, a sophisticated group familiar with the frank discourse of negotiations.¹¹ Further, the September 28 EIB was a lawful expression of 8(c) rights, accurately summarizing the events of September 27. GCX 31. That the Union may not have cared for the recitation of facts contained in the EIB does not make that EIB unlawful. No reasonable reading of the EIB could support the ALJ's conclusion that it "implied that the Union bore fault for passing on the opportunity to increase benefits." D.35:27. Even if it did, the ALJ's purpose is not to shelter employees from an employer's criticism of their Union concerning a breakdown in negotiations. That is well settled law.

Finally, the ALJ improperly read Mr. Giglio's June 29 statements to somehow provide context for the September 28 EIB. D.35:22-32. The record belies any connection between these two events, especially because three months lapsed in between the two dates and the Company and Union held four bargaining sessions in the interim.

¹¹ The Board attaches "little significance" to off-hand comments made during bargaining. St. George Warehouse, Inc., 349 NLRB 870, 877 (2007). "Although some statements made by negotiating parties may show an intention not to bargain in good faith, the Board is especially careful not to throw back in a party's face remarks made in the give-and-take atmosphere of collective bargaining." Id. (internal quotations omitted). "To lend too close an ear to the bluster and banter of negotiations would frustrate the Act's strong policy of fostering free and open communications between the parties." Id. (internal quotations omitted).

D. Respondent Did Not Unlawfully “Direct Deal”

The ALJ also found the Company engaged in “direct dealing” in a July 3 EIB (identified as EIB 2018-06). GCX 24; D.32:14-45; 33:1-23. This finding also is without merit. The Company did not “direct deal.” However, even it had, the Company effectively repudiated any wrongdoing.

The Union’s April 23 ground rules proposal stated: “The Company will allow for a ratification meeting(s) to take place offsite beginning around lunchtime during the work week whenever the Bargaining Committee has a proposal ready for a ratification vote. Union members will lose no pay in attending this meeting.” GCX 17, pg. 9. The parties did not reach agreement on this proposal. Tr. 63, 100-101.

Approximately five weeks later, the Company distributed EIB 2018-06 to all Clinton employees via e-mail. Tr. 197; GCX 24. The EIB explained tentative agreement had been reached on nearly all items. Tr. 198; GCX 24. The Company advised that “[i]f and when the ILEU brings the Company’s last, best and final offer to a vote, it is expected that Union members be provided reasonable time away from work to meet and vote.” Tr. 198; GCX 24 (emphasis added).

Over two weeks later, the Union expressed its belief that the EIB constituted direct dealing. Tr. 199, 248-49; RE 23. The Company’s bargaining team was surprised; it mistakenly believed the parties had agreed to the Union’s April 23 proposal, which was consistent with past practice. Tr. 248-49. The Company team had agreed internally to the Union’s proposal but after discussing it, realized it had not communicated back to the Union. However, upon discovering its mistake, and out of an abundance of caution, the Company immediately drafted a repudiation e-mail which it distributed to all bargaining unit employees on July 25. Tr. 250; GCX 30. The Company informed employees:

[t]he ILEU notified the Company last week that our EIB of July 3, 2018 contained a statement that contradicted what the Company had presented to the ILEU prior to bargaining. The company confirmed the ILEU was correct, and we apologize.

Specifically, the EIB stated relative to a potential ILEU vote on the Company's offer at the time 'it is expected that Union members be provided reasonable time away from work to meet and vote' The Company should not have said this. GCX 30, pg. 1.

The Company further explained its statement can be "construed as what is called unlawful 'direct dealing,'" and confirmed it "cannot present a proposal to employees that is not already presented to the employees' Union." Tr. 201; GCX 30, pg. 1. Finally, the EIB assured employees it would not engage in direct dealing in the future. Tr. 201; GCX 30, pg. 2.

Direct dealing occurs when an employer communicates directly with union-represented employees to the exclusion of the union, for the purpose of establishing or changing terms and conditions of employment or undercutting the union's role in bargaining. Southern California Gas Co., 316 NLRB 979, 982 (1995). United Techs. Corp., 274 NLRB 609, 610-611 (1985), enf'd. sub nom. NLRB v. Pratt & Whitney, 789 F.2d 129 (2d Cir. 1986), is particularly instructive. There, the employer presented the union with two contract options: a two-year reopener package and a new three year agreement. Id. The employer preferred the three-year option. In turn, it distributed a letter which, inter alia, "urged employees to vote at the ratification meeting..." for the three year option. The Board concluded there was no direct dealing because the communications were non-coercive and "[t]here was no suggestion that the employees should abandon their Union and negotiate for better terms directly with the [employer]." Id.

Here, the ALJ erred by finding the EIB constituted direct dealing. It contained an innocuous statement that the Company "expected" that if there was a vote, union members would be "provided reasonable time away from work to meet and vote." GCX 24. The Company did not promise to pay for time voting, it did not promise to change work hours to allow employees to vote, and it did not promise to release employees in the middle of the workday. Tr. 198-99; GCX 24. Rather, the only reasonable reading of this statement is that if there was a vote, the Company

“expected” it would be scheduled to allow employees to vote during their non-work time. Thus, the ALJ erred in finding Mr. Giglio maintained an “expectation” that the Union hold a vote.

Further, the ALJ’s findings suffer from internal inconsistencies which evidence clear error. The ALJ found the EIB satisfied the above-referenced second prong because it “undercut the Union’s bargaining position” and the “Company encouraged employees to ask their bargaining representative for a ratification vote rather than leaving it to internal union processes.” D.32:29-33. However, in the Decision’s next section, the ALJ found “the content of the emails merely indicates that the Company sought to communicate its views regarding the contract and its views as to whether the Union should hold a ratification vote on its proposals” and “lawfully communicated its opinion in a way that demonstrates no coercive intent.” D.34:1-3.

Moreover, the ALJ ignored that Mr. Myers agreed it is possible to schedule a vote outside of regular work hours. Tr. 198-99. Thus, there was nothing unlawful in the Company stating it was the Company’s “expectation” (as opposed to a requirement) that employees would be “provided reasonable time away from work to meet and vote;” such an expectation does not establish or change terms and conditions of employment, nor does it undercut the Union’s role in bargaining. Rather, it was a simple statement that the Company expected a vote to be scheduled at convenient, non-work times – a standard practice in contract ratification votes. Finally, the evidence shows the e-mail was not sent to the exclusion of the Union because Mr. Myers received it. GCX 24.

Even if the EIB did constitute direct dealing, the Company’s repudiation nullified any violation. GCX 30. As soon as the Union brought the issue to the Company’s attention, the Company investigated and promptly took measures to repudiate any wrongdoing. GCX 30. In so doing, the Company followed the tenets of Passavant Memorial Hospital, 237 NLRB 138 (1978):

It is settled that under certain circumstances an employer may relieve himself of liability for unlawful conduct by repudiating the conduct. To be effective, however, such repudiation must be “timely,” “unambiguous,” “specific in nature to the coercive conduct,” and “free from other proscribed illegal conduct...” Furthermore, there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer’s part after the publication. And, finally, the Board has pointed out that such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights. Id. (Internal citations omitted).

The Company’s July 25 communication was timely disseminated to all unit employees by e-mail shortly after the Union raised the issue. GC 30. The Company unambiguously apologized for its error and pledged to not interfere with employees’ Section 7 rights. GCX 30.

The ALJ incorrectly focused on the fact the Company sent its repudiation only to the bargaining unit; however, doing so was wholly sound and there is no authority holding to the contrary. Tr. 199-200. Further, the ALJ ignored the EIB could not constitute direct dealing with non-unit employees whom the Company was free to communicate with directly. Tellingly, the language of the Complaint itself accuses the Company of dealing directly “with unit employees.” As this allegation implies, the Company’s communications with unit employees are the only communications of relevance. Thus, the ALJ’s reliance upon Auto Workers Local 785, 281 NLRB 704, 707 (1986) is misplaced. Nothing in that case, or any other case cited by the ALJ, stands for the proposition that a repudiation is ineffective if it is not sent to non-bargaining unit employees.¹² As a result, this allegation should be dismissed.

¹² Finally, the EIB reflected an innocent mistake in communicating something the Company bargaining team had agreed to internally but had not conveyed to the Union. The Board has recognized errors in bargaining happen and they should not automatically be considered unfair labor practices. In Eagle Transport Corp., 338 NLRB 489, 490 (2002), the Board dismissed an unfair labor practice charge holding that:

We also agree with the judge that the Respondent did not violate Section 8(a)(5) and (1) by returning unit employees to their previous wage rates. This was not a

E. The ALJ Erroneously Found the Company Unlawfully “Promised” Employees Eight Weeks PPTO If They Withdrew From Union Representation

The ALJ also found the Company violated the Act by promising PPTO benefits if employees decertified the Union. This conclusion was erroneous; the ALJ failed to recognize that this remark was a stray, sarcastic comment made to the Union’s bargaining committee which could not reasonably be interpreted as an unlawful bribe.

1. Facts

In November 2017, the Company adopted its PPTO policy for all non-represented employees, providing eight weeks of paid time off for the adoption or birth of a child. Tr. 154. This benefit was not, and could not be, extended to represented employees without first negotiating with their collective bargaining representative. Tr. 155-56.

On the first day of bargaining, the Union proposed adding PPTO to a list of Company benefits for represented employees. Tr. 75-76; JE 22, pg. 4. During discussions that day and thereafter, the Union offered no concession in exchange for PPTO. The Union’s stance was surprising in light of the fact that, as early as the fifth bargaining session, Mr. Giglio explained “PPTO is not free, which is why it need[s] to be discussed in bargaining.” JE 5, pg. 20.

situation involving the granting and subsequent rescission of a wage increase. Rather, an administrative error resulted in the miscalculation of wages in a single paycheck, and the Respondent promptly corrected the error upon discovering it [14 days later]. We find that this correction did not involve a change in the employees’ terms and conditions of employment and, therefore, did not require bargaining.

The ALJ found Eagle Transport Corp. inapposite because it dealt with a unilateral change as opposed to a direct dealing violation. D.33:13-24. The ALJ misses the key to Eagle Transport Corp. which is that an employer which makes an error, but promptly corrects it, should not be unnecessarily punished. The ALJ also found Eagle Transport Corp. distinguishable because, according to the ALJ, in that case, the violation was unintentional while, according to the ALJ, in this case, “not sending the repudiation to all affected employees” was intentional. There is simply no record evidence to support the conclusion the Company intentionally failed to send the repudiation to non-unit employees.

At the fifth bargaining session, Mr. Giglio summarized the problem as follows:

PPTO, when it was rolled out for exempt ranks, every one of the exempt personnel pays for that. PPTO isn't free. People would use it benefit from it, but everyone pays for it. So since you are part of a collective bargaining agreement that stipulates what you receive, all we said is that you need to financially justify why PPTO should be given to the ILEU. In other words, you would have to pay for it as well. You have got to realize that something has to be given.

At the time, the [Union's] original request was, 'Please give us PPTO.' There was nothing offered in return. When we explained that if you are just relying on the magnanimity of the Company to provide PPTO, we would really need to have something offered because the exempt people pay for it. The represented people would have to pay for it as well. JE 5, pg. 20-21.

During the June 4 session, Mr. Giglio pointed out the parties' CBA did not contain PPTO benefits, and he twice emphasized the parties were there to negotiate. JE 9, pg. 24. On June 5 and June 8, Mr. Giglio explained the Company had offered represented employees one week of PPTO. Mr. Giglio stated this offer was "significant and unprecedented" as no other union-represented group had been offered this benefit. JE 10, pg. 52-53; JE 11, pg. 3. Later during the June 8 session, Mr. Giglio remarked how pleased he was to offer one week of PPTO because he wanted represented employees to enjoy that benefit. JE 11, pg. 14-16.

When the Union repeatedly asked why the Company would not simply extend eight weeks of PPTO to the bargaining unit, Mr. Giglio consistently responded represented employees receive certain benefits unrepresented employees do not. Tr. 157-58; JE 5, pg. 27.¹³ Mr. Giglio continued to explain PPTO must be bargained like the rest of the represented benefit package, and the Company was present to bargain. JE 5, pg. 20; Tr. 158, 261-62.¹⁴ Mr. Giglio continued to

¹³ Mr. Giglio specifically referenced double time for certain work, a grievance and arbitration procedure, and an established pay rate as examples of benefits bargaining unit employees receive that non-represented employees do not. Tr. 158-59; JE 5, pg. 22, 26-27; JE 11, pg. 15.

¹⁴ Mr. Davis confirmed Company benefits have historically been expanded to represented employees through the process of negotiations. Tr. 316. Mr. Davis further confirms he never

emphasize the Union had to offer something in return for PPTO, explaining the Company wanted a quid pro quo: “Generally in bargaining quid pro quo, if you want eight weeks of PPTO you have to give up something that the company values worthy of giving you eight weeks PPTO.” Tr. 167; JE 19, pg. 31. Mr. Giglio further explained PPTO is different for represented employees because, once a benefit is extended to a CBA, it is difficult to remove. Tr. 158; JE 9, pg. 24.¹⁵

On July 9, the parties met for the fifteenth day of bargaining, having had at least that number of conversations regarding PPTO. The Union continued to make the same arguments – that the Company was being unfair and was discriminating against the Union. Mr. Myers again asked, “what it would take to get” PPTO? Tr. 102, JE 15 pg. 113. Mr. Giglio, sarcastically and out of frustration, responded that employees could get PPTO by “[w]alk[ing] away from the bargaining agreement.” Tr. 102, 263, JE 15 p. 113. This, of course, was technically true; it was undisputed that every non-represented ExxonMobil employee receives eight weeks of PPTO. Mr. Giglio then clarified “[i]f you weren’t covered by a Collective Bargaining Agreement, if you were exempt, you would have eight weeks of PPTO.” JE 15, pg. 113-114. Mr. Giglio also noted there were other methods to achieve eight weeks of PPTO, and encouraged the Union to speak with its attorney further about the matter. JE 15, pg. 114. Mr. Myers then stated “[s]o you are saying if [we get decertified], you will give us eight weeks of PPTO?” JE 15, pg. 115. Mr. Giglio replied “You said that, I didn’t...” and reiterated the Company had already made an unprecedented offer for the Union to consider. JE 15, pg. 114-115.

directed the Clinton bargaining team to reject all PPTO proposals and is aware of no such directive. Tr. 317.

¹⁵ An example of this is the United Way Day. Tr. 156. The United Way day benefit provides all employees a day off if certain fundraising goals are met. Tr. 156. After the Company terminated the United Way Day for all employees, the Union filed a grievance and prevailed. Tr. 156.

Mr. Myers asked Mr. Giglio “What do you mean?” Tr. 162, 340-41, JE 15 pg. 113. In response, Mr. Giglio explained “[i]f you weren’t covered by a Collective Bargaining Agreement ... you would have eight weeks of PPTO.” JE 15 p. 114. Mr. Myers understood Mr. Giglio to be stating that if Clinton employees were not covered by a collective bargaining agreement, they would get PPTO “just like every other employee.” Tr. 162. This was true because all non-represented employees receive eight weeks of PPTO, and Mr. Myers and Mr. Fredrickson were well aware of this fact. Tr. 341. Significantly, a few minutes later, the Union’s treasurer, Thomas Ferro, acknowledged “[w]e have a CBA, so certain benefits don’t get applied to us.” JE 15, pg. 119-120. This, however, was academic.

The comment was sarcastic and without meaning; it was absurd to interpret Mr. Giglio’s comment as an offer or a bribe (to the Union Executive Board no less), and the Union committee clearly did not receive it as such. In fact, Vice President Fredrickson testified the statement was “absurd.” Tr. 343. Mr. Myers, President of the ILEU, confirmed he would not entertain getting rid of the Union in exchange for PPTO and gave the Company no reason to believe he would. Tr. 166. Mr. Giglio similarly testified that he never thought the Union would “walk away” in exchange for PPTO, but was speaking out of frustration. Tr. 263. To the contrary, Mr. Giglio said he was there to bargain, that he was looking for a quid pro quo, and that the Union could obtain PPTO through bargaining. Tr. 164-66; JE 5, pg. 28.¹⁶

Mr. Myers acknowledged the comment was made at the end of a long day of bargaining, and at a time when he also was frustrated with the lack of progress. Tr. 102-03; 160. That no one

¹⁶ The Company continued to bargain over PPTO following the July 9 session, ultimately offering one week of PPTO, the same offer recently extended and accepted in collective bargaining negotiations for the Company’s Billings, Montana site and more than the PPTO agreements at two other sites. JE 10, pg. 47; Tr. 157, 165-66.

took the comment seriously is confirmed by the fact that Mr. Fredrickson described his response simply as laughter. Tr. 343.

2. Discussion

Mr. Giglio did not promise benefits to employees in exchange for eliminating the Union, and only a tortured reading of the transcript could lead to that conclusion. Mr. Giglio made this comment on one of approximately 23 bargaining sessions and the consistent testimony of every single person present, both from the Company and the Union, confirms nobody understood his statement to be serious. Tr. 166, 263, 343. Rather, Mr. Giglio was stating a well-known fact: all non-represented employees receive PPTO. Further, he immediately explained this and reiterated the Company was prepared to bargain over the issue. JE 15, pg. 114.

In sum, Mr. Giglio's comment was a meaningless, frustrated remark. The Board attaches "little significance" to off-hand bargaining comments that evidence nothing more than sarcasm. See e.g. St. George Warehouse, Inc., 349 NLRB at 877, discussed supra. "Although some statements made by negotiating parties may show an intention not to bargain in good faith, the Board is especially careful not to throw back in a party's face remarks made in the give-and-take atmosphere of collective bargaining." Id. (internal quotations omitted). "To lend too close an ear to the bluster and banter of negotiations would frustrate the Act's strong policy of fostering free and open communications between the parties." Id. (internal quotations omitted).

The ALJ disregarded this authority, finding a "reasonable employee would understand such statements as implying a promise of a benefit in exchange for decertifying the Union." D.38:19-21. The ALJ evidently believes unit employees are unable to discern sarcasm versus reality. Clearly, the ALJ ignored the context in which this single comment was made and, more importantly, that the Union's executive committee clearly did not interpret Mr. Giglio's comment as a bribe. Moreover, the Board has recognized that "[a]n employer has a right to compare wages

and benefits at its nonunion facilities with those received at its unionized locations. The Board has repeatedly held that providing such information is not unlawful. . . . [A]bsent threats or promise of benefit, an employer is entitled to explain the advantages and disadvantages of collective bargaining to its employees, in an effort to convince them that they would be better off without a union.” Langdale Forest Products Co., 335 NLRB 602 (2000).

Here, Mr. Giglio did not attempt to persuade any employee they would be better off without a Union. Rather, out of frustration, he sarcastically and factually noted unrepresented employees receive eight weeks of PPTO. Mr. Giglio did not intend this statement as a “promise,” and the evidence confirms none present interpreted it as such.¹⁷

F. The Company Made No Material Change To Its Performance System; The Union Waived its Right to Bargain; and the Company Had a Sound Arguable Basis for its Actions

The ALJ also improperly held the Company violated the Act by unilaterally making changes to its performance appraisal system. This allegation, which was based on events which happened prior to the instant round of negotiations (and thus are wholly distinct from the remainder of this case), fails for a number of reasons: (1) there was no material change, (2) the Union waived its right to bargain over the decision to change the performance review system, and (3) the Company took the Union’s views into consideration concerning the changes, as required by the CBA, thereby establishing a sound arguable basis defense. The ALJ erred by applying a “fait accompli” analysis which has no place in this case.

¹⁷ In fact, Mr. Giglio’s statement was made to the Union’s bargaining committee, which was obviously comprised of Union supporters. In Rossmore House, 269 NLRB 1176, 1177-1178 (1984), the Board held that the employer did not violate the Act when it interrogated open union supporters concerning their union activities. This was because an interrogation of open union supporters is not coercive. The sarcastic remark at issue in the present case should be viewed in the same light; considering the audience, it was not coercive.

1. Facts

Article 26, Section 6 of the CBA states that performance evaluation procedures “may be revised by the Company as necessary after management has consulted with the Union and taken its views into consideration.” GCX 2, pg. 58. Mr. Myers testified he first learned of potential changes to the performance review system in or around January 2018. Tr. 191. Contrary to what the ALJ found, when Mr. Myers asked Mr. Giglio why the Union had not yet been approached with considered changes, Mr. Giglio logically explained the Company wanted to finalize its suggested changes before passing them along for the Union’s consideration. Tr. 192.

On March 7, Mr. Giglio sent to Mr. Myers an email providing advance notice of proposed changes. GCX 5, pg. 1. Mr. Giglio explained performance rating categories would be narrowed from five categories to two: “meets requirements” and “does not meet requirements.” GC 5, pg. 2. Mr. Myers responded the next day, asking whether changes were intended to be effective for the 2017 performance appraisals. Tr. 45; GCX 7. Ms. Naquin and Mr. Giglio replied on March 8 and 9, respectively, confirming the updated system would be applied for 2017. GCX 8. Ms. Naquin further confirmed the Company stood ready to take the Union’s views into consideration, and asked that the Union provide its input as soon as practical. GCX 8, pg. 1.

On March 14, Mr. Myers, Mr. Fredrickson and Mr. Giglio met to discuss proposed changes. Tr. 47. Mr. Myers described the Union’s position, noting its concern that it was too soon for the Company to implement the change for 2017. Tr. 48-49. Mr. Giglio explained the Company’s position that employees are often unhappy with the performance appraisal process unless they receive a rating of “outstanding,” and the changes were intended to alleviate that problem. Tr. 48. Mr. Giglio further agreed to get back to the Union regarding its concerns. Tr. 50.

As promised, Mr. Giglio followed up the following week, responding to each of the Union’s concerns. Tr. 50-51; GCX 9. On March 23, the Union submitted an information request

seeking information regarding the number of employees receiving each performance rating over the prior three years. GCX 11. Mr. Giglio responded the following week, showing 401 performance evaluations conducted, with not one employee receiving an unsatisfactory rating. GCX 12, pg. 3; GCX 13. Only three received “needs improvement.” GCX 12, pg. 4; GCX 13.

On March 30, after soliciting and considering the Union’s concerns, the Company for the first time distributed a template of the performance evaluation form to supervisors. Tr. 297-98. Contrary to the ALJ’s erroneous finding, Ms. Naquin testified it was not possible for any employee to have received the new performance evaluation form prior to this date. Tr. 297-98.¹⁸

¹⁸ The Union tried mightily to establish performance evaluations commenced in March. This effort failed. Mr. Myers testified that in his twelve years of employment and eleven performance appraisals, the earliest his appraisal was completed was June, the latest November. Tr. 35-36. His 2018 evaluation was not completed until the middle of August. Tr. 182. Mr. Fredrickson’s 2018 evaluation was completed in May or June. Tr. 328.

Despite this, Mr. Fredrickson claimed he was aware of one employee, of roughly 165 in the unit, whose review was conducted in March. Tr. 321, 329. Although Mr. Fredrickson considered this discovery a “big deal,” and despite his claim that he had a copy of the review at his home, he did not produce a copy at the hearing, nor did the employee, Steve Burke, testify. Tr. 330-32. Neither Mr. Myers nor Mr. Frederickson could name any other employee who they believed received a review in March. Tr. 190-191, 328-330.

Mr. Myers further claimed one employee, Vincent Burgos, received a calendar invite for his evaluation on or around March 15. Tr. 188. Mr. Myers was unable to recall the specific date scheduled for the alleged evaluation and admitted the parties were still discussing revisions throughout the month of March. Tr. 188-89. In any event, Mr. Giglio testified without contradiction that calendar appointments are “placeholders” and any such invitation was irrelevant. GCX 13. And, of course, there is no record evidence that Mr. Burgos received his evaluation prior to March 30. Indeed, Mr. Giglio represented during email discussions with Mr. Frederickson that “the Company ... delayed initiation of the process, to insure the Union more than ample time to address its concerns, regarding this minor change.” GCX 13. Mr. Fredrickson acknowledges he had the opportunity to respond to this email, for example to dispute Mr. Giglio’s assertions or to specifically identify Steve Burke as an issue. Tr. 347. Mr. Fredrickson admits he did not do so. Tr. 347-48. Thus, the ALJ’s contrary findings are clear error.

Indeed, Mr. Frederickson’s credibility is in serious question. He allegedly has Mr. Burke’s evaluation, but did not produce it at the hearing, nor did he produce Mr. Burke. Further, he represented to Mr. Giglio “[W]e are aware that evaluations have already taken place.” GCX 13

The Company manages employee performance outside of their annual evaluation, and employees regularly receive coaching throughout the year and as required by day-to-day events. Tr. 184. Mr. Myers admitted, but the ALJ ignored, these day-to-day coachings were not impacted by the change in the evaluation system. Tr. 185. The ALJ also disregarded that Mr. Giglio confirmed this in his initial email, stating “The company will continue to follow the guidelines outlined in Article 26, Section 7 – unsatisfactory work performance.” Tr. 185; GCX 5.

“Acceleration,” allows an employee to move to the next level of the pay progression more rapidly than the regular annual progression. Tr. 194-95. It is undisputed the decision to accelerate is within the Company’s discretion both before and after adjustments to the performance evaluation process. Tr. 194-95, 270.

Performance evaluations do not impact employee compensation. Tr. 270.

2. Discussion

This allegation fails from the outset, as changes to the performance evaluation system did not constitute a material change and, thus, no bargaining obligation exists. The duty to bargain only arises if a change is “material, substantial and significant” and the onus is on General Counsel to establish a prima facie case. See e.g. North Star Steel Co., 347 NLRB 1364, 1367 (2006). Unilateral changes that are *de minimis* do not violate the Act. See Peerless Food Products, 236 NLRB 161 (1978); Nynex Corp., 338 NLRB 659, 662 (2002).

In The Trading Port, Inc., 224 NLRB 980 (1976), it was alleged the employer unlawfully failed to bargain over efforts to enhance individual employee productivity. The employer installed a timeclock to monitor how long it took each worker to fulfill assignments. Id. The employer did

(emphasis added). Mr. Fredrickson did not reference Steve Burke specifically, and later admitted that he had no evidence to support his representation that multiple evaluations had taken place. Tr. 349. Rather, Mr. Fredrickson admits he made a wholly unsupported assumption, and misleadingly represented it to Mr. Giglio as fact. Tr. 350. The ALJ ignored this fact.

not notify the employees or their bargaining representative of its intent to evaluate employees in this manner. *Id.* at 981. The Board affirmed an ALJ's decision which concluded the employer did not violate the Act. Of particular significance, the ALJ held:

an employer has every right to expect that an employee will perform his work efficiently and when, **on the basis of entirely discretionary considerations, it is determined that an employee's output has fallen below tolerable levels, the employer is free, without intervention of the Act, to terminate that employee even though the various considerations supporting that decision were not subject to prior notification and bargaining with the exclusive statutory representative.** *Id.* at 983 (Emphasis added).¹⁹

In the present case, the only revision to the performance evaluation process – reduction of the five performance classifications to two – did not affect employees' ability either: (1) to advance through the accelerated pay progression; or (2) the disciplinary standards as both subjects remained within the supervisor's discretion at all times. GCX 11; Tr. 185, 194-95, 270. The Company's standards and employees working conditions remained unchanged in every sense. The only alteration was the method for recording employee performance. Such a purely administrative

¹⁹ In *UNC Nuclear Industries*, 268 NLRB 841 (1984), the Board adopted an ALJ's decision finding the employer's administration of an oral test to determine nuclear reactor operators' startup readiness after an outage did not violate Section 8(a)(5) of the Act. The employer took the position that "[a]ny operator requiring further training would not lose salary or job status and no change would be made in his job classification." *Id.* at 844. However, when the employer attempted to administer the oral test, several operators refused to comply. *Id.* The employer subsequently informed those who refused to take the test that they would be afforded another opportunity to do so, and if they refused again, they would be sent home. *Id.* at 845. The employees refused to take the oral test again and were suspended. *Id.*

The ALJ ruled the test did not "materially, substantially, or significantly" alter the employees' working conditions, but rather "was an extension of its existing...outage training program [which] was an element of [its] day-to-day managerial control which it was free to exercise." *Id.* at 847. Further, the ALJ noted "the test embodied no new areas of expertise [sic] beyond the previous competence of the incumbent certified nuclear operators..., [and] involved material well within the ready comprehension of these trained operators and required no lengthy training regime." *Id.* Accordingly, the ALJ found the employer lawfully administered the test and disciplining the employees who refused to take the test. *Id.* at 847-848.

change does not constitute a material change requiring bargaining. Thus, because there was no change, the ALJ incorrectly found the Company “currently has no specific process addressing promotion and discipline under the new system.” D.36:30. The ALJ also found that the changes in UNC Nuclear, (and, presumably The Trading Port which the ALJ did not cite) “did not materially change employee incentives...[while] these changes will.” That conclusion is belied by the undisputed evidence establishing that promotion, pay, and discipline remain unchanged by virtue of the change to the appraisal system.

Even assuming the purported change at issue was a material term, this allegation likewise fails because the Union clearly and unmistakably waived its right to bargain over the matter. Here, the Union waived its right to bargain over the performance review system, based on contractual language stating the system “may be revised by the Company as necessary after management has consulted with the Union and taken its views into consideration.” GCX 2, pg 58. In this regard, the ALJ properly found the Union waived its right to bargain over the changes at issue. That should have ended the inquiry. However, the ALJ improperly concluded the Company failed to take the Company’s concerns into account, and instead violated the Act by presenting the changes as a “fait accompli.” The ALJ ignored that “waiver” and “fait accompli” are incompatible concepts. D.37:20-29. Specifically, the ALJ erroneously relied upon Harley-Davidson Motor Co., 366 NLRB No. 121 (2018), where the Board held the employer unlawfully presented a voluntary separation incentive plan to employees as a fait accompli in connection with layoffs the company had the clear and unmistakable right to effectuate. However, unlike the present case, the Board made clear in Harley-Davidson that there was no contractual waiver. As a result, the Board’s conclusion in that case has no bearing on the instant case where it is clear the Union agreed to language constituting a clear and unmistakable waiver over the particular matter at issue.

By contrast, the Division of Advice's opinion in General Electric Co., 01-CA-26374 (Div. Advice Aug. 28, 1990) is instructive. There, the Region concluded the employer presented changes to benefits plans as a *fait accompli*. However, the Division of Advice concluded the collective bargaining agreement contained a waiver which obviated the employer's need to bargain over those changes. As a result, the Division of Advice recommended dismissal of the charge.

The specific contract language at issue here required only that the parties discuss the Union's concerns. GCX 2, pg. 58. The Company fulfilled that obligation in the form of email communications, exchanges of information, and an in-person meeting discussing the Union's objections. GCX 5, 7, 8.²⁰ There is no dispute that Mr. Giglio asked for, and was willing to consider, the Union's input. Tr. 193-94. Further, the ALJ ignored the Board will not find an unlawful unilateral change in violation of Section 8(a)(5) if the record shows "an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it...." Vickers, Inc., 153 NLRB 561, 570 (1965). See also Crest Litho, Inc., 308 NLRB 108, 110 (1992). As a result, this allegation is likewise without merit.

G. The Company Did Not Engage In Bad Faith Bargaining

Finally, the ALJ concluded the Company's general conduct during bargaining demonstrated overall bad faith. D.41:7-23. This finding was predicated upon the ALJ's erroneous findings concerning the violations addressed above. Remarkably, the ALJ included reference to the Company's changes to the performance appraisal system even though the facts underlying this allegation transpired before the instant round of negotiations commenced. The Board examines the

²⁰ The Company timely did so, raising this issue weeks before implementation took effect. See e.g., Burns Ford, 182 NLRB 753, 754 (1970) (finding that employer did not present layoff as a *fait accompli* when it would not take effect for another week after announcement).

charged party's total conduct both at and away from the bargaining table to determine if the party is "engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement." Public Service Co. of Oklahoma (PSO), 334 NLRB 487 (2001), enfd 318 F.3d 1173 (10th Cir. 2003).

Given the overwhelming evidence the Company bargained in good faith, the ALJ's findings are confounding. Leading up to this hearing, the parties met 23 times in full-day sessions, reached agreement on 90 percent of all issues raised, and spent countless hours discussing all outstanding issues. Indeed, Mr. Myers' admitted the Company (1) wanted an agreement, (2) always emphasized it was "there to bargain," (3) never refused to meet, (4) presented a contracting proposal in a sincere attempt to reach agreement, (5) modified its proposals "many times," and (6) consistently explained its proposals and positions.

If either party bargained aggressively, if not unlawfully, it was the Union. In addition, as part of determining whether the totality of circumstances establishes that a company has bargained good faith an ALJ must consider the union's behavior at the bargaining table as part of his analysis. Bridon Cordage, Inc., 329 NLRB 258, 265 (1999) is directly on point. There, the Board affirmed an ALJ's decision finding:

Finally, inasmuch as an evaluation of a party's good or bad faith bargaining requires analysis of the totality of the circumstances, the conduct of both parties must be scrutinized. For, a bargaining agent's own bad faith bargaining may 'effectively excuse[] the [employer's] obligation to bargain.' In the context of the statutory bargaining duty, this principle is not simply an application of the equitable defense of in pari delicto. Instead, a union's bad faith bargaining can effectively obliterate 'the existence of a situation in which [the employer's] good faith could be tested.' 'If it cannot be tested, its absence can hardly be found.' (Internal citations omitted).

The Union immediately presented 34 proposals (to the Company's five), instantly pushing several contentious issues, such as arbitration and subcontracting. The Union presented regressive contracting proposals that went far beyond the CBA and Arbitrator Klein's award, which

incredibly, the Union accused the Company of disregarding. After the award issued, the Union showed little, if any, interest in compromise to facilitate agreement. Rather, the Union held its ground, refused to compromise, and in many instances retracted and even regressed. Finally, at a critical time in bargaining, the Union refused to meet for over a month. Despite the Union's games and tactics, the Company continued to bargain in good faith and repeatedly modified its proposals in an effort to reach agreement. Indeed, Union President Myers conceded his belief that the Company sincerely wished to reach agreement on a new CBA. Tr. 141.

V. CONCLUSION

The ALJ improperly judged the Company's proposals and, lacking sufficient legal bases, resorted to inventing law and cherry-picking "facts" buried in thousands of pages of transcripts and other documents.

Contracting work is a mandatory subject of bargaining and it was clear error for the ALJ to find otherwise. The ALJ's finding of illegality is erroneous because the Company never declared impasse or conditioned acceptance on this issue.

The Company did not refuse to bargain personal time in retaliation for a two-year old unfair labor practice charge filed by the Union (which was dismissed). Rather, the Company discussed personal time *ad nauseum*. The Company rejected the Union's proposal to give individual supervisors unlimited discretion to grant personal time because the Company was concerned about inevitable inconsistency and corresponding challenges. As the Union admitted, this was the same concern the Company expressed two years earlier when it limited supervisor discretion leading to the Union's unfair labor practice charge. In fact, Region 22 and the Office Appeals emphasized the Company's legitimate concern in this regard in dismissing the charge.

The Company did not "disparage or denigrate" the Union. Rather, the Company accurately described a bargaining session in which the Union unilaterally changed the agreed-upon proposal

format, withdrew its proposals, then stormed out of the meeting and quit for the day in contravention of agreed-upon ground rules.

The Company did not deal directly deal with employees in an innocuous EIB, and even if it did, the Company cured its violation consistent with Board authority.

The Company did not unlawfully offer the Union bargaining team PPTO if they withdrew from the Union. Rather, General Counsel plucked from the transcripts a stray remark that Mr. Giglio sarcastically made in frustration as the Union relentlessly accused the Company of anti-union bias for not agreeing to personal time even though the Union offered nothing in return.

The Company did not unlawfully change its performance appraisal process. Rather, the CBA contained an express waiver allowing such changes, which, in any case, were *de minimis*.

Finally, the Company did not engage in overall bad faith bargaining. The ALJ's finding is predicated upon his other erroneous conclusions concerning other allegations which should be dismissed for the reasons stated above.

For the foregoing reasons, the Complaint should be expeditiously dismissed in its entirety.

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CERTIFICATE OF SERVICE

The undersigned affirms that on July 24, 2019, Respondent’s Brief in Support of Exceptions was filed with the National Labor Relations Board using the e-filing system at www.nlr.gov, and that copies were served on the following individuals by electronic mail:

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