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	Case Nos.:	18-CA-202617 18-CA-205446 18-CA-205920 18-CA-205927 18-CA-207874 18-CA-210170 18-CA-210936 18-CA-211086

BEMIS COMPANY, INC. and PHILLIP A. McMEINS, An Individual	Case No.:	18-CA-209515

CHARGING PARTY GRAPHIC COMMUNICATIONS CONFERENCE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 727-S'S REPLY TO RESPONDENT BEMIS COMPANY, INC.'S ANSWERING BRIEF

Charging Party Graphic Communications Conference of the International Brotherhood of Teamsters, Local 727-S ("Local 727-S" or "Union"), by and through its undersigned counsel and pursuant to Rule 102.46(e) of the National Labor Relations Board ("NLRB" or "Board") Rules and Regulations, submits this Reply to the Answering Brief filed by Respondent Bemis Company, Inc. ("Bemis," "Company," or "Employer"). For the reasons explained herein and in the Briefs filed in Support of the Cross-Exceptions to the Decision of Administrative Law Judge ("ALJ") Charles Muhl dated July 1, 2019 ("ALJD"), the Board should reject the arguments raised in Bemis's Answering Brief and grant the Cross-Exceptions accordingly.

ARGUMENT

I. Bemis Does Not Dispute That It Violated the Act by Refusing to Include Mandatory Subjects of Bargaining in a Written Agreement with the Union.

Local 727-S cross-excepted to the ALJ's failure to find that Bemis's refusal to include certain mandatory subjects of bargaining in any collective bargaining agreement with the Union constituted independent violations of Sections 8(a)(1) and 8(a)(5) and not merely evidence of the Company's surface bargaining. Bemis's answering brief fails to raise any argument in opposition to this Cross-Exception. Thus, the Board should find that Bemis waives any such argument and concedes the point. *See The Boeing Co.*, 362 NLRB 1789, 1789 n.1 (2015) (holding that a respondent waived an argument by not raising it in an exceptions briefs); *Antioch Bldg. Materials, Co.*, 323 NLRB 73, 74 (1997) (finding that an argument was waived because "Respondent failed to raise its contention in a timely manner); *see also* NLRB Rule 102.46(f) ("Matters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding."). The Cross-Exception should be granted accordingly.

II. Ms. Hesler Engaged in Protected Activity When She Posted in the Union's Facebook Group and Spoke up during Group Meetings.

A single employee engages in protected, concerted activity if she is engaged with, or acts on the authority of, other employees and not only on behalf of herself. *Meyers Indus., Inc.*, 281 NLRB 882, 886 (1986). Bemis's contention that Linda Hesler's posts in the Union's Facebook group and her comments during group meetings were simply "personal gripes" and not concerted activity is misguided as it ignores the context in which the comments were made, as well as the substance of the comments themselves.

When Ms. Hesler posted on Facebook about how Bemis was apparently refusing to allow her to use the restroom without a doctor's note, she did so in a group maintained by the Union

for members of Local 727-S to discuss precisely this sort of work related issue rather than her personal Facebook page. Tr. 726:10-25; GC Ex. 106. The Union submits that it should be obvious that by posting to a forum maintained by the Union for employees to discuss terms and conditions of employment rather than her personal page, Ms. Hesler was initiating a discussion and soliciting support from her coworkers about a particular term and condition of employment, the Employer's apparent bathroom break policy. This is protected and concerted activity. *Meyers Indus., Inc.*, 281 NLRB at 887 (confirming that initiating conversations with coworkers about the terms and conditions of employment is protected by Section 7). This is likely why many other members of Local 727-S engaged with the comment by providing their reactions and commenting on the issue. Tr. 728:18-729:23. Had this actually been a mere "personal gripe," Ms. Hesler would have more likely posted to her personal Facebook page instead of the Union's discussion forum.

Ms. Hesler's comments to Bemis managers and supervisors at group meetings about terms and conditions of employment are also protected by Section 7 because they were clearly complaints made on behalf of other employees and not just herself. *See Alstate Maint., LLC*, 367 NLRB No. 68, slip op. at 6 (Jan. 11, 2019) (describing the factors used to determine when individual employee engages in concerted activity); *Meyers Indus., Inc.*, 281 NLRB at 886-87 (same). Ms. Hesler's statements involved issues of concern for groups of employees (if not the entire bargaining unit), including the Employer failing to reimburse employees for safety shoes, Tr. 649:7-651:19, vacation scheduling, Tr. 651:20-654:20, the treatment of new hires, Tr. 695:21-697:3, unfair standards imposed on the entire finishing department, Tr. 711:3-19, and the Employer taking money out of an account which had traditionally been for the employees to plan activities, Tr. 712:11-22. In particular, it is difficult to comprehend how complaints from Ms.

Hesler, a 23-year veteran of the Centerville plant, to the plant manager advocating for better treatment for *new hires* could be considered a "personal gripe." The Board should reject this incredible position and find that these comments all represent concerted activity.

III. Bemis's Unilateral Change to Seniority Preferences in Shift Bidding Violated the Act.

In defense to the General Counsel's argument that the Employer violated the Act by unilaterally changing the system in which employees bid for and are awarded shifts, Bemis holds out an agreement that it purportedly reached with the Union on the matter. According to the Employer, its change from "plant seniority" to "department seniority" could not have violated the Act because it was made pursuant to an agreement with Local 727-S. But this misses the point of the Cross-Exception altogether.

Even assuming that the parties did actually reach this supposed agreement as to departmental seniority, it was only extracted from the Union as a product of Bemis's bad faith bargaining and unfair labor practices. Starting in June 2017, Tr. 1049, the Union had requested (repeatedly, as Bemis continued to fail to produce it) a complete seniority list in order to evaluate the Company's proposed change to employees' seniority when the plant moved to 24/7 operations. ALJD at 53. Throughout the parties' discussions about the National Beef scale-up, the Union consistently maintained that it needed to review this list before it could agree to adopt a system involving department seniority since the Union would need to evaluate what effect the Company's proposed change to seniority would have. Tr. 1048-50, 1108, 1125, 1271. Despite its repeated requests and communicating to the Employer that the seniority list was necessary to effectively bargain over the matter, Bemis did not produce a complete seniority list until January 10, 2018. ALJD at 82, n.162; Tr. 1160:13-20; *see also* GC Ex. GC Ex. 849; GC Ex. 851. Thus, even if the Union did relent and agree to the change to department seniority in November 2017,

it did so without the necessary seniority list and only after Bemis improperly withheld it for months, forcing the Union to bargain with its hands tied behind its back. Tr. 1160:13-20. Browbeating the Union into an "agreement" with refusals to negotiate in good faith and failures to respond to requests for information necessary for meaningful bargaining is not a legitimate agreement which can serve as a defense to Bemis's unilateral change to the seniority system.[1]

The Company's perceived inconsistency with the timeline of events does not change this analysis. As the ALJ explained, the Union had requested the seniority list for specific bargaining over changes to Centerville operations as the Company scaled up production to meet the demands of the National Beef contract *and* for purposes of its general contract negotiations. ALJD at 53, 79, 82. Thus, it is of no moment that the Union's initial request for the seniority list was made months before Local 727-S was informed of the National Beef contract and the associated changes to shift bidding and seniority. The seniority list may have been first requested to address seniority provisions in a collective bargaining agreement, but it was requested again after learning about the National Beef contract as necessary for the Union to bargain over the operational changes moving to a 24/7 schedule. *Id.*

IV. The Board Should Direct Bemis to Reimburse the Union's Bargaining Expenses.

In claiming that its violations do not rise to the level of "unusually aggravated misconduct" warranting reimbursement of the Union's bargaining expenses, Bemis understates the extent and significance of its unfair labor practices at issue in this case. As the ALJ properly found, the Employer maintained work rules which restricted Section 7 activity; unlawfully

[1] The Employer's other defense to this Cross-Exception—that it actually produced a seniority list before January 10, 2018—is flatly contradicted by the record and should be disregarded summarily. Tr. 1160:13-20; 1280-81, 2143; *see also* Resp. Ex. 1 and Resp. Ex. 6 (containing no information about any employee's department seniority that Bemis had proposed to use for shift bidding).

imposed a policy prohibiting employees from posting Union materials on their lockers; gave an employee a negative performance evaluation expressly because she was involved with the Union; discriminatorily disciplined, harassed, and terminated an employee because she was a supporter of Local 727-S; directed a supervisor to conduct overnight surveillance of suspected union organizing; unlawfully laid off a neutral employee in favor of retaining one with antiunion sentiments; unilaterally laid off several employees and eliminated positions from the unit without providing any notice or any opportunity to bargain; circumvented Local 727-S and negotiated with individual employees over terms and conditions of employment; refused to respond to information requests; refused to meet at reasonable times to reach an initial agreement; engaged in bad faith surface bargaining; and implemented unilateral changes to terms and conditions of employment, all while demonstrating blatant union animus for years following Local 727-S's certification. These are serious unfair labor practices which cumulatively undermine the employees' selected bargaining representative and communicate to the employees that the Employer will do whatever it wants with respect to the terms and conditions of employment of their employees, regardless of the law, and that any employee that tries to involve a union to stop the Employer will be made to pay for it.

Bemis's reliance on *Pacific Beach Hotel*, 361 NLRB 709 (2014), *enf'd in relevant part sub nom.*, *HTH Corp. v. NLRB*, 823 F.3d 668 (D.C. Cir. 2016) as a means of distinguishing its conduct from cases in which bargaining expenses were properly included in the remedy is therefore misguided. Just because the unfair labor practices in that case took place during an election and are different than those at bar does not mean that Bemis's conduct is any less egregious. What is more, Bemis's conduct actually resembles that of the employer in *Pactific Beach Hotel* in many significant respects. *See* 361 NLRB at 714 (explaining that reimbursement

of bargaining expenses was a necessary remedy since, like here, the employer bargained in bad faith, unlawfully disciplined and terminated union supporters, imposed unilateral changes, and enforced work rules that constrained Section 7 conduct, thereby sending "a clear message that not only will they refuse to abide by the law, but they will take adverse action against those employees who exercise their rights"). Moreover, the Board has regularly ordered reimbursement of a union's bargaining expenses when an employer engages in unfair labor practices far less outrageous than those at issue here. *See, e.g.*, *Barstow Cmty. Hosp.*, 361 NLRB 352 (2014), *remanded*, 820 F.3d 440 (DC Cir. 2016), *reaffirmed*, 364 NLRB No. 52 (Jul. 15, 2016); *Fallbrook Hosp.*, 360 NLRB 644 (2014); *Whitesell Corp.*, 357 NLRB 1119 (2011); *Regency Serv. Carts, Inc.*, 345 NLRB 671 (2005); *Alwin Mfg. Co.*, 326 NLRB 646 (1998).[2]

Reimbursement of Local 727-S's bargaining expenses is particularly necessary in this case to "make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table," *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995), given the remote location of the parties' bargaining. Bemis's dilatory tactics and surface bargaining required the Union's chief negotiator to travel to Centerville, IA (an ordeal involving flying to Des Moines, driving another ninety miles or so, and then paying for lodging) twenty-three times over the course of two years just for the Company to keep stringing the Union along with no real intention of reaching an agreement. *See* GC Ex. 520.

[2] Consistent with this line of cases, a remedial order directing Respondent to reimburse Local 727-S's bargaining expenses should also include the Union's litigation expenses associated with this unfair labor practice action, including its attorneys' fees and costs. *See Pacific Beach Hotel*, 361 NLRB at 712; *Alwin Mfg. Co.*, 326 NLRB at 647.

V. The Company's Work Rule is an Unlawful Ban on False Statements and Speaking Ill of the Employer.

The Company's handbook provides as follows: "Do not make or publish false, vicious or malicious statements concerning any employee, supervisor, the company or its products." This is not a simple "civility rule" as Bemis so characterizes it. In actuality, and by its very terms, the rule is ban on false statements and negative remarks about the Company. As written, the rule prohibits the most fundamental Section 7 conduct. Slogans like "Bemis is unfair to workers," claims by an employee attempting to organize that "the Company does not have your best interests at heart," union literature stating that "Bemis products are made with unfair labor," or remarking that "John Haberman is a liar" after a difficult bargaining session would all necessarily run afoul of this rule, and the offending employee would be subject to discipline for no other reason than exercising their Section 7 rights.

For this reason, the Company's attempt to analogize its work rule to the sort of "Category 1" policy at issue in *William Beaumont Hospital*, 363 NLRB No. 162 (Apr. 13, 2016) must fail. *See Boeing Co.*, 365 NLRB No. 154, slip op. at 3-4 (2017) (discussing the presumptive lawfulness of actual civility rules which, unlike here, merely require that employees "'work harmoniously' or 'conduct themselves in a positive or professional manner'"). Although the work rule in *William Beaumont* also implicated "intentional misrepresentation of information," its context made clear that the rule was not a ban on false statements as Bemis claims. *See William Beaumont Hosp.*, Case No. 07-CA-093885, JD slip op. at 15 (2014) ("In the instant case, there is no general prohibition against making false statements. Rather, the Code prohibits intentional misrepresentation of information (which implies malice) and negative or disparaging comments about the moral character or professional capabilities of an employee or physician. The Code's introductory paragraph makes it clear that the hospital's concern is patient care, so,

when read in context, the rule has nothing to do with protected activity."), *adopted as modified* 363 NLRB No. 162. Bemis's work rule, by contrast, is an unlawful ban on false statements. *See Tinley Park Hotel & Convention Ctr.*, 367 NLRB No. 60 (2019) (adopting, post-*Boeing*, an ALJ's decision that "[b]y prohibiting "false or malicious" statements, the Respondent has banned merely false statements, an overly broad prohibition," and finding a violation accordingly); *First Transit, Inc.*, 360 NLRB 619, 636 fn. 2 (2014) (concluding that a rule prohibiting "false, vicious, or malicious statements concerning the Company or its services, a client, or another employee" was unlawful).

The examples of presumptively lawful civility rules in the July 6, 2018 General Counsel memorandum cited by the Company similarly provide no support for the proposition that this work rule should fall within *Boeing*'s Category 1. *See* General Counsel Memorandum 18-04, "Guidance on Handbook Rules Post-Boeing" at 3 (2018). If anything, this rule most resembles a "rule regarding disparagement or criticism of the *employer* (as opposed to civility rules regarding disparagement of employees, see Section 1-A, above)," or a "rule against making false or inaccurate statements," which the memorandum identifies as *Boeing* Category 2 rules warranting individual scrutiny. *Id.* (emphasis in original). And, for the reasons stated above and discussed in the General Counsel's brief in support of its Cross-Exceptions, the rule's adverse impact on Section 7 rights far outweigh any of Bemis's proffered justification for the rule.

CONCLUSION

For the reasons discussed herein and the brief filed in support of the General Counsel's Cross-Exceptions, and the ALJD should be adopted in accordance with the Cross-Exceptions filed by the Union and the General Counsel.

Respectfully submitted,

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Dated: November 6, 2019

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6th day of November, 2019, the foregoing Charging Party Graphic Communications Conference of the International Brotherhood of Teamsters, Local 727-S's Reply to Respondent Bemis Company, Inc.'s Answering Brief was filed electronically via the NLRB's e-filing system and served via email to the following individuals:

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