

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

ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS
ON BEHALF OF COUNSEL FOR THE GENERAL COUNSEL

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GENERAL COUNSEL'S ANSWERING BRIEF¹

This brief will not attempt to recapitulate the facts in the manner of the GC's Brief to the Administrative Law Judge, or the ALJ's decision. Instead, it will be limited to responding to selected arguments raised in Respondent's Brief in Support of Exceptions.

I. ALJ Conclusions Without Exceptions

Counsel for the General Counsel would first point out that Respondent has not excepted to the following conclusions of the Administrative Law Judge (ALJ):

1. Respondent's non-solicitation policies violated Section 8(a)(1) of the Act, ALJD 9-10, 96 ll.12-14;

2. Respondent's no-distribution rule violated Section 8(a)(1) of the Act, ALJD 92-93, 96 ll.12-14;

3. Respondent's ban on locker room postings on about March 27, 2017, violated Section 8(a)(1) of the Act, ALJD 10-11, 96 ll.16-18;

4. Respondent's punishment of Elizabeth Nichols by its comments and grades on her performance evaluations violated Section 8(a)(3) and (1) of the Act, ALJD 11-12, 96 ll.20-22, 27-28;

¹ 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. ____.
General Counsel's Brief in Support of Cross Exceptions, filed the same day as this brief: GC.Cross.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. ____.

5. Respondent's surveillance of employees' union activities by sending Supervisor Phil McMeins to work a night shift to keep an eye on Nichols, violated Section 8(a)(1), ALJD 30, 96 ll.24-25;

6. Respondent's unilateral changes to schedules announced on November 15, 2017, and implemented on January 1, 2018, insofar as they affected employees with work restrictions limiting them to 8 hours' work in a day, ALJD 56 l.27-57 l.2 and fn.104, 97 ll.10-12.

Accordingly, these findings and their accompanying remedies should be affirmed in the absence of exceptions.

II. Respondent's Exceptions 1-8 Regarding to Linda Hesler's Termination

Respondent's Brief in Support of Exceptions argues, without case citation, that the ALJ erred in considering disciplines outside of the 10(b) period as evidence of animus in this case (Resp.Ex.Br. 30 fn 8). Respondent is wrong. The ALJ properly used events, such as those occurring just after the Union came in and falling outside the 10(b) period, as background evidence of Respondent's unlawful animus. *See, CSC Holdings, LLC*, 365 NLRB No. 68, slip op. at 4 (2017) and *Brinks, Inc.*, 360 NLRB 1206, 1206 fn. 3 (2014) ("it is well established that conduct that exhibits animus but that is not independently alleged or found to violate the Act may nevertheless be used to shed light on the motive for other conduct that is alleged to be unlawful") (ALJD 33 ll.8-11 fn. 66).

Respondent spins Hesler's discipline and discharge in misleading ways. First, Respondent conveniently fails to mention that Hesler's manager, Phil McMeins, strenuously objected to discharging her and refused to go along with Plant Manager Augustiniak's charade to discharge Hesler which included trumping up reasons to get rid of her. Respondent further

argues that Human Resources Manager Chris Rutt merely presented “the facts” at a weekly meeting and the Respondent then decided to terminate her. The record shows, and the ALJ found, that Respondent relied upon anything but “the facts.” Respondent’s General Manager John Augustiniak refused to use objective measures, stated that he didn’t care about the “defect rate” and unequivocally voiced that Hesler, among other things, had a “bad attitude” and was a “bad apple.” The ALJ further found in “. . . context, and given [Augustiniak’s] overall union animus, [his] use of [“bad attitude”] was a veiled reference to Hesler’s Union activity.” (Resp.Ex.Br. 32; ALJD 24 ll.5-7, 32 ll.34-35, 40 fn 74).

Respondent further spins the facts and claims, presumably without intending irony, that a month prior to her discharge, Hesler “acknowledged” in another discipline she was spending too much time trouble-shooting her machine (Resp.Ex.Br. 30, GCX. 102 at 5). The record reflects and the ALJ found that trouble-shooting was part of Hesler’s job – indeed, she had been praised for her ability to trouble shoot, and Respondent instructed her that she should spend more time doing so (ALJD 15 ll.19-21, Tr 669–683; Tr 684–686, 689; GCX. 101 at 3, 102 at 3).

Respondent also glosses over the fact that in Hesler’s penultimate discipline included a reference to the number of times Hesler went to the bathroom during a shift. This reference was crossed out by human resources when Hesler contested it and presented Respondent with a doctor’s note. (ALJD 22 ll.5-7, Resp.Ex.Br. 31, fn 9, GCX 102 at 5). Since the reasons for disciplining Hesler obviously made no difference to whether she deserved discipline, the removal of this line from her discipline was further evidence that Respondent was bent on disciplining Hesler regardless of what she did. Moreover, the reason for inclusion of the bathroom usage discipline in the first place was particularly egregious. Supervisor Jennifer Schoonover instructed employee Laura Lowe to report to her how many times Hesler went to the

bathroom during her shift, how often she was speaking with coworkers,² and her work quality. Schoonover's basis for doing so were that she didn't like Hesler and was looking for a way to get her fired (ALJD 19 II.10-16; Tr 52–58, 71–73).

Respondent wrongly argues that the ALJ disregarded Board law by not addressing the Board's decision Electrolux Home Products, Inc., 368 NLRB No. 34 (2019), in finding the reasons given by Respondent for Hesler's termination were pretextual. The Board in Electrolux made it clear that it did not intend to wipe pretext from its analyses when, as in the instant case, it is appropriate. The underlying facts in the instant case and in Electrolux are dissimilar in important respects. The Board in Electrolux found "no other evidence to support an inference that the Respondent was motivated by [the employee's] union activities, but the record contains countervailing evidence that the Respondent bore no animus against collective bargaining or toward the employee members of the Union's bargaining team." Electrolux, 368 NLRB No. 34, slip op. at 5. Indeed, Respondent severely downplays just how animus-ridden the ALJ found its conduct, by stating, "[t]he ALJD found animus due to Augustiniak's statements during the Union election – a year before Hesler's termination – and his statements during the meetings discussing Hesler's discipline and termination" (Resp.Ex.Br. 33). In stark contrast to this bald attempt at downplaying the animus, the ALJD found a record replete with animus, both general toward the Union, towards Hesler's protected conduct, and as demonstrated by markedly increased

² The ALJ found Respondent had a practice of attempting to keep strong Union supporters from talking with coworkers at work and the following examples suggest Schoonover's instruction to Lowe fit this pattern. First, the ALJ found as fact that Respondent would not permit certain employees to train new-hires because they were strong union supporters (ALJD 18 II.19-27). And second, Respondent's Augustiniak instructed manager McMeins to surveil employee Elizabeth Nichols so that he could prevent her from leaving her area to talk with other employees about supporting the Union (ALJD 33 II.18-20). The ALJ further found as fact that employees often left their running machines to talk with coworkers while they were working without being told by supervisors not to do so. (ALJD 22 Fn 43).

prevalence in the issuance of discipline after the Union's election win³ (ALJD 32-33, 34 ll.15-17). For these reasons, Electrolux does not apply.

Respondent incorrectly excepts that the ALJ misapplied the Wright Line burden shifting analysis (Resp.Ex.Br. 34). After holding that Respondent's proffered reasons for discharge of Hesler were pretextual, Respondent was motivated by union animus, and there existed a "nexus" between her discharge and her protected activity,⁴ the ALJ correctly placed the burden on Respondent to show it would have discharged Hesler absent her activity (ALJD 32 ll.20-21, 34 ll.7-10, 15-18, 35 ll.19-21). The ALJ properly held Respondent failed to do so. (ALJD 36 ll.3-5). Contrary to Respondent's assertion in its Brief in Support of Exceptions, the ALJ doesn't impermissibly shift the burden to Respondent of proving discriminatory treatment. Rather, the ALJ stated Respondent's own summary of disciplines over the prior two years showed it did not adhere to progressive discipline steps, by "either repeating steps or not discharging employees who were eligible under the policy," including two employees who worked on the same product and same order as Hesler but who were not disciplined (ALJD 35 ll.36-38; 36 ll.5-14). The ALJ didn't impermissibly shift the burden as argued by Respondent, rather, he noted Respondent's defenses weren't credible.

Respondent argues that the ALJ erred in determining "[Respondent] failed to produce sufficient evidence that it previously discharged employees pursuant to its progressive discipline

³ In roughly comparable time periods, the Respondent went from 12 to 51 verbal warnings; two to 20 written warnings; one to nine final warnings; and zero to four discharges whereas the number of non-disciplinary corrective actions it issued declined from 175 to 91 (ALJD 33 ll.27-31, GCX 15, 42-43).

⁴ Respondent also wrongly excepts to the ALJ's alleged disregard of Tschiggfrie Props. Ltd. V. NLRB, 896 F.3d 880, 886 (8th Cir. 2019), establishing that there needs to be some nexus between Respondent's animus and Hesler's discharge. Respondent does not flesh out its bare exception on this point (Resp Ex 4). Regardless, the ALJ directly addressed Respondent's argument in the ALJD (ALJD 33 ll.32-33, 34 ll.1-19). The ALJ dismissed this argument for three reasons. First, Augustiniak was found to have ample specific animus toward Hesler and he was the decision maker. Second, the law didn't require specific nexus or some particularized motivating animus toward the employee's activity, and even if it did, the ALJ held a nexus was demonstrated by the record. Third, Eight circuit law is not binding on the NLRB.

policy in the same manner it terminated Hesler” by “ignor[ing]Parties’ stipulation that some employees were disciplined for quality and some were not.”⁵ To support its argument, Respondent again argued what it failed to successfully get in on the record at trial: that Respondent issues discipline only when a problem’s “root cause” is known (Resp.Ex.Br. 35, ALJD 36 ll. 26-27, Tr 2080, 2319). Respondent cites a lone example wherein Hesler wasn’t disciplined despite defective product being produced by her. While Respondent appeared to attempt on the record to establish *why* Hesler wasn’t disciplined for this specific order, it failed to do so. The closest Respondent came on record was:

Respondent: The only thing that [Respondent] knew was, well, you had been signed in at the time, but they didn’t know what you were doing or how you were doing it, right?

Hesler: I can’t say, I guess.

Respondent: But, anyway, you didn’t - - the discipline, although it had been prepared, it was never given to you?

Hesler: Yes.

(Tr 982 ll.6-18).

Respondent also excepts to the ALJD by footnote stating it wasn’t accurate that two other employees working on the same machine and order as Hesler contributed to the error she was discharged for (Resp.Ex.Br. 36, fn 12). However, contrary to its contention in its exceptions, the evidence establishes that its own human resources manager stated just the opposite (Tr 1253 ll.12-25, Tr 1254 ll.1-25, 1255 ll.1-9). Indeed, the ALJ found the record

⁵ Further, and contrary to Respondent’s exception (Resp.Ex.Br. 35) that the ALJ ignored the Parties’ stipulation that some employees were disciplined for quality and some were not, the ALJ actually found Respondent’s explanation for such “. . . inconsistencies in its discipline of employees for quality issues were due to it only discipling employees when the root cause of the issue was known[.]” to be “. . . insufficient to establish the Respondent had a practice of not disciplining employees, if it did not know the root cause of a quality issue.” (ALJD 36 ll.20-27, Tr 981-982, 2080, 2319).

shows that two other employees worked on the same order as Hesler did, produced defective bags, yet neither of those two other employees received any discipline (ALJD 36 ll.5-13, GCX. 15 p.9).

III. Respondent's Exceptions 10-12 Regarding Information Requests Related to Employees' Disciplines and Discharges

The ALJ found as a matter of fact that the Union requested the following information on about August 8, 2017:

a list of all operators who worked on the order for which the Respondent terminated Hesler; a list of all work orders containing defects and the action taken; and records of all employees logging in and out at the start and end of shifts, as well as for breaks, for the past year. With respect to Lewis' termination [for violation of Respondent's cell phone usage policy, the Union] asked for all write-ups for violations of the cell-phone policy for the past year.

(ALJD 28 ll.26-30). (The ALJ did not discuss it, but the original request included all attendance points for the last year and write-ups for Rod Rodinizer as well, GCX 407 p.2.) The ALJ found that Respondent never furnished the list of operators who also worked on the order for which Hesler was terminated, the list of work orders containing defects and action taken, or write-ups for cell phone abuse, and that it provided only a partial response to the request for log in-and-out information (ALJD 29 ll.31-37). The ALJ concluded (ALJD 36-38) that the information was presumptively relevant, and that it was specifically relevant both to the individual discharges and the on-going general bargaining for a discipline policy (ALJD 37 ll.16-23 & fn. 71). Accordingly, the ALJ correctly concluded that Respondent violated Section 8(a)(5) (ALJD 38 ll.6-7, 97 ll.7-8).

The gist of Respondent's argument in support of exceptions is that 1) it provided the information; and 2) it requested clarification of the information requests and the Union never

answered that. These are contradictory claims – how could Respondent have provided the information if it didn't know what the Union wanted?

The evidence fully supports the ALJ's finding that the information was not provided. Union President Andre Johnson testified that he received only Rodinizer's write-ups, attendance point information, and a partial response on records for logging in and out, only covering the last six months and missing some departments (Tr 1628-1629). Specifically, Johnson denied receiving any list of work orders including bad quality write-ups, the list of operators who worked other parts of the job Hesler was fired for, or write-ups for cell phone use (Tr 1628). No Respondent witness testified any differently.

Respondent's Brief in Support of Exceptions cites Tr 1683-1684 for its claim that "Johnson admitted that Rutt actually provided the Union with the information" (Resp.Ex.Br. 77). The cited testimony does not support that claim. Instead, Johnson testified on cross-examination that he did not respond in writing to Rutt's request for clarification because he started getting responses to the August 8 information request (Tr 1683-1684), and some of the responses, specifically information about employees punching in and out, were voluminous (Tr 1628, 1684). Johnson did not testify on cross-examination that he got any more information than he admitted to on direct, and no Respondent witness testified that it provided any more than that.

Respondent's claim of confusion is also unavailing. Rutt's first response on August 9 claims that he was confused because Respondent already bargained all four terminations (GCX 407 p.5). Rutt asked for an explanation of any claim the Union had as to how Respondent had failed in its legal duty to bargain the terminations as required by Total Security,⁶ but also then states that he would provide the requested information by the following week (GCX 407 p.5).

⁶ Total Security Management, 364 NLRB No. 106 (Aug. 26, 2016).

Johnson responded by claiming that Respondent did not bargain to impasse over any of the terminations as required by Total Security prior to their implementation, some of which had information requests outstanding at that time, and asked for dates on which to bargain the terminations (GCX 407 p.7). Rutt then asked for more information from Johnson about the alleged pre-implementation information requests (GCX 407 p.9) – specifically what did the Union ask for and when? As the ALJ found, this does not indicate any confusion about the information request that was the subject of this complaint – the one made on August 8 (ALJD 37 l.25-38 l.4). Rutt was already hard at work answering the August 8 requests (GCX 407 p.5) – he just never finished it.

It would make no sense for Rutt to ask for an explanation of what the Union asked for and when, in response to the August 8 request – that was clear. Respondent has no right to delay responding to a legitimate information request by claiming confusion when there is no reasonable confusion. “It is never reasonable to refuse to understand that which is reasonably understandable as a means of delaying provision of information.” Albertsons, Inc., 351 NLRB 254, 351 (2007). Accordingly, the findings and conclusion that Respondent refused to provide relevant information should be affirmed.

IV. Respondent’s Exceptions 13-21 Regarding Permanent Job Eliminations and Kent Morlan as an 8(a)(3) Discriminatee

Respondent’s Exceptions regarding the permanent job eliminations raise three basic issues: 1) it had no bargaining obligation because the decision was consistent with past practice; 2) it bargained sufficiently anyway; and 3) elimination of Kent Morlan’s job was not discriminatory.

A. Past Practice

Respondent argues that it established a “past practice” of laying off employees when business was down under Raytheon Network Centric Systems, 365 NLRB No. 161 (2017) (Resp.Ex.Br. p.15-17). Establishing a past practice would require Respondent to prove that a particular stimulus produced a consistent response, predictable in kind and degree. Id., slip op. at 13. “A past practice is one that occurs ‘with such regularity and frequency that employees could reasonably expect the ‘practice’ to continue or [recur] on a regular and consistent basis.’” Santa Barbara News-Press, 358 NLRB 1415, 1416 (2012) (reaffirmed after Noel Canning, 362 NLRB No. 26 (Mar. 17, 2015) (quoting Caterpillar, Inc., 355 NLRB 521, 522 (2010), enfd. mem. 2011 WL 2555757 (D.C. Cir. 2011), and Sunoco, Inc., 349 NLRB 240, 244 (2007)).

There was no past practice of laying employees off. There is no “season” or other consistent stimulus. There is no formula for determining how much business justifies how many employees. In this instance, Respondent decided to lay off some employees in response to 2017’s sales falling short of expectations (Tr 2066). There is no evidence, however, that layoffs automatically or predictably followed similar conditions in the past. As John Haberman repeatedly said at the bargaining table, layoffs have been few and far between, and he could find no consistent policy in Respondent’s, or its predecessors’, past (Tr 924-926, 1119; GCX 521 p.95; RX 24, pp. 024519, 024555, 022469). Even in the recent circumstances of this case, Respondent did not respond to any particular business conditions with a predictable layoff – instead it lived with declining sales for months, hoping they would improve (Tr 337-339), and it implemented a plant-wide shut down around the July 4th holiday as an alternative response (Tr 429-430).

In support of its past practice argument, Respondent cites a single example of a single employee laid off in 2013 (Resp.Ex.Br. p.14). Yet it offered no evidence of the circumstances that led to that layoff – nothing about the cause of the layoff, the total number of employees affected, the circumstances that led to it, or the consequences for the affected employee. That’s not a past practice as contemplated by Raytheon – that was simply a union-free employer doing whatever it wanted, whenever it wanted.

The layoff at issue in this case was not consistent even with Respondent’s “paradigm” example – the affected employee, Newman, was offered another job, unlike the employees permanently laid off in this case. Haberman also admitted at the bargaining table that Respondent allowed seniority-based bumping in the past (RX 24, p.024518), but in this case, Rutt specifically refused to consider that for Morlan, claiming that decision had already been made. The ALJ correctly found there was no past practice (ALJD 45 1.40-46 1.18).

B. “Bargaining” That Did Occur

Respondent argues (Resp.Ex.Br. p.18-19) that it satisfied its obligation to bargain the permanent layoffs and job eliminations. As described by the ALJ (ALJD 42 11.20-32), the bargaining that actually occurred on July 7 was a joke. Among other things, Rutt told Johnson for the first time the names and positions of the people he wanted to layoff; in response to the Union representatives’ questions about whether it was being done by seniority, Rutt said it was corporate decision and they were going in another direction; in response to whether Respondent would offer severance benefits, Rutt said he would deal directly with the employees on that issue (ALJD 42 11.20-32; Tr 1596-1599). Rutt didn’t even have a time line for the Union as to when the layoffs would be implemented – as even Rutt testified, “I don't believe we gave a specific date because, again, we had to go through the motions of moving it up through the corporate

ladder” (Tr 1243). It turns out Rutt wasn’t even in the loop regarding timing – on the same day Rutt said he didn’t know the time line, Respondent announced the decision directly to the laid-off employees and gave them a severance agreement on a take-it-or-leave-it basis (ALJD 43 ll.1-17, Tr 801-802). That may be consistent with Respondent’s opinion of “good faith bargaining,” but it is not consistent with the law.

Respondent quibbles over whether some notice was given before July 7. The only evidence describing this notice, however, was Johnson’s testimony that Rutt told Zaputil more layoffs might be coming (Tr 1593), and Zaputil’s testimony that when she was first told about Morlan’s discharge, she asked Rutt if he could find another job for Morlan (Tr 258, 371). As Zaputil testified, without contradiction, she had repeatedly told the HR managers that she had no authority to bargain on behalf of the Union, she was just there to pass things on to Johnson (Tr 237-238). Rutt did nothing to supplement this. While he testified that there was a “discussion” on July 5 (Tr 1242), he never described it. The meager “notice” given before July 7 does nothing to bolster a claim of good-faith bargaining.

Respondent seems to think good-faith bargaining means, once it discusses a topic even a little, thereafter it can do whatever it wants. On the contrary, it can’t implement until it has made a complete proposal. See Stone Boat Yard, 264 NLRB 981 (1983) (notice that employer wants to make “substantial changes” does not justify any specific unilateral change). In the case of the permanent layoffs, Respondent never made a complete proposal, at least not to the Union.

Moreover, Respondent ignored its obligation to refrain from making unilateral changes while first-contract bargaining was going on. In such circumstances, Respondent was obligated to refrain from making changes to terms and conditions of employment until it negotiated to agreement or overall impasse in the general contract negotiations, not just a limited impasse over

specific layoffs. Bottom Line Enterprises, 302 NLRB 373, 374 (1991) (“[A]n employer’s obligation . . . encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole.”), enfd. mem. 15 F.3d 1087 (9th Cir. 1994); RBE Electronics of S.D., Inc., 320 NLRB 80 (1995) (same). The ALJ acknowledged this principle (ALJD 45 ll.19-21), but did not make any specific findings that the permanent layoffs or job eliminations violated this obligation. Given the ALJ’s other findings, that would have been redundant, but it remains the law. Respondent neither cites these cases nor argues with their principles in its Brief in Support of Exceptions.

Bottom Line and RBE would require a finding that the Union agreed to the layoffs or waived its rights to bargain – there is not even an argument⁷ that either of those things happened. Terms for layoff, including whether to ask for volunteers, bumping rights, application of seniority, and severance benefits, were being debated at the bargaining table. Therefore, the layoffs violated the Bottom Line and RBE requirements, regardless of any discussions on July 5 or 7.

C. Discrimination Against Morlan

Respondent repeatedly claims that Morlan’s job was largely eliminated by its purchase of a new device for dispensing ink to the printers, the Nova Flow system, while Bradshaw’s job was unaffected (Resp.Ex.Br., 13, 20, 24). In addition, it claims this is its Wright Line rebuttal, the nondiscriminatory reason for Morlan’s termination (Resp.Ex.Br., 22-24). The problem is, that’s just not true. Morlan testified without contradiction that his main function was developing color matches to customer specifications, using another device, the X-rite system, and that task was

⁷ Actually, Respondent does refer to an “agreement” related to mandatory layoffs (Resp.Ex.Br. p.19), but its reference, GCX 501, is to a unilaterally implemented sheet Respondent made laid off employees sign, which was not previously shown to or discussed with the Union (Tr 240-242).

not affected by Respondent's acquisition of the Nova Flow system (ALJD 50 1.41—51 1.9; Tr 796-799, 812, 856-857).

Respondent repeatedly and erroneously contends that Nova Flow automated the process of preparing the ink formulas (Resp.Ex.Br., 11-12). That's not true, either – Nova Flow picked up after the formula was prepared and automated the process of turning the formula into a bucket of ink that could be poured into a press (Tr 856-857). Consider the digital revolution in photography as an analogy – in the old days, producing a photograph required a dark room, manual mixture of the developing chemicals, and moving a piece of photographic paper through the process. Now, one only has to open a computer file and push the “print” button. Easy as that is, it has not affected the creative process of taking the picture in the first place. The problem with Respondent's claim is, Morlan was the photographer and Bradshaw was the dark room technician – it was Bradshaw's job that was automated by the Nova Flow system, not Morlan's, which was specifically and correctly found by the ALJ (ALJD 51 11.6-7).

The theory that Morlan's job was eliminated by the Nova Flow system is purely a creation of Respondent's attorney on cross examination of Morlan, unsupported by any Respondent witness. Respondent offered no actual evidence to establish why it laid off Morlan instead of Bradshaw. No one involved in making the decision testified.⁸ This is worth an adverse inference that this testimony would have cut against Respondent. See East End Bus Lines, Inc., 366 NLRB No. 180, slip op.27 (Aug. 27, 2018); Int'l Automated Machines, 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988). This is especially appropriate concerning Respondent's decision-makers, who alone know the real reasons for this choice. CSC Holdings, LLC, 365 NLRB No. 68, slip op.5 fn.15 (May 11, 2017). This theory is also inconsistent with

⁸ Augustiniak testified about the layoffs (Tr 2069-2071), but he did not play any part in the decision-making – he was merely an observer of the impacts the layoffs had in the plant (Tr 2068).

Rutt's and Plant Manager John Augustiniak's expressed rationale for the layoffs – that business was soft (Tr 256-257, 800-801, 1596) – and with Respondent's position statement filed in answer to the charge (GCX 44).

Respondent also cites First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666 (1981) and Electrolux Home Products, Inc., 368 NLRB No. 34 (2019), in support of its argument regarding Morlan. First, First Nat'l Maint. is irrelevant to this case. No one is arguing about Respondent's acquisition or implementation of the Nova Flow system. Even granting that was a nonmandatory subject and a contributing cause for the layoff (contrary to Rutt's and Augustiniak's testimony that the layoff was purely economic), its effects would still be mandatory subjects. First Nat'l Maint. itself recognized that issues including the order for succession of layoffs are almost always mandatory subjects and "effects" of even non-bargainable subjects remain subject to bargaining. First Nat. Maint. Corp. v. N.L.R.B., 452 U.S. 666, at 676–77, 681.

Second, Electrolux is not on point. That case held that a prima facie case of discrimination under Section 8(a)(3) may not be built on evidence of pretext alone, without some other factors suggesting that the motive hidden by the pretext was union activity rather than some other, perhaps even illegal under some other statute, factor. In this case, a prima facie case is supported by facts that were not present in Electrolux, including evidence of animus, and other contemporaneous unfair labor practices demonstrating a proclivity to violate the Act.

There is nothing truly "novel" about the theory behind the allegation that Morlan's layoff was discriminatory. The Act protects employees regardless of which way they lean on the union question, and that includes neutrality. Bradshaw was one of the most anti-union employees in the plant (Tr 805-808, 249-253); Morlan was neutral (Tr 805). They were on different sides of the union question. Respondent's decision on the layoff favored Bradshaw, for no reason other

than his anti-union proclivities. The ALJ correctly concluded the decision favored the anti-union employee, in violation of the Act (ALJD 50 1.30-51 1.40).

V. Respondent's Exceptions 22-25 Regarding Voluntary and Involuntary Layoffs

In its attack on the ALJ's conclusion that Respondent violated the Act by temporarily laying off employees (volunteers first, then Nichols, McClurg and Shives against their will), Respondent again relies primarily on its argument about past practice (Resp.Ex.Br., 27-29). Again, the ALJ's decision that there was no established past practice is more than amply supported by the record, particularly John Haberman's testimony that he said at the bargaining table that there was no past practice for layoffs (RX 24, pp. 24555, 22468-22469; he even said it in writing, GCX 521 p.95).

In addition, Respondent argues that the ALJ "ignored" evidence of "bargaining" that occurred before Respondent announced its decisions on June 15 (starting the layoffs by soliciting volunteers) and July 7 (involuntary layoff of Nichols, McClurg, and Shives) (Resp.Ex.Br., 29-30). Respondent's ideas regarding bargaining are simply not compatible with the requirements of the Act. It does not help that Respondent hosted "spit-ball" sessions before announcing its decisions. As the ALJ recognized, Respondent did not make a specific proposal before those dates, giving the Union a chance to respond – instead, it took what it learned in the spit ball sessions to a final proposal that it implemented on the same day that it outlined the proposal to the Union (ALJD 48-50). By then, the decisions were presented to the Union as a fait accompli (ALJD 49 ll.4-6). And even then, Respondent gave each affected employee a release and waiver to sign including more terms that had never been proposed to the Union, such as continuation of health benefits (GCX 501, Tr 239-240). That's not good faith bargaining as required by the Act.

Implementing a specific proposal after a “spit-ball” session is simply not compatible with good faith – bargaining doesn’t even really start until an employer makes a full proposal. See Stone Boat Yard, 264 NLRB 981 (1983) (implementation only permitted consistent with complete proposals).

In addition, the same problem with Bottom Line (302 NLRB 373 (1991)) and RBE (320 NLRB 80 (1995)) described above in connection with the permanent job eliminations applies to the temporary layoffs. The ALJ did not make a specific conclusion on this issue, but the principle still applies, and again, Respondent does not address this problem in its Brief in Support of Exceptions. Since the layoff issue was pending first-contract bargaining, it doesn’t matter how much discussion preceded implementation of this discrete proposal – Respondent was precluded from implementing the layoff until it reached agreement on a contract.

VI. Respondent’s Exceptions 26-29 Regarding Direct Dealing

Respondent’s Exception 26 disputes “all elements of the direct dealing test,” (Exc. p. 7), but in its Brief in Support it argues only with the ALJ’s rejection of its past practice defense. As noted by the ALJ (ALJD p.47 ll.6-10):

An employer engages in direct dealing when: (1) the employer communicates directly with union-represented employees; (2) the discussion was to establish or change wages, hours, and terms and conditions of employment or to undercut the union’s role in bargaining; and (3) the communication was made to the exclusion of the union. El Paso Electric Co., 355 NLRB 544, 545 (2010) (citations omitted).

That these elements were satisfied cannot be denied. The credited evidence established that when the Union asked to bargain over severance pay, HR Manager Chris Rutt said he would discuss that with the people being laid off, and Rutt presented the severance agreement to Morlan

that same day (Tr 800-802, 1598-1599). This is clearly direct dealing. CE Natco/CE Invalco, 272 NLRB 502, 505-506, 524-525 (1984).

Respondent's past practice argument does not withstand scrutiny, for three reasons. First, the Act gives the Union the right to bargain about "layoffs," which includes many aspects, including the selection criteria, severance benefits, rights to recall, etc. As John Haberman repeatedly testified, Respondent had no past practice regarding layoffs (RX 24, 24555, 22468-22469, GCX 521 p.95; see also Tr 1119 (Roberts confirming Haberman said there was no past practice regarding layoffs at the contract bargaining table)). Even if Respondent did certain parts of a layoff the same way "every time" within its few-and-far-between layoffs, that does not establish any past practice for layoffs.

Second, Respondent's evidence may support finding that the terms of the SUB⁹ plan have never changed, but there is no evidence that the release and waiver, and severance benefits, have always been the same. That part of the agreement included two week's continuation of wages and benefits, before the SUB plan benefits kicked in (GCX 35-38). Respondent has the burden of proving all elements of past practice, and this one is missing.

Finally, union employees are not eligible to participate in the SUB plan by its own terms. See the Independent Auditor's Report attached to RX 9, p.7. Therefore, as a "past practice," the plan disappeared as far as the bargaining unit was concerned when the Union was elected. The fact that Respondent "chose" to apply it to union employees in the summer of 2017 was a new condition of employment for represented employees, not a past practice.

⁹ "SUB" stands for supplemental unemployment benefits, which Respondent paid to make up for the difference between money collected from state unemployment insurance and employees' regular wages (Tr 1903, 1921-1922).

VII. Respondent's Exceptions 30-37 Regarding 24-hour operations

Respondent makes three basic arguments about its decision on November 15, 2017 to proceed with a 24-hour schedule for the finishing department on the same terms as it was already running the extrusion department (three 12-hour shifts one week and four 12-hour shifts the next week for each employee), which it implemented over the Union's continued protest on January 1, 2018: 1) the Union agreed; 2) Respondent satisfied its duty to bargain in good faith first; and 3) it had no obligation to bargain because the new schedule was consistent with past practice.¹⁰

A. There Was No Agreement

The ALJ found no agreement, with full support in the record (ALJD 56 ll.2-4). Respondent's own witness on this issue, Michael Livingood, did not even say they reached agreement before he announced the company decision on November 14. Even according to Livingood, he met with the Union on November 8 (Tr 1986-1990), and they were still discussing 8-hour options by email on November 9 (RX 18). At the next meeting on November 14, Livingood testified that he rejected the "Des Moines model" (Tr 1997), one of the many round-the-clock options under consideration that still included the Union's preferred 8-hour shifts, but the rest of the meeting dealt with reintegration of SO's returning from a layoff, an extrusion department issue (Tr 1997-1999). Livingood did not testify, as Respondent's brief claims (Resp.Ex.Br. p.46) that "Johnson agreed . . . that Bemis should move forward with the 12-hour shift operation" – the only discussion of shift length even in Livingood's version is that he, Livingood, rejected the Des Moines model (Tr 1997-1998).

¹⁰ There is no specific exception, and no argument in Respondent's brief, about 24/7's application to employees with 8-hour-per-day work restrictions. Accordingly, the ALJ's conclusions (ALJD 56 l.27-57 l.2 and fn.104) regarding this aspect of the implementation should be affirmed in the absence of exceptions.

Respondent harps on the extrusion department as an agreed-upon model for the entire plant (Resp.Ex.Br. p.44-45). This completely ignores how different that issue was – it was about rebalancing shifts after a recall from layoff in a department that was already working 12-hour shifts (see Johnson’s description of the support operator issue at Tr 1637-1638). That has nothing to do with whether employees in another department should have to work eight hours, or twelve hours, or how many days in a row.

Livingood did not testify that Johnson agreed to 12-hour shifts even in general, much less to any specific proposal. In the November 14 emails, Livingood rejected any possibility of 8 hour shifts and notified the Union the company was going ahead with a specific 12-hour shift schedule attached to that email (GCX 414), but Johnson was too busy working that day and dealing with the extrusion department issues to read those emails until after all of the meetings (Tr 1645-1646). As noted above in the temporary layoff section, bargaining doesn’t even really start until Respondent makes a specific proposal – Stone Boat Yard, 261 NLRB 981 (1983). In this case, Respondent sprung this proposal on the Union when it wasn’t looking and implemented the proposal before even getting a response.

B. “Bargaining” That Did Occur

Second, the bargaining that did occur did not satisfy the good-faith requirement. As noted above, Respondent did not make a specific proposal for a 12-hour shift schedule until the morning of November 14, and it implemented it that the same evening, without any reasonable, intervening chance for the Union to respond. Respondent was also at the time refusing to answer the Union’s requests, at the general bargaining table and in the local discussions of the National Beef scale-up, for a seniority list based on department seniority, the proposed method for determining shift preference (Tr 967-968, 1049, 1146, 1164; see also GC.Cross.Ex.Br., Sec. II).

Respondent argues (Resp.Ex.Br. 46) that the Union never responded to the November 14 emails. This is just one more example of Respondent playing fast and loose with the facts. It ignores Johnson's and Zaputil's uncontradicted testimony that the next day at a sidebar during the general contract negotiations, Johnson asked Livingood when he was going to get his meeting with the plant manager and the affected employees (as previously promised by Rutt and requested from Livingood, Tr 291, 1634, 1638-1639) to talk about options for continuous operations, and Livingood said they were going ahead with previously-announced plan (ALJD 54 ll.14-17; Tr 292-293, 1646). Livingood never testified about this meeting.

On this issue, the ALJ specifically concluded that Respondent failed the Bottom Line (302 NLRB 373 (1991)) and RBE (320 NLRB 80 (1995)) requirements: "In any event, because contract negotiations were ongoing, the Respondent was not free to implement the schedule changes absent the Union's consent," (ALJD 56 ll.15-16). Respondent does not even clash with the Bottom Line and RBE conclusion in its Brief in Support of Exceptions.

C. Past Practice

Finally, Respondent tries the past practice argument again regarding its move to a 24-hour schedule. It boldly claims that its past practice for the finishing department is established by the fact that it has long operated the extrusion department on the same basis, and on its 24-hour operations in Des Moines (Resp.Ex.Br. 47). The only "past practice" established by the extrusion department, as far as finishing employees are concerned, is that Respondent used to be able to do whatever it wanted, whenever it wanted, before employees elected a union representative. "Past practice" was 8-hour shifts Monday through Friday for employees in the finishing department. And it's funny that Respondent now considers Des Moines' practice

relevant to establishing something for Centerville¹¹ when it objected to entering the Des Moines collective bargaining agreement into the record on relevance grounds (Tr 1579-1581) – it can't have that argument both ways.

VIII. Respondent's Exceptions 40-49 Regarding Refusal to Meet at Reasonable Times

The ALJ concluded that Respondent failed to meet its obligation under Section 8(d) of the Act to meet at "reasonable times" (ALJD 64-67). In sum, he concluded (ALJD 67 ll.11-16):

The Respondent arbitrarily limited bargaining to an average of 2 days per month, despite reaching only eight tentative agreements in 1½ years and leaving almost all of the significant issues outstanding. It steadfastly refused the Union's repeated requests for more bargaining dates. The Respondent either offered no explanation or the "busy negotiator" defense for its refusals to meet more often. As a result, the Respondent violated Section 8(d) and 8(a)(5) by failing to meet at reasonable times to reach a first contract.

The record evidence amply supports the findings. It's not the number of meetings, or the paltry number of issues resolved, or Respondent's excuses for not meeting more – it's the totality of circumstances. The parties agreed they are not at impasse (Tr 1208, 2208). If they can't get to agreement or impasse in two years, they aren't trying, or as proven in this case someone is trying not to. In light of the evidence of how hard the Union pushed for more meetings and Respondent resisted, it's clear who that was.

Respondent argues (Exception No. 41; Resp.Ex.Br. p.67) that "glacially slow progress" can't be used to support the finding of refusal to meet at reasonable times because Respondent is not required to make concessions. Respondent conflates the two separate bargaining violations. Glacially slow progress is merely a reason for finding that the schedule, which was totally controlled and limited by Respondent, was not sufficient to get the job done. It was not

¹¹ Respondent also did not argue that Des Moines established any relevant past practice in its post-hearing brief to the ALJ.

“standing firm” that was the problem for this violation – it was standing firm for two years while constantly resisting the Union’s efforts to accelerate the pace that violates the Act.

Respondent argues with the ALJ’s “unsupported” finding that its spokesperson, John Haberman’s, speaking style contributed to lack of productivity (ALJD 65 fn.123). This finding is in fact well supported by the record – Roberts testified in support of it (Tr 957-958); Haberman’s notes show him dominating the conversations (RX 24). Moreover, this is a credibility finding based on the ALJ’s observation of Haberman during the hearing and on the witness stand. Respondent offers no basis for disturbing this credibility resolution. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

Haberman’s speaking style is only one example of the time Respondent wasted even when it did deign to meet. The ALJ made a lengthy list of trivial movements on paper, made after lengthy caucuses (ALJD 90 ll.21-42). Respondent devoted a half-day on December 20, 2016 to a general presentation touting its world-wide safety record (Tr 935-936). The Union never argued otherwise – it was looking for a voice at the table with the creation of a safety committee including employees (GCX 701 p.8), which Haberman could not stomach (RX 24 024452). Again, it’s not just the waste of time that is the problem for this violation – if Respondent wanted to bargain that slowly, it had an obligation imposed by Section 8(d) to meet more.

Respondent argues (Exceptions #43, 46) that its rejection of extra meeting dates requested by the Union does not support finding that there was a refusal to meet at reasonable times when those dates were merely additions to meetings already on the calendar. Finding refusal to meet at reasonable times means Respondent should have met more and sooner. When Respondent grudgingly agreed to a date or two, Roberts invariably followed up by asking for

more dates. Respondent habitually refused, asking instead to wait and see how one meeting went before agreeing to another. Respondent kept doing that well into the negotiations, when it should have been obvious that the pace was not sufficient to get to an agreement or an impasse. That also kept the parties from scheduling meetings far enough ahead to avoid other business conflicts on the part of their committees.

Respondent argues (Exception #44) that the parties agreed that meeting on three consecutive days was not productive. This ignores the evidence supporting the ALJ's finding (ALJD 66 ll.5-14) that the Union agreed to that in the beginning, but changed its mind. This argument is consistent with Respondent's approach to negotiations on a broader level – at the plant-level negotiations, it also seized on isolated comments to justify expansive implementations that overstepped the actual negotiations.¹²

This violation is established basically by the clear evidence of how one-sided the efforts to meet more were – the Union wanted to meet more, and Respondent objected at every turn. In light of the lack of progress and the length of time passed, the violation is clear (ALJD 67 ll.11-16).

IX. Respondent's Exceptions 38-39, 50-54 Regarding Surface Bargaining

The ALJ concluded (ALJD 85 ll.31-36, 91 ll.34-39), with ample support in the record:

At the bargaining table, the Respondent's refusal to memorialize agreements; bargaining proposals giving it unilateral control over mandatory bargaining subjects; and its refusal to meet at reasonable times, along with other dilatory tactics, demonstrate it did not intend to reach a collective-bargaining agreement

¹² Respondent also continues to argue about the number of meetings (Resp.Ex.Br. 2, 56). It claims "both parties agree" that there were more than 55 meetings (Id. fn.1). It gives no citation for either the "agreement" or the number of meetings. The ALJ counted based on both negotiator's notes (GCX 520, RX 24). In any event, the number of meetings is not dispositive of the issue. Given the other findings regarding Respondent's resistance to more meetings, its waste of time when it did meet, trivial progress, and passage of two years' time, the conclusion should be the same regardless of exactly how many meetings were held.

with the Union. Away from the table, the Respondent's numerous unilateral changes to significant terms and conditions of employment and its direct dealing with employees support the same conclusion.

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When looking at the totality of the Respondent's conduct, as the law requires, the final portrait displays an employer who wanted to convince its employees they were worse off for having chosen to be represented by the Union. The Respondent attended numerous bargaining sessions and exchanged many proposals, but I conclude it simply was going through the motions in doing so and did not intend to reach an initial contract with the Union. The Respondent engaged in surface bargaining.

Respondent underestimates the problem with its continued insistence on leaving important subjects including promotions and transfers, and discipline, outside of the collective bargaining agreement, to be dealt with as it pleases by relying on its handbook. The ALJ correctly concluded: "Why a mandatory subject of bargaining needs to be addressed in a contract is self-explanatory" (ALJD 86 1.44-87 1.1). As noted in the General Counsel's Post-Hearing Brief to the ALJ (GC.ALJ.Br. 81-82):

Even before Section 8(d) of the Act was added to the National Labor Relations Act by the LMRA of 1947, the Board recognized the importance of embodying agreements into a written contract signed by union and employer as a matter of respect to the union. See, e.g., Westinghouse Elec. Co., 22 NLRB 147, 162-165 (1940) (agreement to post statements of policy does not satisfy duty to bargain); Hartsell Mills Co., 18 NLRB 268, 279 (1939) (oral agreements insufficient to satisfy duty to bargain), *enfd.* 111 F.2d 291 (4th Cir. 1940).

Even though Respondent has not yet insisted to impasse on separation of these subjects from its agreement with the Union, the amount of time it has wasted arguing for this exclusion (Tr 938, 954, 969, 1025, 1037, 1113, 1140, 1184, 1741, 1748, RX 24 p.024463) should be considered evidence of Respondent's bad faith and lack of desire to reach a lawful agreement (besides constituting bargaining time wasted regarding the analysis of refusal to meet at reasonable times). See Montgomery Ward & Co., 37 NLRB 100, 120 (1941), *enfd.* 133 F.2d 676 (9th Cir. 1943): "Far from being a mere formal part of the agreement, the written contract constitutes the very object of collective bargaining, 'the absence of which ... tends to frustrate the end sought by collective bargaining.'" This stance demonstrates Respondent's subjective intention not to reach any "agreement," but to maintain as closely as it can its union-free status quo.

Respondent also argues (Resp.Ex.Br. 52, 75-76) that the Union also proposed that certain subjects should be left out of the agreement, including health benefits and the details of the 401(k) plan. With the decline of Taft-Hartley trust-administered benefit plans, as Roberts testified, adopting employer benefit plans with their own controlling documents that apply across their union- and non-union workforces is becoming the norm (Tr 2303-2304). And it's one thing for the Union to agree to leave something out, but completely different for Respondent to insist on it. As noted above, including agreements in a signed contract is a matter of respect for the union – no doubt employers would prefer to leave everything out. They just can't legally insist on it.

Respondent explains (Resp.Ex.Br. 55) that as a philosophical matter, it wanted to be free to change things, and the Union wanted restrictions on its ability to change things. That reveals one of Respondent's fundamental misunderstandings of what bargaining in good faith is all about. That's what a contract is for – unions agree not to strike in exchange for settled terms and conditions of employment for the duration of the contract. This reveals Respondent's unlawful intent – it is not willing to change from its non-union ways of being able to do whatever it wants, whenever it wants.

Respondent also argues (Resp.Ex.Br. 75) that the ALJ's reliance on dilatory tactics in support of finding surface bargaining (ALJD 89-90) is a disguised attack on the content of its proposals. On the contrary, the dilatory tactics described are well supported in the record and an oft-cited factor in finding surface bargaining. See Regency Serv. Carts, Inc., 345 NLRB 671, 673 (2005) (citing cases). Regardless of the subject, dilatory tactics demonstrate Respondent's intent to exhaust the Union's patience and run out the clock on employee support without reaching a contract.

Respondent relies primarily on one case to support its position on surface bargaining, St. George Warehouse, 341 NLRB 904 (2004). Respondent mischaracterizes the decision as establishing that away-from-the-table misconduct is “not relevant” to surface bargaining (Resp.Ex.Br 65). Respondent ignores that case’s own recitation of general principles: “In determining whether a party has violated its statutory duty to bargain in good faith, the Board examines the totality of the party’s conduct, both at and away from the bargaining table.” Id. at 906 (quoting Public Service Co., 334 NLRB 487 (2001), *enfd.* 318 F.3d 1173 (10th Cir. 2003)).

It also ignores the nexus found by the ALJ in this case between its away-from-the-table misconduct and its conduct at the table. Respondent claims that the actors in away-from-table misconduct were not the same as its negotiators (Resp.Ex.Br. 65-66). That’s largely because Respondent failed to identify the actors involved in most of the violations, and it ignores the fact that unfair labor practices were committed in this case at many levels (Plant Manager Augustiniak (ALJD 32 ll.2-14, Tr 485-487, 499); Human Resources Managers Rutt (ALJD 37 l.25-38 l.7) and Livingood, (ALJD 56 ll.18-25); see also Tr 2088-2104, GCX 150 (Augustiniak was reporting on employees’ union activities to Haberman and other managers higher up than Centerville)).

The Board considered the evidence in St. George Warehouse demonstrated that the respondent met frequently and regularly, and made significant concessions to try to come to an agreement. While the ALJ considered that respondent’s rejection of a union security clause and its request for a broad management rights clause favored a finding of surface bargaining, the Board was not impressed by those factors. There was no evidence of the refusals to meet, dilatory tactics, refusal to memorialize significant issues in the collective bargaining agreement that infected the bargaining process in this case. St. George Warehouse is not like this case.

X. Respondent's Exception 55 Regarding Social Media and Off-Duty Access Policies

Respondent argues with two of the ALJ's conclusions regarding handbook rules. First, the ALJ found the following portion of Respondent's "social media" policy unlawful:

Employees are expected to be respectful and professional when using social media tools. With the rise of websites like Facebook, MySpace, and LinkedIn, the way in which employees can communicate internally and externally continues to evolve. We expect our employees to exercise judgment in their communications relating to Bemis so as to effectively safeguard the reputation and interests of Bemis.

Respondent argues (Resp.Ex.Br. pp.7-8) that its policy requiring employees to be "respectful and professional" and to "safeguard the reputation and interests of Bemis" when communicating on social media is legal under the Boeing analysis (Boeing Co., 365 NLRB No. 154 (Dec. 14, 2017)). The ALJ properly conducted a Boeing balancing analysis and found the rule wanting (ALJD 93-95). The main problem with the rule is it applies to any social media activity by employees, even when in their own homes and off duty. The only example cited as an employer interest in support of the rule could be easily addressed by a rule tailored to the circumstances, which involved posting of proprietary customer information. In fact, this rule does specifically address "proprietary" interests in part of the rule found lawful by the ALJ (ALJD 95 ll.3-4 (first paragraph of the rule violates the Act)). The ALJ properly found employees' interests in communicating with each other about working conditions and with the public about employment-related concerns outweighed Respondent's minimal interests in application of this rule to proprietary problems and should be affirmed.

Second, the ALJ found the following handbook policy unlawful:

Employees are not to remain on or enter company property unless: scheduled to work, attending a company-sponsored event, or meeting with a Supervisor or Human Resources Representative. To be on company property for any other reason will require approval by a supervisor or a member of management from the facility.

Respondent argues that its off-duty access rule should be re-examined under Boeing's balancing test. The ALJ properly noted that Boeing approved analysis of off-duty employee access rules under pre-existing law established in Tri-County Medical Center, 222 NLRB 1089 (1976). The full Board has subsequently endorsed this analysis at least insofar as it applies to rules like Respondent's that apply off-duty access for any reason. Southern Bakeries, LLC, 368 NLRB No. 59 (Aug. 28, 2019).

Respondent makes two arguments about this rule not necessarily premised on Boeing, first, that Member Emanuel's expressed desire to reconsider Tri-County should be accommodated in this case, and second, that its entire property is a "working area." Member Emanuel noted in Eym King of Michigan, LLC, 366 NLRB No. 156, p.2 fn.8 (Aug. 15, 2018), that he would be willing to reconsider Tri-County's application to employers' parking lots and other outside areas. In the subsequent case of Southern Bakeries, on the other hand, he has apparently limited his interest to the third prong of the Tri-County analysis, requiring that such rules apply to all off-duty access equally. 368 NLRB No. 59, slip op. at 2 fn.5. Since Respondent's rule makes no distinctions among various uses employees might seek off-duty access for, this is not an appropriate case in which to consider whether certain exceptions might be accommodated. Second, Respondent cites one example of an "exterior" work activity – Morlan's use of the loading dock to check up on hazardous waste shipments (Resp.Ex.Br. p.8 fn.2). How that makes the outer reaches of the parking lot a "working area" is not explained. There is no evidence "working activity" extends to any other outside areas such as the parking lot, and the rule clearly applies there, too. Accordingly, the ALJ's conclusions should be affirmed.

XI. Respondent's Exception 9: Hesler's Discharge as a violation of Section 8(a)(5)

Given the fact that the ALJ concluded in his decision that it was unnecessary to reach the 8(a)(5) issue (ALJD 36 fn.70), and because the General Counsel has not excepted to that conclusion, it is unnecessary for the Board to reach the issue in this case. However, Counsel for General Counsel would note that the General Counsel argued in Care One, 22-CA-204545, currently pending on exceptions (see 368 NLRB No. 60 (Aug. 29, 2019) (denying charging party's motion to withdraw charge allegation on this issue in light of General Counsel's request to overrule Total Security Management)), that Total Security Management should be overruled. That case is currently pending before the Board.

XII. Other Issues Without a Specific Exception

In a "background" section of its Brief in Support of Exceptions, Respondent argues (Resp.Ex.Br. 50-51, fn.21) that the ALJ erred in precluding evidence of meetings that took place after issuance of the complaint. There is no exception specifically related to this evidentiary ruling so the argument should be rejected for failure to file an exception alone.

If the Board chooses to consider the issue as subsumed by the other refusal-to-meet or surface bargaining exceptions, it should affirm the ALJ. The General Counsel has unreviewable discretion over the scope of a complaint. If the complaint alleges surface bargaining occurred between two dates, Respondent is free to argue that it is innocent for the period alleged, but it is not free to enlarge the scope of the complaint – that complaint stands or falls based on the evidence that matches the pleading.

Conclusion

For the foregoing reason, Respondent's Exceptions to the Administrative Law Judge's Decision should all be denied.

Dated: October 9, 2019

/s/ Joseph H. Bornong

/s/ David J. Stolzberg

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