UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BEMIS COMPANY, INC.	**Cases**	**18-CA-202617**
and		
GRAPHIC COMMUNICATIONS CONFERENCE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 727-S		**18-CA-205446** **18-CA-205920** **18-CA-205927** **18-CA-207874** **18-CA-210936** **18-CA-211086**
BEMIS COMPANY, INC.		
and	**Case**	**18-CA-209515**
PHILLIP A. McMEINS, An Individual		

RESPONDENT BEMIS COMPANY, INC.'S ANSWERING BRIEF TO GENERAL COUNSEL'S AND PHILLIP A. MCMEINS' CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Dated October 23, 2019.

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Respondent, Bemis Company ("Bemis", "Company" or "Employer") pursuant to Rule 102.46 of the National Labor Relations Board ("NLRB" or "Board") Rules and Regulations, submits this Answering Brief to the Cross-Exceptions filed by counsels for General Counsel and counsel for Phillip A. McMeins to the Decision of the Administrative Law Judge ("ALJ") Charles Muhl dated July 1, 2019 ("ALJD").

I. The ALJD Correctly Determined that McMeins' Discharge Did Not Violate Parker-Robb.

Protection under the National Labor Relations Act (the "Act") is afforded to employees, not supervisors. *See, e.g. Pontiac Osteopathic Hospital*, 284 NLRB 442 (1987). This is no dispute that McMeins was a supervisor within the meaning of § 2(11) of the Act. Therefore, McMeins discharge only violates the Act if it falls into one of the Board's narrow exceptions to the rule that the Act's protection only applies to employees. As General Counsel stated during his opening statement, the Complaint allegation was brought on behalf of McMeins under a *Parker-Robb Chevrolet*, 262 NLRB 402 (1982), theory. (Tr. 16). Under this theory, the discharge of a supervisor may violate § 8(a)(1) and (3) of the Act if the discharge is in retaliation for adversely testifying to an employer's interest or refusing to commit unfair labor practices. *Id.* at 402-403. Here, General Counsel alleged that Bemis discharged McMeins for refusing to commit an unfair labor practice. The ALJ correctly determined that was not the case. (ALJD p. 40). McMeins own testimony contradicts General Counsel's theory. He confirms that he never *refused* to follow through on any alleged illegal directive from Respondent.

The exception in *Parker-Robb* is very limited. It applies when (1) an employer directs a supervisor to commit an unfair labor practice; (2) the supervisor refuses to commit the unfair labor practice; and, (3) the supervisor is consequently terminated as a result of that refusal. *See id*. at 403. General Counsel did not satisfy these requirements. General Counsel now seeks to

expand *Parker Robb* into uncharted waters. The Board should reject the request to expand well-settled law.

The *Parker-Robb* exception does not apply to McMeins because he never refused to commit an unfair labor practice. Although McMeins may not have agreed with discipline issued to Hesler on June 30, 2017, he testified that he stood by Respondent's decision. (Tr. 527-531; ALJD 21-22). Moreover, McMeins testified that he would support the findings of the Human Resources investigation regarding her termination (Tr. 559). McMeins specifically testified to the following:

> A. John [Augustiniak] said "Based on Chris [Rutt's] investigation, that if, if Chris's investigation showed that Linda [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 I agree with the termination?"
> Q. And your response?
> A. Yes.

(Tr. 559-60).[1] McMeins' testimony supports the ALJD's finding that McMeins never refused to commit an unfair labor practice. (ALJD p. 39-40). Consequently, he is not protected by the Board's limited *Parker-Robb* exception.

General Counsel's arguments down-playing McMeins' damaging testimony are misguided. General Counsel alleges that McMeins' agreement to support Hesler's termination was a "hypothetical posed by Respondent's Counsel during cross-examination" and therefore the testimony "does not establish that McMeins agreed with the real-time decision to discharge Hesler." (GC Cross-Except. Br. at 2). This fails for two reasons. First, this testimony was not a hypothetical. This was McMeins testimony about a conversation between him and John Augustinak regarding Hesler. Second, this testimony did not occur on cross-examination by

[1] While General Counsel attempts to credit Respondent's Counsel with a "hypothetical", the reality is that the testimony was that of McMeins.

Respondent's Counsel. Rather, this was testimony that in answer to questions on direct examination by General Counsel. *Ibid*. Regardless of whether the testimony occurred on cross-examination or direct examination, it is still testimony of McMeins standing for the proposition that he would support Respondent's decision to termination Hesler. Consequently, the ALJD's conclusion that McMeins agreed with decision to discharge Hesler is correct. (ALDJ p. 39).

The ALJD correctly analogized McMeins' termination to *Pontiac Osteopathic Hospital*, 284 NLRB 442 (1987). There, a supervisor voiced her opposition to discharging an employee who had criticized the respondent. The respondent demoted the supervisor for failing to support management in its decision. The Board determined the supervisor's demotion did not violate the Act under a *Parker-Robb* theory of liability. In so deciding, the Board determined that when an employer directs a supervisor to commit an unfair labor practice, "the supervisor is forced to choose between violating the law or disobeying the employer's request", which could result in discipline or discharge, and "an employer is able to pressure a supervisor into violating the law on its behalf." *Id*. at 443. Conversely, when a supervisor voluntarily "chooses to express disapproval of management policy, the supervisor is not coerced at all." *Id*. That is, the supervisor is not required to choose between violating the law and being disciplined or discharged.

Like the supervisor in *Pontiac Osteopathic*, McMeins voluntarily voiced his disapproval for Hesler's discipline. McMeins, on his own initiative, explained that he did not believe discipline was warranted without an objective standard to measure Hesler's performance. McMeins advocated for an objective "defect rate" standard. (Tr. 546-47). This standard was much different than the method already in place at Bemis: a root cause analysis to determine whether discipline was appropriate, under which no discipline would be issued if the reason for

the defect could not be identified. (Tr. 2080). McMeins' standard would have unilaterally eliminated the root cause analysis and would have substituted an unidentified numerical standard, or "defect rate", which did not consider the actual cause of the defect. Respondent rejected McMeins' proposal because it was not a standard Bemis could legally implement. McMeins' objection to Hesler's discipline and advocacy of the defect rate was entirely voluntary, just like the supervisor in *Pontiac Osteopathic.* Moreover, as described above, McMeins ultimately agreed with Respondent's decision. (ALJD p. 39; Tr. 559-60). Consequently, like the supervisor in *Pontiac Osteopathic*, McMeins was not directed, nor did he refuse, to commit an unfair labor practice.

McMeins alleges that *Pontiac Osteopathic* should not apply because "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." (GC Cross-Except. Br. at 4). This broad allegation is incorrect, and General Counsel cites to no record evidence to support this claim. Although Respondent mentioned the discipline and discharge to McMeins, he had no "authority or disapproval authority" over the decision. (Tr. 2061). Moreover, General Counsel incorrectly summarizes the facts of *Pontiac Osteopathic* to distinguish it from the instant case. General Counsel alleges "the discharged supervisor [in *Pontiac Osteopathic*] failed to support the discharge of an employee *after the discharge* had been completed." (GC Cross-Except. Br. at 4) (emphasis in original). The supervisor in *Pontiac Osteopathic* told the respondent, when it was considering discipline of the employee, that she did not support the discharge and believed it was wrong. *Pontiac Osteopathic*, 284 NLRB at 442. Like McMeins, the supervisor disagreed with the respondent before the discharge occurred.

Rather than admit to the similarities between *Pontiac Osteopathic* and the present case, General Counsel argues that the ALJD should have analogized this case to *FlorStar Sales, Inc*., 325 NLRB 1210 (1998). The ALJD correctly found that "General Counsel's reliance on *FlorStar Sales, Inc.* is misplaced." (ALJD p. 40, n. 73). *FlorStar Sales, Inc.* discusses the *Parker-Robb* exception explaining that "an employer violates Section 8(a)(1) of the Act for discharging a supervisor for failure to prevent unionization" in the context of a "too lenient" supervisor. *Id*. at 1214. This starkly contrasts with the exception at issue here, which is the alleged refusal to commit an unfair labor practice in the context of discipline. General Counsel alleges that Augustiniak specifically instructed McMeins to engage in unfair labor practices "which he carried out", such as "surveillance and investigations into fabricated misdeeds by Hesler."[2] General Counsel again cites to no record evidence to support these allegations and none exists. Ironically, to the extent General Counsel proved that Respondent directed McMeins to commit an unfair labor practice, General Counsel explicitly admits that McMeins "carried out" these tasks. (General Counsel's Cross Exceptions Br. p. 5). Since McMeins did not refuse to commit any unfair labor acts, his discharge does not fall into the exception found in *Parker-Robb* and the Board should resist any further expansion.

II. The ALJD Correctly Found that Hesler Did Not Engage in Concerted Activity.

The ALJD correctly determined that Hesler's Facebook post and comments at various meetings were not concerted activity protected by the Act. The Board has found that a single individual engages in concerted activity in limited circumstances. To be protected under Section 7 of the Act, conduct has to be concerted activity must be engaged for the purpose of "mutual aid or protection." *See, e.g. Fresh & Easy Neighborhood Market*, 261 NLRB 151, 153 (2014).

[2] Importantly, assuming "misdeeds" means reasons for disciplining Hesler, none of those were fabricated. The ALJD found that Hesler had ongoing quality problems within the year preceding her termination. (ALJD p. 35). None of the Parties except this finding.

Generally, for activity to be concerted, the employee must be engaged with or on the authority of other employees, and not on behalf of herself. *See, e.g. Meyers Industries, Inc. (Meyers II),* 281 NLRB 882, 886 (1986); *see also Goodyear Tire & Rubber Co*., 269 NLRB 881 (1984). Here, Hesler merely expressed personal gripes solely for her own personal benefit. Such behavior is not protected by the Act.

Hesler did not engage in concerted activity by posting on the Union's Facebook page "It's a sad when you have to get a note from your doctor to use the restroom." (ALJD p. 31-32, n. 65). This post was not for the mutual aid or protection of other employees nor did Hesler engage with or act on the authority of other employees when making this post. She was not bringing up a group complaint, but rather expressing her discontent with the need for her to bring in a doctor's note to prove her need for excessive bathroom breaks. Such personal gripes do not fall into the definition of concerted activity. *See Alstate Maintenance, LLC,* 367 NLRB No. 68, slip. op. p. 5 (2019) (finding that a comment expressing a personal gripe was not concerted activity). Contrary to General Counsel's argument, the "medium in which steward Hesler made her comment" – Facebook – is not the basis of the ALJD's finding that Hesler's comments were not protected by the Act. The substance of the post was personal in nature and not for the benefit of other employees. Consequently, the ALJD correctly determined it is not considered concerted activity protected by the Act.

Likewise, Hesler's comments at meetings were, at most, personal gripes and not concerted activity protected under the Act. General Counsel relies heavily on the fact that Hesler made these statements in front of a group at various meetings. Essentially, General Counsel asserts that because Hesler made comments in a group setting, they must be considered concerted activity protected by the Act. But "[t]he fact that a statement made a meeting, in a

group setting or with other employees present will not automatically make the statement concerted activity." *Alstate Maintenance*, 367 NLRB No. 68, slip. op. at 7. Instead, "to be concerted activity, an individual employee's statement to a supervisor or manager must either bring a truly group complaint regarding a workplace issue to management's attention, or the totality of the circumstances must support a reasonable inference that in making the statement, the employee was seeking to initiate, induce or prepare for group action." *Ibid*. General Counsel makes no argument that Hesler's comments were truly group complaint and cannot successfully do so. Hesler's complaints were personal issues for her. Additionally, there is not enough evidence regarding the meetings to demonstrate that the totality of circumstances supports an inference that Hesler was seeking to "initiate, induce or prepare of group action." *Ibid*. As pointed out by the ALJD, the testimony regarding these meetings was limited. As a result, General Counsel's argument relies almost exclusively on inferences. These inferences ultimately result in leaps in logic that are unsupported by the record. Therefore, the ALJD's finding that Hesler's comments at these meeting is not concerted activity protected by the Act should be upheld.

III. The ALJD Correctly Determined that Respondent Did Not Violate the Act by Using Department Seniority.

Without citing to any Board law, General Counsel alleges that the ALJD's finding that Union agreed to implement department seniority for the National Beef scale up is invalid because "Respondent did not bargain in good faith." (GC Cross-Except. Br. at 12). General Counsel asks the Board to disregard testimony from the Union's own witnesses and record evidence that the Parties agreed to use department seniority for the continuous operation, and instead find that the agreement is invalid because Respondent did not bargain in good faith.

General Counsel essentially asks the Board to "void" what he sees as a bad deal by the Union. This argument fails.

Respondent fulfilled its duty to bargain with the Union regarding the seniority shift preferences. On October 12, 2017, HR Manager Rutt sent a letter to Johnson and Zaputil indicating that the entire facility may need to operate as a continuous operation, and that they would be discussing this topic at the meeting the following morning (GC Ex. 410). Discussions about this topic began the same day. On November 3, November 8, and November 14, 2017 Respondent and the Union had meetings to discuss the continuous shift operation, including seniority preferences. (Tr. 1979; Tr. 1981-82; Tr. 1986-87; Tr. 1996-97). The Parties discussed the various options for shifts and Livingood took Johnson's recommendations to Bemis leadership. After concluding that the Union's recommendation of an eight-hour shift schedule would not work for the Centerville plant, the Parties agreed to move forward after the November 14 meeting (Tr. 1997-98). Johnson indicated to Livingood that they should move forward with implementation of the 12-hour shifts, using department seniority, and they could deal with any fallout later. (Tr. 1998).

Nearly two weeks after they agreed to move forward with their plan, the Union tried to backpedal. Livingood testified that on November 30, 2017, during a regular bargaining session, Johnson asked if he and Zaputil could have a sidebar discussion (Tr. 2009).[3] During the break, Livingood met with Johnson and Zaputil, and Johnson explained that he had a solution for "the Company's problem" (Tr. 2009-10). Johnson went on to suggest that the Respondent should reset department seniority for purposes of shift preference based on current plant seniority and then thereafter use department seniority on a go-forward basis (Tr. 2010). Essentially, Johnson "was trying to do a reset" (Tr. 328). Livingood immediately stated that Bemis had already

[3] Mr. Johnson testified that the sidebar occurred on November 29, 2017. (Tr. 1700).

completed the canvasing and had begun posting schedules in order to give the employees a full month notice of the schedule changes (Tr. 2011). Nevertheless, Livingood informed Johnson and Zaputil that he would discuss the matter with Respondent's Leadership Team (*Ibid.*). The following week at the managers meeting Livingood raised the new proposal made by Johnson to do a "reset." Consistent with Livingood's initial response, the Management Team concluded that this was not feasible because the canvasing had already been completed and schedules had already been posted. (Tr. 2011-12). On December 12, 2017, Livingood followed up with Johnson via e-mail and reiterated the discussion that they had held on November 30th , stating in relevant part (GC Ex. 416):

> I just wanted to get back to you regarding your new proposal to reset department seniority (for purpose of shift preference) based on current plant seniority and then use department seniority on a go forward basis. Since we have already canvassed and started assigning employees based on the department seniority as we previously discussed and agreed upon on November 14, 2017 and I confirmed in an email to you on November 14, 2017, we believe the best way forward is to continue with the process to get us properly staffed for National Beef. As noted, we will continue to work on issues that arise from the use of department seniority for shift preference.

Johnson responded to this e-mail on December 14 indicating that he would like to discuss "a better way forward than your current plan" (*Ibid.*). Livingood immediately responded asking Johnson if he was available the following week (*Ibid.*). Livingood further responded via e-mail clarifying that what Johnson was now describing as "your plan" was actually the agreement that the Parties had reached back in early November (Resp. Ex. 23).

Once Bemis began the canvass on November 15, no one from the Union leadership expressed concern to Bemis regarding seniority until November 30, during the sidebar conversation. Despite believing that the Parties had already agreed to use department seniority

and despite the fact that the canvass had been complete for several departments, Livingood still took Johnson's suggestion to Bemis leadership following the November 30 discussion. Clearly, as determined by the ALJD, the record evidence supports the finding that the parties agreed to use department seniority during the shift canvass and then the Union tried to do a "reset". At that point, Respondent was entitled to reject the Union's suggestion. (ALJD p. 58).

General Counsel's argument that the Respondent did not bargain in good faith is disingenuous. It is premised on the argument that Respondent failed to provide the Union with seniority lists. First, Respondent maintains that it provided Respondent with seniority lists prior to January 10, 2018. (Tr. 1279; Resp. Ex. 6-7; Tr. 1275-82). Second, the timing of its argument simply does not work with the timeline of events that actually occurred. The shift to departmental seniority was premised entirely on the National Beef scale up. Respondent initially informed the Union about the National Beef contract in September 2017, the Parties began bargaining over the continuous shift implementation in October 2017, and the Parties reached an agreement to move forward with a continuous operation, utilizing 12-hour shifts and department seniority in November 2017. General Counsel now alleges that this agreement was invalid because of an allegedly unanswered information request from June 2017 – months before bargaining over the National Beef scale up was even known about.

General Counsel concedes that the Parties agreed but argues – without any citation to Board law – that the Board should find that the agreement should be voided. This argument flies in the face of the record. Record evidence demonstrates that the Parties bargained over seniority, the Union agreed to the Respondent's proposal to move forward with department seniority, and then the Union tried to renege on the agreement once it began to receive "blowback" from Union members. (Tr. 325-27; Tr. 1703). Once an agreement was reached, as found by the ALJ, the

Respondent was not legally obligated to void that agreement. Therefore, the finding of the ALJ should be sustained.

IV. The ALJD'S Remedy Correctly Excluded Reimbursement of the Union's Bargaining Expenses.

There is no basis for awarding the Union bargaining costs incurred through negotiations here. This is not a case of "unusually aggravated misconduct." *Columbia College Chicago*, 368 NLRB No. 86 (Sept. 30, 2019). The Board reserves awarding certain extraordinary remedies, such as bargaining expenses, in only the most extreme cases. *See, e.g., Whitesell Corp.*, 357 NLRB 1119, 1122-1123 (2011) (awarding bargaining expenses where respondent refused to agree to recognition clause, made unlawful regressive proposals, required unilateral control over mandatory subjects of bargaining, implemented an attendance system penalizing employees involved in contract negotiations, unreasonably withheld information regarding its proposals, conditioned bargaining on the union proving it intended to reach agreement, made unilateral changes to terms and conditions of employment and twice declared impasse); *Frontier Hotel & Casino*, 318 NLRB 857, 857-59 (1995) (awarding bargaining expenses where respondent made unlawful regressive proposals; unilaterally reduced wages by half, changed the qualifications for holiday pay by requiring a minimum of 2000 hours, eliminated the employee pension plan, and replaced the employee health plan; pushed the unions to strike and then threatened to terminate and replace strikers; stated it would eliminate all collective-bargaining agreements; refused to discuss the unions' proposals; and prematurely declared impasse); *Harowe Servo Controls, Inc.*, 250 NLRB 958, 960, 964-965 (1980) (awarding bargaining expenses where respondent was extremely late in arriving at bargaining sessions on several occasions; made unlawful regressive proposals; took a "take it or leave it" negotiating position; unreasonably withheld requested information from the union; renounced pre-strike agreements; prolonged a strike; unlawfully

froze unit employees' wages and refused to negotiate over bargaining-unit group leaders' pay; rejected union's proposal without truly considering it; unilaterally changed wage improvement program and bonuses; and dealt directly with employees about grievances).

For example, in *Pacific Beach Hotel*, 361 NLRB 709, 714 (2014), *enfd. in relevant part sub nom., HTH Corp. v. NLRB*, 823 F.3d 668 (D.C. Cir. 2016), the Board enforced an order awarding the union bargaining expenses where the respondent's historical conduct spanning an entire decade amounted to a slew of outrageous violations of the NLRA and federal court orders. The Board found that the respondent committed nine unfair labor practices when it (i) unlawfully interfered in two union elections, (ii) threatened and coerced employees, (iii) unlawfully granted wage increases and promotions to interfere with a union election, (iv) unlawfully discharged members of the union bargaining committee, (v) promulgated numerous unlawful rules that restricted employees' Section 7 rights, (vi) bargained in bad faith, (vii) unlawfully withdrew recognition from the union, (viii) unlawfully imposed discipline, and (ix) made changes to employees' terms and conditions of employment without bargaining with the union. *Id.* at 709-710. Further, respondent's violations resulted in a civil contempt order and three Section 10(j) injunctions issued by a federal court. *Id.* at 709 n. 3. To make matters worse, when a union representative notified Pacific Beach's regional vice president of operations that some unilateral changes violated one of the Section 10(j) injunctions, the vice president replied, "Fuck the judge. He's wrong . . . [the changes are] not illegal unless I go to jail." *Id.* at 710 n. 10. The respondent's pervasive contempt for the Board, the federal courts, and the Act warranted the extraordinary remedy, imposed in only the most extreme cases.

Bemis's conduct here does not remotely rise to the level of outrageous behavior as seen in *Pacific Beach Hotel* and its related line of cases. Bemis disputes the ALJD's findings as to all

of the conduct relied upon in concluding Bemis engaged in surface bargaining and refused to meet at reasonable times. Even if the Board affirms the ALJD's findings of fact and conclusions of law on those issues, the ALJD's conclusion that the circumstances did not rise to the level of especially egregious conduct should not be reversed (ALJD at 99, n. 178). Bemis' conduct did not rise to a "willful defiance of the Act." *Pacific Beach Hotel*, 361 NLRB 709 (2014).

Bemis engaged in hard, but lawful, bargaining during contract negotiations. Bemis' primary spokesperson, Associate General Counsel John Haberman, approached bargaining to maximize consistency of operations across Bemis North America and give the Company maximum flexibility to adapt to changing business circumstances. Haberman's philosophy was equally countered by the Union's chief spokesperson, International Representative Phil Roberts, whose mandate from the membership was to restrict Bemis as much as possible. (Tr. 2138-41; Tr. Tr. 1377.) Bemis consistently met with the Union at reasonable times over at least 55 meetings spanning multiple days. (GC Exs. 521, 522; Tr. 1206.) Bemis' away-from-the-table conduct was lawful and never affected the parties' at-the-table conduct. Bemis never refused to discuss or bargain over any mandatory subject of bargaining. (Tr. 2146.) Bemis never engaged in regressive bargaining, but rather made proposals large and small to help the parties reach agreement and many tentative agreements were struck to move the parties closer to a final contract. *Management & Training, Inc.*, 366 NLRB No. 134, slip op. at 6 ("The fact that proposals are regressive or unacceptable to the union, or that the union finds the employer's explanations for them unpersuasive, does not suffice to make the proposals unlawful if they are not 'so harsh, vindictive, or otherwise unreasonable as to warrant a conclusion they were proffered in bad faith.'").

Based on the record evidence, Respondent and the Union's negotiations were not a "complete waste of time." This conclusion only arises if one silos single proposals rather than viewing them as a whole, as is required by Board law. *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). Further, it cannot go unmentioned that Mr. Roberts admitted that there was no contract because many of Respondent's proposals simply were not "good enough" for the Union, not because of some illegal proposal or position (Tr. 1383). Awarding the Union negotiating expenses where the Union itself doubtless contributed to the lack of progress in reaching agreement is unwarranted. Thus, even if the Board affirms the ALJD's conclusion that Bemis engaged in surface bargaining and refused to meet at reasonable times, the ALJD's remedy (issuance of cease-and-desist and affirmative bargaining orders, requirement that the certification year should be extended by one year, and instituting a minimum bargaining schedule) should remain unchanged. The remedy fashioned by the ALJ was his view based on the findings he made and should not be disturbed.

V. The ALJD Correctly Concluded Bemis' Handbook Rule Banning "False Statements" Is a Lawful Rule of Basic Civility.

The Board should uphold the ALJD that Bemis' golden-rule style policy (Rule 18) is neutral on its face and does not violate Section 8(a)(1). Indeed, the ALJD is completely supported by the Board's recent decision in *Boeing*.

Bemis' Rule 18 fits squarely within Boeing's classification of a Category 1 lawful rule because, as Ms. Dees testified, the policy "really is just the golden rule" reinforcing Bemis' core value of "Respect" (Tr. 1918). In *Boeing*, the Board held that rules like Bemis' prohibition against malicious statements cannot be found to interfere with Section 7 rights, as nearly all conduct covered by these policies do not implicate the act. 365 NLRB at 4 n.15.

In arguing that this policy is unlawful and that the ALJD should be reversed, General Counsel attempts to distinguish Bemis' policy from the policies in *William Beaumont Hosp.*, 363 NLRB No. 162 (Apr. 13, 2016). However, General Counsel's attempts to distinguish *William Beaumont* are confusing. General Counsel states: "The Board has never found a ban on 'false' statements or any synonym of it to be lawful." (GC Cross-Except. Br. at 18.) Yet, the civility rule at issue in *William Beaumont* prohibited "[i]mproper conduct or inappropriate behavior or defiance," and included as an example "[b]ehavior that is rude, condescending or otherwise socially unacceptable. *Intentional misrepresentation of information.*" *Id.* at slip op. 1 (emphasis added). An "intentional misrepresentation" is precisely synonymous with a "false" statement. And to be sure, the Board specifically held that banning an "intentional misrepresentation" in William Beaumont's Code of Conduct was lawful. *Id.* at slip op. 3. Comparing this lawful prohibition of "intentional misrepresentations" with Bemis' prohibition of "false or malicious statements" leads to no conclusion other than that Bemis' civility policy is also lawful.

Moreover, in the July 6, 2018 memorandum regarding "Guidance on Handbook Rules Post-Boeing," the General Counsel gave as examples of lawful rules those which prohibit employees from posting or otherwise making comments that are "rude," "disparaging," "unbusinesslike," "otherwise socially unacceptable," and simply "negative." General Counsel Memorandum 18-04, "Guidance on Handbook Rules Post-Boeing" at 2 (2018) [hereinafter General Counsel Memo 15-02]. These descriptors parallel Rule 18's probation on "false, vicious or malicious statements." Because employees are capable of exercising their Section 7 rights without engaging in disparaging behavior, Rule 18 is lawful.

For the reasons cited, the Cross Exceptions should be denied.

Dated at Milwaukee, Wisconsin, the 23rd day of October 2019.

OGLETREE, DEAKINS, NASH, SMOAK
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CERTIFICATE OF SERVICE

The undersigned certifies that on the 23rd day of October, 2019, the foregoing pleading, **RESPONDENT BEMIS COMPANY, INC.'S ANSWERING BRIEF TO GENERAL COUNSEL'S AND PHILLIP A. MCMEINS' CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**, was electronically filed with the NLRB, using the NLRB's filing system and, served upon the following individuals by Email or U.S. Mail:

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