

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BEMIS COMPANY, INC.

and

GRAPHIC COMMUNICATIONS CONFERENCE  
OF THE INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, LOCAL 727-S

18-CA-202617

18-CA-205446

18-CA-205920

Cases 18-CA-205927

18-CA-207874

18-CA-210170

18-CA-210936

18-CA-211086

BEMIS COMPANY, INC.

and

PHILIP A. McMEINS, An Individual

Case 18-CA-209515

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BRIEF IN SUPPORT OF CROSS-EXCEPTIONS ON  
BEHALF OF COUNSEL FOR THE GENERAL COUNSEL

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## GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS<sup>1</sup>

### **I. Respondent Violated Section 8(a)(1) of the Act by Discharging Supervisor Phil McMeins**

#### *Exceptions #1 and 2*

The Act protects the statutory supervisor who disobeys an employer's order and refuses to commit an unfair labor practice. The Board in Parker-Robb stated, "The need to ensure that even statutorily excluded individuals may not be coerced into violating the law or discouraged from participating in Board processes or grievance procedures, compels that they be protected despite the general statutory exclusion." Parker-Robb Chevrolet, Inc., 262 NLRB 402, 404 (1982); see also Pontiac Osteopathic Hospital, 284 NLRB 442 (1987).

In this case, manager Phil McMeins refused to add pretextual fuel to union supporter Linda Hesler's file and further refused to discharge her. McMeins chose not only to attempt to convince his superiors against discharging Hesler based on nonobjective standards but refused to do so. This led to McMeins' own discharge about one week after. The bases for the discharge were found by the ALJ to have been pretextual. (ALJD p 40 fn. 74).

#### **A. The Facts found by the ALJ establish McMeins was discharged for refusing to commit an unfair labor practice**

In the instant case, manager McMeins repeatedly disagreed with general manager John Augustiniak's trigger-happy discipline when it came to employee Linda Hesler, instead asserting

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<sup>1</sup> Citations to the record include the following:

Decision of the Administrative Law Judge, July 1, 2019: ALJD \_\_\_.  
Respondent's Exceptions, filed August 28, 2019: Resp.Ex. \_\_\_.  
Respondent's Brief in Support of Exceptions, filed August 28, 2019: Resp.Ex.Br. \_\_\_.  
Transcript of Hearing, August 14-24, 2018: Tr \_\_\_.  
Exhibits introduced at hearing by Respondent: RX \_\_\_.  
Exhibits introduced at hearing by the General Counsel: GCX \_\_\_.  
General Counsel's Post-Hearing Brief to the Administrative Law Judge, filed October 26, 2018:  
GC.ALJ.Br. \_\_\_.

that she should be disciplined only if objective facts warranted it, i.e. only under *lawful* considerations. At each turn, Augustiniak threatened McMeins that protecting Hesler could jeopardize his standing with Respondent. Augustiniak did not express disapproval for McMeins' disagreeing with the Respondent's decision, but rather for protecting Hesler. Augustiniak required McMeins' agreement to go forward with Hesler's discharge as his repeated questioning and requests to have him 'sign-on' to the discharge demonstrated. *Id.* at 442. The record shows that Respondent's disciplines must go through the chain of command, from supervisor up through the manager (here, McMeins) and human resources. (ALJD 34; Tr 2107). Contrary to the ALJ's findings, McMeins consistently refused to agree to the unlawful discharge; he refused to commit an unfair labor practice. (Tr 518-521; 555-557; ALJD 39-40).

The ALJ's recitation of the facts state that McMeins eventually agreed with the decision to discharge Hesler. (ALJD 39-40). But that is not what the trial record reflects. McMeins agreed to the following: "Based on Chris's investigation, that if, in fact, Chris's investigation showed that [Hesler] did walk away from the machine, and there was a history of poor performance just, *strictly based on that*, and if Chris's investigation did show that would [you] agree with the termination?" (Tr 559) (emphasis added). By McMeins agreeing to a hypothetical posed by Respondent's counsel during cross-examination, where union animus and disparate treatment did not exist (ALJD 32); where Augustiniak hadn't told McMeins he wasn't interested in following the law (Tr 510); and based only on the hypothetical facts stated, that does not establish that McMeins agreed with the real-time decision to discharge Hesler.<sup>2</sup> Instead, McMeins did all he could to remain loyal to his employer while attempting to get Augustiniak to follow objective

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<sup>2</sup> McMeins also states, he would support termination if the human resources investigation was accurate. However, McMeins was not privy to the contents of the investigation at any time and therefore, was merely another hypothetical response (Tr 615 ll.13-16).

measures, and not to fire Hesler based on trumped up charges. The record simply does not establish McMeins agreed to Hesler's discharge; in fact, he refused to agree to the discharge. What he did agree to on the stand was a hypothetical situation, untainted by Respondent's animus and other unfair labor practices.

**B. Based on credibility, the ALJ made the correct assessment of the circumstances precipitating McMeins' discharge.**

The ALJ concluded that McMeins was discharged for standing in the way of Augustiniak's unlawful actions:

Were it necessary, I would conclude that Augustiniak's stated reason for discharging McMeins was a pretext and McMeins was discharged because he repeatedly refused to support Augustiniak's desire to discipline and discharge Hesler. The sequence of events from June 30 to July 21 makes clear that Augustiniak's discharges of McMeins and Hesler were linked. He discharged McMeins just 1 week after the meeting where he opposed Hesler's discharge and the day after Rutt informed the Union that the Respondent intended to discharge Hesler. Augustiniak himself told McMeins in the meeting to discuss Hesler's June 30 discipline that "protecting Linda Hesler could jeopardize your standing at Centerville," because of Hesler's union support. Augustiniak held true to his word shortly thereafter.

(ALJD fn. 74). In the face of being threatened more than once that his employment could be jeopardized if he protected Hesler, McMeins did just that: he refused to commit an unfair labor practice by manufacturing a reason to discharge Hesler and attempted instead to prevent his superior from committing one. McMeins refused to go along with each step Augustiniak took to unlawfully discharge Hesler, knowing that he could lose his job. The ALJ improperly frames this as just refusal to support and thus properly analyzed under Pontiac Osteopathic (see below Section C). Counsel for the General Counsel argues this was more than just refusal to support but was also a refusal to commit an unfair labor practice. McMeins refused to trump up false facts on Hesler (Tr 557 ll.1-7, 24-25, 558 ll.1-4) and another employee Elizabeth Nichols (Tr 543 ll.23-

25, 544 Il. 1-2). It is unlawful for an employer to discharge a supervisor for refusing to commit an unfair labor practice. Parker-Robb 262 NLRB at 404. This is what McMeins refused to do.

McMeins was unsuccessful in his endeavors and, as the ALJ put it, he “deserved a better fate.” (ALJD 40). The ALJ made the underlying factual findings to support a violation, but he just didn’t take that last step, namely that McMeins’ refusal to sign off on Hesler’s discharge wasn’t merely a lack of support, but indeed a refusal to commit an unfair labor practice. The ALJ already concluded that there was no business reason for discharging McMeins. The ALJ examined Respondent’s stated rationale and found it incredible. He explicitly stated that the reasons offered were “pretext.” McMeins did not only disagree, he refused to be part of the unfair labor practice. This is exactly what Parker-Robb addresses, and why the ALJ erred in failing to find the violation.

**C. The ALJ understood the facts properly, but analyzed under the wrong case, Pontiac Osteopathic**

Because the facts, as discussed above, establish that McMeins was terminated for refusing to commit an unfair labor practice by trumping up a reason for Hesler’s discharge, the ALJ applied the wrong legal standard in concluding that Respondent did not violated the Act when it discharged McMeins. Specifically, the ALJ applied Pontiac Osteopathic, where the discharged supervisor failed to support the discharge of an employee *after the discharge* had been completed; she had no role in the discipline. Id. at 442. The ALJ in the instant case relies on Pontiac Osteopathic, stating that the facts are “strikingly similar” to the facts before him. (ALJD 39) Counsel for the General Counsel disagrees. As noted above, and contrary to the facts in Pontiac Osteopathic, where the supervisor wasn’t involved in the discharge, it was essential in the instant case for Respondent to get McMeins’ approval for Hesler’s discharge, which he never gave; it was this consistent refusal to sign on to her discharge that Counsel for the General

Counsel has argued was the refusal to commit an unfair labor practice and therefore protected under Parker-Robb. For the above reasons, Pontiac Osteopathic was inappropriately applied by the ALJ.

**D. The ALJ should have instead analyzed this fact scenario under FlorStar Sales, Inc., 325 NLRB 1210 (1998).**

The ALJ in FlorStar Sales, Inc., 325 NLRB 1210 (1998) (summarily affirmed by the Board), found a supervisor was unlawfully discharged because he failed to engage in unfair labor practices as successfully as another of the employer's supervisors in violation of Section 8(a)(1) of the Act. In the instant case, the ALJ did not agree with Counsel for the General Counsel's citation to this case on the grounds that it was not binding precedent as there were no exceptions filed.<sup>3</sup> Though not binding, it remains particularly instructive. As in Flor Star, McMeins was repeatedly falling short of another supervisor Jennifer Schoonover where it came to manufacturing unlawful bases to terminate Hesler. Whereas Schoonover brought Augustiniak many issues to speed Hesler along the discipline track, McMeins repeatedly gummed the works. Indeed, McMeins was specifically instructed by Augustiniak to engage in other unfair labor practices which he carried out (e.g., surveillance and investigations into fabricated misdeeds by Hesler), but returned findings to Augustiniak that did not support his preferred outcomes. Unlike Schoonover, who trod the path toward Hesler's discharge along with Augustiniak, McMeins got in the way. Viewed in this light, Augustiniak fired McMeins for refusing to commit unfair labor practices by bringing him additional pretext to use against Hesler and failing to support

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<sup>3</sup> The ALJ further states that FlorStar is inapposite because "the employer there instructed a manager to persuade employees against the union and he would be held responsible if he did not. The employer later discharged the supervisor for not being tough enough as a manager. The Respondent here gave no such instructions to McMeins." (ALJD 40, fn. 73). However, though it is accurate that McMeins was never instructed to persuade employees against the Union, the facts are quite similar to the instant case, whereas McMeins was instructed to commit various unfair labor practices and was informed multiple times that a failure to adhere to Augustiniak's way of doing things (as it related to seeking the discharge of Hesler) could jeopardize his job.

Augustiniak's clear objective to quash the attempt of pro-union employees to gain the support of others.

**E. The ALJ erred by imposing a stricter standard than Parker-Robb requires, that the supervisor “think” appropriately**

The ALJD states McMeins deserved a better fate as he “defended an employee he supervised from what he viewed as unwarranted discipline and called for her to be evaluated based upon objective factors. *But the record evidence does not establish that he thought Augustiniak's treatment of Hesler was motivated by Hesler's union activity.* Thus, his conduct falls into the category of failure to support management action amounting to an unfair labor practice. The Parker-Robb exception does not apply and the Respondent's discharge of McMeins was lawful.” (emphasis added; ALJD p 40). The ALJ, however, does not cite to any case law requiring a supervisor to know or express *why* the employer was discriminating against the employee or what laws the employer was violating. Moreover, Parker-Robb itself contains no such requirement.

Just as the Board does not require an employer or union to know its conduct is unlawful in finding a violation under the Act, the Board does not and should not require that a supervisor know or voice what an unfair labor practice is, but the ALJ appears to make this part of the Board's test. See Yoshi's Japanese Rest., Inc., 330 NLRB 1339, fn. 3 (2000) (The Board rejected the employer's argument that its ignorance of the law would excuse or otherwise mitigate the discriminatory impact of the wage and benefit increases on its employees). McMeins knew Hesler was being targeted but didn't *express* that it was for her union activity. (Tr 444; ALJD 40). That McMeins didn't know, didn't conclude, or didn't voice contemporaneously or on the record at the hearing, that he thought Augustiniak was discharging her for that purpose, but nevertheless knew something was not right, should not remove him from the protections Parker-

Robb affords supervisors refusing to commit unfair labor practices. McMeins clearly took issue with Augustiniak's treatment of Hesler and refused to play along. He expressed more than once that Hesler should be judged by objective criteria, not just Augustiniak's unlawful rationale. He stated his disagreement to Augustiniak and refused to make it easy for Augustiniak to discharge her. The ALJ found that McMeins failed to go along, i.e. refused to participate in the unlawful scheme. This is all that Parker-Robb requires. See also Trus Joist Macmillan, 341 NLRB 369 (2004) (Board affirms the ALJ's finding that the Respondent unlawfully discharged the supervisor for refusing to commit the unfair labor practice of giving the employee an unwarranted evaluation downgrade because of his prominent union activities) and Texas Dental Ass'n, 354 NLRB 398 (2009) (Board concluded that the Respondent unlawfully discharged its supervisor for refusing to participate in its reasonably evident quest to identify and terminate employees involved in protected concerted activity). Accordingly, the Board should find Respondent's discharge of its supervisor Phil McMeins is a violation of Section 8(a)(1).

## **II. Hesler Was Engaged in Protected Concerted Activity When She Made Facebook Posts and When She Spoke Up at Meetings**

### *Exception #3*

#### **A. The ALJ should have found Hesler's July 3, 2017, Facebook post to be protected concerted and Union activity.**

An employee's activity is concerted when the employee is engaged with (or on the authority of) other employees and not only by herself. Meyers Industries (Myers I), 268 NLRB 493 (1984). The Board later made clear that under certain circumstances a single employee could be engaged in concerted activity. Meyers Industries (Myers II), 281 NLRB 882 (1986). Employees who initiate discussions of concerns regarding terms and conditions of employment,

even when “in its inception [it] involves only a speaker and a listener . . . is an indispensable preliminary step to employee self-organization.” Id. at 887. The Board later reaffirmed that employees are engaged in concerted activity for mutual aid and protection when they discuss terms and conditions of employment even in the absence of planned action. St. Margaret Mercy Healthcare Centers, 350 NLRB 203, 204 (2007). Breaks are considered by the Board to be a term and condition of employment. Illiana Transit Warehouse Corp., 323 NLRB 111, 122 (1997) (Board affirms ALJ finding limitations on break times mandatory subject of bargaining). Under these circumstances, the Board should view Hesler’s comment regarding her needing a doctor’s note in order to not receive discipline to be protected and concerted. It is clear from the record that Hesler posted about a recent experience wherein her bathroom use was monitored and she was required to get a doctor’s note so she would not be disciplined. It is clear that by posting this on the Union’s Facebook page, that Hesler was inviting reactions from her coworkers; indeed, employees “reacted” to, “liked,” or commented about the post. (Tr 726 ll.5-9, 16-25, 728 ll.16-25, 729 ll.15-19; GCX 106). The Board would find union steward Hesler’s comment to be union activity if she had made the comment at an in-person Union meeting. The medium in which steward Hesler made the comment should not change this conclusion. For these reasons, the ALJ’s finding that Hesler’s Facebook post was not Union or other protected concerted activity should be overturned.

**B. Similarly, the ALJ should have found Hesler’s comments at group meetings during April 2016, December 2016, and on June 15, 2017, to have been protected concerted activity.**

The Judge cites to Alstate Maintenance, LLC, (367 NLRB No. 68, slip op. at 7 (Jan. 11, 2019) in concluding that several comments made by Hesler at group meetings were not concerted. The ALJ should have found Hesler’s comments to have been concerted as they are

distinguishable from the comment at issue in Alstate. In that case, the employee stated in a group setting, “We did a similar job a year prior and we didn’t receive a tip for it.” Id. In finding this comment not concerted, the Board, citing to the trial transcript that the speaker’s remark was “just a comment,” held that the speaker was merely griping and specifically disclaimed any object in initiating or inducing group action. Id. at 6. There are no such disclaimers in the instant case.

The Board in Alstate reaffirmed several factors the Board historically has applied which tend to support the inference the employee was seeking to initiate, induce, or prepare for group action; not all factors must be present. (1) the statement was made in an employee meeting called by the employer to announce a decision affecting wages, hours, or some other term or condition of employment; (2) the decision affects multiple employees attending the meeting; (3) the employee who speaks up in response to the announcement did so to protest or complain about the decision, not merely to ask questions about how the decision has been or will be implemented; (4) the speaker protested or complained about the decision's effect on the work force generally or some portion of the work force, not solely about its effect on the speaker him- or herself; and (5) the meeting presented the first opportunity employees had to address the decision, so that the speaker had no opportunity to discuss it with other employees beforehand. Id. at 8. (internal reference to cases omitted).

Hesler’s comments at a meeting during about April 2016 requires such an inference where she brought up the issue regarding a change to reimbursement rates for safety shoes. Reimbursement rates are terms and conditions of employment. Florida Steel Corp., 231 NLRB 923 (1977). The meeting led by Plant Manager John Augustiniak, other Respondent managers, and attended by a group of about 25-30 employees was ostensibly to be about the coming Union

election. During meeting, Hesler talked about an unexpected reduction in the safety-shoe reimbursement affecting all employees. She told Respondent “we aren’t asking for anything more than what was allotted to us” when describing how in the past employees could use the allowance toward more than one pair of shoes, but the current system changed without any notification resulting in a loss of money. (Tr 649-654). Here, though the record is not clear if this meeting was the first opportunity for employees to voice concerns regarding shoe allowance, Hesler’s conduct supports the inference her statements were bringing truly group concerns to management’s attention and thus was protected concerted activity.

During another group meeting in December 2016, led by Augustiniak and attended by about 8-10 employees, the wide-ranging discussion regarding productivity changed directions to discuss turnover in the finishing department and how supervisors were “hard” on new employees. Employee protest of supervisory conduct is protected activity. Millcraft Furniture Co., 282 NLRB 593, 595 (1987). See also Avlon-Carver Community Center, 255 NLRB 1064, fn. 2 (1981). In this meeting, Hesler said, “I don’t think we (meaning as an area) are very nice. We don’t treat our new people very well. They - - they make them feel like they’re not wanted. If they don’t like them, they – they’re mean, and sometimes the supervisors are hard on them.” (Tr 695-697). Hesler was clearly attempting to bring to Augustiniak’s attention concerns over treatment of new employees in the finishing department in order to better their working conditions. She was addressing a concern regarding treatment of employees by supervisors and was also clearly seeking to initiate discussions raising such group concerns, which is sufficient for the Board to find she was engaged in protected concerted activity.

Yet again, during a June 2017 group meeting with about 30-35 employees led by Augustiniak and the Human Resources Manager, Hesler spoke up about various matters. After

Augustiniak took issue with production in the Finishing Department, Hesler said, “well, that’s not really our fault. The extrusion area [] are allowed so many resin spots per million . . . Well, their quality standards, they’re allowed resin spots so many per million feet, whatever, but yet we’re not allowed to have any resin spots. So while their quality - - I mean theirs goes through their quality just fine, we have to go through and pull it all out. That slows us down.” (Tr 710-711). Here again, Hesler was addressing a concern regarding production standards for the entire finishing department she was a part of. At the very least, Hesler was clearly seeking to initiate discussions raising such group concerns, which is sufficient for the Board to find she was engaged in protected concerted activity.

It is clear from the context of this case, that each time Hesler opened her mouth during these various meetings, that she was engaged in protected, concerted activity; the Board should find as much.

### **III. Respondent Violated Section 8(a)(5) and (1) of the Act By changing its Seniority Preference Policies Regarding Bidding Shifts and Jobs**

#### *Exception #4*

There is no dispute that until November 2017, Respondent awarded shifts when there was competition to the applicant with the greatest “plant seniority,” or overall length of service with Respondent and its predecessors at the same location, and that it changed the policy to prefer “department seniority,” or length of service within the department containing the job in issue, for the National Beef “scale-up” starting on January 1, 2018 (ALJD 53 ll.20-23 and fn.98). The ALJ concluded that this change did not violate the Act because Union President Andre Johnson agreed to the change (ALJD 57 l.20-58 l.4). Even conceding the credibility resolution backing

that finding of an agreement, Counsel for the General Counsel still urges reversal of the ALJ's conclusion because Respondent did not bargain the issue in good faith.

As found by the ALJ, whether to use plant or department seniority was a topic at the general bargaining negotiations (ALJD 79 ll.8-13, 82 ll.27-35), as well as within the meetings specifically directed at daily operational changes regarding layoffs, recalls, and a proposal to ramp up production because of a big new contract with National Beef (ALJD 53 ll.8-9, 22-23). At the general bargaining table, the Union asked for a seniority list with department seniority dates as early as June 2017 (Tr 1049). The ALJ found (ALJD 82 fn.162), and the evidence is uncontradicted, that no list with department seniority was produced until January 10, 2018, and then the parties started arguing over its accuracy (Tr 1146, 1164).

Respondent argues that a seniority list was previously provided in its Brief in Support of Exceptions, pp. 55-56, 60-61. Yet its citations to prior delivery of a list only include plant seniority lists<sup>4</sup> – the list with department seniority dates was not produced until January 10, 2018 (Tr 1164, GCX 849, 851). Haberman said at the bargaining table as late as November 29, 2017, that he was still working on the department list (Tr 1146 (Roberts)); see also Tr 2010-2014, Livingood said department seniority was not even tracked until November 15, 2017).

Nevertheless, Respondent used some department seniority list to recall extruders from layoff and do the (illegal – ALJD 55 l.14-57 l.2) shift change in the finishing department to scale up for National Beef. As Roberts explained, seeing the list before reaching tentative agreement on this proposal was critical so the Union could judge the impact of the change (ALJD 79 ll.12-

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<sup>4</sup> Respondent proposes two previous lists, but neither had any information about department seniority. The first, RX 6, was sent in August 2016 in answer to the Union's opening information request, and it has only a date for "original hire," which could extend back to a predecessor employer, and "continuous service date," which in no event extended back prior to Bemis' acquisition of the plant, and for employees hired since then, matched their "original hire date" (Tr 1280-81, 2143). The second, RX 1, was sent in August 2017 in connection with the local bargaining over temporary layoffs, and it has only a "benefits service date," which matches the "original hire date" on RX 6. In other words, those lists are limited to "plant seniority."

13; Tr 1108). Accordingly, even if Johnson agreed to use department seniority going forward, that agreement depended on the Union's ability to judge the impact of the change (Tr 1125-1126, Roberts explaining that agreeing to any application of seniority depended on an agreement on seniority dates) – and Respondent's refusal to produce the list should make its adoption of the “agreement” anyway an exercise in bad faith.

#### **IV. The Remedy Should Include Reimbursement of the Union's Bargaining Expenses**

##### *Exception #5*

Counsel for the General Counsel specifically requested (GC.ALJ.Br., at 96), as a remedy for Respondent's unfair labor practices, reimbursement to the Union for bargaining costs incurred throughout the negotiations. The ALJ declined the request with little explanation, finding only that imposition of other special remedies, including extension of the certification year by a full 12 months and a minimum bargaining schedule of four days per month, six hours per day, were sufficient to address the level of severity of Respondent's unfair labor practices (ALJD 99 II.2-25 & fn.178).

In cases of unusually aggravated misconduct, . . . where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their “effects cannot be eliminated by the application of traditional remedies,” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969), citing *NLRB v. Logan Packing Co.*, 386 F.2d 562, 570 (4th Cir. 1967), *an order requiring the respondent to reimburse the charging party for negotiation expenses is warranted both to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table. . . . [T]his approach reflects the direct causal relationship between the respondent's actions in bargaining and the charging party's losses.*

Frontier Hotel & Casino, 318 NLRB 857, 859 (1995), enfd. in relevant part sub nom.

Unbelievable, Inc.v. NLRB, 118 F.3d 795 (D.C. Cir. 1997) (emphasis added).

This remedy is necessary to remedy Respondent's refusal to meet at reasonable times (ALJD 64-66) and surface bargaining (ALJD 84-91). Either finding should be sufficient to justify this remedy. The ALJ found numerous other unfair labor practices relevant to this issue as a demonstration of Respondent's mind-set in the negotiations, such as: unilateral changes including layoffs and schedule changes affecting a high percentage of the unit (ALJD 45-50, 55-57); discharge of a leading union supporter, Linda Hesler (ALJD 30-36); and other evidence of Respondent's antipathy towards employees' choice of representation (ban on locker posting in response to union postings, ALJD 10 ll.2-13; surveillance, ALJD 30 ll.14-36; manipulation of a layoff to save a union opponent's job, ALJD 50-51). See also the General Counsel's defense of these findings in its Answering Brief to Respondent's Exceptions.

A unanimous Board including then-Chairman Battista and Members Schaumber and Walsh ordered reimbursement of a union's bargaining expenses, even without a request from any party before the ALJ, in Regency Serv. Carts, Inc., 345 NLRB 671 (2005) (Schaumber dissented on an information request issue). This case is even more egregious. Regency Serv. Carts relied on only two violations of the Act, surface bargaining and refusal to provide information about a peripheral drug testing issue. It relied on "dilatatory tactics" over a 32-month stretch of inconclusive bargaining to support the finding of surface bargaining, without finding it an independent violation. Id. at 672-673. It justified the award of bargaining expenses thusly:

We do not intend to disturb the Board's long-established practice of relying on bargaining orders to remedy the vast majority of bad-faith bargaining violations. In most circumstances, such orders, accompanied by the usual cease-and-desist order and the posting of a notice, will suffice to induce a respondent to fulfill its statutory obligations. Frontier Hotel & Casino, 318 NLRB at 859. Nevertheless,

we find that an extraordinary remedy is warranted under the circumstances of this case.

In our view, the Respondent's bad faith in negotiations, as described in section 1 above, establishes beyond doubt that the Respondent's unfair labor practices "infected the core of [the] bargaining process to such an extent that their 'effects cannot be eliminated by the application of traditional remedies.'" This is so because the Board's traditional remedy of an affirmative bargaining order, standing alone, will not make the Union whole for the financial losses it incurred in bargaining with the Respondent, financial losses which the Respondent directly caused by its strategy of bad-faith bargaining. Reimbursement of negotiation expenses is therefore warranted to make the Union whole for the costs of its negotiations with the Respondent and to restore the status quo ante.

Id. at 676.

A minimum bargaining schedule establishes a prospective cure for Respondent's refusal to meet at reasonable times. Extension of the certification year helps restore the Union's repose that it earned by its initial certification. Neither of those remedies compensates the Union for the expenses incurred in what turned out in the end to be a complete waste of time caused by Respondent's refusal to meet at reasonable times and surface bargaining.

The magnitude of the violation is what makes this the extraordinary case contemplated by Regency Service Carts and Frontier Hotel. It took a lot of time and expense for the Union to participate in this two-year charade – 23 trips, requiring Phil Roberts to fly in to Des Moines, Iowa, and for him and the other union committee members to drive from Des Moines to Centerville, off the clock, and put up in lodging (GCX 520, listing meeting dates). This remedy is especially important in this case, involving a newly certified union fighting for legitimacy in its certification year. Barstow Community Hosp., 361 NLRB 352, 355 (2014), remanded, 820 F.3d 440 (DC Cir. 2016), reaffirmed, 364 NLRB No. 52 (Jul. 15, 2016).

The only question is, when did Respondent commence surface bargaining? The ALJ found it commenced on November 1, 2016 (ALJD 97 ll.18-20). The remedy should cover

almost the entire period of negotiations at issue in this case, from November 2016 through the date of the complaint, April 26, 2018. For purposes of Section 10(b), to support finding the violation, it must have “continued” within six months of filing of the surface bargaining charge (18-CA-210170, filed November 20, 2017). All of the indicia of surface bargaining – Respondent’s dilatory tactics, its insistence on keeping important subjects out of the contract, its broad waivers, unilateral changes, direct dealing, etc. – certainly continued after May 20, 2017, six months before the surface bargaining charge.

Its conduct prior to that may not be the basis for finding an unfair labor practice, but it does shed light on the violation. Tennessee Const. Co., 308 NLRB 763, 763 fn.2 (1992). It also justifies a remedy extending beyond the 10(b) date. See Lundy Mfg. Corp., 136 NLRB 1230, 1233–34 (1962), enfd. 316 F.2d 921 (2nd Cir.), cert denied, 375 U.S. 895 (1963) (“background evidence” as defined by Local Lodge No. 1424, IAM (Bryan Mfg. Co.) v. NLRB, 362 U.S. 411 (1960) may be the rationale for remedial measures necessary to expunge the effects of unfair labor practices that occur within the limitations period).

Pinpointing the moment dilatory tactics and surface bargaining commenced is impossible. See Regency Serv. Carts, 345 NLRB 671, 676 fn.14 (2005). Had Respondent merely run some of the same proposals up the flagpole temporarily, those would not have been unlawful on their face; had the parties reached more agreements, the pace would not necessarily have been found illegal. It is only in hindsight, with the benefit of being able to see how long Respondent insisted on its illegal tactics, how long it continued to waste time, that surface bargaining was apparent from the moment John Haberman took over the negotiations in November 2016, and thus that is the date assigned to the surface bargaining and refusal to meet allegations in the complaint (Complaint pars. 16(b) and (c)). Thus, the Union’s wasted expenses

didn't just start accumulating in May 2017. This is the precise situation anticipated in Regency Serv. Carts and it deserves a full remedy.

## **V. The Handbook Rule Banning “False Statements” Is Not a Rule of Basic Civility**

### *Exception #6*

The Handbook Rule including the ban on false statements:

18. Do not make or publish false, vicious or malicious statements concerning any employee, supervisor, the company or its products.

Counsel for the General Counsel argued this rule violates the Act only insofar as it prohibits “false” statements. See GC.ALJ.Br, p.93. The ALJ considered it a “basic standard of civility” approved by Boeing Co., 365 NLRB No. 154 (2017) (ALJD 93, ll.26-31). This analysis conflates disparate parts of the rule and of the Boeing case.<sup>5</sup>

Boeing's primary target was standard-of-civility cases like William Beaumont Hosp., 363 NLRB No. 162 (Apr. 13, 2016), which considered rules that do not on their face address protected concerted activity. Standard-of-civility rules were found to have no effect or at best slight effect on NLRA rights because a “broad range of activities protected by the NLRA are consistent with basic standards of harmony and civility; therefore, rules requiring workplace harmony and civility would have little if any adverse impact on these types of protected activities.” Boeing, 365 NLRB No. 154, slip op. at 4, fn.15. As shown below, the ban on false statements, by contrast, has a direct and well-recognized impact on protected activity.

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<sup>5</sup> Rules at least analogous to this ban on false statements have come up in two Board cases since Boeing was decided. In Tinley Park Hotel, 367 NLRB No. 60 (Jan. 8, 2019), the Board affirmed an ALJ's conclusion that a rule prohibiting “making or publishing false or malicious statements” violated the Act, but only in the absence of exceptions. Id. slip op at 1 fn.1. In Cordia Restaurants, Inc., 368 NLRB No. 43 (Aug. 14, 2019), the Board remanded an ALJ decision issued prior to Boeing for reconsideration in light of Boeing. Id., slip op. at 5. The rule at issue in that case prohibited “acts of dishonesty towards the Company, its customers, and other Team Members, . . . or committing other acts which tend to bring the Company into disrepute . . . .” In this case, the ALJ considered Boeing, so there is no need for a remand.

Boeing discussed rules prohibiting “false” statements among a list of other prohibited conduct in its review of what it considered “arbitrary” decisions in prior cases. However, the words that straddled the prohibitions of the Act included, on the side previously found legal, abusive, threatening, injurious, offensive, intimidating, coercing, or interfering with other employees, versus, on the side previously found illegal, vicious, profane, malicious, loud, abusive and foul. 365 NLRB No. 154, slip op. at 11-13. Those are in some instances identical, and they are all nearly synonymous. The Board has never found a ban on “false” statements or any synonym of it to be lawful, nor has it been criticized in a circuit court for finding these rules violative. See, e.g., Universal Fuels, 298 NLRB 254, 255 (1990) (“The Board has consistently found that rules which prohibit the making of “false, vicious or malicious statements” violate Section 8(a)(1) because they include within their proscription false statements that may nonetheless be protected”); Beverly Health & Rehab. Servs., Inc., 332 NLRB 347, 348 (2000), *enfd.* 297 F.3d 468 (6th Cir. 2002); American Cast Iron Pipe Co., 234 NLRB 1126, 1131 (1978), *enfd.* 600 F.2d. 132, 137 (8th Cir. 1979).

The ban on “false” statements about the company or its products has implications against protected concerted activity that words like abusive and offensive do not. The latter have their own well developed contexts in areas including racial and sexual harassment, in which employers have substantial interests that have no connection to the NLRA. In addition, they are primarily concerned with how a person behaves, not what they are saying. The former, on the other hand, is most likely to come up in criticism of the employer. An employee who vents, “our employer is cheating us” risks discipline if this rule is allowed to stand, no matter how “nicely” they say it.

Protection for merely “false” statements has earned recognition from the Supreme Court, which the Board may not ignore. See Linn v. Plant Guard Workers, 383 US 53, 60-62 (1966) (state libel law preempted by NLRA’s protection of speech during labor disputes unless it is “malicious” – deliberately or recklessly false). Note the statements considered protected by the Supreme Court:

[Employees at another plant] were deprived of their right to vote in three NLRB elections. . . . These [employees] were robbed of pay increases. [Their managers] were lying to us . . . . No doubt [those employees will file criminal charges. Somebody may go to Jail!

This is simply not a rule of general civility. Upholding this rule is likely to engender criticism from the courts of appeal. “An employer's effort to squelch criticism from employees, and threatening to punish ‘false’ statements without evidence of malicious intent, is quite different from demanding employees comply with generally accepted notions of civility.” Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. N.L.R.B., 253 F.3d 19, 26–27 (D.C. Cir. 2001). There is no need to draw fine distinctions between synonyms for various types of rude behavior. The standard for protecting merely “false” statements, compared to unprotected statements made with actual malice, is long-standing and well defined. See id. and its reference to New York Times Co. v. Sullivan, 376 US 254 (1964). In addition, it would be easy for Respondent to comply – it merely needs to add the malice requirement conjunctively to its ban on false statements.<sup>6</sup> Accordingly, the Board should find Respondent’s rule prohibiting “false” statements is a violation of Section 8(a)(1).

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<sup>6</sup> This rule prohibits “false, vicious, or malicious statements.” Respondent’s use of the disjunctive precludes excusing this for mere imprecision. See First Transit, Inc., 360 NLRB 619, 629 (2014); Simplex Wire & Cable Co., 313 NLRB 1311, 1315 (1994); Radisson Muehlebach Hotel, 273 NLRB 1464, 1479 (1985).

**Conclusion**

For the foregoing reason, General Counsel's Cross-Exceptions to the Administrative Law Judge's Decision should all be granted.

Dated: October 9, 2019

**/s/ Joseph H. Bornong**

**/s/ David J. Stolzberg**

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