

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

**NOAH'S ARK PROCESSORS, LLC d/b/a
WR RESERVE**

And

**Cases 14-CA-217400
14-CA-224183
14-CA-226096
14-CA-231643
14-CA-235111**

**UNITED FOOD AND COMMERCIAL WORKERS
UNION LOCAL NO. 293**

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING
BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

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I. Overview

This case is before the National Labor Relations Board (Board) based on a Second Consolidated Complaint alleging that Noah's Ark Processors, LLC d/b/a WR Reserve (Respondent) violated Sections 8(a)(1), (5), and 8(d) of the National Labor Relations Act (Act). By Decision dated October 11, 2019, Administrative Law Judge Andrew S. Gollin (ALJ) concluded that Respondent violated the Act, in substantial part, as alleged in the General Counsel's Second Consolidated Complaint that issued on February 22, 2019.¹ Following the issuance of the ALJ's decision, on November 8, 2019, Respondent filed timely exceptions wherein it argues the ALJ made numerous errors in reaching his conclusions. In accordance with Section 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel respectfully files this answering brief, and for the following reasons, submits that Respondent's exceptions are without merit.

II. Respondent's Exceptions

Respondent filed seventeen (17) exceptions to the ALJ's decision that it groups together in three categories within its legal argument: (1) whether Respondent unlawfully terminated employees for engaging in protected, concerted activity on March 27, 2019 (Exceptions 1, 2, 12, 16); (2) whether Respondent interfered with the NLRB's investigation by providing employees with legal counsel (Exceptions 3-8, 11, 13-15); and (3) whether Respondent bargained in bad faith with the Union in negotiating a successor collective-bargaining agreement (Exceptions 9-11, 17).² In support of its exceptions, Respondent provides no additional arguments or

¹ The General Counsel is filing cross-exceptions in response to the ALJ's conclusion that Respondent's payment of wages contrary to the collective-bargaining agreement between January 23, 2018 and August 23, 2018 was time barred under Section 10(b) of the Act.

² Respondent did not file exceptions over any other aspects of the ALJ's Decision. Under Section 102.46(a)(1)(ii) of the Board's Rules and Regulations, any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged should be deemed to have been waived. Additionally, under Section 102.46(b)(2) of the Board's

clarification as to why the ALJ's conclusions were in error beyond recycling the limited facts and legal arguments it submitted to the ALJ in its post-hearing brief. The record and Board law support the ALJ's findings and conclusions on these issues. For the reasons set forth below, Respondent's exceptions are without merit.

A. About March 27, 2018, Respondent made coercive statements to employees regarding their protected, concerted activities and terminated ten employees for engaging in a protected work stoppage. (Exceptions 1, 2, 12, 16).

The ALJ concluded that Respondent committed several unfair labor practice violations directed at employees who engaged in a protected work stoppage on March 27, 2018.

Specifically, the ALJ found Respondent, by Paul Hernandez and Mike Helzer (1) threatened employees with termination for engaging in protected, concerted activities; (2) told employees they were terminated for engaging in protected, concerted activities; and (3) threatened to call the police because the employees engaged in protected, concerted activities in violation of Section 8(a)(1) of the Act. JD 45:25-28.³ The ALJ also found that on March 27, 2018, Respondent terminated employees because they engaged in protected, concerted activities in violation of Section 8(a)(1) of the Act. JD 46:1-5. In its exceptions, Respondent argues the ALJ's findings and conclusions related to the events of March 27, 2018 are "contrary to the record as a whole, and contrary to established Board law." R Exceptions 1, 2, 12, 16. For the reasons set forth below, Respondent's exceptions lack merit.

1. Relevant Facts

In the weeks leading up to March 27, 2018, employees in Respondent's packing (or

Rules and Regulations, the Board should disregard Respondent's exceptions not discussed and cited in its brief. *Southern Bakeries, LLC*, 364 NLRB No. 64, slip op. at 1, fn. 1 (2016); *New Concept Solutions, LLC*, 349 NLRB 1136, 1136 fn. 2 (2007).

³ References will be denoted using the following abbreviations followed by page numbers and line numbers where applicable: Administrative Law Judge's Decision (JD); Trial Transcript (T); General Counsel's Exhibits (GC); Respondent's Exhibits (R); Joint Exhibits (JT); and Respondent's Brief (R Brief).

packaging) department talked to supervision and human resources about their wages and their desire for a raise. T. 477-478; R 10. Packaging employees had also learned that a less senior employee in a different department was making more money. This issue had been raised with their supervisor, Joel Murillo. T. 257, 493-494, 808-809. Murillo testified that packaging employee Sandra Diaz had complained to him a couple of times about the issue and that she had told him “there is a lot of people getting mad because (another employee) get a raise and we don’t.” T. 809-810. On March 26, 2018, a group of packaging employees discussed the matter and decided to gather in the cafeteria the following morning in order to talk to Respondent’s management. T. 257-260, 470, 494. Employee Kyle Anzualdo testified the employees decided to go to the cafeteria, “Because if we are on the floor, then (management) won’t pay attention.” T. 462. Union steward/employee Guadalupe Ortiz testified that the cafeteria is “where (the employees) would be heard the best.” T. 257. Employee Sandra Diaz testified that after getting the run-around from human resources and supervisor Joel Murillo, employees wanted to follow-up with a higher-level manager. T. 479-480. Murillo overheard the group’s plan and advised against it. T. 258-259. Because the issue was so important, the group did not heed Murillo’s warning and gathered in the cafeteria the next day to address their concerns with management.

First thing on the morning of March 27, 2018, a group of approximately 20-30 employees, primarily from packaging, gathered in the cafeteria with the goal of addressing these issues with management. Guadalupe Ortiz was the only employee in the group who spoke English and she served as the group’s spokesperson and translator. T. 264-265, 471, 495-496. The first supervisor to engage the group was Fabrication Superintendent Chris Kitch. T. 262, 496. Kitch does not speak fluent Spanish and as a result, communicated directly with Ortiz. T. 263-264, 496. Kitch asked Ortiz why employees were in the cafeteria and not on the floor

working. T. 264. Ortiz responded that the employees wanted to know why raises had not been given and why there were employees making more than others. T. 265. Kitch's responded that was determined by the Union contract. T. 265. Ortiz told Kitch that she tried explaining to her coworkers but they wanted an explanation from Kitch. T. 266. Even though Ortiz had served as a Union steward for five months, she did not have the authority to file grievances on behalf of employees. If any issues were brought to her attention, she would notify Union Representative Terry Mostek. T. 267. After notifying Kitch that the employees wanted an explanation directly from him, he responded that he was going to try and find the plant owner. T. 267. Once Kitch departed the cafeteria, the employees talked amongst each other. It was determined that if the company fired one of the employees, the entire group would leave. T. 269. There was no discussion of quitting. T. 268. The group had gathered in the cafeteria after they had first acquired their equipment necessary for work that day – helmet, frock, gloves, boots, etc. – with the intent to report to their work areas. T. 263.

Approximately fifteen minutes later, Chris Kitch returned with Operations Manager Paul (Pablo) Hernandez. T. 268. Hernandez speaks Spanish and was able to communicate with the group without a translator. T. 269. Ortiz told Hernandez that the group needed a raise. T. 471. Hernandez responded that he could not do anything because he was not in charge of raises. T. 471. Hernandez testified that he told the employees that what they were doing was not the way to do things and that what they were doing would just cause them to lose their jobs. T. 213. Hernandez told the employees that those who did not want to work could go home. T. 269, 471, 498. Hernandez confirmed on the stand that he told employees, “they needed to go to work or they could lose their jobs.” T. 213-214. Hernandez was angry and yelled at the employees when they asked about wages. T. 481. Hernandez confirmed that when the protesting employees

started talking to employees from the kill floor about what was going on, he asked them to leave the property. T. 214; GC 16. Hernandez told the employees they had to leave the facility or else he would call the police. T. 463, 472-473. A group of approximately ten employees got up and started to walk toward the door. T. 269, 471. In response, Hernandez instructed his supervisors to write down the employees' names because they would not be permitted to return. T. 269-270, 481, 501. Two groups of employees departed the cafeteria that morning with both groups walking down the same hallway to get to their destination. One group departed the building while the other group returned to the work floor. T. 270-271. As the employees walked down the hallway, Hernandez told the employees, "You guys either go to work, leave now, or you're terminated." T. 271. The employees who went outside returned their frocks, gloves, and equipment to the supply room because they are not permitted to be taken outside. T. 272, 471, 482, 498.

Once the employees were outside in the parking lot, Plant Manager Mike Helzer joined Paul Hernandez to address the employees. T. 272, 483. Helzer does not speak Spanish and talked directly to Ortiz as the group's spokesperson/translator. T. 273. Helzer told the employees that what they were doing violated the collective-bargaining agreement.⁴ T. 273. Ortiz did not know what Helzer meant but responded that might be but if the group left, she would leave with them. T. 273-274. Helzer replied that there was a solution to the problem and that was to go to work and discuss the problem later in the day. T. 274. The employees rejected Helzer's proposal because they were fearful that if they returned to the building, Respondent would forget about their issues and there would be no solution to their concerns. T. 274. Once Helzer was informed of this response, Helzer and Hernandez instructed the employees to leave

⁴ The collective-bargaining agreement had expired on January 28, 2018. JT 1

the parking lot because the police would be there shortly. T. 275, 464, 483. On direct questioning by Respondent's attorney, Helzer confirmed that he threatened to call the police if the employees did not leave the premises. T. 738. At that point, Paul Hernandez instructed employees to return their work ID's. T. 215, 275, 464, 473, 483. Employees need their work ID's to enter the gate at the guard shack in order to access Respondent's facility and they need them to clock in for work once inside. T. 215, 275-276. As instructed, the employees turned in their ID's and then left the Respondent's premises. T. 276, 464, 484, 501. The employees asked Hernandez if they could wait for Human Resources Manager Lidia Acosta to arrive. T. 484. Hernandez denied the request and instructed employees to leave or he would call the police. T. 484, 502.

A couple of hours later, at 8:49 a.m., Hernandez emailed a summary of the events to Lidia Acosta. T. 216; GC 16. In his summary, Hernandez wrote that the employees had gathered in the cafeteria "because they had an issue with needing a raise." GC 16. Hernandez wrote that what they were doing was not the way to address their issue and that a grievance should be filed. GC 16. When the employees did not agree to return to work, Hernandez told the employees they would be considered terminated for quitting or terminated for not following a supervisor's instruction. GC 16. When those employees started talking to other team members "asking them to walk off with them" is when Hernandez asked the packing employees to leave the property. GC 16. Hernandez confirmed that he requested the employees return their work ID's once they reached the parking lot. GC 16.

On March 30, 2018, supervisor Joel Murillo completed separation forms for ten employees involved in the work stoppage on March 27, 2018. T. 297; JT 16. For each employee, Murillo marked "Voluntary Resignation – Job Abandonment" and "Involuntary

Termination – Violation of company policy.” JT 16. Murillo explained that he marked “Involuntary Termination – Violation of company policy” because the employees refused to go back to work on March 27, 2018. T. 299. Murillo also marked that each employee was not to be rehired. Murillo marked “No” in response to the question, “Expect to recall person to work?” JT 16. In explaining why, Murillo testified, “Because they do that one time, they can do it again. Acting like that, they can act again the same way.” T. 300.

Several weeks later, a few of the employees instructed to leave Respondent’s facility, turn in their ID’s, and depart the premises contacted Lidia Acosta about returning to work. Those employees included Sandra Diaz, Maria Diaz and Brittney Spratt. T. 484-485, 502-504, 569-570. The employees turned in a statement summarizing what took place on March 27, 2018. T. 485; JT 17. In the statement written by Sandra Diaz, Diaz confirmed that the employees wanted an explanation for why employees with less seniority were making more money than those in packing. JT 17, p. 4. While the employees were gathered in the cafeteria, management engaged employees in a rude tone even though the employees only wanted an explanation. JT 17, p. 4. Management gave the employees ten minutes to leave and Paul Hernandez ordered supervisor Joel Murillo to write down the employees’ names who left and they would not be permitted to return. JT 17, p. 4. The employees were confused and turned in their equipment so that there would be no further problems. After they gathered in the parking lot, the employees wanted to talk to Lidia Acosta. However, Mike Helzer told the employees they had two minutes to leave and Paul Hernandez rudely requested employees turn in their work ID’s. JT 17, p. 4.

2. Argument

Respondent repeats the same arguments it made in its brief to the ALJ and those arguments continue to lack support in fact and law. Regarding the ALJ’s findings that Paul

Hernandez and Mike Helzer made unlawful statements to the employees in the cafeteria, hallway, and parking lot, Respondent provides no support for its position that the ALJ's findings should be reversed. As it did in its brief to the ALJ, Respondent cites to general denials set forth by various Respondent supervisors to support its position. R brief at 5-6. As identified by the record and the ALJ in his decision, the events of March 27, 2018 were collectively described by witnesses for the General Counsel, witnesses for Respondent, and documentary evidence. Furthermore, Respondent admits the threats being made within its own brief. For example, Respondent acknowledges Paul Hernandez threatened employees to go back to work or they would lose their jobs. R brief at 5, citing T. 213:25-214:6. Respondent also acknowledges Mike Helzer threatened to call the police on the employees. R brief at 6, citing Helzer's testimony set forth at T. 738:3-15. Consistent with the credited testimony of the General Counsel's witnesses and the admissions of Respondent's supervisors, the ALJ found Respondent, by the statements made by Hernandez and Helzer, violated Section 8(a)(1) of the Act on March 27, 2018. Respondent does not directly argue credibility in its brief, but to the extent it indirectly argues against the ALJ's credibility determinations, the ALJ's credibility resolutions are significantly supported by the record and it is well settled that the Board attaches great weight to an administrative law judge's credibility findings. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950), *enfd.* 188 F.2d 362 (3rd Cir. 1951). Lastly, the cases cited by the ALJ in his decision are directly on point with respect to his findings. JD 24:9-21; See also *Benesight, Inc.*, 337 NLRB 282, 283 (2001)(unlawful threat of termination in response to employees engaged in a protected work stoppage); *Robertson Industries*, 216 NLRB 361, 361-362 (1975); *Sands Hotel and Casino*, 306 NLRB 172, 184 (1992)(employer statement to employees that their termination was a result of their protected activity violative of Section 8(a)(1)).

Regarding the ALJ's finding that Respondent unlawfully terminated the employees, Respondent argues that the employees abandoned their jobs when they left Respondent's facility on March 27, 2018. R brief at 20. As the ALJ found, the record contradicts this position. Respondent was faced with an escalating situation it sought to rid itself of as quickly as possible. Plant Manager Mike Helzer testified to learning that employees in Respondent's shipping department wanted a raise. T. 735. Fabrication Superintendent Chris Kitch brought it to Helzer's attention that there were shipping employees who would not go to work because they wanted more money. T. 750-752. Helzer went to the shipping dock and addressed the employees, advising that he could not give a raise because, "We are under a contract. I cannot give out any raises to anybody." T. 752. Helzer then had to address a larger group of employees primarily from packaging that were also demanding a wage increase where, in Helzer's words, "it got more serious." T. 735-736. Respondent was faced with a scenario where employees from multiple departments were complaining about their wages and Respondent sought to quash those complaints as quickly as possible by any means necessary. The group that "got more serious" were the same employees who Paul Hernandez admittedly ordered out of the building once the employees started communicating with other employees from the kill floor as to why they were present in the cafeteria. T. 214; GC 16. Respondent sought to rid itself of these "pot stirrers." By Respondent's coercive statements and actions, any employee would reasonably understand that their employment had been ended by Respondent. The employees had reported to work with the intention of addressing a wrong they believed existed with their wages, yet they were fully prepared to report to their work area. Each employee had acquired their equipment necessary for work and were set to report to their department. It was Respondent who ordered them to do otherwise. Specifically, Operations Manager Paul Hernandez instructed employees to leave the

facility, informed them that their protected activity would cost them their jobs and that if they did not go to work they could lose their jobs, instructed a supervisor to written down those employees' names to ensure they could not come back, and confiscated employee IDs necessary to go through security to access the facility. Both Hernandez and Helzer also threatened to call the police on the employees as they continued to engage in protected conduct. The employees were engaged in a protected work stoppage when they gathered in the cafeteria and that work stoppage continued as the employees gathered in the parking lot at the direction of the Respondent. When the employees left Respondent's premises on March 27, 2018, no reasonable employees would understand that their jobs continued to exist. The accusation of job abandonment is not supported by the record. Respondent ordered the employees to leave the facility, threatened them with police action, and ordered them to turn in the one item that is necessary for them to gain access to the facility. As the ALJ wrote,

The testimony, Hernandez's email summary description of what occurred, and the termination notices establish that Respondent knew the employees were protesting wage matters and they were terminated because they engaged in this work stoppage/walkout and refused to return to work until their concerns were addressed.

JD 23:4-7.

Next, Respondent argues even if it is determined that the employees were terminated, those employees were not engaged in protected activity because they were engaged in an illegal, unauthorized work stoppage or "wildcat strike" because it was done without Union authorization and in violation of the no-strike provision set forth in Article 16 of the parties' collective-bargaining agreement. R brief at 19-20. The ALJ correctly dismissed this defense as the work stoppage occurred two months following the expiration of the collective-bargaining agreement. JD 23:9-15. It is well-settled that a no-strike clause does not survive an expired contract. See

Lincoln Lutheran of Racine, 362 NLRB 1655, 1657-1658 (2015); *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198-199 (1991).

The ALJ also addressed Respondent's argument that the employees were not protected because Respondent was required to collectively bargain with the Union as the employees' collective-bargaining representative. JD 23:17-28, 24:1-2. The ALJ accurately noted that the employees were protesting Respondent's failure to comply with the terms of the parties' collective-bargaining agreement by paying less-senior employees higher compensation than those with more seniority where the contract establishes starting compensation and increases based on job classification and longevity. Additionally, the ALJ astutely found that Respondent's argument was additionally disingenuous because Helzer did not decline to address the wage concerns because the Union served as the bargaining representative. Helzer offered to meet with the employees and discuss their wage concerns after work if they agreed to return to work. JD 23:30-32, 24:1-2; T. 274, 737.

Lastly, Respondent argues it did not act "on the basis of anti-union animus" and would have taken the same action toward these employees absent their protected activity. R brief at 20-21. The General Counsel did not allege Respondent's termination to be in response to union activity in violation of Section 8(a)(3) of the Act. As set forth by the record and found by the ALJ, Respondent terminated ten employees on March 28, 2018, in retaliation for those employees engaging in a protected work stoppage in violation of Section 8(a)(1) of the Act.

For these reasons, Respondent's exceptions 1, 2, 12, and 16 should be dismissed.

B. Respondent interrogated employees in response to Board subpoenas (Exceptions 3, 4, 5, 6, 13)

Respondent groups ten of its exceptions under the category of whether it interfered with the Board's investigation by providing legal counsel to employees in response to those

employees receiving investigative subpoenas from the Board during its investigation of the unfair labor practice charges filed by the Union. R Exceptions 3-8, 11, 13-15. The first category of interference concerns Respondent's interrogation of employees with respect to their receipt of Board subpoenas and their interactions with Board agents. As set forth below, the record and Board law fails to support Respondent's exceptions and they should be dismissed.

1. Relevant Facts

Around October 2018, employee Otis Simmons notified Respondent's Administrative Assistant Mary (Chmelka) Junker that he had received a subpoena. T. 139-140. Junker asked that Simmons bring in his subpoena the following day so that she could look at it. T. 140. Simmons brought Junker his subpoena along with a corresponding cover letter showing that he was required to appear before a Board agent on November 7, 2018. T. 141; GC 7. Junker then faxed the Board's cover letter outlining the reasons for Simmons receiving an investigatory subpoena to Respondent's attorney Jerry Pigsley, CEO Fischel Ziegelheim, and Michael Koenig.⁵ T. 140-141. When Respondent learned that its employees had received subpoenas from the Board for sworn affidavits, it made the decision to retain and pay for outside attorneys to represent employees during their interviews with the Board. T. 142-143, 325; JT 15. On November 6, 2018, Respondent placed the retained attorneys in several management offices at Respondent's facility so that they could meet with employees. T. 146. The attorneys were placed in a conference room as well as the offices of Plant Manager Mike Helzer and Fabrication Superintendent Chris Kitch. T. 146-147. Respondent posted a notice advising employees of their right to have an attorney, noting that Respondent had retained attorneys for the employees, and provided employees with the attorneys' contact information. T. 143-145;

⁵ Ziegelheim described Koenig as one of his consultants. T. 332. Other supervisors and managers for Respondent, including Junker, understood Koenig to be one of Respondent's owners. T. 64.

JT 15. The record established that when employees did not make contact with those attorneys, Respondent's supervisors and managers approached employees in order to ascertain whether they had received communications from the Board to provide sworn testimony. Both employees and managers testified concerning managers approaching and questioning employees about whether they had received correspondence from the Board, including a subpoena. For example, on November 6, 2018, Supervisor Jose Madrigal called employee Juvencio Ramirez de la Cruz while he was at home and asked if he had received a subpoena in a yellow envelope. When Ramirez responded that he had not, Madrigal advised that if he had not, he would get one soon. T. 413-416. Madrigal informed Ramirez that Respondent had an attorney and Ramirez could have a meeting with the attorney if he wanted. T. 413. After speaking with Madrigal, Ramirez understood the attorney to be Respondent's attorney. T. 417. On November 6, 2018, Supervisor Joel Murillo approached employee Marcial Torres-Santiago while he was working and asked if he had received a letter to meet with a Board agent at a church in Hastings. T. 451-455. Murillo informed Torres-Santiago that there was somebody who needed to talk to him in the office. T. 451. It was not until Torres-Santiago arrived at the office and met the attorney that he learned who he was meeting with. T. 451. Former supervisor Josue Guerrero supervised approximately 21-23 employees on Respondent's rib line. T. 162-163. Guerrero testified that in October 2018, Fabrication Superintendent Chris Kitch told him that employees had received letters concerning the Union. T. 163, 168-169. Although he initially denied asking employees if they had received any correspondence, once confronted with his Board affidavit dated December 17, 2018, Guerrero confirmed that following receiving instruction from Kitch, Guerrero "went and asked every employee one by one if they received a letter from the union." T. 166. Guerrero clarified on re-direct that Kitch had informed him that

the employees were receiving letters that had “something to do with the Union.” T. 168-169.

Respondent’s unlawful questioning of employees was not limited to asking employees about their receipt of Board subpoenas. Respondent also questioned employees about the substance of their discussions with Board agents once employees returned to work. Operations Manager Paul Hernandez is second in command at Respondent’s facility under General Manager Mike Helzer. T. 70, 207. The following day, November 8, 2018, Paul Hernandez approached Aramis Hernandez-Acosta at his work station and asked what the Board agents had asked Hernandez-Acosta. T. 371. Hernandez-Acosta minimized the encounter by responding, “A bunch of dumb stuff.” T. 372. Paul Hernandez laughed and walked away. T. 372. However, Hernandez returned to Hernandez-Acosta’s work station the next day, November 9, 2018, and again asked Hernandez-Acosta what had had been asked. Hernandez-Acosta responded with a similar line, “A bunch of stupid stuff.” T. 372.

2. Argument

In making his conclusion that Respondent violated Section 8(a)(1), the ALJ credited the testimony of employees Catalan, Hernandez-Acosta, De la Cruz, Torres-Santiago, Torres, and Ledezma. JD 28: fn. 33. The ALJ found the employees’ testimony to be “candid, straightforward, and consistent...based on a strong recollection of the critical events at issue, and they were testifying against their interests by testifying against their employer.” JD 28: fn. 33, citing *Flexsteel Industries*, 316 NLRB 745, 745 (1995), Affd. Mem. 83 F.3d 419 (5th Cir. 1996). Respondent provides no justification for reversing the Board’s long standing practice of giving weight to the administrative law judge’s credibility findings. See *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950), enfd. 188 F.2d 362 (3rd Cir. 1951).

Based on the credible testimony of Respondent's current employees, the ALJ found that supervisors Joel Murillo and Jose Madrigal questioned employees about whether they received a Board subpoena in violation of Section 8(a)(1). JD 29:19-20. He also found that supervisor Josue Guerrero questioned employees as to whether they had received a letter from the Union. JD 29:20-22. As the ALJ wrote in his decision, Board law has established an employer is prohibited from questioning employees about whether they have received a Board subpoena or correspondence from a union. JD 29:15-23, citing *Frank Leta Honda*, 321 NLRB 482, 483, 490-91 (1996), citing *Metalite Corp.*, 308 NLRB 266, 272 (1992); *Collins Mining Co.*, 177 NLRB 221, 225 (1969), enfd. 440 F.2d 1069 (6th Cir. 1971); *Montgomery Ward & Co., Inc.*, 93 NLRB 640, 649 25 (1951), enfd. 192 F.2d 160 (2d Cir. 1951).

The ALJ agreed with the General Counsel that in applying the totality of circumstances test set forth in *Rossmore House*, 269 NLRB 1176 (1984), a supervisor approaching subordinates at work or calling them at home to determine if they had received a letter from the Union or a Board subpoena would "reasonably tend to interfere with, restrain or coerce employees in their Section 7 rights and would interfere with the Board's processes in carrying out the statutory mandate to protect such rights." JD 29:25-29.

The ALJ further agreed that Respondent violated Section 8(a)(1) when its supervisors questioned employees about their receipt of Board subpoenas without providing the appropriate assurances set forth in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enf. denied on other grounds 344 F.2d 617 (8th Cir. 1965). JD 28:4-33, 29:1-46, 30:1-5. The exceptions set forth in *Johnnie's Poultry* are clear and limited. As detailed by the ALJ in his decision, to initiate questioning of employees in the limited circumstances set forth in *Johnnie's Poultry*, an employer must:

...communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees.

JD 28:25-30.

The record supported the ALJ's finding that Respondent's questioning went awry in two ways. First, the questioning of employees about whether they received subpoenas is not one of the limited purposes of *Johnnie's Poultry*. Second, even if there was a valid reason, it is undisputed that Respondent failed to provide any assurances to employees as required.

Lastly, the ALJ properly found that supervisors Paul Hernandez and Jose Madrigal violated Section 8(a)(1) when they questioned employee Hernandez-Acosta about the content of his meeting with Board agents ("the feds"). JD 29:31-37. Hernandez-Acosta's credited testimony established this improper questioning that Board law has established is a violation of the Act. JD 29:32-35, citing *Acme Bus Corp.*, 357 NLRB 902, 904 (2011); *Wire Products Mfg. Corp.*, 326 NLRB 627-628 (1998), *enfd.* 35 sub nom. 210 F.3d 375 (7th Cir. 2000); *U.S. Cosmetics Corp.*, 368 NLRB No. 21, slip op. at 29 (2019); *Contris Packing Co.*, 268 NLRB 193 (1983).

Respondent provides no justification in its brief in support of its exceptions to reverse the ALJ's findings related to Respondent unlawfully interrogating employees in violation of Section 8(a)(1) of the Act. As such, Respondent's Exceptions 3, 4, 5, 6, and 13 should be dismissed.

C. Respondent required employees to meet with and/or use attorneys retained and compensated by Respondent prior to and during their meetings with the Board, thereby interfering with the Board's processes (Exceptions 7, 14)

Respondent filed exceptions to the ALJ's findings that Respondent violated Section 8(a)(1) of the Act by requiring employees to meet and/or use attorneys retained and compensated by Respondent prior to and during their meetings with Board agents, thereby interfering with the Board's processes. R Exceptions 7 and 14, citing JD 31:4-6, 45:42-44. In supports of its exceptions, Respondent repeats the same arguments it made to the ALJ, primarily citing to *Florida Steel Corp. v. N.L.R.B.*, 587 F.2d 735, 751 (5th Cir. 1979) for the proposition that it had the right to offer employees legal assistance as long as there was no "coercion, threat of reprisal, or force." R brief at 21-22, citing *Florida Steel Corp.* at 751. Respondent also points to the Notice to Employees that was posted at Respondent's facility informing employees of their right to utilize the attorneys paid by Respondent. R brief at 23, citing JT 15. The ALJ addressed each of Respondent's arguments in his decision and correctly found they lacked support. JD 30:6-41, 31:1-6.

1. Relevant Facts

After Respondent learned that employees had received investigative subpoenas from the Board, Respondent made the decision to retain outside counsel to represent the employees during their interviews with the Board and Respondent posted a notice to inform employees of this free benefit. T.140-145; JT 15. In a unit of consisting of hundreds of employees, only one employee asked Respondent for a copy of the notice after hearing about it from a coworker. T. 145. The attorneys retained by Respondent were physically present at Respondent's facility on November 6, 2018, the day before the scheduled Board affidavits. T. 146. The attorneys were placed in a conference room and the offices of Plant Manager Mike Helzer and Fabrication Superintendent Chris Kitch. T. 146-147. As of the arrival of the attorneys, Respondent had only heard from two employees concerning their interest in talking to the attorneys. T. 145, 147-148. Upon the

arrival of the attorneys between 8 and 8:30 a.m., Mary Junker attempted to determine which employees might have received Board subpoenas. T. 148, 151. She did so by reviewing a list of employees who had resigned from the Union. T. 148; GC 8. The list was one that had been created by Human Resources Manager Lidia Acosta. T. 148. Junker talked to Operations Manager Paul Hernandez and told him “that possibly some of these people might have gotten the same correspondence that Otis (Simmons) received. And so that we should let them know that there are lawyers here, and if they want to come up and talk to them, to come up and talk to them.” T. 150. Junker had that conversation with Hernandez because “there wasn’t too many people coming in to talk to the attorneys.” T. 151. Junker knew that because of the location of her desk in relationship to the rooms where the attorneys were set up. Employees would have to walk by her to get to those rooms. T. 151-152. Both Hernandez and Fabrication Superintendent Chris Kitch reviewed Junker’s list and would leave her work area, presumably to “see if they can find anybody that wants to talk to the lawyers.” T. 152-153.

Several employees testified to their respective experiences regarding the circumstances that led them to meeting with the Respondent paid-for attorneys. On November 6, 2018, Operations Manager Paul Hernandez approached Aramis Hernandez-Acosta at his work station and told Hernandez-Acosta that he needed a company attorney to counsel him. T. 365. Hernandez-Acosta had not yet received his subpoena but Hernandez told him he had been subpoenaed. T. 365. Hernandez told Hernandez-Acosta that he “had to go to the office to talk to the company attorney.” Hernandez-Acosta told Hernandez that he did not have to go and Hernandez responded by telling Hernandez-Acosta it was mandatory. T. 366. Hernandez escorted Hernandez-Acosta to meet with the attorney in one of Respondent’s offices. T. 366-367. Hernandez-Acosta did not feel like he had a choice to go to the office and meet with the

attorney. T. 371. Once in the meeting, Hernandez-Acosta also did not feel like he could leave the meeting with the attorney because he was afraid of being fired. T. 370-371. Supervisor Jose Madrigal called employee Juvencio Ramirez de la Cruz while he was at home, asked if he had received a subpoena and told him about an attorney he could meet with. T. 413-416. Ramirez understood the attorney to be Respondent's attorney. T. 417-419. Employee Steve Catalan testified to Paul Hernandez contacting him at his work station and telling him that he was needed in the office. T. 440. Hernandez did not tell Catalan why he was needed in the office or that it was voluntary for him to go. T. 440-441. The only thing Hernandez told Catalan was, "You need to go to the office. They want to talk to you." T. 441. Supervisor Joel Murillo approached employee Marcial Torres-Santiago and told him there was "somebody who needed to talk with (him) in the office." T. 451. Torres-Santiago did not learn who he was meeting with until he arrived at the office and the attorney explained who she was. T. 451. When Murillo approached Torres-Santiago at his work station, Murillo did not explain who Torres-Santiago was meeting with, what it was about or that it was a voluntary meeting. T. 452. Current employee Alejandro Torres testified that his supervisor, Joel Murillo, approached him and told him to go to the office to see the attorney. T. 508. Although Torres testified that he recalled Murillo telling him it was voluntary, twice Torres testified unsolicited that Murillo told him that he had to talk with the attorney and nothing else was discussed between the two about it. T. 508-509. Former employee Luz Esther Ledezma Duran testified that her supervisor at the time, Joel Murillo, told her to go to the office to talk to the attorney. T. 517. Murillo approached Ledezma while she was working and told her she should go see the attorney. T. 518. Ledezma "didn't have any idea" why she was meeting with the attorney. T. 520. On direct, when Ledezma was asked if she thought she could continue working and not talk to the attorney, she testified that she did not

consider that “because of fear” and she had fear because she “didn’t want to get into trouble.” T. 518.

2. Argument

As set forth above, the record contains substantial testimony from employees concerning the events that led to them meeting with attorneys retained by Respondent. The cases cited by the ALJ in his decision are directly on point regarding whether it is a violation for an employer to offer to assist an employee in retaining legal counsel, or to offer to provide legal counsel at no cost to the employee, in the context of a Board investigation. See *KFMB Stations*, 349 NLRB 373 (2007); *S.E. Nichols, Inc.*, 284 NLRB 556, 580-582 (1987), *enfd.* in relevant part 862 F.2d 952 (2d Cir. 1988), *cert. denied* 490 U.S. 1108 (1989); *Florida Steel Corp.*, 233 NLRB 491, 494 (1977), *enf. denied* 587 F.2d 735 (5th Cir. 1979). As the ALJ wrote, Respondent’s reliance upon the Fifth Circuit denying enforcement of the Board’s order in *Florida Steel* is distinguishable from the facts in this case because here, the record established that Respondent required employees meet with the retained attorneys prior to and/or while meeting with the Board. JD 31:fn. 37. The ALJ reiterated that employees Hernandez-Acosta, Torres-Santiago, Torres, and Ledezma all credibly confirmed this fact. JD 31:1-3.

Lastly, contrary to Respondent’s argument that it provided independent legal counsel as opposed to its own attorney, the record properly supports the ALJ’s rejection of this argument in that employees had every reason to believe the attorneys in question were Respondent’s attorneys. JD 31:fn. 38. One employee testified to the retained attorneys as “company attorneys” and another testified that he was told by one of the attorneys that she “worked for the company.” The lack of separation or independence was further emphasized by Respondent’s placement of the attorneys in the officers of upper management, specifically the plant manager and production

superintendent. T. 146-147, 366, 419.

For these reasons, the record and Board law supports the ALJ's finding and conclusion that Respondent violated Section 8(a)(1) of the Act by requiring employees to meet and/or use attorneys retained and compensated by Respondent prior to and during their meetings with Board agents, thereby interfering with the Board's processes. Respondent's Exceptions 7 and 14 should be dismissed.

D. About November 6, 2018, Respondent, by Paul Hernandez, told employees they were required to use Respondent's paid attorneys and told employees Respondent did not want employees speaking to the Board about matters they should not be talking about (Exceptions 8, 15).

Respondent filed exceptions to the ALJ's finding and conclusion that Respondent telling employees they cannot be trusted to speak to a Board agent without a company-provided attorney would reasonably inhibit employees from resorting to the Board for the protection of their Section 7 rights, and that Paul Hernandez's statements to Aramis Hernandez-Acosta violated Section 8(a)(1). R Exceptions 8 and 15, citing JD:31:25-27, 45:46-50. As set forth below, the ALJ's finding and conclusion is supported by the record and Board law.

1. Relevant Facts

As detailed above, on November 6, 2018, Operations Manager Paul Hernandez approached Aramis Hernandez-Acosta at his work station and told him that he "needed a company attorney to counsel" him. T. 365. Hernandez told Hernandez-Acosta that he had been subpoenaed. Hernandez-Acosta responded that he was not a criminal and had not committed any crimes. T. 366. Hernandez then told Hernandez-Acosta that he was required to go to the office and talk to "the company attorney." T. 366. When Hernandez-Acosta declined, Hernandez responded, "Yes, it is mandatory." T. 366. Hernandez told Hernandez-Acosta that he had to talk to the attorney because he did not want Hernandez-Acosta to get confused when talking to the

Board agents and he did not want him using a word that he did not know how to properly respond to. T. 366. Hernandez-Acosta testified that Paul Hernandez walked him to the meeting with the attorney. T. 367. Although Hernandez-Acosta did not want to meet with the attorney, he did so because Hernandez insisted that it was mandatory that he did so. T. 367. Hernandez-Acosta also did not feel he could leave the meeting with the attorney without risking being fired. T. 370-371.

2. Argument

Respondent, by Paul Hernandez, made coercive statements to Aramis Hernandez-Acosta concerning his obligations to meet with attorneys retained by Respondent and Respondent's underlying desire to control employees' testimony to the Board. In *Certain-Teed Products Corporation*, 147 NLRB 1517 (1964), the Board reversed the ALJ and found that Respondent violated Section 8(a)(1) of the Act by making statements that were designed to discourage employees from supplying information to a Board agent and hinder the Board's investigation of charges against the employer. *Id.* at 1520. The Board held:

In reaching this conclusion, we rely on the facts that Respondent advised virtually all of its approximately 100 employees that they need not cooperate in the Board investigation; that it told several of these employees that their cooperation would result in their being subpoenaed and forced to testify at a hearing, thus indicating that their cooperation would involve them more deeply in the litigation; that Respondent's opinion regarding the investigation was not solicited by employees, and the language it utilized was in many instances intemperate; and that Respondent made other coercive statements to employees which we have previously found violated Section 8(a)(1), including statements expressing disbelief and annoyance at employees who testified at the first hearing. We find, therefore, that the above-described conduct by Respondent interfered with the rights of employees to obtain redress from the Board and thereby violated Section 8(a)(1) of the Act.

Id. at 1520-1521.

“Section 8(a)(1) of the Act makes it unlawful for an employer, via statements or

conduct, to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.” *Chipotle Services, LLC*, 363 NLRB No. 37, slip op. at 14 (2015), citing *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000). “The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain, or coerce union or protected activities.” *Id.*; see also *Park 'N Fly, Inc.*, 349 NLRB 132, 140 (2007). The Supreme Court has stated that...”Congress has made it clear that it wishes all persons with information about such [unfair labor] practices to be completely free from coercion against reporting them to the Board.” *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967). This freedom is necessary, “to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses.” *John Hancock Mutual Life Insurance Co. v. N.L.R.B.*, 191 F.2d 483, 485 (D.C. Cir. 1951). Similarly, the Board has held that the purpose of Section 8(a)(4) is to ensure effective administration of the Act by providing immunity to individuals who initiate unfair labor practice charges or assist the Board in proceedings under the Act. *General Services, Inc.*, 229 NLRB 940, 941 (1977).

Again, the ALJ credited Acosta-Hernandez’s testimony concerning his conversations with Paul Hernandez relating to meeting with Respondent’s attorneys. JD 28: fn. 33. In its brief in support of its exceptions, Respondent provides no explanation to justify reversing the ALJ’s findings on this subject as it simply repeats Hernandez’s general denials from the stand. R brief at 15. The record and Board law supports the ALJ’s finding that through Paul Hernandez’s coercive directives and statements to Aramis Hernandez-Acosta, Respondent sought to coerce an employee in advance of his meetings with Board agents for the purpose of

providing sworn testimony by advising the employee that Respondent sought to curb the freedom the employee otherwise would have to speak freely to the Board. JD 31:25-27.

For these reasons, Respondent's Exceptions 8 and 15 should be dismissed.

E. Respondent's Bad-Faith Bargaining, Premature Declaration of Impasse, and Unlawful Implementation of its Last, Best and Final Offer (Exceptions 9, 10, 11, 17)

Respondent filed exceptions to the ALJ's findings and conclusions that Respondent failed or refused to bargain in good faith with the Union over a successor agreement and unlawfully implemented its last, best and final offer (LBFO) which unilaterally changed mandatory subjects of bargaining, including articles addressing dues checkoff, grievance procedures, safety, holidays, union access, and the term of the agreement, without first bargaining with the Union to an overall good-faith impasse. R Exceptions 9, 10, and 17, citing JD 39:33-34, 42:5-9, 47:4-8. Respondent does not dispute the facts related to these exceptions. The argument is a legal one and contrary to Respondent's exceptions, the ALJ's findings and conclusions are supported by Board law.

1. Relevant Facts

The facts concerning the events that led up to and during the parties' negotiation for a successor collective-bargaining agreement are not disputed. In fact, Respondent did not call any witnesses in its case in chief for the purpose of addressing the allegations set forth in the General Counsel's Second Consolidated Complaint that concerned Respondent's failure to bargain in good faith. In its brief in support of its exceptions, Respondent used the equivalent of one page (four paragraphs) to reiterate a fraction of the relevant facts that are more fully summarized by the ALJ in his decision. R brief at 17-18. As Respondent did not call its own witnesses, the facts set forth in the ALJ's decision are based on the testimony of the parties' lead negotiators

and documentary evidence. JD 31-37. As Respondent does not dispute the facts, the question is whether the record established bad faith bargaining and premature declaration of impasse and unlawful implementation of an LBFO which unilaterally changed mandatory subjects of bargaining in violation of Section 8(a)(1) and (5) of the Act. As the ALJ concluded, the record does and Respondent's exceptions lack merit.

The relevant timeline is important to reiterate. On November 6, 2017, Union President Mike Marty sent a letter to Respondent's CEO Fischel Ziegelheim seeking to schedule negotiations for a successor collective-bargaining agreement. Within his letter, Marty also requested information concerning all bargaining unit employees. T. 657; JT 2. For each bargaining unit employee, Marty requested information including their department, job classification, hourly rate, full-time or part-time status, hire/seniority date, termination date, regular hours worked, overtime hours worked, premium hours worked, vacation hours paid, personal day hours paid, health and welfare contributions made, and pension contributions made. JT 2. Respondent's Administrative Assistant Mary Junker confirmed that she received the letter by certified mail on November 9, 2017 and she forwarded it to Ziegelheim and Respondent's attorney Jerry Pigsley. T. 157-158; GC 9. Despite Respondent receiving the letter within three days, the Union received no response from Respondent. T. 657. On December 27, 2017, Mike Marty sent an email to Fischel Ziegelheim renewing the Union's request to open negotiations and its request for information. T. 658; JT 3, p. 1. When the Union received no response from Respondent, on January 5, 2019, Marty renewed his request a second time by email and regular mail to Zieglheim, Pigsley and Michael Koenig. T. 658-659; JT 3, p. 2-4. Again, the Union received no response. T. 659. On January 15, 2018, Union attorney Eric Zarate emailed Pigsley advising that the Union had not received any response to the Union's prior requests for

bargaining and information. JT 3, p. 5. By email dated January 17, 2018, Respondent's attorney Jerry Pigsley informed Eric Zarate that he had heard back from his client and requested two or three dates to commence negotiations. JT 3, p. 6. On January 24, 2018, Zarate responded to Pigsley that the Union will first need to receive the information it had been requesting since November 6, 2017 in order to prepare a proposal. JT 3, p. 6. Zarate advised that assuming the information is received in the near future, the Union planned to begin negotiations around February 20, 2018. JT 3, p. 6. By letter dated February 12, 2018, Zarate renewed the Union's requests for bargaining information, Respondent's willingness to engage in negotiations at the Union's hall, and Respondent's willingness to enter into a contract extension. JT 3, p. 8-11. On February 19, 2018, Pigsley replied to Zarate by email (1) advising he had been authorized by his client to commence contract negotiations, (2) proposing bargaining dates on March 14, 16, 19, 21, 22, 23, and 26-30, and (3) that his client would seek to provide the Union's requested information within the next 30 days. JT 3, p. 8. Later that day, Zarate informed Pigsley that each date Respondent proposed was acceptable to the Union "provided that the Company provides the requested information in the near future as indicated." JT 3, p. 8. On February 21, 2018, Pigsley informed Zarate that Respondent was not available for negotiations on all of the dates he had previously proposed and suggested the Union select one date that worked best. JT 3, p. 15. On February 22, 2018, Zarate informed Pigsley that the Union preferred scheduling more than one date as past negotiations between the parties have taken more than a single session. JT 3, p. 14-15. Zarate proposed meeting briefly on March 22, 2018 to exchange proposals while meeting again March 26-28 for negotiations. JT 3, p. 15. Six days passed without a response from Pigsley. On February 28, 2018, Zarate sought an update. JT 3, p. 14. Pigsley replied on the same date that he did not have a response from his client. JT 3, p. 14.

Another six days passed without a response from Pigsley. On March 6, 2018, Zarate sought another update from Pigsley. JT 3, p. 13-14. Zarate proposed, as a bare minimum, that the parties meet on March 22, 2018 to exchange contract proposals while Pigsley waited for his client's answer on other dates. JT 3, p. 13-14. Zarate also asked if Respondent could provide any portion of the Union's requested information prior to the parties first scheduled negotiation session, noting that Respondent had four months to provide the information in question. JT 3, p. 13-14. On the same date, Pigsley replied that the parties should plan on the first negotiation meeting to take place on March 22, 2018. JT 3, p. 13. Pigsley had no update on the Union's information request and he would seek from his client that some of the information be provided ahead of the parties' first scheduled bargaining session on March 22, 2018. JT 3, p. 13.

The parties met on March 22, 2018 at the Union hall in Grand Island, Nebraska.⁶ Jerry Pigsley was present as the sole representative for Respondent. T. 659-660; JT 25 p. 1. The Union provided Respondent with its first contract proposal. JT 4; JT 25, p. 1. Respondent did not have a proposal to give the Union. Respondent did not provide the Union with any of its requested information prior to the meeting or during the meeting. T. 662-663. Mike Marty served as the Union primary spokesperson and asked Pigsley about the Union's request. T. 662-663. Pigsley's response was, "We're working on it. I'll get back to you." T. 663. At the conclusion of the meeting, Marty asked Pigsley about dates for future negotiations. T. 661-662. Pigsley responded with only one date in April 2018. Marty reminded Pigsley that he did not see how that date would work as the parties already had an arbitration scheduled for the date in question. T. 662. Pigsley did not offer any additional dates and the parties departed the meeting without a second negotiation scheduled. T. 662.

⁶ All contract negotiations between the parties took place at the Union hall in Grand Island, Nebraska.

By email dated March 28, 2018, Zarate memorialized a phone call he had with Pigsley earlier in the day. JT 3, p. 17-18. Zarate wrote that the Union had requested another bargaining session with Respondent and had proposed meeting any time prior to April 22, 2018. Zarate further wrote that Pigsley had promised to confer with his client and get back to Zarate by the end of the day if possible. JT 3, p. 17-18. Lastly, Zarate reminded Pigsley that he promised to provide the Union's requested information by the end of the day, if possible. JT 3, p. 17-18. Zarate advised Pigsley that the Union was prepared to file an unfair labor practice charge against Respondent if the company failed to provide the requested information or schedule additional dates by the end of the day. JT 3, p. 17-18. Later that day, Pigsley replied that Respondent was prepared to meet again on April 25, 2018 for negotiations, or alternatively May 9, 2018, but it was still gathering the information requested by the Union. JT 3, p. 17. Zarate responded to Pigsley admonishing Respondent for its lack of availability without any explanation. JT 3, p. 17. Zarate noted Respondent had only met with the Union once to exchange proposals and even then, Respondent failed to provide the Union with any proposal. Respondent merely received the Union's proposal and that was the parties' one brief meeting in almost five months. JT 3, p. 17. Zarate reminded Pigsley that the Union had proposed to meet with Respondent for negotiations almost every day between March 22 and April 22, 2018 and the company was now only willing to meet on one day and only as early as April 25, 2018, a date that Pigsley was aware that the parties already had reserved for an arbitration. JT 3, p. 17. Zarate agreed to forward the company's request to meet on May 9, 2018 to the Union, but noted the Union was unwilling to tolerate additional delays. JT 3, p. 17.

On March 29, 2018, the Union filed Case 14-CA-217400 alleging Respondent (1) failed and refused to bargain in good faith with the Union and (2) failed to furnish information

requested by the Union. T. 663; GC 1-A.

On May 7, 2018, Zarate confirmed by email that the Union stood ready to negotiate on May 9, 2018. JT 3, p. 20. On May 8, 2018, Pigsley informed Zarate that he was notified that morning that his client needed to postpone the negotiation scheduled for May 9, because Respondent's CEO Fischel Ziegelheim was expected back for negotiations but was now not able to return by then. JT 3, p. 19-20. Zarate replied, "Though not entirely surprised at this point, the Union is disappointed by Company's failure to meet for contract negotiations that were scheduled well in advanced (sic)." Zarate proposed rescheduling to May 15, 2018 and requested that Respondent schedule additional meetings beyond that date. JT 3, p. 19. Two days passed without hearing back from Pigsley when Zarate emailed to confirm the new date. JT 3, p. 19. Pigsley did not respond until May 14, 2018 confirming that his client was agreeable to meet again for negotiations *the following day*. JT 3, p. 19.

The parties met for a second time on May 15, 2018. JT 25, p. 1. Jerry Pigsley participated for Respondent and Terry Mostek and Union Secretary/Treasurer Brian Schwisow were present for the Union. T. 62; JT 25, p. 1. Although Respondent provided the Union with its initial contract proposal, it did not provide the Union with any of its requested information. T. 62; JT 5; JT 25, p. 1. On May 24, 2018, Pigsley emailed Zarate advising that Union Representative Terry Mostek had told Pigsley that he would provide dates when the Union was available to meet again and as of his email, Pigsley had not received any dates. JT 3, p. 22. Pigsley also noted a conversation with Zarate concerning the potential of the Union withdrawing Case 14-CA-217400 if the parties could arrive at a bargaining schedule acceptable to the Union. Pigsley proposed meeting for negotiations no less than twelve hours per month (6-hour sessions on two separate or consecutive days). At this time, the Region had concluded

its investigation of Case 14-CA-217400. This is evident from Zarate's reply email to Pigsley on May 25, 2018. JT 3, p. 21. In his email, Zarate rejected Respondent's proposed settlement terms as being inadequate "especially in light of the settlement terms being proposed by the NLRB which requires 24 hours of bargaining per month, production of the information requested by the Union, and posting of NLRB notices." JT 3, p. 21. Zarate advised that he would provide blackout dates shortly and requested any preferred dates Respondent had in mind. JT 3, p. 21. Pigsley asked if 24 hours was the minimum the Union would agree to. Zarate answered that he would forward any settlement offer to his client, but it would be considered in the context of the settlement terms proposed by the NLRB. JT 3, p. 21.

On June 20, 2018, Region 14 Regional Director Leonard Perez approved the parties' executed informal Board settlement agreement in Case 14-CA-217400. T. 664; JT 11. The terms of that settlement required Respondent to "provide the Union with the information it requested in writing on November 6, 2017, December 27, 2017, January 5, 2018, January 24, 2018, February 12, 2018, February 21, 2018, March 6, 2018, and March 28, 2018." JT 11, p. 5. It also required a bargaining schedule of "no less than 24 hours per month for at least six hours per session, or in the alternative, on any another (sic) schedule to which the Union agrees." JT 11, p. 1. The terms of the settlement also required Respondent bargain in good faith with the Union "in good faith with respect to wages, hours, and other terms and conditions of employment until a full agreement or a bona fide impasse is reached..." JT 11, p. 5.

By letter dated June 26, 2018, Zarate renewed the Union's request for bargaining. JT 3, p. 27-28. Zarate reiterated what he had previously told Pigsley – that the Union was available to meet throughout the months of June, July and August for negotiations with the exception of certain dates. JT 3, p. 27. As June was nearly over, Zarate confirmed the Union was available

to meet throughout July and August with the exception of nine days. JT 3, p. 27. In his same letter, Zarate raised an arbitration decision that sustained the Union's grievance concerning Union access to Respondent's facility. JT 3, p. 28; JT 23. Respondent confirmed at the hearing that it had banned the Union from access its facility since the end of June 2017. T. 331-332, 335, 590, 734, 749-750. Zarate noted that the arbitrator directed Respondent to permit the Union to send representatives of its choosing to the plant and also required make up sessions to be allowed for all employees who did not attend orientation meetings because of Respondent's decision to ban Union representatives. JT 3, p. 28. Pigsley replied a week and a half later on July 5, 2018 with four dates Respondent was available for negotiations (July 13, 20, 30, and 31) from 10 a.m. to 4 p.m. JT 3, p. 25. Zarate replied that the Union was available July 13, 30 and 31, and alternatively proposed July 17 or 27 in lieu of July 20. Zarate also reminded Pigsley that the Union had not yet received the information Respondent was required to provide. "In order to make contract negotiations more productive, the Union reminds the Company of its obligation to produce that information and renews its request that the Company fulfill that obligation as soon as possible." JT 3, p. 24-25. Zarate also inquired, again, about Union access to Respondent's facility pursuant to the arbitrator's decision. JT 3, p. 25. On July 10, 2018, Pigsley confirmed that Respondent agreed to meet on July 27, 2018 from 10 a.m. to 4 p.m. JT 3, p. 24. Pigsley also informed Zarate that any attempt to implement the arbitrator's decision regarding Union access would be contested by Respondent. JT 3, p. 24.

On July 13, 2018, the parties met again. JT 25, p. 1. Mike Marty, Terry Mostek and Brian Schwisow participated for the Union. Administrative Clerk Mary Junker was the sole representative for Respondent. JT 25, p.1. The Union did not know that Junker was going to be present as Respondent's negotiator until she arrived that day. T. 667. Union President, and

lead negotiator, Mike Marty knew Junker because she was previously the human resources manager at the JBS plant in Grand Island, Nebraska, which is another Union facility. T. 667. Marty was not aware of Junker's role with Respondent. T. 667. Before discussions began on July 13, 2018, Junker told the Union, "I don't know why I am here. I don't know why they sent me. I can't make any decisions." T. 668. Junker confirmed this at the hearing. T. 66-67. Junker did not learn she was going to serve as Respondent's negotiator at the table until a couple of days prior to July 13, 2018. T. 63. Beginning with the bargaining session that was held on July 13, 2018, Junker served as Respondent's primary spokesperson at the table. T. 62, 669. With the exception of one session on July 27, 2018, Junker was the sole representative for Respondent at the table. JT 25. Junker was not authorized to agree to any proposals. T. 66. She was required to bring all proposals back to CEO Fischel Ziegelheim and his business partner Michael Koenig. T. 66. Ziegelheim and Koenig were the only two individuals authorized to accept or reject the Union's proposals. T. 66-67. At the July 13 session, Mike Marty provided the Union's responses to Respondent's May 15 proposal. T. 68. Junker, however, did not have answers for the Union in response to its proposal from March 22, 2018 because she had only recently received the proposal from Jerry Pigsley. T. 68-69.

On the same date (July 13, 2018), Jerry Pigsley emailed Mike Marty information he had received from his client responsive to the Union's original information request on November 6, 2017. JT 19. Pigsley's email included partial information for only fifteen employees. JT 19. On July 16, 2018, Eric Zarate emailed Pigsley advising of the substantial deficiencies that existed with the information Respondent provided and that it was indicative of Respondent's lack of good faith to comply with the Board settlement identified as Joint Exhibit 11. JT 20. Zarate noted that for a unit that the Union understood constituted approximately 250 employees,

Respondent provided partial information for only fifteen of those individuals. JT 20. As of the NLRB administrative hearing that occurred March 18-22, 2019, Respondent had provided no additional documents responsive to the Union's information request beyond the limited information it provided to the Union on July 13, 2018. T. 666.

On July 16, 2018, Zarate provided Pigsley two weeks' notice that the Union was no longer available to meet on July 30 and 31, 2018 "due to an unforeseen last minute conflict." JT 3, p. 24. Zarate confirmed the Union's intent to negotiate on July 27, 2018, and sought dates for August. Zarate advised that the Union was available all of August except for August 6-10 and August 16. JT 3, p. 24. Pigsley did not provide an immediate response.

On July 27, 2018, the parties met for their next bargaining session. T. 69; JT 25, p. 1. Mike Marty, Terry Mostek, and International Representative Oscar Saenz participated for the Union. Mary Junker and Operations Manager Paul Hernandez were present for Respondent. JT 25. Junker confirmed at the hearing that Hernandez was present because the Union had complained that Respondent was not acting in good faith by using Junker as Respondent's negotiator at the table. T. 71-72. However, all Hernandez did at the session was observe. T. 669. At the July 27 session, Junker informed the Union that if she needed to, she could reach out to Ziegelheim and Koenig ("the owners"). T. 670. Junker had answers from the owners to the Union's March 22, 2018 proposal and the owners had denied the entire proposal. T. 74. After Junker notified the Union that the owners had rejected the Union's proposal, the parties caucused and the Union put together a modified proposal. T. 75, 672; JT 6, p. 1-2; JT 25. The Union proposed modifications to its original March 22 proposal in addition to dropping certain proposals in exchange for Respondent doing the same. JT 6, p. 1-2. Because Junker had no authority to agree to the proposals, she had to take time to contact the owners. T. 76. Junker

was unsuccessful because the owner she reached was traveling and he “didn’t have anything in front of him or anything like that. So he just asked that I bring both proposals back and go over with him what was presented to me by the Union.” T. 78-79. The meeting ended without answers for that reason. T. 79. The only resolution reached during this meeting was the Union’s acceptance of Respondent’s proposal to change the name of the company from Nebraska Prime Group to Noah’s Ark Processors, LLC t/a WR Reserve. T. 74; JT 5; JT 25, p.1.

Zarate’s next communication with Pigsley was his email on July 16 seeking dates in August 2018. When Zarate had not heard back from Pigsley, on August 10, 2018, Zarate emailed Pigsley again advising that Respondent had not provided additional contract negotiation dates or any additional information responsive to the Union’s November 6, 2017 request, particularly where Zarate had detailed all of the ways that Respondent’s production was deficient on July 16, 2018. JT 3, p. 23-24. Zarate questioned whether Respondent intended to bargain in good faith and furnish the information as required by the settlement agreement in Case 14-CA-217400. JT 3, p. 23. Pigsley responded later that day with four dates in August to resume negotiations, with the earliest being August 17, 2018. He made no reference to providing additional documents to the Union. JT 3, p. 23.

The parties met again on August 17, 2018. T. 79; JT 25, p. 1. Junker informed the Union that the owners had accepted certain minor proposals made by the Union in its original March 22, 2018 proposal, specifically Union proposals 2, 3, 18, and 19. T. 79-80, 681-682; JT 4, p. 3, p. 7. In the 2013-2018 collective-bargaining agreement, under Article 3 – Management Rights, it read “Employees must pass probation to enjoy benefits.” JT 1, p. 3. Through Union proposals 2 and 3, the Union sought to (1) move that language from Article 3 – Management Rights to Article 17 – Seniority, and (2) add the word “health” in front of “benefits” to clarify

the benefits the provision was referring to. T. 80, 682-683. Article 17 – Seniority defines employees’ probationary periods as 60-days. JT 1, p. 9. The Union’s proposals numbered 18 and 19 both involved an update to Article 15 – Non-Discrimination. JT 1, p. 15; JT 4, p. 7. Union proposal 18 sought to delete the current language and Union proposal 19 sought to replace the old language with an updated version with additional protected classes. T. 80, 681-682; JT 4, p. 7. Those limited tentative agreements, along with the agreement to change Respondent’s name, were the only agreements reached between the parties during the entire negotiation session process. T. 80-81; JT 6, p. 1-10; JT 25.

Although Junker communicated the owners’ acceptance of the minor tentative agreements concerning the Union’s proposals clarifying benefits meant health benefits, moving that language to the appropriate article, and updating protected classes under anti-discrimination, Junker did not have any response from the owners to the Union’s most recent proposal made on July 27, 2018. T. 81, 673-674. The parties met again on August 22, 2018. T. 673-674; JT 25, p. 1. Again, Junker did not have a response from the owners to the Union’s July 27, 2018 proposal because the owners were unavailable. T. 673-674. At no time during those sessions did Junker attempt to contact the owners; she simply informed the Union that they had been unavailable to provide answers to her. T. 674.

The parties had agreed to meet again for negotiations on August 28, 2018. On August 27, 2018, Pigsley notified Zarate that Respondent’s “negotiating team cannot meet tomorrow.” No reason was provided. JT 3, p. 29. Ten minutes later, Zarate replied asking for Respondent’s availability in September, asking if Respondent would be willing to schedule five dates instead of four due to Respondent’s cancellation of the August 28 session. JT 3, p. 29.

The parties met again for negotiations on August 30, 2018. JT 25, p. 2. At this session,

Junker informed the Union that the owners had rejected the Union's entire July 27, 2018 modified proposal.⁷ T. 81, 675. Junker did not provide any details or explanations. T. 675. Junker did not provide any counter proposals on behalf of the owners. T. 81-82, 675. At that point, the negotiation session essentially stopped and the Union was then required to come up with a different proposal. T. 675. Mike Marty testified that typically the parties' bargaining sessions started at 10 a.m. and although the sign out/stop sheets executed by the parties may show a later time, most of the time spent together involved talking about non-work related topics. T. 675-676; JT 9.

The parties met again for negotiations on September 12, 2018. JT 25, p. 2. Consistent with each and every time the Union made a written proposal to Respondent, the Union showed up at the bargaining session with a proposal already prepared to read and distribute.⁸ T. 82, 676-677; JT. 6, p. 3; JT 25, p. 2. Contrary to Respondent, the Union prepared for its bargaining sessions with Respondent. Mike Marty testified to the process he would follow in advance of each meeting. Marty's primary office is located in Fremont, Nebraska approximately 120 miles one direction from the Union hall in Grand Island, Nebraska. T. 660. For each scheduled bargaining session, Marty would travel to Grand Island the night before, review his notes and prepare for the following day's meeting. T. 660. The parties' meeting on September 12 was no different. When Marty provided the proposal to Junker and read it to her, Junker's sole response was, "I'll get back to you." T. 677. Contrary to Junker's statement to the Union on July 27 that she could contact the owners if necessary, other than her phone call to the owners during the July 27 bargaining session, Junker never attempted to contact the owners while the

⁷ Marty testified that on most of the Unions' proposals identified in Joint Exhibit 6, he wrote the date the Union made the proposal and the date Respondent rejected each proposal. T. 672.

⁸ The only exception was the modified proposal the Union made while the parties caucused on July 27, 2018.

parties were at the table. T. 677. Junker never asked any questions about the Union's proposal. T. 676-677. Junker would receive the Union's proposal and simply state, "I'll get back to you." Junker provided no other details. T. 678. The parties would then engage in casual conversation as there was nothing more the Union could do until Junker took the time to take the Union's proposal to the owners for their acceptance or rejection. T. 677.

The parties had agreed to meet again on September 19, 2018. On September 14, 2018, Jerry Pigsley emailed Eric Zarate to inform him that Respondent needed to cancel that bargaining session because the owners were not available on account of their observation of a Jewish holiday. JT 3, p. 30. In his email, Pigsley wrote that he understood the Union cancelled the September 14 and September 28 bargaining sessions. JT 3, p. 30. On September 17, 2018, Zarate responded to Pigsley. Zarate wrote:

I have informed the Union that the Company is unable to meet for negotiations on the 19th. The Union notes the fact that the Company finds it necessary to cancel negotiations because of Mr. Koenig and Mr. Ziegelheim's lack of availability even though neither have attended any contract negotiations, frankly demonstrates that Ms. Chmelka,⁹ the person who the Company has been sending to negotiation sessions as its representative, lacks any real authority to negotiate with the Union.

JT 3, p. 30.

Zarate also disputed that the Union cancelled the September 14 or 28 meetings. Zarate wrote that Mary Chmelka (Junker) informed the Union that the owners were in Israel and that she "could not respond to contract negotiation matters on which the Union is currently awaiting a response from the Company without them, and that she needed to wait for them to return." Zarate advised that the Union views Respondent as the party who cancelled the September 14 session. Zarate noted that no bargaining session was ever scheduled for September 28. JT 3, p.

⁹ Mary Junker's maiden name is Chmelka. T. 66.

30. Zarate requested Respondent's availability for the remainder of September as well as October 2018. JT 3, p. 30. Pigsley responded on October 5, 2018 with proposed bargaining dates of October 11, 18, 25, and 31, 2018. JT 3, p. 32. Zarate accepted those dates and Respondent's proposed start time of 10 a.m. on the same date. JT 3, p. 32.

The parties met again for contract negotiations on October 11, 2018. JT 25, p. 1. At this meeting, Junker informed the Union that the owners rejected the Union's September 12, 2018 proposal. T. 85; JT 6, p. 3; JT 25, p. 2. No reasons were given. No explanation was provided. No counter proposal was made. T. 85, 674-678. Negotiations came to a halt, the parties engaged in non-work discussions and signed off at the end of each session with the Union tasked with putting together a new proposal for Respondent to ultimately reject. Both Marty and Junker testified that this was the process that was followed for each and every proposal made by the Union. T. 86, 674-678. The progression of the Union's proposals and Respondent's rejections is set forth below:

Bargaining Date	Proposal Activity	Exhibit
July 27, 2018	New Union Proposal	JT 6, p. 1-2
August 17, 2018	No Answer (owners unavailable)	
August 22, 2018	No Answer (owners unavailable)	
August 30, 2018	Respondent rejects 7/27/18 proposal	
September 12, 2018	New Union Proposal	JT 6, p. 3
October 11, 2018	Respondent rejects 9/12/18 proposal	
October 18, 2018	New Union Proposal	JT 6, p. 4
October 25, 2018	Respondent rejects 10/18/18 proposal	
October 31, 2018	New Union Proposal	JT 6, p. 7
November 7, 2018	Respondent rejects 10/31/18 proposal	

November 13, 2018	New Union proposal	JT 6, p. 8
November 30, 2018	Respondent rejects 11/13/18 proposal	
December 7, 2018	New Union proposal	JT 6, p. 9
December 12, 2018	Respondent rejects 12/7/18 proposal	
December 19, 2018	New Union proposal	JT 6, p. 10

This process continued through the parties' negotiation session on December 19, 2018. December 19, 2018 was the last bargaining session where the Union made a bargaining proposal. T. 678. The parties next met on January 2, 2019. T. 88, 679; JT 25, p. 3. At this meeting, Mary Junker presented Mike Marty with Respondent's last, best and final offer (LBFO). T. 88, 679; JT 7; JT 25, p. 3. No discussion occurred at this meeting other than Junker informing Marty that the proposal was Respondent's LBFO. T. 679-680. Junker did not give Marty a deadline to respond. T. 685. After Marty had a chance to review the LBFO, there were aspects of the proposal that jumped out at him. Marty noticed that the tentative agreements that had been reached on August 17, 2018, were not indicated in the proposal. T. 680. He also noticed that the LBFO did not include any proposal for employees' wages under Article 12. T. 680; JT 7. Respondent's original proposal on May 15, 2018 included a wage proposal that included 15 cent increases for employees every six months. JT. 5, p. 1. Respondent's LBFO was silent with respect to wages. JT 7, p. 1. The only time wages came up during contract negotiations was during a bargaining session sometime between May 15, 2018 and January 2, 2019, when Marty questioned Junker about whether Respondent was proposing a wage decrease in its May 15, 2018 proposal. T. 683-684. Junker's response was, "Oh, I don't know. I'll get back to you." T. 684. Junker confirmed in her testimony that she did not know what Respondent was proposing for wages in its May 15, 2018 proposal. T. 94; JT 5. Lastly,

Respondent's LBFO included a one-year term of agreement. T. 685; JT 7. The parties never discussed duration at the table and Respondent's LBFO was the first time duration was included in any proposal made by either party. T. 96, 685; JT 4; JT 5, p. 2; JT 6; JT 7, p. 2.

Marty contacted Junker and requested another meeting because he had questions concerning the LBFO. T. 685-686. Marty, Terry Mostek, and Junker met on Friday, January 25, 2019. T. 92-93, 685; JT 25, p. 3. At this meeting, Junker confirmed that the tentative agreements reached by the parties on August 17, 2018 were part of the LBFO. T. 93, 686. When Marty asked Junker about the absence of a wage proposal, Junker responded, "Well, we already did wage increases." T. 686. Junker testified to telling Marty that Respondent removed its wage proposal because the proposal "didn't relate to the wages we were paying at the time, presently when I was speaking to him." T. 95. Junker testified that the wages Respondent was paying as of her January 25, 2019 meeting with Marty and Mostek were the wages in effect following Respondent's wage increases in August 2018. T. 95. Lastly, Marty asked Junker about Respondent's insertion of a one-year term of agreement. T. 687. Junker did not provide a response. T. 687. The meeting ended on that note without Junker giving the Union a deadline for response. T. 687, 689.

On Monday, January 28, 2019, the Union received a favorable decision in its lawsuit seeking to enforce the arbitration award that issued on June 25, 2018 concerning Respondent's failure to allow Union representatives access to Respondent's facility as required by Article 21 of the parties' collective-bargaining agreement. T. 690-692; JT 23; JT 24. On January 28, 2019, the District of Nebraska granted the Union's Motion for Summary Judgment and confirmed the arbitration award. JT 24. On Wednesday, January 30, 2019, Mike Marty sent two Union representatives to Respondent's facility to gain access consistent with the arbitration

award. T. 692. However, Respondent denied the Union's request. T. 692. On that same day, Jerry Pigsley emailed Eric Zarate informing him that because the Union had not accepted Respondent's LBFO, Respondent was declaring impasse and implementing the LBFO. JT. 8. Respondent has confirmed that effective January 30, 2019, it implemented each and every aspect of its LBFO. JT 10. Subsequent to Respondent notifying the Union that it was declaring impasse and implementing the LBFO, Union attorney Eric Zarate sought to have Respondent rescind its decision to implement the LBFO. T. 711-713. Respondent did not rescind the LBFO and the terms of that proposal were in effect as of the date of the hearing. T. 713.

2. Argument

To dispute the ALJ's finding that Respondent engaged in bad faith bargaining, culminating in the premature declaration of impasse and unlawful implementation of its LBFO, Respondent makes the same arguments it used in its brief to the ALJ. R brief at 23-25. Respondent argues the parties met nearly twenty times between March 22, 2018 and January 25, 2019; the parties reached minor tentative agreements related to (1) the change in Respondent's legal name, (2) updating anti-discrimination language, and (3) moving certain language from one article to another; and after the parties were "at the end of their rope," Respondent declared impasse and implemented its last, best, and final offer. R brief at 23-25. In doing so, Respondent disregards most of the record that the ALJ cites for the basis of his finding. The ALJ acknowledged Respondent's arguments in his decision and rejected them based on the record and Board law. JD 40:26-31, 41:1-2.

In interpreting the "good faith" standard during bargaining, the Board will examine the totality of a party's conduct, both at and away from the table, to determine if the negotiations have been used to frustrate or avoid mutual agreement, i.e. surface bargaining. See *Regency*

Service Carts, Inc., 345 NLRB 671 (2005); *Public Service Co. of Oklahoma*, 334 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003); *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991); *Atlanta Hilton & Tower*, 271 NLRB, 1600, 1603. (1984). The Board will look at several factors to determine whether a party is simply going through the motions including the nature of the bargaining demands, delay tactics, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already-agreed-upon provisions, and arbitrary scheduling of meetings. *Id.* These factors are overwhelmingly present in this case and support the ALJ's finding.

The record fully supports the ALJ's conclusion that Respondent bargained in bad faith away from the table by:

...repeatedly failing or refusing to provide the Union with presumptively relevant information that was requested for the purpose of bargaining a successor agreement, unilaterally implementing changes to contractual wage rates and the dues-checkoff procedures without the Union's consent and without providing the Union with notice or an opportunity to bargain, and bypassing the Union and dealing directly with Unit employees regarding the observance of the Independence Day holiday. Respondent also coerced employees into signing the pre-printed non-disclosure forms which included the same type of information that the Union had been requesting in order to negotiate a successor agreement.

JD 38:25-32.

The violations identified by the ALJ as evidence of Respondent's bad faith conduct away from the table are accurately described throughout the ALJ's decision on the following pages:

- Repeatedly failing or refusing to provide the Union with presumptively relevant information that was requested for the purpose of bargaining a successor agreement.

JD 5:1-46, 6:1-45, 7:1-6.

- Unilaterally implementing changes to contractual wage rates without the Union's

consent and without providing the Union with notice or an opportunity to bargain.

JD 16:17-36, 17:1-35, 18:1-6.

- Unilaterally implementing changes to dues checkoff procedures without the Union's consent and without providing the Union with notice or an opportunity to bargain.

JD 13:36-43, 14:1-36, 15:1-45, 16:1-16.

- Bypassing the Union and dealing directly with Unit employees regarding the observance of the Independence Day holiday.

JD 24:22-47, 25:1-39.

- Coercing employees into signing the pre-printed non-disclosure forms which included the same type of information that the Union had been requesting in order to negotiate a successor agreement.

JD 12:20-40, 13:1-7.

Respondent did not file exceptions to any of the violations cited by the ALJ above as evidence of bad faith conduct away from the table. "It is well-established Board practice" to adopt a judge's findings to which no exceptions are filed. *Anniston Yarn Mills*, 103 NLRB 1495, 1495 (1953); Section 102.46(a)(1)(ii) of the Board's Rules and Regulations ("Any exception...not specifically urged shall be deemed to have been waived."). Additionally, the record also supported the ALJ's conclusion that Respondent engaged in bad faith bargaining at the table. The ALJ's finding that Respondent failed to designate a negotiator who had any real authority is supported by the record and Board law. JD 38:34-47. Respondent used a representative at the table who acted as a mere conduit to communicate the owners' rejection of each proposal without explanation while offering no proposals of its own between Respondent's initial proposal on May 15, 2018 and its last best final offer on January 2, 2019. The Board has found such lacking authority to constitute a failure to engage in meaningful bargaining. See

Lloyd A. Fry Roofing Company v. NLRB, 216 F.2d 273, 275 (9th Cir. 1954); *S-B Manufacturing Co.*, 270 NLRB 485, 492 (1984); *Standard Generator Service Company of Missouri, Inc.*, 90 NLRB 790, 791 (finding bad faith bargaining due, in part, to failure to invest sufficient authority in negotiator), enforced, 186 F.2d 606 (8th Cir. 1951). As the ALJ found, Junker's lack of authority and ability to speak knowledgably on behalf of Respondent led to short, unproductive sessions primarily consisting of casual conversation. JD 38:45-47.

The record also supports the ALJ's second finding that Respondent engaged in dilatory tactics in scheduling sessions. As detailed above, Respondent delayed in responding to the Union's requests for bargaining sessions without explanation. Respondent proposed limited dates that were known conflicts to the parties. Respondent also cancelled multiple bargaining sessions, on short notice, because individuals who were not involved in any of the negotiation sessions were not available on the dates in question. Respondent provided no explanation for its conduct.

Lastly, the ALJ found that Respondent engaged in bad faith bargaining by its failure to submit counter proposals or provide any explanations for its blanket rejections of the Union's proposals. JD 39:18-31. The Board will look at several factors to determine whether a party is simply going through the motions including the nature of the bargaining demands, delay tactics, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already-agreed-upon provisions, and arbitrary scheduling of meetings. *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). As the ALJ wrote, the Board also considers the lack of exchange of proposals or counterproposals. JD 39:19-20, citing generally *Mid-Continent Concrete*, 336 NLRB 258, 260 (2001); *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1042 (1996), enfd. 140 F.3d

169 (2nd Cir. 1998); and *MRA Associates, Inc.*, 245 NLRB 676, 677 (1979). Respondent made one proposal in May 2018 and its second/last in January 2019, when it declared impasse. T. 62, 88, 679-680; JT 5; JT 7; JT 25, p. 1, 3. The Union, on the other hand, made numerous counter proposals that were summarily rejected by Respondent without any explanation. JT 6. As the ALJ wrote:

A party demonstrates an overall lack of good faith when, as here, it does not budge from its initial bargaining position(s), fails to explain its positions, and refuses to make any effort to compromise to reach common ground on key issues. *Altofer Machinery Co.*, supra at 150; *John Asuaga's Nugget*, 298 NLRB 524, 527 (1990), enfd. in pertinent part 968 F.2d 991 (9th Cir. 1992). See also *Mid-Continent Concrete*, supra.

JD 39:27-31.

Respondent's brief in support of its exceptions fails to provide any facts, details, or valid arguments to contradict the overwhelming evidence set forth in the record in support of the ALJ's finding that Respondent engaged in bad faith bargaining with the Union over a successor collective-bargaining agreement.

The record further supports the ALJ's rejection of Respondent's position that the parties were at a valid impasse because they could not reach an agreement on important issues. As noted by the ALJ, Respondent never identified what those issues were or the importance of any specific issues. JD 41:12-19. Respondent's additionally argues that impasse occurred when the Union failed to give an answer to Respondent's LBFO. R Brief at 25. Again, the ALJ addressed this argument fully and accurately in noting the LBFO did not constitute a complete proposal because it lacked the TA's reached by the parties and did not contain a wage provision. JD 41:20-23; JT 7. Equally as important, the ALJ recognized, in agreement with the General Counsel, that Respondent declared impasse and implemented its LBFO while it simultaneously refused to provide the Union with presumptively relevant information related to bargaining unit

employees' terms and conditions of employment that were necessary for the Union to make valid economic proposals. JD 41:23-29. At the time of Respondent's declaration of impasse, the Union had not made an economic proposal, including one concerning wages, because Respondent continued with its refusal to provide information that had been requested since November 6, 2017. T. 663-664 As stated by the ALJ, "The Board has held the employer's failure to provide requested information that is necessary for the union to create proposals or counterproposals and, as a result, engage in meaningful bargaining, will preclude a lawful impasse." JD 41:23-25, citing *E. I. du Pont & Co.*, 346 NLRB 553, 557-558 (2006); *Decker Coal Co.*, 301 NLRB 729, 740 (1991); See also *Lakeland Bus Lines, Inc.*, 335 NLRB 322, 326 (2001)(implementation of final offer was unlawful because the employer's failure to furnish information precluded the parties from reaching a valid impasse); See *Monmouth Care Center v. NLRB*, 672 F.3d 1085, 1093 (D.C. Cir. 2012)("It was . . . reasonable for the Board to conclude that the [employers'] failure to provide information concerning a central point of contention between the parties--indeed, regarding an issue that the [employers] themselves characterize as a 'key bargaining issue' [citation omitted]--frustrated the parties' efforts to reach an agreement and precluded a finding of genuine impasse.").

Lastly, Respondent makes no reference in its brief regarding declaring impasse in an environment of numerous unremedied unfair labor practices. The Board has held that "a finding of impasse presupposes that the parties prior to the impasse have acted in good faith." *Circuit Wise, Inc.*, 309 NLRB 905, 918 (1992). "Generally, a lawful impasse cannot be reached in the presence of unremedied unfair labor practices." *Id.* An impasse is unlawful if it is partially based on the employer's unremedied unfair labor practices. *Laborer's Fund Adm. Office of Northern California, Inc.*, 302 NLRB 1031, 1033 (1991); *Wayne's Dairy*, 223 NLRB

260 (1976) (“A party cannot parlay an impasse resulting from its own misconduct into a license to make unilateral changes.”). The ALJ reached the same conclusion that even if the parties were at a deadlock in their negotiations, a finding of impasse is foreclosed because of the serious unremedied unfair labor practices set forth in this case. JD 41:37-46, 42:1-2. As the ALJ noted in his decision, Respondent did not even attempt to refute certain alleged unfair labor practices, including its refusal to provide information to the Union and its unilateral changes related to dues checkoff and employees’ wages in violation of Section 8(a)(1) and (5). Respondent failed to address these issues in its post-hearing brief. JD 7:3-5, 16:6-9, 17: 33-35. As addressed above, Respondent failed to file exceptions on several violations of the Act found by the ALJ. As such, the record supports the ALJ’s conclusion that Respondent was prohibited from declaring a lawful impasse in the environment of unremedied unfair labor practices.

The record established that Respondent has failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit in violation of Section 8(a)(5) of the Act. Similarly, Respondent’s implementation of its LBFO on January 30, 2019, was done without first bargaining with the Union to an overall good-faith impasse and the corresponding unilateral changes made to mandatory subjects of bargaining violated Section 8(a)(1) and (5) of the Act. As such, Respondent’s Exceptions 9, 10, and 17 should be dismissed.

F. Since at least January 23, 2018, Respondent has attempted to undermine the Union as the exclusive collective-bargaining representative of the Unit. (Exception 11)

The ALJ found merit to the General Counsel’s complaint paragraph alleging Respondent violated Section 8(a)(1) and (5) by undermining or denigrating the Union as the collective-bargaining representative of the Unit employees. JD 43:18-19. In reaching this conclusion, the ALJ cited Respondent’s refusal to provide the Union with requested information that was relevant and necessary for bargaining a successor agreement, coercing employees into signing

non-disclosure forms related to the information the Union had requested, unilaterally changing the terms of the parties' agreement without the Union's consent and changing mandatory subjects of bargaining without providing the Union with prior notice and opportunity to bargain over those changes, direct dealing, overall bad-faith bargaining, prematurely declaring impasse and implementing its last, best, and final offer. JD 43:12-18. As previously addressed, Respondent failed to file exceptions over any of these underlying violations found by the ALJ except for his overall bad-faith bargaining and premature declaration of impasse findings.

In its exceptions, Respondent argues that the ALJ's finding is "contrary to the record as a whole, and contrary to established Board law." R Exception 11. However, in its brief in support, Respondent provides no legal argument to support Exception 11. The only references made by Respondent to Exception 11 is citing it as an exception for each and every violation identified in Respondent's "Factual Summary." This includes (1) complaint allegations that were dismissed by the ALJ and (2) unfair labor practices that did not constitute a basis for the ALJ's finding that Respondent violated Section 8(a)(1) and (5) by undermining or denigrating the Union as the bargaining representative of the Unit employees. See R Brief at 4, 5, 6, 9, 10, and 15.

As detailed above, Respondent's arguments concerning the ALJ's findings and conclusions that it engaged in overall bad faith bargaining, prematurely declared impasse, and implemented a LBFO changing mandatory subjects of bargaining fall well short of warranting a reversal of the ALJ. The only separate violation cited by the ALJ in support of this finding was Respondent's direct dealing. Again, Respondent did not file an exception to that conclusion. Even if it had, it provides no argument in support. All that Respondent offers in its brief

concerning direct dealing related to moving the Independence Day holiday is a confirmation of the facts set forth in the record. R brief at 17.

The cases cited by the ALJ on page 43 of his decision are directly on point as they relate to Respondent's conduct in this matter. JD 42:27-43:10, citing *General Athletic Products Co.*, 227 NLRB 1565, 1575 (1977); *NLRB v. United Technologies Corp.*, 789 F.2d 121, 134 (2nd Cir. 1986); *Formosa Plastics Corp.*, 320 NLRB 631, 632 (1996); *Outdoor Venture Corp.*, 336 NLRB 1006, 1011 (2001)(direct dealing); *Grosvenor Resort*, 336 NLRB 613, 617 (2001) (unilateral changes in wages and benefits); *Bryant & Stratton Business Institute*, 321 NLRB at 1044 (failure to provide information); *Thill, Inc.*, 298 NLRB 669, 672 (1990) (overall bad-faith bargaining), enfd. in part 980 F.2d 1137 (7th Cir. 1992). Respondent provides no basis in fact or law to "reject" the ALJ's findings or conclusions of law related to this issue. For these reasons, Respondent's Exception 11 should be dismissed.

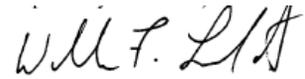
III. Conclusion

The General Counsel respectfully submits that for all of the reasons set forth above, Respondent's exceptions are without merit and that the ALJ's findings, conclusions of law, and proposed remedies concerning Respondent's violations of Section 8(a)(1), (5), and 8(d) of the Act, to which Respondent excepts, are supported by the record and Board law. The General Counsel requests that the Board affirm the ALJ's recommended order.¹⁰

¹⁰ The General Counsel is filing cross-exceptions to the ALJ's conclusion that Respondent's payment of wages contrary to the collective-bargaining agreement between January 23, 2018 and August 23, 2018 was time barred under Section 10(b) of the Act.

Dated: November 22, 2019

Respectfully Submitted,

Handwritten signature of William F. LeMaster in cursive script.

William F. LeMaster
Julie M. Covell
Counsel for the General Counsel