

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

_____ )	
TRIUMPH AEROSTRUCTURES, VOUGHT )	
AIRCRAFT DIVISION )	
)	
and )	Case Nos. 16-CA-197912
)	16-CA-198055
LAWRENCE HAMM, and Individual )	16-CA-198410
)	16-CA-198417
and )	
)	
RODNEY HORN, an Individual )	
)	
and )	
)	
THOMAS SMITH, an Individual )	
)	
and )	
)	
INTERNATIONAL UNION, UNITED )	
AUTOMOBILE, AEROSPACE AND )	
AGRICULTURAL WORKERS OF )	
AMERICA, LOCAL 848 )	
_____ )	

**TRIUMPH'S BRIEF IN SUPPORT OF ITS CROSS-EXCEPTIONS TO THE  
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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## INTRODUCTION

Respondent Triumph Aerostructures (“Triumph” or “Company”) files cross-exceptions to Administrative Law Judge Robert A. Ringler’s September 30, 2019 decision (“ALJD”).

The judge dismissed the Complaint, in its entirety, finding the allegations were “meritless” and Triumph did not “fail to bargain” under Section 8(a)(5) of the National Labor Relations Act (the “Act”) when it (i) terminated one employee and suspended another represented by the UAW, Local 848 (the “Union”) without sufficient pre-discipline notice and opportunity to bargain; and (ii) implemented a reduction in force (“RIF”) on April 21, 2017 that affected 12 employees in one department. The General Counsel filed exceptions on December 27, 2019. The International Union, United Automobile, Aerospace and Agricultural Workers of America, Local 848 (“Local 848” or “Union”) also filed exceptions on December 27, 2019. Triumph has filed Answering Briefs in response. Although Triumph agrees that the judge correctly dismissed the Complaint in its entirety, Triumph has filed cross-exceptions to the judge’s failure to make *alternative findings* regarding *additional grounds* for dismissing the Complaint allegations.

With respect to the layoff allegation, the judge concluded that Triumph and the Union had reached an impasse by April 21, 2017. In doing so, the judge did not analyze the two alternative grounds Triumph presented to dismiss the RIF allegation. First, the notice and bargaining Triumph provided to the Union was more than sufficient to satisfy Triumph’s bargaining obligations under the “economic exigency” doctrine, especially considering the Company had a status quo RIF policy that it used for this layoff – not some new policy or changed procedure. Second, the judge should have concluded, as a threshold matter to dismiss the RIF allegations, that the Union waived bargaining over the layoff *decision* – which in this

case was the threshold operational decision to reduce 12 employees from the bond shop based on lower customer demand – and pursued bargaining over *effects* issues only, including loan/transfer rights and selection procedures.

Third, even assuming the Union did not waive decision bargaining, the judge rightly found the parties reached impasse on “the layoff,” however defined, before April 21, 2017. Yet in doing so the judge did not address additional record evidence reinforcing this conclusion. The record is replete with more reasons to find impasse was reached before April 21, 2017, and Triumph identifies these relevant facts and precedent in this supporting brief.

Turning to the discipline allegations, the judge correctly dismissed those allegations, but should have done so on different grounds. Triumph agrees with the General Counsel that extant precedent, *Total Security Management (“TSM”)*, 364 NLRB No. 106 (2016), applied at the time but was incorrectly decided and should be overruled, and that Triumph’s actions were lawful under the Board’s pre-*TSM* standard. On this basis alone the judge’s decision can be affirmed. But assuming the Board continues to apply *TSM*, the judge failed to make findings regarding a critical threshold basis to dismiss the claims: *equitable estoppel*, based on the parties’ longstanding practice *for years* regarding Triumph’s regular discipline notifications and requests to engage on discipline matters at the Red Oak facility, and the Union’s acquiescence to that practice without ever requesting pre-discipline notice and bargaining.

In sum, the Board has numerous bases to affirm the judge’s dismissal of all Complaint allegations. Triumph’s cross-exceptions present in detail these alternative grounds for the Board’s fulsome consideration given that the General Counsel and UAW have filed exceptions.

## **I. FACTUAL BACKGROUND**<sup>1</sup>

Much of the evidentiary record in this case is undisputed; indeed the parties agreed to an extensive “Joint Stipulations of Fact” and joint exhibits before the hearing. Jt. Exhs. A-Z. That said, the General Counsel’s Exceptions highlight the few factual disputes in a manner that requires Triumph to provide a fulsome, detailed account of the relevant evidentiary record.

### **A. Triumph’s Red Oak Facility.**

Triumph manufactures aircraft components at its facility in Red Oak, Texas. ALJD at 2:7-8. Between 1968 and 2013, the Union represented a multi-facility bargaining unit of production and maintenance employees at Triumph’s Dallas, Texas and Grand Prairie, Texas plants. *Id.* at 2:16-17. In 2013, Triumph decided to close the Dallas facility and relocate operations to its newly-constructed Red Oak facility. *Id.* at 2:17-18.<sup>2</sup> In August 2013, before the Union’s recognition attached at the site months later, Triumph set initial terms and conditions of employment at Red Oak, including discipline and reduction-in-force policies. ALJD at 2:28-29; Jt. Exh. Z at 3; Jt. Exh. A.

On January 13, 2014, Triumph voluntarily recognized the Union as the representative of production and maintenance employees at Red Oak, due to sufficient transfer levels from the

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<sup>1</sup> References to the hearing transcript are noted as “Tr.” followed by the page and line number. References to hearing exhibits are noted as “J. Exh.” for joint exhibits, “GC Exh.” for General Counsel exhibits, and “R. Exh.” for Company exhibits. References to the ALJ’s Decision are noted as “ALJD” followed by the page and line number.

This factual background section is identical to the factual background set forth in Triumph’s Answering Brief in Response to the General Counsel’s Exceptions, and cross-referenced in Triumph’s Answering Brief in Response to the UAW’s Exceptions. It is repeated herein for convenience.

<sup>2</sup> As the General Counsel notes, the judge incorrectly stated that Triumph closed both its Dallas and Grand Prairie facilities. ALJD at 2:18; GC Exception 3; GC Br. at 2 fn. 2. However, this minor factual error is not substantive and did not affect the judge’s analysis. In other words, granting Exception 3 has no material impact on the outcome.

Dallas and Grand Prairie plants, and offered to bargain for a new collective bargaining agreement (“CBA”) that would cover the Red Oak facility. *Id.* at 2:18-28; Jt. Exh. Z at 5; Jt. Exh. A.1 at 9. In response, the Union filed Board charges asserting that the Red Oak employees were already covered by the CBA for the Dallas-Grand Prairie multi-facility unit. Jt. Exh. A.2. In December 2014, the Regional Director for Region 16 issued a unit clarification decision holding that the Red Oak facility constituted a separate appropriate bargaining unit, and rejecting the Union’s demand to impose the old CBA at Red Oak. *Id.* The Union also pursued and lost a contract arbitration over the same unit scope and contract application issues. Tr. 239:1-9.

In May 2015, after the NLRB and arbitral litigation had run its course, Triumph and the Union began bargaining for a Red Oak CBA. ALJD at 2:29; Jt. Exh. Z at 9. Bargaining continued until contract ratification on March 25, 2018. ALJD at 2:29-30.

**B. Facts Relating to the Discipline Allegations.**

1. Discipline Notification and Bargaining at the Red Oak Facility Between March 2014 and May 2017.

The initial terms and conditions of employment at Red Oak included a detailed discipline policy that provided for general offenses, major offenses, and applicable disciplinary procedures and penalties. ALJD at 2:41-3:29; Jt. Exh. A.

On March 5, 2014, Triumph provided the Union with copies of disciplinary notices, warnings, and records issued to bargaining unit employees at the Red Oak facility on or after January 13, 2014. Jt. Exh. B. Triumph proposed that the parties “establish an agreed-to process whereby designated Union representatives could be notified of and respond to disciplinary actions at Red Oak,”<sup>3</sup> or alternatively, an interim grievance procedure by which the Union could

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<sup>3</sup> Triumph made this offer in compliance with then-extant Board law as stated in *Alan Ritchey, Inc.*, 359 NLRB 396 (2012), which was vacated by the U.S. Supreme Court’s June 2014 decision in *NLRB v. Noel Canning*, 573 U.S. 513 (2014).

grieve unit member discipline, up to and including termination. *Id.* The Union did not respond to Triumph's offer to bargain over individual disciplinary actions or an interim grievance procedure.

On April 1, 2014, Triumph sent the Union another letter again raising the issue of employee discipline at Red Oak. Jt. Exh. C. The letter attached disciplinary actions issued against bargaining unit employees at the facility since Triumph's March 5, 2014 correspondence. The letter also noted that the Union had failed to "respond or in any way acknowledge the Company's desire to establish a mechanism by which your represented members may have representation in disciplinary actions" or to "notify the Company of a Union representative that the Company should contact in the event of potential disciplinary action." *Id.* Triumph reiterated its offer to "discuss issued discipline and to bargain over an interim notification and/or grievance procedure for discipline," and stated that "in the meantime the Company will continue to enforce the established terms and conditions of employment, including taking disciplinary action for violation of Company rules and procedures." *Id.* The Union again did not respond. Tr. 310:22-24.

Triumph needed the Union to designate a representative to receive notice of potential disciplinary action because there were no Union stewards, committee members, or other Union representatives on-site at Red Oak. Tr. 315:5-18. In the face of the Union's silence on this issue, and its evident lack of interest in pursuing the opportunity to bargain over employee discipline or an interim grievance procedure, Triumph continued a regular practice of sending periodic (approximately monthly) letters to the Union attaching all discipline issued (warnings, suspensions, and discharges) to the Red Oak facility bargaining unit employees over the preceding period. Each letter repeated the same language cited above, offering to bargain over

discipline whether before or after it issued. See R. Exhs. 2 (letters dated 4/7/16; 9/6/16; 10/4/16; 11/3/16; 12/6/16; 2/6/17; 3/7/17; 4/3/17; 5/4/17) and 10 (letters dated 9/9/14; 10/1/14; 11/12/14; 8/4/15; 9/8/15; 10/8/15; 11/4/15; 12/7/15; 1/5/16; 3/14/16)<sup>4</sup>; Tr. 311:2-7, 312:17-314:3.

The Union never provided Triumph with a contact point(s) for engaging in timely pre-discipline bargaining. Tr. 318:4-319:5. Local 848 President James Ducker testified that the Union was not interested in pre-discipline notice until May 2017 and did not respond to Triumph's requests to provide a contact point. Tr. 156:24-157:18. In contrast, at Triumph's Tulsa, Oklahoma facility, the Union in April 2016 (also the UAW, but a different local serviced by International Union Representative David Barker, who also serviced the Red Oak bargaining unit) provided a contact person and requested notification via text before any suspensions or terminations.<sup>5</sup>

After receiving approximately 30 such regular update letters from, Triumph, the Union on December 21, 2016, for the first time, proposed a procedure whereby disciplinary actions would be bargained *after* their implementation, at periodic first contract negotiation sessions. Jt. Exh. F. Triumph readily agreed, and that process continued for approximately five months, until May 2017, again without objection from the Union. Tr. 320:9-321:6.

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<sup>4</sup> Danielle Garrett testified that she had not retained copies of every letter that was sent, but that each letter listed the previous dates on which a letter had been sent. Tr. 313:10-16. Thus, in addition to the dates listed above, letters were also sent on 4/1/14; 4/9/14; 8/4/14; 12/16/14; 1/6/15; 2/7/15; 4/13/15; 5/5/15; 6/10/15; 7/9/15; 2/3/16; 5/5/16; 6/9/16; 7/11/16; 8/1/16; and 1/13/17. See R. Exh. 2 (5/4/17 letter).

<sup>5</sup> The judge rejected Triumph's attempt to offer the parties' letter memorializing this Tulsa arrangement into evidence. Tr. 213:5-215:22. Triumph has filed a Cross-Exception to the judge's rejection of this exhibit. As explained further in Triumph's brief in support of its cross-exceptions, this evidence is relevant to the Union's decision not to pursue pre-decision discipline bargaining at Red Oak before May 2017, as they clearly knew Triumph was ready and willing to engage in such bargaining as evidenced by the Tulsa understanding.

2. Termination of Thomas Smith and Suspension of Rodney Horn.

On November 17, 2016, Triumph suspended unit employee Thomas Smith pending investigation, then terminated him for poor workmanship and gross negligence in performance of his job duties following its investigation. ALJD at 3:33-34; R. Exh. 11. Smith had a history of similar violations and progressive discipline. R. Exh. 11. The Union did not file a charge over Smith's termination or any alleged failure to bargain either before or after the termination decision despite learning of the discharge no later than early February 2017. Jt. Exh. Z at 17; R. Exh. 12 at 2; Tr. 327:11-14. However, Smith filed a Section 8(a)(5) charge on an individual basis on May 8, 2017. GC Exh. 1(e).

On April 3, 2017, Triumph issued unit employee Rodney Horn a 5-day suspension for gross negligence and failure to report errors to management. ALJD at 3:34-35; R. Exh. 13. On May 4, 2017, Triumph informed the Union of Horn's suspension, in keeping with Triumph's longstanding practice, which the Union had accepted, of providing monthly discipline updates. Jt. Exh. Z at 34; Jt. Exh. V; R. Exh. 14. The Union did not file a charge over Horn's suspension or any alleged failure to engage in pre-discipline or post-discipline bargaining. Instead, on May 2, 2017, Horn filed a Section 8(a)(5) charge as an individual. GC Exh. 1(c).

3. Triumph and the Union Negotiate and Agree on an Interim Discipline Notification Process.

As discussed above, from March 2014 to May 2017 the Union did not (a) respond to Triumph's requests for a designated representative to receive notice prior to the imposition of discipline, (b) request pre-discipline notification or bargaining, or (c) otherwise indicate that it objected to Triumph's practice of providing monthly update letters. As mentioned above, Local 848 President Ducker testified that the Union was not interested in receiving pre-discipline notice because he believed there "was no point." Tr. 157:12-18.

Shortly after Smith and Horn filed their unfair labor practice charges, however, on May 26, 2017, the Union sent Triumph a letter requesting to meet and bargain over “an interim notification process for discipline for Red Oak bargaining unit employees.” Jt. Exh. W. This was the first time the Union had requested pre-discipline bargaining at the Red Oak facility. Tr. 321:21-25, 154:20-24. Triumph quickly responded and agreed to meet on June 1 and June 2, 2017.

After discussions on June 1 and 2, the parties executed an “Interim Discipline Notification for Red Oak Agreement” on June 2, 2017. Jt. Exh. Z at 36; Jt. Exh. X; Tr. 322:4-12. Among other things, the agreement provided that Triumph would provide pre-discipline notification by email to the Local 848 President, International Representative, and the local union hall Executive Assistant, and required the Union to respond within 2 days to request pre-discipline bargaining.. Jt. Exh. X, para. 2.

**C. Facts Relating to the Layoff Allegations.**

1. Triumph’s Status Quo Reduction in Force Policy.

 Triumph Aerostructures - Vought Aircraft Division	<b>RED OAK SITE POLICY</b>		
	NUMBER <b>H1-0512</b>	EFFECTIVE DATE <b>08/01/2013</b>	PAGE <b>1 of 2</b>
Subject <b>REDUCTION IN FORCE</b>			

The initial terms and conditions of employment at Red Oak included the following Reduction in Force (“RIF”) policy that would address situations where Triumph had overstaffed classifications or departments:

Management will begin by assessing the remaining and future statement of work and determine the skills and abilities needed to perform the remaining and future statement of work. Management will then determine the RIF units [the peer group against which employees in the same classification are compared] and classifications where reductions will occur.

Employees within the impacted classification will be rated based upon the degree to which they possess the skills and abilities defined above. In addition, factors

such as experience, performance, education and documented concerns regarding performance, conduct or similar issues, will also be considered, as appropriate, in determining the final ranking.

ALJD at 4:22-37; Jt. Exh. A at 2. The RIF policy first required the Company to identify the impacted employee classifications, and then employees in those classification(s) would be rated and ranked (“rack and stack”) using eight competencies: attendance, communications, integrity/organizational commitment, job knowledge/skills/learning, productivity, quality, safety, and teamwork. Jt. Exh. A at 4. These competencies overlapped with the Red Oak facility’s annual performance review process. Tr. 299:9-21.

2. Triumph Becomes Aware of Customer Demand Reductions That Require a Headcount Reduction in the Red Oak Facility’s Bond Shop.

The bond shop at Triumph’s Red Oak facility is distinct from the rest of the plant. Tr. 242:25-243:7. It has a separate supervisory structure, cost data, and performance trends. Tr. 244:2-6, 244:23-245:2. Bond shop employees (bonders) have their own job classification, perform different work, and utilize different skills than employees in other classifications, such as assembly, painting, toolmaking, production, and maintenance. ALJD at 5 fn.8; Tr. 243:11-19, 244:7-22, 406:3-407:3.

Not all of Triumph’s customers utilize the bond shop. In late 2016 and early 2017, Triumph customers utilizing the bond shop included Bell Helicopter, Gulfstream, Northrop Grumman, and Pratt & Whitney. ALJD at 2 fn. 2; Tr. 375:25-376:6. Triumph’s bond shop business is highly dependent on and sensitive to its customers’ orders and production schedule requirements. Tr. 241:18-242:10, 378:8-13. Managers review staffing levels on a regular basis and forecast manpower requirements. Tr. 375:12-15, 380:11-381:15, 388:12-23. In the bond shop, these staffing analyses are conducted in the aggregate and for each customer program. Tr. 388:4-23; R. Exh. 15 (aggregate analysis); GC Exh. 10 (program-specific analysis).

In late 2016 and early 2017, the bond shop projected an unanticipated decline in volume due to unforeseen decisions by Bell and Gulfstream to reduce orders and production schedules later in 2017. ALJD at 5:3-4; Jt. Exh. Z at 19; Tr. 376:8-24, 377:19-378:7. This led to the bond shop manpower forecast in March showing that by the end of April 2017 the volume of work in the bond shop would not sustain current staffing levels. ALJD at 5:4-5; R. Exh. 15; Tr. 384:20-385:1. At the time, there were approximately 97 bonders in the bargaining unit (out of approximately 500 unit employees), and the manpower forecast showed that after Friday, April 21 there would only be enough work for 80 employees. R. Exhs. 15-16; Tr. 385:2-8.

Thus, Bond Shop Manager Eileen Rowe informed Triumph's Senior Director of Labor Relations, Danielle Garrett, that the bond shop would be overstaffed starting by late April, and Triumph planned to reduce headcount in the bond shop to avoid overstaffing. Tr. 246:24-247:7, 247:17-24, 385:16-25. Initially, Triumph was not certain how many bonders would be affected or the precise date the reduction would occur, as it was still waiting on final information from customers. Tr. 248:24-249:5, 385:25-386:2. Based on the preliminary customer data available in late March and related projections, Triumph believed the size of the reduction would range from 6 to 15 employees but likely would be 12 employees. Tr. 249:6-9, 386:2-7.

3. Triumph Gives the Union Notice and an Opportunity to Bargain.

On March 28, 2017,<sup>6</sup> Triumph sent a letter to the Union providing notice of its tentative plan to lay off 12 bargaining unit employees from the bond shop on Friday, April 21, 2017. ALJD at 5:10-29; Jt. Exh. G. The letter explained that the headcount plan was "due to a reduction in the bond shop loads, primarily due to the production slowdown in G600 and P-42 Programs," that the size of the reduction could range from 6 to 15 employees, and that Triumph

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<sup>6</sup> All dates hereinafter are in 2017, unless otherwise noted.

intended to make a final decision by April 10. *Id.* Triumph stated that it “intend[ed] to comply with the status quo layoff [RIF] policy,” but was “willing to discuss or meet over these tentative layoffs if the Union is interested” and was “willing to discuss a potential loan agreement to keep the affected employees gainfully employed.” *Id.*

On March 30, the Union “accept[ed] the opportunity to negotiate the anticipated layoffs” and requested bargaining dates. ALJD at 5:31-33; Jt. Exh. H. That same day, the Union also sent Triumph a request for information. ALJD at 5:31-44; Jt. Exh. I. Triumph responded the next day, March 31, providing the requested information and raising several questions. ALJD at 6:1-36; Jt. Exh. J. In its March 31 letter, Triumph also proposed that the parties bargain over the reduction in force and related issues during nine previously-agreed on dates for first contract negotiations. Jt. Exhs. J, Z at 22. The Union did not tell Triumph those dates were not enough or that it needed more dates. Tr. 253:5-7.

4. April 5, 2017 Bargaining Session.

The parties first met to discuss the planned reduction in force on April 5. The Union indicated that it “underst[ood]” Triumph needed to modify bond shop headcount. R. Exh. 4 at 5; GC Exh. 2 at 4. The Union, critically, did not pursue bargaining over Triumph’s threshold decision to reduce bond shop headcount or the size of the headcount reduction. Tr. 263:10-23. Instead, the parties immediately turned to the issues of *who* to select for the reduction, and *what rights* may apply to impacted employees, such as loan or transfer rights. Triumph already had a policy – the RIF policy – that would deal with the “who” question, but there were no existing policies on rights for impacted employees, such as loan rights, transfer rights, or recall rights. Specifically, the Union was interested in discussing an arrangement to loan bonders out to other job classifications or assignments in the plant – which would allow them to remain employed by

Triumph, albeit not in the bond shop – but asked Triumph to provide a framework for discussion, which Triumph did right away. Tr. 263:1-264:8. The framework Triumph offered on April 5 included the following relevant terms:

**Letter of Agreement  
Red Oak Bond Shop Temporary Loans**

In as much as the Company tentatively planned to layoff approximately 12 bond shop employees at its Red Oak location on or about April 21, 2017, the Company and the Union have agreed to the following:

- In lieu of layoff, the Company may loan not more than 20 bond shop employees to other UAW job classifications and/or assignments associated with continuous improvement/lean activities for a period not to exceed six (6) months from the date of the instant agreement.
- Employees who are loaned will not have their compensation affected for the duration of the loan.
- The Company shall have the sole discretion to determine which individual bond shop employees shall be loaned outside of the bonding job classification.
- The Company shall have the sole discretion to determine the job assignments of loaned employees.
- Should an individual employee refuse to be loaned and/or refuse to perform the assigned tasks outside, the employee shall be deemed to voluntarily terminate his employment.

ALJD at 6:40-7:9<sup>7</sup>; Jt. Exh. K.

The parties then proceeded to discuss the potential loan arrangement. The Union asked if Triumph could make loan selections by seeking volunteers, but Triumph explained that would not work because it had to select employees based on skills and ability to perform program-specific work requirements in the bond shop. R. Exh. 4 at 6; GC Exh. 2 at 5. Triumph also explained it needed flexibility in making loan assignments outside the bond shop. R. Exh. 4 (10:37 a.m. session) at 4-5; GC Exh. 2 at 8-9.

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<sup>7</sup> The judge incorrectly referred to the April 5 loan framework as Triumph’s initial proposal. ALJD at 6:38. However, Triumph’s initial proposal was set forth in its March 28 letter to the Union, where Triumph proposed, absent some alternative agreement with the Union, implementing the reduction in force under its status quo policy. Jt. Exh. G; Tr. 264:2-8. There was no status quo “loan” policy or program in effect. Tr. 265:13-16.

5. April 6, 2017 Bargaining Session.

The Union rejected Triumph's loan framework and offered its own loan proposal on April 6. ALJD at 7:12. The Union's loan proposal contained the following relevant terms:

**Union's Response to the Company's Proposed Letter of Agreement  
Red Oak Bond Shop Temporary Loans**

**April 6, 2017**

In as much as the Company tentatively planned to layoff approximately 12 bond shop employees at its Red Oak location on or about April 21, 2017, the Company and the Union have agreed to the following:

- In lieu of layoff, the Company may loan not more than 20 bond shop employees to other UAW job classifications and/or assignments associated with continuous improvement/lean activities for a period not to exceed six (6) months. If the need arises to increase the number, the parties will meet and mutually agree to adjust the number..
- Employees who are loaned will not have their compensation affected for the duration of the loan.
- The Company will seek volunteers to loan.
- The Company will make every attempt to place loaned employees into positions where they may have previous experience or may be successful.
- The Company will collaborate with the Union to satisfy these loans.
- Should an individual employee refuse to be loaned and/or refuse to perform the assigned tasks outside, the employee shall be laid off for a period not to exceed six (6) months from the date of the instant agreement.

ALJD at 7:18-31; Jt. Exh. L.

The parties discussed the Union's proposal on April 6. Triumph explained that asking for volunteers did not fit its business needs because it did not account for a scenario where too few bond shop employees volunteered, or where bond shop employees with the skills needed to perform the remaining bond shop work volunteered. ALJD at 7:31-35; Tr. 266:7-268:20; R. Exh. 5 at 1; GC Exh. 3 at 3. As to the loan assignment process, Triumph explained that while it did not object to Union input, Triumph needed to implement the reduction in force quickly, and the Union's proposal would open up the process to disputes over assignments and create delays. ALJD at 7:34-35; R. Exh. 5 at 2-5; GC Exh. 3 at 3-6.

Later that day, Triumph delivered a counterproposal on loans to the Union, which contained the following relevant terms:

**Letter of Agreement  
Red Oak Bond Shop Temporary Loans**

In as much as the Company tentatively planned to layoff approximately 12 bond shop employees at its Red Oak location on or about April 21, 2017, the Company and the Union have agreed to the following:

- In lieu of layoff, the Company may loan not more than 20 bond shop employees to other UAW job classifications and/or assignments associated with continuous improvement/lean activities for a period not to exceed six (6) months from the date of the instant agreement.
- Employees who are loaned will not have their compensation affected for the duration of the loan.
- The Company shall have the sole discretion to determine which individual bond shop employees will be loaned outside of the bonding job classification.
- The Company shall have the sole discretion to determine the job assignments of loaned employees.
- Should the Union have concerns regarding a loaned employee(s) and/or the type of work said loaned employee(s) is assigned, the Company will meet with the Union to discuss such concerns in an attempt to reach mutual resolution.
- Should an individual employee refuse to be loaned and/or refuse to perform the assigned tasks outside, the employee shall be deemed to voluntarily terminate his employment.
- Should the need arise to increase the number of employees loaned out and/or the duration of the loan, the parties will meet to discuss the possibility of an increase of scope.

ALJD at 7:37-8:8; Jt. Exh. M.

The parties then discussed Triumph's proposal in "off the record" conversations. Tr. 269:9-17. While the Union appreciated Triumph's movement on allowing for Union input regarding loan assignments, the Union remained adamant that selection should be done by volunteers, which would eliminate Triumph's ability to retain discretion over selection. ALJD at 8:8-10; Tr. 269:16-17, 86:21-23. Triumph told the Union that if the Union was going to insist on its position regarding volunteers, then the parties were unlikely to reach an agreement that used loans and should instead focus on topics they could agree on. Tr. 269:16-270:4. The Union apparently viewed Triumph as "withdrawing" its loan proposal, but Triumph did not have the same view at the time or at the hearing. Tr. 269:22-270:4.<sup>8</sup> The Union did not dispute that it was

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<sup>8</sup> Triumph's bargaining notes from April 6 do not reflect any off the record discussions or their contents. R. Exh. 5. The Union's notes from that day state that during an off the record conversation, Triumph told the Union that it would have to "rescind" its loan language and would do so on the record the next day. GC Exh. 3 at 6. Neither Triumph's nor the Union's

insisting on volunteers for any alternative loan program, nor did it ever indicate a willingness to give Triumph discretion over selection of employees for the loans. Tr. 272:12-16.

6. April 7, 2017 Bargaining Session.

On April 7, the Union handed Triumph a request for information relating to contract employees working in the assembly department. Jt. Exh. N; Tr. 90:11-21, 168:23-25; R. Exh. 6 at 2-9; GC Exh. 4 at 2-7. The Union requested this information in anticipation of discussing topics other than loans, in this case transfer rights to other departments for impacted bonders. Tr. 271:16-24.

Triumph asked clarifying questions about what specific information the Union was seeking. Triumph then provided verbal responses to the Union's questions. Tr. 270:15-271:15; R. Exh. 6 at 2-9; GC Exh. 4 at 2-7. The Union next passed a proposal that dealt with alternative reduction in force selection procedures (the "who" to select) and on transfer rights (the "what rights" would apply to those selected) to Triumph. The Union's April 7 proposal included the following terms:

- In lieu of layoff, employees shall be selected in seniority order based off of job classification entry date.
- The low senior employees will be offered a transfer into the Assembly job classification. Affected employees will be placed into the four-week skills training Assembly class.
- Employees who are transferred from the Bond Shop job classification into the Assembly job classification will not have their compensation or seniority calculation date affected.

ALJD at 8:14-23; Jt. Exh. O. The parties had previously discussed layoff selection procedures during their overall contract bargaining sessions, and each was familiar with the other's position, including that the Union strongly disagreed with the status quo RIF policy where reductions

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bargaining notes indicate Triumph "rescinded" its April 6 loan proposal on the record. R. Exh. 6; GC Exh. 4.

occur based on performance ratings and rankings, rather than by strict reverse seniority. Tr. 176:15-177:10, 185:19-186:5, 198:4-12, 278:20-280:1.

The parties discussed the Union's April 7 proposal during the session. Triumph explained that a selection process based solely on seniority was unacceptable for the same reason it opposed volunteer-based selection for loans – it needed flexibility to ensure the right employees stayed in the bond shop. Tr. 185:13-16, 272:23-273:6, 278:20-279:7, 280:19-25. Triumph was not opposed to placing affected bonders (i.e. those selected for the reduction) in the assembly skills training class, but objected to an automatic guarantee that they would be paid the same compensation they had received in the bond shop because assembly work required different skills. Tr. 274:7-15, 281:22-282:1. Triumph's position was that for a "permanent" transfer, compensation should be commensurate with each employee's skills and experience in assembly. Tr. 274:16-275:3.

Triumph asked the Union to explain how it would be fair if bond shop employees with little or no experience transferred into assembly and retained their wage, which was higher than the wage paid to many experienced assembly workers, and expressed concerns about the tension this could cause among employees. ALJD at 8:23-25; R. Exh. 6 at 10-20; GC Exh. 4 at 7-15. The Union did not address these concerns. Triumph explained that maintaining the same compensation for affected bond shop employees who transferred to assembly, regardless of their skills or experience, simply would not be "fiscally or operationally responsible." Tr. 274:7-15, 281:22-282:1; R. Exh. 6 at 20; GC Exh. 4 at 14. Although Triumph's loan proposal had provided that affected employees would maintain the same compensation, that was because a loan arrangement would have been temporary, while transfers would be permanent. Tr. 275:4-276:2.

Triumph then told the Union it would try to formulate a counterproposal on transfer rights that addressed the issues the parties had discussed and would get back to the Union. R. Exh. 6 at 21; GC Exh. 4 at 15. That afternoon, the parties had an “off the record” meeting where they again discussed selection methods and transfer rights. Tr. 185:3-16, 280:14-281:8. Triumph gave the Union a compromise counterproposal, which contained the following terms:

**Letter of Agreement  
Red Oak Bond Shop and NDI Layoffs**

In as much as the Company tentatively plans to lay off approximately 12 bond shop and approximately 3 NDI employees at its Red Oak location on or about April 21, 2017, the Company and the Union have agreed to the following:

- In lieu of processing layoffs under the initial terms and conditions of employment, which identifies a rack and stack process based upon certain competencies, the Company has agreed to utilize a modified rack and stack based upon competencies as proposed by the Union (competency assessment attached hereto).
- Layoffs shall be processed in accordance with the rack and stack scoring, based upon an employee's overall performance rating, with the bottom rated employees laid off in inverse seniority order by job classification. Seniority shall be determined by the last date of hire.
- Employees, who are affected by layoff, may apply for an open assembly position at the Company's Red Oak location. Any employee affected by layoff who applies for an open assembly position, shall be given an offer of employment for the appropriate assembly labor grade at an hourly rate of pay commensurate with said employee's assembly and/or assembly inspection experience.
- Employees affected by layoff who apply and accept an offer for an assembly position will retain their seniority without a break in service.
- Employees who accept a position in assembly shall be on a probationary period for ninety (90) working days. Should the employee not meet expectations in assembly, the employee shall be terminated.
- Employees who are laid off from either the bond or NDI classification shall have no rights to re-enter the classification from which they were laid off.

ALJD at 8:27-9:2; Jt. Exh. P. The modified rack and stack selection process offered to take seniority into account in order to address the Union's concern about the subjectivity of rack and stack under the status quo RIF policy. Tr. 185:12-16, 280:19-25. The Company also was willing to agree to transfer rights as outlined above. At the time, the Union did not tell Triumph it was categorically opposed to the concepts outlined in Triumph's April 7 proposal and indicated it would consider them. Tr. 281:3-282:3.

7. April 10 to April 18, 2017.

April 7 was a Friday. During the week of April 10, David Barker (the Union's chief negotiator) and Danielle Garrett (Triumph's chief negotiator) were scheduled to be in Tulsa,

Oklahoma for bargaining over a first contract at Triumph's Tulsa facility. Tr. 132:24-133:1, 200:25-201:18, 282:13-17. The Union did not attempt to cancel or reschedule the Tulsa negotiations to pursue additional bargaining over the planned Red Oak RIF, nor did the Union attempt to meet with other Triumph representatives to discuss the RIF that week. Tr. 282:4-284:3.

On Friday, April 14, the Union sent Triumph a letter regarding the RIF negotiations.<sup>9</sup> In the letter, the Union undermined the progress made on April 7 as follows:

- Rejected Triumph's April 7 compromise on selection criteria and transfer rights;
- Withdrew the Union's April 7 modified rack and stack proposal, and stated that "the Union is wholeheartedly opposed to the rack and stack [performance ranking] philosophy";
- Identified some items the Union "would like to see," including (i) "some form of a plant-wide retirement incentive to reduce headcount in the bond shop"; (ii) a mechanism by which laid off employees could apply for an open assembly position at the Red Oak facility and be given an offer of employment at their current rate of pay, benefits, and seniority; and (iii) laid off bond shop employees would have recall rights for 15 months; and
- Acknowledged that "it appears that the two parties might not reach an agreement concerning a layoff procedure in a timely manner for the bond shop layoffs that are upon us."

ALJD at 9:5-29; Jt. Exh. Q. Given the stage of the discussions, the Union's letter disappointed the Company. Tr. 286:17-287:16, 292:12-22; R. Exh. 7 at 3; GC Exh. 5 at 2-3. As to the other items the Union stated it "would like to see," they involved topics that the parties had already discussed and Triumph had already indicated were unacceptable. Tr. 287:3-17. The plant-wide retirement incentive was new, but did not fit Triumph's need to reduce headcount *in the bond shop*. Tr. 288:5-24.

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<sup>9</sup> The judge described this April 14 letter as a "counter." ALJD at 9:7. However, as explained in the text and through testimony, the Union's letter was not a formal bargaining proposal.

On April 18, the Union requested “all evaluations of Bond Shop and NDI employees, the competencies used, who evaluated each employee, and anyone else that had input on the ratings.” ALJD at 9:32-39; Jt. Exh. R. This request related to the application of the status quo RIF policy selection procedures, consistent with the Union’s April 14 statement that the parties had reached no understanding regarding alternative selection procedures and the tentative RIF date announced on March 28 was quickly approaching (April 21). On April 18, Triumph was still finalizing its rack and stack rankings under the RIF policy, which required supervisors and managers to evaluate and score all of the employees in the bond shop. Tr. 290:3-9.; R. Exh. 7 at 5 (9:17 a.m.), 1 (2:26 p.m.); GC Exh. 5 at 5, 16.

8. April 19, 2017 Bargaining Session.

The parties’ final bargaining session took place on April 19. The meeting started at approximately 9:17 or 9:18 a.m. R. Exh. 7 at 1 (9:17 a.m.); GC Exh. 5 at 1. The parties first discussed the Union’s April 14 letter. The Union stated that the purpose of the letter, which rejected Triumph’s April 7 offer and withdrew the Union’s previous proposal on modified selection procedures, was also to inform Triumph that “[i]t doesn’t look like our bargaining is going to determine how this happens” and “we have bargained this as much as we could bargain it” and “we understand we have not come to an agreement.” R. Exh. 7 at 4 (9:17 a.m.); GC Exh. 5 at 3-4. The Union early in the session asked Triumph to delay the scheduled April 21 layoff by several days so the parties could continue bargaining. But the parties had already engaged in extensive bargaining, and Triumph did not see the parties being able to reach any alternative deal after the Union rejected Triumph’s April 7 good faith compromise on selection procedures and transfer rights and stated it was “wholeheartedly opposed” to any system that factored in employee performance. Tr. 293:1-11; R. Exh. 7 at 7-9 (9:17 a.m.); GC Exh. 5 at 6-7. Triumph informed the Union it did not consider the Union’s April 14 letter to be a proposal, and the

Union stated it would get Triumph a proposal. R. Exh. 7 at 4 (9:17 a.m.); GC Exh. 5 at 4. The parties then took a break to caucus around 9:42 or 9:44 a.m. R. Exh. 7 at 9 (9:17 a.m.); GC Exh. 5 at 7.

The parties reconvened later that afternoon, around 1:00 or 1:14 p.m. R. Exh. 7 at 1 (1:00 p.m.); GC Exh. 5 at 8. At that session, the Union gave Triumph a formal counterproposal, which contained the following terms:

**Union's Proposed Letter of Agreement Red Oak Bond Shop Layoff**

April 19, 2017

In as much as the Company tentatively plans to lay off approximately 12 bond shop employees at its Red Oak location on or about April 21, 2017, the Company and the Union have agreed to the following:

- Employees within the bond shop who have been employed for less than forty-eight (48) months or who have transferred from another facility within the past forty-eight (48) months shall be evaluated and laid off under the initial terms and conditions of employment, excluding active discipline.
- Employees who are affected by layoff may apply for an open assembly position at the Company's Red Oak location. Any employee affected by layoff who applies for an open assembly position shall be given an offer of employment at their current rate of pay.
- Employees affected by layoff who apply and accept an offer for an assembly position will retain their seniority and benefits without a break in service.
- Employees who accept a position in assembly shall be on a probationary period for ninety (90) working days. Should the employee not meet expectations in assembly based on skill alone, the employee shall be placed on indefinite layoff.

In the event that the bond shop has openings within the next 15 months, the following shall apply:

- Employees who are affected by layoff may apply for an open bond shop position at the Company's Red Oak location. Any employee affected by layoff who applies for an open bond shop position shall be given an offer of employment at the bond shop labor grade and hourly rate of pay that they held at the time of layoff.
- Employees affected by layoff who apply and accept an offer for a bond shop position will retain their seniority and benefits without a break in service.

ALJD at 10:3-26; Jt. Exh. S. The parties then went through the Union's latest proposal item-by-item, with Triumph rejecting the Union's proposals as either identical to past rejected proposals (including on transfer rights with automatic compensation grandfathering), or not aligning with business needs. ALJD at 10:26-29; Tr. 294:10-297:9; R. Exh. 7 at 1-11 (1:00 p.m.); GC Exh. 5 at 8-16.

The Union's proposal on selection was designed to ensure that "the people that would potentially be laid off are the people that they'd [Triumph] hired last" because by limiting

rankings to employees with less than 48 months seniority, only those employees with limited seniority would be eligible and ranked. Tr. 100:21-24, 294:10-295:16. Triumph explained that the Union's proposal to exclude active discipline in the rack and stack rankings was unworkable because performance evaluations would be essentially meaningless if Triumph could not consider disciplines. R. Exh. 7 at 2-4 (1:00 p.m.); GC Exh. 5 at 8-10. The Union was unable to explain how Triumph could evaluate these issues without considering disciplines. As to recall rights, Triumph explained that the Union's proposal for recall rights for 15 months did not align with Triumph's business needs because Triumph did not want to obligate itself to bring back a poor performer. Tr. 296:14-297:3; R. Exh. 7 at 6-8 (1:00 p.m.); GC Exh. 5 at 12-13.

The Union then suggested a "years of service multiplier" for laid off bonders who accepted positions in assembly, which Triumph rejected due to its position that employees should be paid commensurate with assembly skills and experience. Tr. at 355:7-12. The Union also suggested a letter of agreement that would allow the rack and stack evaluations to be challenged via a yet-to-be negotiated grievance procedure, which Triumph rejected due to its interest in finality regarding the RIF, as the Union's suggestion could give rise to challenges to the RIF years later. R. Exh. 7 at 8 (1:00 p.m.); GC Exh. 5 at 15.

Triumph stated it did not believe the parties were "anywhere close" regarding an agreement to deviate from the status quo RIF selection procedures, based on the Union's letter, the proposal it had just passed, and told the Union "if you can't get past it just tell me you just can't get past it ... if that's a sticking point it's a sticking point, just say it." *Id.* The Union did not repeat its request for a delay in RIF implementation, but instead responded that it would caucus and determine whether it had another proposal to offer Triumph: "we understand what you rejected we will go discuss and talk about the direction we would like to go, if act

accordingly if a modified counter proposal at this at this point is appropriate we will make determination and let you know” and “we understand the rejection point of our proposal that we’ve given to the company, we will go down and discuss if we’re going to modify any of our proposal and we’ll get back with you shortly.” R. Exh. 7 at 9-10 (1:00 p.m.); GC Exh. 5 at 15-16. The parties then took a break at 1:45 or 1:46 p.m. R. Exh. 7 at 11 (1:00 p.m.); GC Exh. 5 at 16.

After a brief caucus, the parties reconvened at 2:26 or 2:27 p.m. R. Exh. 7 at 1 (2:26 p.m.); GC Exh. 16. The Union came back to the table and announced:

The union understands the company has rejected our proposal and we don’t see resolution coming today. Our next order of business going forward will be dealing with the wage proposals and the disciplines in the morning and whatever contractual items we discuss over the next 2 days. We understand your rejection of our proposal.

R. Exh. 7 at 1 (2:26 p.m.); *see also* GC Exh. 5 at 16.

Later that same day, Triumph gave the Union a letter that formally rejected the items the Union had identified in its April 14 letter that it would “like to see.” ALJD at 10:35-43; Jt. Exh. T. The letter noted that the parties had engaged in bargaining regarding the layoffs but had been “unable to reach mutual agreement.” *Id.* Triumph stated it would proceed with the RIF of 12 bond shop employees on April 21, 2017, but noted it was “open to consider future Union proposals on layoff and recall procedures.” *Id.* After April 19, however, the Union did not make another proposal or request additional bargaining over the RIF, either before or after its implementation. Tr. 142:23-143:5, 144:24-145:18, 171:10-16, 206:4-6, 297:23-298:7.

On April 20, Triumph provided the final rack and stack rankings to the Union, which identified the bottom 12 individuals impacted by the RIF, in response to the Union’s April 18 request. ALJD at 9:39, 11:1-13; Jt. Exh. U; Tr. 290:15-23. The Union did not seek to bargain over the employee rankings, either before or after April 21. Tr. 305:7-14, 438:25-439:2.

9. The April 21, 2017 Layoff.

As indicated in Triumph's March 28, 2017 letter to the Union – which referred to the tentative plan to lay off 12 bond shop employees on April 21, 2017 but noted the size of the reduction could range from 6 to 15 employees – Triumph reviewed and considered a number of potential scenarios based on the customer information and internal data, including different headcount reduction totals. Tr. 370:18-25, 371:13-22, 398:23-399:11; Charging Party Exh. 1; GC Exh. 10. Ultimately, Triumph decided on a reduction of 12 employees – well within the 6-15 range announced on March 28. Tr. 371:1-3, 399:10-24, 401:23-402:2. Triumph also considered a scenario where a second *potential* layoff would occur in June 2017, but it later decided another layoff was not necessary, and no June layoff occurred. CP Exh. 1; GC Exh. 10; Tr. 371:20-372:3, 395:14-20, 401:23-402:2. The reduced staffing level in the bond shop in late April was sufficient to meet production demands in the following months – without a further decision to reduce headcount being necessary. Tr. 394:18-396:12, 409:18-21.

On April 21, Triumph implemented the RIF.<sup>10</sup> The 12 lowest-ranked employees in the bond shop (out of approximately 100) were impacted. ALJD at 11:15-18; Jt. Exh. Z. The bottom 12 employees included three of the Charging Parties – Lawrence Hamm, Rodney Horn, and Michael Kindley. The Union never requested further bargaining over the RIF. Tr. 298:17-20, 305:4-14. While the parties had first contract bargaining sessions scheduled for April 26, 27, and 28, they did not bargain over the RIF or related issues at those meetings. Tr. 298:8-20. Nor did the Union file any unfair labor practice charges in connection with the RIF. Tr. 146:4-16, 207:22-25. Instead, the Union directed employees who complained about being selected –

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<sup>10</sup> While the judge stated the RIF was conducted in accordance to Triumph's "final" proposal, ALJD at 11:17-18, Triumph implemented the RIF pursuant to its status quo policy as the parties had not reached any alternative agreement(s).

employees who had not been part of the bargaining committee and did not have any firsthand knowledge of the negotiations – to file individual Section 8(a)(5) “failure to bargain” charges (3 of the 12 impacted bonders filed charges in May 2017). Tr. 148:1-9, 208:18-20, 209:13-19, 210:8-10. The Union did not join any of the charges until about three weeks before the complaint issued eight months later in January 2018. GC Exh. 1(i).<sup>11</sup>

## **II. ARGUMENT**

The Second Amended Consolidated Complaint alleged Triumph violated Section 8(a)(5) of the Act by: (1) terminating Thomas Smith and suspending Rodney Horn “without providing the Union with notice and an opportunity to bargain,” and (2) laying off 12 bond shop employees on April 21 “without first bargaining with the Union to impasse over the layoff.” GC Exh. 1(s).

The judge dismissed the Complaint in its entirety, calling the allegations “meritless.” ALJD at 1. As to the discipline allegations, the judge found Triumph lawfully terminated Smith and suspended Horn pursuant to its status quo discipline policy. ALJD at 3:40-4:14. Although Triumph exercised discretion in applying its policy, the disciplines did not constitute a change in any term or condition of employment. *Id.* Applying *Oberthur Technologies*, 366 NLRB No. 5 (2019), the judge found Triumph had no obligation to give the Union pre-implementation notice or opportunity to bargain under the circumstances. *Id.* The judge therefore did not address the issue of whether the allegations should be dismissed under the equitable estoppel principle given the Union’s decision not to pursue pre-decision notice and bargaining for Red Oak disciplinary matters prior to late May 2017.

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<sup>11</sup> While the bond shop’s reduced staffing levels were sufficient to keep up with production demands for many months after April 21, they were subsequently reduced even further through natural attrition, and eventually bond shop demand increased somewhat. Based on increased bond shop demand, all 12 laid off bond shop employees were offered reinstatement (shortly after the original complaint issued in early 2018), with some accepting and some declining the offer. Tr. 276:19-277:9.

As to the RIF allegation, the judge found Triumph lawfully implemented the April 21 RIF after the parties reached a valid impasse in bargaining. ALJD at 12:20-13:7.

While Triumph agrees with the judge's dismissal of the Complaint, Triumph cross-excepts to the judge's failure to find additional grounds for dismissing the Complaint allegations.<sup>12</sup>

**A. The Judge Should Have Dismissed the RIF Allegation For Alternative or Additional Reasons. [Cross-Exceptions 4-16]**

1. Preliminary Cross-Exceptions to the Judge's Factual Findings. [Cross-Exceptions 5-11]

As an initial matter, Triumph cross-excepts to several of the judge's factual findings regarding Triumph's proposals. Although these minor descriptive errors do not affect the judge's substantive analysis of impasse, these corrections provide further context for the parties' bargaining and additional support for dismissing the RIF allegation.

First, the judge incorrectly referred to the Union's April 14 letter to Triumph as a "counter" and as a "proposal." ALJD at 9:7, 9:45. Both Triumph's and the Union's bargaining notes reflect that neither Triumph nor the Union considered the letter to be a proposal. R. Exh. 7 at 4 (9:17 a.m.) ("Danielle - ... Is [the April 14 letter] a proposal? Is this your wishes? What is this? .... I think you owe me a proposal. James – Okay we will give you a proposal."); GC Exh. 5 at 4.

Second, the judge described the parties' April 19 discussions out of order when he stated that the Union requested a RIF delay after Triumph rejected the Union's proposal. ALJD at 10:26-30. Instead, the record shows that at the initial 9:17/9:18 a.m. meeting that morning, the

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<sup>12</sup> The General Counsel and the Union filed Exceptions to the judge's dismissal of the Complaint and briefs in support. Triumph responds to those Exceptions and briefs in separate answering briefs.

Union at first asked Triumph to “reconsider” its timeframe for implementing the RIF and to delay it “maybe a couple of days.” R. Exh. 7 at 7 (9:17 a.m.); GC Exh. 5 at 6. However, the Union then turned around a proposal that afternoon, which it passed to Triumph during the parties’ 1:00/1:14 p.m. session. R. Exh. 7 at 1 (1:00 p.m.); GC Exh. 5 at 8. During that same session, Triumph reviewed the Union’s proposal, and rejected each element with discussion and explanation at the table. R. Exh. 7 at 1-11 (1:00 p.m.); GC Exh. 5 at 8-16. The Union acknowledged the Company’s rejection and the parties took a break so the Union could determine whether to make another proposal. R. Exh. 7 at 9-11 (1:00 p.m.); GC Exh. 5 at 15-16. When the parties reconvened at 2:26/2:27 p.m., the Union informed Triumph it would not be offering another proposal. R. Exh. 7 at 1 (2:26 p.m.); GC Exh. 5 at 16. Thereafter, the Union chose not to request further bargaining *or* make another proposal.

Third, the judge incorrectly referred to Triumph’s April 5 loan framework as Triumph’s initial proposal. ALJD at 6:38. However, Triumph’s initial proposal was to conduct the RIF pursuant to its status quo RIF policy, absent some alternative agreement, as set forth in Triumph’s March 28 letter to the Union. Jt. Exh. G; Tr. 264:2-8. There was no status quo “loan” policy or transfer program in effect at Red Oak. Tr. 265:13-16.

Lastly, the judge incorrectly stated the April 21 RIF was conducted in accordance with Triumph’s “final” proposal. ALJD at 11:17-18. However, Triumph implemented the RIF pursuant to its status quo RIF policy, as proposed in its March 28 letter to the Union, because the parties had not reached any alternative agreement(s). Jt. Exhs. U, Z at 32-33.

2. The Relevant Bargaining Framework for Layoffs Motivated by Economic Exigencies is Expedited. [Cross-Exception 12]

The Board has addressed bargaining over layoffs in similar “status quo” situations and recognized that, because bargaining need not be protracted, an employer generally complies with

Section 8(a)(5) with several weeks' notice and bargaining. *See, e.g., Gannett Co.*, 333 NLRB 355, 357 (2001) (to be adequate under the Act, “[t]he prior notice must afford the union a reasonable opportunity to evaluate the proposals and present counter proposals before implementing [the] change”) (citation omitted). The Board even has found employers to satisfy their pre-layoff bargaining obligations with *less notice and bargaining* than Triumph provided the Union here. *See, e.g., KGTV*, 355 NLRB 1283, 1284 (2010) (notice issued 3 weeks in advance of layoff implementation date “was an adequate period for the parties to negotiate”); *Paramount Liquor Co.*, 270 NLRB 339, 343 (1984) (dismissing failure-to-bargain allegation where union was given 11 days' notice of layoff and no final decision was made until after a meeting between the employer and the union); *Burns Ford, Inc.*, 182 NLRB 753, 754 (1970) (reasonable notice and opportunity to discuss impending layoff given where employer “was in a period of declining sales and was attempting to reverse this trend through various means,” union was notified 6 days in advance, and parties met twice prior to layoff).

In cases where the Board has found a layoff bargaining violation, by contrast, the employer either (a) failed to provide notice of its plans before implementation or (b) refused to bargain altogether before or after the layoff. *See, e.g., Pan Am. Grain Co.*, 343 NLRB 318, 318 (2004) (finding violation where employer's general statements in 2001 concerning future workforce reductions were not sufficient to provide the union with a reasonable opportunity to bargain over the employer's layoffs in February 2002), *enforced*, 558 F.3d 22 (1st Cir. 2009); *Ebenezer Rail Care Servs.*, 333 NLRB 167, 172-73 (2001) (finding violation where employer informed union of March 5 layoff on the afternoon of March 4, and noting the employer could have informed the union on March 1, “which would have provided ample opportunity to complete negotiations before that time”); *Lapeer Foundry & Machine*, 289 NLRB 952, 955

(1988) (finding violation where employer laid off employees without notifying the union or bargaining over the decision). Critically, the Board has *never* found an employer violated its obligation to bargain over a layoff where the employer proposed to use its status policy RIF policy, provided the union with several weeks' advance notice, provided extensive information, met on four days to bargain, and exchanged numerous proposals or counterproposals to deviate from the status quo policies and procedures in a union-favorable manner.<sup>13</sup>

The judge fails to cite or address any of this case law, or otherwise reconcile the need to decide whether “impasse” was reached with the fact that it was *the Union*, not Triumph, that wanted to bargain for a deviation from the status quo procedures. And it is undisputed that the April 21, 2017 layoffs were a result of exigent circumstances – customer order levels – requiring prompt action. Jt. Exh. Z at 19 (stating in part “[t]he General Counsel does not allege that Respondent’s business rationale failed to qualify as exigent circumstances such that Respondent had a duty to bargain to overall impasse or agreement with the Union on a collective bargaining agreement prior to making unilateral changes”). It is also undisputed that Triumph gave the Union notice on March 28, a total of 24 days in advance of the planned RIF, and that the parties met and bargained on four days in April and exchanged numerous written proposals where Triumph repeatedly tried to compromise to the Union and employees’ benefit. Jt. Exh. Z at 18, 25-27, 30.

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<sup>13</sup> In fact, the Regional Director for Region 16 dismissed a charge filed by Local 848 involving the May 2015 bond shop layoffs, finding Triumph satisfied its bargaining obligation – despite less notice and bargaining than in 2017 – because Triumph “notified the Union about the need to layoff employees, and ... the parties bargained about that layoff prior to implementation.” R. Exh. 9 at 2.

The judge should have dismissed the Complaint allegation based on the Union receiving sufficient notice and opportunity to bargain under the relevant legal framework.

3. The Union Failed to Pursue Bargaining over the “Decision” to Lay Off Employees from the Bond Shop, and Instead Pursued “Effects” Bargaining over Loan/Reassignment Rights and Selection Procedures. [Cross-Exception 13]

The judge’s decision also contains no discussion of a critical, threshold issue related to the Complaint’s allegations tied to “impasse” – whether the alleged failure to reach impasse involved the “decision” or “effects” of the decision at issue. Instead the judge’s decision simply moves into an “impasse” analysis, finds that impasse was reached, and then dismisses the claims. ALJD at 11-13. The Board’s precedent dating back many decades emphasizes the significant legal and remedial differences with “decision” versus “effects” bargaining, and makes clear that the bargaining pursued here was “effects” bargaining *where no impasse is required pre-implementation*.

Once a union has received notice of the employer’s decision to reduce headcount in a given department or plant, the union must act with “due diligence” to request bargaining, or risk waiver. *Bell Atl. Corp.*, 336 NLRB 1076, 1086 (2001). While a union may have the right to bargain over both the RIF decision *and* its effects, the Board will find that the union has waived its right to bargain over the decision where the union requests bargaining over the effects and fails to pursue bargaining over the decision. *KGTV*, 355 NLRB at 1284-85; *see also Print Fulfillment Servs., LLC*, 361 NLRB 1243, 1247-48 (2014) (even though union initially requested bargaining over both layoff decision and its effects, the union effectively waived its right to bargain over the decision where it subsequently sought to bargain over only the *selection* of employees to be laid off and *other effects* of the decision to reduce headcount). As mentioned, an employer need not reach “impasse” on effects issues before implementation. *See, e.g.*,

*Komatsu Am. Corp.*, 342 NLRB 649, 650 (2004) (finding that meaningful effects bargaining occurred both before and after employer implemented its decision); *see also Port Printing Ad & Specialties*, 351 NLRB 1269, 1270 (2007) (finding employer was required to bargain over the effects of layoff decision even after the layoff was implemented), *enforced*, 589 F.3d 812 (5th Cir. 2009).

Although the Complaint is silent as to whether it alleges a decision or effects bargaining violation, it appears that the General Counsel has pursued a decision bargaining violation because it claims no “impasse” was reached and fails to allege that any *post-implementation* conduct (after April 21, 2017) violated the Act. The record evidence shows, however, the Union *did not* seek to bargain over Triumph’s threshold decision to implement a reduction in force – in other words to layoff employees in the bond shop based on customer volume, as illustrated by the following chart:

Decision Bargaining Topics	Company	Union
Keep bond shop headcount the same (no layoff from bond shop)	No proposal*	No proposal*

  

Effects Bargaining Topics	Company	Union
Loan out impacted bond shop employees to other departments	Right to select employees for loan out	Must be limited to volunteers from bond shop
Layoff selection procedure	Status quo ranking <u>or</u> modified ranking with seniority as one factor	Seniority-based selection only (with minor exception)
Assembly transfer rights	Transfer rights, but with compensation adjusted based on experience	Transfer rights, but with compensation grandfathered even if much higher than other assembly employees
Recall rights	Status quo – no recall rights	Recall rights to bond shop for 15 months

\*E.g., no proposals to create part time positions; no proposals to eliminate overtime; no proposals to institute across-the-board hours reduction to maintain staffing levels

In other words, the Union did not pursue bargaining over *whether to* reduce bond shop headcount. The Union never requested to bargain about Triumph’s operational need to reduce headcount or the size of the reduction, even though Triumph’s March 28 letter noted the

headcount reduction likely would be 12 and could range from 6 to 15. Jt. Exh. G. Nor did the Union make any proposals, such as overtime elimination, job-sharing or part-time conversions, that would allow the bond shop to remain at full headcount (or even reduce the size of the reduction). Triumph's Senior Director of Labor Relations, Danielle Garrett, testified that the Union "took it for a fact that we needed to lay people off from the Bond Shop. We never had any discussions about, was the layoff appropriate, was the quantity of people appropriate, nothing." Tr. 263:14-17. As a result, the Union waived its right to bargain over the threshold decision – whether to reduce headcount in the bond shop – and the Complaint allegation can be dismissed on this basis because it alleges a failure to reach "impasse" – and Board law is clear impasse on effects is not required before implementation.

The testimony of the General Counsel's witnesses only reinforced that the Union did not bargain over the decision here. Local 848 President James Ducker acknowledged that "[t]he decision in this case was that the bond shop was overstaffed and the headcount had to go down by approximately 12." Tr. 113:14-18. Ducker admitted that that the Union "depended on the number that they [Triumph] were supplying," Tr. 117:10-11, and did not make any proposals that would have avoided the need to reduce headcount in the bond shop, Tr. 114:16-20, 115:7-16. Similarly, International Union Representative David Barker testified that "[t]he company makes a decision, we don't make a decision, the union doesn't make a decision to layoff anybody, the company makes that decision." 190:23-25.<sup>14</sup> In describing the parties' negotiating

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<sup>14</sup> The Union's apparent belief that it had no ability to impact Triumph's decision, however, does not establish that the decision was a *fait accompli*, or that Triumph would not have bargained about the issue. See *KGTV*, 355 NLRB at 1284 ("A *fait-accomplis* finding requires objective evidence; a union's subjective impression of its bargaining partner's intention is insufficient."). That is particularly true here, given Triumph's March 28 letter, which noted that its layoff plan to reduce 12 employees was "tentative[]" and that the reduction could range from 6 to 15 employees. Joint Exh. G; see also Tr. 263:18-23 (Q: "And the Union could have come in and said, 'We don't want to take people out of the Bond Shop. We want to figure out a way to keep

sessions, the Union’s Exceptions brief also acknowledges the parties bargained over effects topics only: “The parties exchanged proposals during these negotiations, with the Union maintaining its position that Triumph should use an *alternative layoff mechanism* that would allow the affected bond shop employees *to remain employed* at Red Oak in other jobs.” U Br. at 3 (emphasis added).

The Union thus pursued bargaining over *how to* reduce bond shop headcount, *who to* select for the reduction, and the *rights for* impacted employees, including whether they could loan or transfer into other jobs. Those are “effects issues” under well-settled law. *See First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 681 (1981) (“concessions, information, and alternatives that might ... prevent the termination of jobs” and “matters of job security” are part of effects bargaining); *Print Fulfillment*, 361 NLRB at 1248 n. 25 (noting that issues such as the “procedures to be followed in the reduction of the workforce [and] the [Parties’] rights and obligations in connection with said reduction” involved *the effects* of the layoff decision).

The General Counsel’s apparent theory – that the “decision” to eliminate employees from the bond shop was the same as the “decision” of whether or not bargaining unit employees would *remain employed* by Triumph after April 21 – is not supported by Board law and would drastically expand the scope of the decision bargaining in the layoff context. “A decision to lay off is predicated on the assumption that savings will accrue from reduced labor costs during a period when a full complement of workers is unnecessary.” *Lapeer*, 289 NLRB at 953. Here, a full complement of bond shop employees was not necessary. This was the operative decision, as outlined in Triumph’s status quo RIF policy. Jt. Exh. A (“Management will [] determine the RIF

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everyone in there.” Garrett: “That’s correct. They could have.” Q: “But they didn’t do that?” Garrett: “They did not.”).

units and classifications where reductions will occur.”). The Union chose not to engage on that decision but instead turned to the impacts on affected bond shop employees (and who to select). It had the right to forego decision bargaining, and Triumph had the right to proceed with making and implementing the decision to reduce bond shop headcount on April 21 – regardless of whether the parties were at impasse over the “effects” of the decision.

The General Counsel’s position also triggers a fundamental conflict with the legal framework for layoff bargaining in *exigent circumstances*. As the Board has stated, bargaining in this context must be “timely and speedy,” *Lapeer*, 289 NLRB at 954, and “need not be protracted,” *RBE Electronics of S.D.*, 320 NLRB 80, 82 (1995). The General Counsel’s apparent position on defining the “decision” would require an employer to first bargain to impasse or agreement over whether to reduce headcount in a given department or facility, *and then* bargain to impasse or agreement over whether the impacted individuals will transfer to another job or lose their employment with the Company. Not only would this “two stage” approach substantially *prolong* pre-implementation bargaining, but it would also create uncertainty for employers as to when they have satisfied their decision bargaining obligation and can move to effects.

The General Counsel’s position is unworkable and convoluted, which may explain why the judge chose to dismiss the Complain allegations under the traditional impasse factors, without addressing this “decision” versus “effects” defense. But the Board should not do the same. It should first decide whether the General Counsel has properly raised a “decision” bargaining allegation under this record, as the answer will impact how future employers can assess their bargaining obligations when a union fails to bargain about the threshold question of staffing levels, and instead jumps to how to reduce headcount, select impacted employees, and

what rights (if any) they have to other jobs or employment. *See Lapeer*, 289 NLRB at 954 (recognizing “management has a legitimate concern with the need for speed and flexibility in effectuating a layoff to remedy its economic plight”). While bargaining over the effects may involve a much broader and varied range of issues, because such bargaining can occur before and after the decision is implemented, there is no unwarranted interference in the employer’s right to run its business and align staffing levels with customer demand.

4. In Any Event, the Record is Replete with Additional Evidence Supporting the Judge’s Conclusion That the Parties Reached “Impasse” Before April 21. [Cross-Exceptions 14-16]

The judge – who heard the testimony of the witnesses in this case and reviewed the other record evidence, including the parties’ stipulations and the exhibits – exercised his judgment and easily found the parties had reached impasse by April 21. This is the basis upon which the judge dismissed the RIF allegation. Specifically, the judge found the following factors supported a finding of impasse: (1) the parties’ stable, 50-year bargaining history; (2) the volume of bargaining exchanges; (3) the breadth of layoff topics the parties discussed and Triumph’s reasonable and detailed explanations for its bargaining positions; (4) Triumph’s overall flexibility and good faith during bargaining; and (5) the overall good faith and reasonableness of Triumph’s proposals, which “demonstrated a strong desire to reach agreement.” ALJD at 12:27-13:7.

Triumph agrees that these factors, by themselves, are sufficient to support a finding of impasse. Below, Triumph summarizes the additional factual and legal arguments that the Board can use to supplement an impasse finding and dismiss the RIF allegation on this basis.

a. *The Parties' Bargaining History Supports Impasse. [Cross-Exception 14]*

The parties' failure to reach an agreement regarding the May 2015 bond shop layoff – the only prior layoff at the Red Oak facility during the first contract bargaining period – supports a finding they reached impasse in April 2017. With respect to the May 2015 layoff, Triumph proposed following the status quo layoff policy – the same method it proposed on March 28, 2017 and implemented on April 21, 2017. *See* R. Exh. 8 (Triumph's April 16, 2015 letter to the Union); Jt. Exh. G. The parties bargained over the May 2015 layoff, but were unable to reach an agreement to deviate from the status quo layoff policy. R. Exh. 9 at 2; Tr. 301:5-14. Thus, it is not surprising that the parties were unable to reach an agreement over the same issues in 2017 despite more extensive bargaining and proposal exchange.

b. *Additional Evidence of Triumph's Good Faith Based on Triumph's Proposals. [Cross-Exceptions 5, 9-11]*

The judge correctly cited to several grounds for finding Triumph's good faith:

- “The parties comprehensively covered, inter alia, transfers in lieu of layoffs, seniority-based layoff systems, other layoff ranking systems, recall and separation rights, voluntary retirement systems, and voluntary separations.”
- Danielle Garrett, Triumph's Senior Director of Labor Relations and lead negotiator, “repeatedly offered reasonable and detailed rationales for Triumph's stances, highlighted ambiguities in Union proposals that could trigger unforeseen labor relations problems, and continuously asked valid questions to aid her understanding.”
- “Triumph's overall willingness to shift from its opening position on transfers to a more standardized layoff ranking system showed flexibility consistent with good faith bargaining.”
- “Triumph's initial April 5 proposal was abundantly reasonable and demonstrated a strong desire to reach agreement. Its opening salvo was to altruistically solve the overstaffing dilemma by not laying off anyone and only transferring affected bond shop workers to other departments for a short duration at their current pay. A proposal of ongoing employment at the same wage without the gamesmanship of holding it back until the eleventh hour of negotiations hardly paints the picture of bad faith. In sum, Triumph acted with fairness during bargaining, reached a valid impasse, and did not unlawfully implement its [] layoff proposal.”

ALJD at 12:28-13:7.

Overall, Triumph's proposals sought good faith compromise with the Union, based on the Union's dislike of the status quo RIF policy, with reasonable alternatives offered to incorporate seniority rights and find alternative employment (whether loans or transfers) for the bonders selected for the reduction.

Triumph clearly wanted to reach a deal to avoid a potential dispute. It could have insisted from the start on its proposal to apply the status quo RIF policy, without deviation, which would have narrowed the range of options considerably. But instead Triumph considered creative and reasonable alternatives to the status quo that it found *less preferable* in the hopes of reaching a deal and keeping impacted bonders employed after April 21 in other departments. The Union, however, did not like Triumph's proposals, and refused to consent to Triumph's ability to select bonders based on performance and/or business need, or transfer rights that involved a possible lower compensation rate after transfer. Tr. 130:17-20; 198:18-199:13 (Q: "If you have somebody who's been doing the job for five, ten years making \$25 an hour and then somebody from bond shop who has no experience comes in making \$39 an hour." Barker: "The perception. What you're talking about is a perceived inequity." Q: "Yeah." Barker: "They don't know the experience level these people might've had."). The Union was entitled to decline compromise offers, but this does not mean by doing so it could veto the RIF altogether.

*c. The Parties Disagreed on Important Issues. [Cross-Exception 12]*

Disagreement on key issues and options under the alternative proposals exchanged between April 5 and April 19 further reinforces the impasse finding, which the judge did not highlight in detail. The Union clearly disagreed with Triumph's status quo RIF policy, and the Union had numerous opportunities to accept and/or propose something different for purposes of employee selection and rights. Tr. 198:11-12 (Barker: "The company understood we weren't

onboard with pure rack and stack.”); Jt. Exh. Q (“[T]he Union is wholeheartedly opposed to the rack and stack philosophy” for who to select). The parties simply disagreed on alternative approaches to the status quo, including the loan and transfer selection procedures and the rate of pay for bonders who transferred to the assembly department.

Insistence on such positions, and related disagreement, is not bad faith. Both parties “have a duty to negotiate with a sincere purpose to find a basis of agreement,” but “an adamant insistence on a bargaining position is not of itself a refusal to bargain in good faith.” *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984) (quotations and citations omitted). Under Section 8(d) of the Act, the duty to bargain in good faith “does not compel either party to agree to a proposal or require the making of a concession.” With bad faith claims based on one party disliking the other’s proposal(s), the U.S. Supreme Court has held that “the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.” *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 106 (1970) (citation omitted).

As a result, the Board refrains from deciding whether “particular proposals are either ‘acceptable’ or ‘unacceptable’ to a party.” *Reichhold Chems., Inc.*, 288 NLRB 69, 69 (1988), *affd. in relevant part sub nom. Teamsters Local Union No. 515 v. NLRB*, 906 F.2d 719 (D.C. Cir. 1990). The Board looks only to “objective factors” of a party’s desire to “frustrate agreement” through proof of “intransigence or insistence on extreme proposals.” *Id.* at 69, 71. Employers have the right to maintain “hard” proposals and decline further concessions. *Coastal Elec. Coop., Inc.*, 311 NLRB 1126, 1127 (1993) (“[T]he Respondent’s various positions, although indicative of hard bargaining, are not inherently unlawful, and its failure to make concessions, in the absence of other indicia of bad faith, is not a sufficient manifestation of bargaining with

intent to avoid agreement.”). Overall, Congress “never intended that the Government would [] step in, become a party to the negotiations and impose its own views of a desirable settlement.” *H. K. Porter*, 397 U.S. at 103-04.

These were critical issues for both parties, and in the end the Union preferred the “status quo” policy over the numerous alternatives considered. That may be baffling, but it was the Union’s right to reject more-favorable alternatives, *and it was Triumph’s right to proceed with the headcount reduction using the status quo policy on April 21, 2017*. As noted above, the RIF policy – and in particular, the “rack and stack” selection process and seniority rights – was a major issue in the overall contract negotiations, and the Union viewed the April 21 layoff as a possible “benchmark” for the overall contract. Tr. 195:7-12.

*d. Both Parties Understood They Had Reached Impasse. [Cross-Exceptions 4, 16]*

The judge also did not fully address the issue of whether “the parties” understood they had reached impasse by April 21. While the Union has changed its story for purposes of this litigation, back in “real time” the Union knew the pre-implementation bargaining had run its course, it never pursued more, and it failed to pursue any post-implementation bargaining either.

Specifically, the record evidence demonstrates both parties understood they were at bargaining impasse on April 19, 2017 – two days before Triumph implemented the layoff. To begin, Triumph told the Union on March 28 that it was seeking to implement the layoff by April 21. *The Union never objected, and repeatedly indicated it understood this timeline*. As early as April 14, the Union expressly acknowledged that “the parties might not reach an agreement” before April 21. Jt. Exh. Q. On April 19, the Union again acknowledged that bargaining over the layoff had reached an end, thereby mooting the earlier request to delay the RIF by several days. R. Exh. 7 at 4 (9:17 a.m.) (“James [Ducker] - ... It doesn’t look like that our bargaining is

going to determine how this [the layoff] happens.”). After Triumph rejected the Union’s last-minute proposal on April 19, the Union said it would discuss making another proposal and let the Company know about more bargaining or more proposals. *Id.* (1:00 p.m. session), at 9-10. After discussing, the Union told the Company: “we don’t see resolution coming today. Our next order of business going forward will be dealing with the wage proposals and the disciplines in the morning and whatever contractual items we discuss over the next 2 days.” *Id.* at 1 (2:26 p.m.).

By April 21, the parties had engaged in substantial bargaining over the layoff, and yet could not reach agreement on an alternative from the status quo method or new rights for impacted employees. The Union chose not to request any further bargaining or make any new proposals after the April 19 session, which supports an impasse finding. *See ACF Indus. LLC*, 347 NLRB 1040, 1041 (2006) (finding impasse where “[t]he Respondent had nothing left to offer beyond that which had already been rejected, and the Union similarly had offered no new proposals to demonstrate that further progress was possible.”); *Chi. Local 458-3M v. NLRB*, 206 F.3d 22, 34 (D.C. Cir. 2000) (finding impasse where company rejected union’s proposals and the union failed to offer any new proposal); *Huck Mfg. Co.*, 254 NLRB 739, 754 (1981) (whether the parties continue to meet and negotiate is relevant to determining the existence of impasse), *enforced. in relevant part*, 693 F.2d 1176 (5th Cir. 1982).

At trial, when Mr. Ducker was asked what, if anything, the Union still wanted to bargain about after April 19, he could not provide any specifics. Tr. 141:14-23. Ducker testified the Union “wanted to continue to negotiate,” but admitted that “we didn’t have a proposal.” Tr. 172:1-6. Barker also admitted the Union had no further proposals. Tr. 205:21-206:6. Instead, the evidence clearly shows the Union had nothing left to offer. *See ACF*, 347 NLRB at 1041 (union’s request for additional meetings did not preclude impasse where the union failed to offer

any specific proposals: “if the Union had meaningful proposals to make, it could have done so and asked for further negotiations on these proposals .... [but] the reason the Union failed to do so was because it had no further (nonregressive) proposals to offer”).

And, if the Union believed Triumph failed to bargain to impasse by April 21 or otherwise was refusing to bargain, it could have filed an unfair labor practice charge. It never did. Instead, in response to employee complaints about the layoff, the Union told employees they could file unfair labor practice charges as individuals. Three of the 12 laid off employees filed charges in May 2017; however, none of those individuals was part of the Union bargaining committee or had any firsthand knowledge of the negotiations. The individual charges cannot then be construed as requests *by the Union* for further bargaining, especially given that Triumph was not obligated to bargain with the individual charging parties directly (and in fact, would have violated Sec. 8(a)(5)’s prohibition on direct dealing had it done so).<sup>15</sup>

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If the Board does not view this and the other record evidence as sufficient to show impasse, this case should be remanded to take additional evidence regarding the information Triumph subpoenaed about the Union’s bargaining-related documents and communications, which may be relevant to issues involving Union interest in further bargaining before or after the April 19, 2017 bargaining session.<sup>16</sup>

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<sup>15</sup> The Union became a party to one amended charge on January 8, 2018 (Case No. 16-CA-198417, originally filed by Michael Kindley), about three weeks before the first complaint issued in late January, but approximately eight months after the three individuals filed the original charges in May 2017. GC Exh. 1(i).

<sup>16</sup> Before the trial, Triumph issued subpoenas to Charging Parties Hamm, Kindley, Horn, and Smith, and to the custodians of records for UAW Local 848 and the UAW International, seeking information relevant to the bargaining and impasse claim. The Union filed a petition to revoke, which the judge granted. Copies of the subpoenas, the Union’s petition, Triumph’s opposition, and the judge’s ruling were entered into the record at the hearing. R. Exh. 1; Tr. 7:6-19, 9:9-

5. Alternatively, Even If a Bargaining Violation Is Found, the Remedy Should Be a *Transmarine* “Effects” Remedy. [Cross-Exception 17]

The decision versus effects distinction discussed above also matters for remedial purposes, in the event the Board finds that Triumph violated Section 8(a)(5). The General Counsel apparently seeks full reinstatement and back pay for the 12 laid-off bond shop employees, rather than the limited back pay remedy for bargaining violations as set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).<sup>17</sup> But a full reinstatement and back pay remedy is designed to, and in practice has been used to, remedy an employer’s total failure to notify and bargain over a layoff decision. *See, e.g., Pan Am. Grain*, 343 NLRB at 318; *Lapeer*, 289 NLRB at 954. The Board has never imposed a full back pay and reinstatement remedy

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11:7. As discussed in Triumph’s Opposition to the Petition to Revoke, the subpoenas sought information directly relevant to the issues being litigated in this case – issues of waiver, notice, impasse, and estoppel. Specifically, with respect to the RIF allegations, communications between the individual Charging Parties and the Union are relevant to the Union’s waiver of decision bargaining and/or impasse.

The record lacks evidence of any Union requests to bargain over the RIF decision, which by itself should be sufficient to establish waiver. However, to the extent the Board finds it is not, Triumph should be permitted to explore this issue further with relevant evidence regarding the Union’s “public” communications to bargaining unit members about what topics it was pursuing in bargaining, and specifically, whether the Union indicated it was seeking to bargain over the RIF decision, or just the effects of the RIF. Further, while the record evidence is sufficient to establish impasse as to both the RIF decision and effects by April 21, should the Board find it is not, Triumph will be prejudiced by the judge’s revocation of the subpoenas. Evidence of what the Union “publicly” told its members about the negotiations is highly relevant to the Union’s contemporaneous understanding of the status of the negotiations. In fact, Ducker’s testimony touched briefly on this point, when he stated he told employees that Triumph made proposals “the union just couldn’t live with,” strongly indicating he believed the parties were at impasse. Tr. 146:23-25. Thus, to the extent the Board finds the evidence in the record is not sufficient to find impasse, the Board should reverse the judge’s decision to revoke the subpoenas, and the subpoenaed parties should respond with relevant documentation.

<sup>17</sup> As mentioned, Triumph already offered the laid off bond shop employees reinstatement rights in early 2018, and some employees accepted the offer and returned.

where, as here, the employer gave the union 24 days' advance notice and opportunity to bargain, and did bargain over numerous issues, prior to implementing the layoff.

Triumph worked hard – from the start – to comply with its statutory duty and should not be saddled with the most severe penalty available simply because the Union disagreed with the status quo and various alternatives to the status quo policy. To award a decision bargaining remedy here would effectively allow (or at least encourage) a union to block or inordinately delay an economically-necessitated decision to reduce headcount by objecting to the status quo policy and/or reasonable alternatives involving loans, transfers, recall rights, and selection procedures.

Accordingly, even if the parties were not at impasse regarding the layoff as of April 21 (and, for the reasons discussed above, they were), the appropriate remedy is the more limited *Transmarine* remedy, which is designed to ensure that meaningful bargaining occurs, but does not reverse the employer's headcount decision altogether. *See KGTV*, 355 NLRB at 1286 (ordering a *Transmarine* remedy instead of full backpay and reinstatement where the employer gave three weeks' advance notice of the layoff but declined to engage in effects bargaining); *Print Fulfillment*, 361 NLRB at 1243 (awarding a *Transmarine* remedy where the union waived its right to bargain over the layoff decision); *see also Tramont Mfg., LLC*, 365 NLRB No. 59, slip op. at 3, 9 (Apr. 7, 2017) (awarding *Transmarine* remedy where employer implemented layoff decision pursuant to employee handbook policy and gave no notice or opportunity to bargain over effects), *petition for review granted in part and denied in part*, 890 F.3d 1114 (D.C. Cir. 2018).

**B. The Judge Should Have Dismissed the Discipline Allegations Under the Equitable Estoppel Doctrine. [Cross-Exceptions 1, 3-4]**

As discussed in Triumph's Answering Brief to the General Counsel's Exceptions, Triumph concurs with the General Counsel that the judge erred in applying *Oberthur Tech.*, and that current Board law regarding pre-contract discipline bargaining obligations is set forth in *Total Security Management ("TSM")*, 364 NLRB No. 106 (2016). *See* GC Br. at 17-18 (Exception 1).<sup>18</sup> Triumph does not oppose this exception. The General Counsel also argues in Exception 2 that the Board should overrule *TSM* and return to its pre-*TSM* standard, under which an employer has no pre-discipline bargaining obligation so long as the discipline does not constitute a change in the employer's policies. GC Br. at 18-32 (Exception 2). Applying that standard, Smith's termination and Horn's suspension were undisputedly lawful. *See* GC Br. at 32. Triumph supports this exception.

Alternatively, however, even if the Board does not overrule *TSM*, meaning *TSM* remains governing law for this case, the discipline allegations should be dismissed.<sup>19</sup> Given his decision to dismiss the discipline allegations under *Oberthur Tech.*, the judge did not address or resolve Triumph's well-developed equitable estoppel argument. In fact, one is hard pressed to think of a fact pattern that better fits the doctrine. The Board "has long recognized that principles of equitable estoppel will preclude a party from complaining of a unilateral change in a term or condition of employment where it has, by its conduct, led the other party to reasonably believe that it could deal unilaterally with the subject." *Manitowoc Ice, Inc.*, 344 NLRB 1222, 1222-24

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<sup>18</sup> The Union does not except to the judge's dismissal of the discipline allegations.

<sup>19</sup> The General Counsel argues in Exception 13 that under *TSM* Triumph violated the Act by not providing the Union with sufficient notice and an opportunity to bargain before terminating Smith and disciplining Horn, GC Br. at 18. On this exception, Triumph and the General Counsel strongly disagree.

(2005) (dismissing allegation involving employer’s unilateral change to its profit-sharing plan because the union had acquiesced to the employer’s previous unilateral changes to its profit-sharing plans by failing to complain to the employer or file charges with the Board). Estoppel may “‘result even though the party estopped ... did not intend to lose or forego its existing rights or did not consciously agree’ that the other party was free to make unilateral changes.” *Id.* at 1223 (quoting *Tucker Steel Corp.*, 134 NLRB 323, 333 (1961)).

A party may be precluded from asserting its right to bargain over an issue based on “the conduct of the parties (including past practices, bargaining history, and action or inaction).” *Am. Diamond Tool*, 306 NLRB 570, 570-71 (1992) (quotation and citation omitted) (dismissing unilateral layoff allegation where the union did not object to or request bargaining over an earlier unilateral layoff or unilateral layoffs in general, and there was no evidence the employer would not have bargained about the layoffs). “Particularly in the context of initial collective bargaining, where parties have no contract, past practice, or established relationships to guide them,” the Board has stated that it is “incumbent on the Union to take more affirmative action in order to preserve its right to protest” an employer’s unilateral actions. *Id.* at 571.

*For several years*, the Union led Triumph to reasonably believe it could discipline unit employees without notifying the Union about each and every possible disciplinary action. The Union never requested pre-discipline notice and bargaining, despite ample opportunity to do so. In fact, Triumph repeatedly asked the Union, *over 30 times*, for a designated representative to contact *prior to* imposing discipline and offered to negotiate an interim notification procedure. Each Company letter between March 2014 and May 2017 told the Union “you have failed to notify the Company of a Union representative that the Company should contact in the event of potential disciplinary action.” Jt. Exh. C; R. Exhs. 2 and 10.

The Union did not respond to Triumph's requests until May 2017 because, as Ducker admitted, the Union was not interested in pre-discipline notice or bargaining. Specifically, Ducker testified as follows:

Q In connection with the charges that bring us here today, Mr. Ducker, which involve the bond shop layoff as well as Mr. Smith's discharge and Mr. Horn's suspension, do you recall giving an affidavit to Region 16?

A Yes.

Q In that affidavit, do you recall discussing the discipline letters that are Respondent Exhibit 2?

A Yes.

Q Do you recall saying, "Within the discipline letters, the employer asked about establishing an agreed upon process where union representatives can be notified about discipline and regarding bargaining an interim grievance procedure. I had not responded to these requests until last week." Do you recall making that statement?

A Yes.

Q That affidavit was given on or about May 31st, 2017?

A Okay.

Q Does that sound right?

A Yes.

Q You also - - let us know if you recall making this statement, "I had not responded to the employer's request about a procedure for informing the union before employees are disciplined or an interim grievance procedure before last week because I believe that without enforceability, there really was no point." Do you recall making that statement?

A Yeah, that was part of the - - our position.

Tr. 156:15-157:18.<sup>20</sup>

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<sup>20</sup> While Ducker testified he believed there "was no point," this did not relieve the Union of its duty to request bargaining. See *KGTV*, 355 NLRB at 1284 ("a union's subjective impression of its bargaining partner's intention is insufficient"). The Union witnesses also suggested the reason for the Union's delay in requesting pre-discipline bargaining was the Board's decision in *TSM* issued on August 26, 2016. However, this testimony completely ignores the fact that Triumph repeatedly offered to engage in such bargaining for several years prior to *TSM*. Further, even after *TSM* issued, the Union still did not request pre-discipline bargaining until May 26, 2017 – some nine months later and well after the Smith and Horn disciplines at issue.

Nor did the Union object to Triumph's practice of providing routine after-the-fact notice through periodic update letters. By November 2016 (when Smith was terminated), the Union had received approximately 30 letters from Triumph informing it of all disciplines (warnings, suspensions, and terminations) issued to unit employees, and by April 2017 (when Horn was suspended), it had received approximately 35 such letters. *See* Jt. Exh. V; R. Exh. 2 (November 3, 2016 letter). Yet the Union never pursued pre-discipline notice or bargaining, nor did it file any unfair labor practice charges alleging the lack of pre-discipline notice or bargaining. *See Washoe Medical Center*, 337 NLRB 202, 202 n. 1, 206 (2001) (dismissing failure-to-bargain allegation where, although the employer never notified the union before it imposed discipline or offered to bargain about any discipline, the union became aware of discipline issued to various employees after the fact but "never requested bargaining over any of the employee discipline and only sought to assist certain employees in protesting their discipline through utilization of the internal company appeal process"). In December 2016, the Union sought to bargain over *previously-issued* disciplines at the parties' initial contract bargaining sessions. Triumph agreed to the Union's request, and the parties thereafter regularly met and bargained over disciplines that had previously been issued. During this time, the Union did not object to this process or give any other indication it wanted pre-discipline bargaining.

There also is no evidence Triumph would not have engaged in pre-discipline bargaining upon request. Triumph's ongoing attempts since March 2014 to obtain the name of a representative to contact, offers to bargain over an interim procedure, and willingness to engage in post-discipline bargaining as soon as the Union made the request in December 2016

demonstrate the very opposite. And, once the Union finally sought to bargain an interim notification procedure in late May 2017, Triumph immediately accepted the Union's request to bargain, and the parties quickly reached a framework within a few days. Jt. Exhs. W and X.

In sum, prior to May 2017, the Union acquiesced in Triumph's practice of providing routine notification through update letters and should now be estopped from asserting Triumph's failure to provide pre-discipline notice for Smith and Horn was unlawful. The Union chose not to pursue pre-discipline bargaining. Triumph cannot be held liable for that choice in how the Union managed its internal affairs and duty to fairly represent unit employees.<sup>21</sup>

If the Board does not view the record evidence as sufficient to show estoppel, and otherwise does not dismiss these allegations for the reasons explained below (namely reversing *TSM*), this case should be remanded to take additional evidence regarding the information Triumph subpoenaed about the Union's bargaining-related documents and communications, which may be relevant to issues involving Union notice and interest in pre-discipline bargaining.<sup>22</sup>

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<sup>21</sup> Further, while the Union did request post-discipline bargaining as of December 2016, Jt. Exh. F, the parties engaged in bargaining but did not agree on any adjustments to either Smith's termination or Horn's suspension. Finding a bargaining violation here – with its possible attendant remedies of back pay, rescission, reinstatement (for Smith), and an order to bargain – would improperly invert the Board's role. The Board cannot function as a neutral guardian of the bargaining process where it would order bargaining that was never requested and award remedies that a party failed to obtain through the bargaining it did request. *Manitowoc Ice*, 344 NLRB at 1223 (The Board cannot, “under the guise of remedying unfair labor practices, ... attempt to bestow upon the respondent's union employees the benefits which it believes the Union should have obtained but failed to obtain for them as a result of collective bargaining with the respondent on their behalf.”) (quoting *NLRB v. Nash-Finch Co.*, 211 F.2d 622, 627 (8th Cir. 1954)). Accordingly, these discipline allegations should be dismissed.

<sup>22</sup> See, fn. 16, above. Communications between Smith and/or Horn and the Union are relevant to the issues of Union notice and decision not to pursue pre-discipline bargaining. Although Triumph believes the evidence in the record – including documentary evidence showing Triumph sent more than 36 letters over 3 years providing the Union with post-discipline notice and inviting the Union to provide contact information for pre-discipline notice and bargaining, as

C. **The Board Should Overturn *Total Security Management* If the Discipline Allegations Are Not Otherwise Dismissed Under the Equitable Estoppel Doctrine. [Cross-Exception 2]**

Should the Board conclude that equitable estoppel does not foreclose the discipline allegations, the Board must jettison *TSM* and dismiss the allegations here under pre-existing law. In *TSM*, the Board imposed new, unworkable requirements and restrictions on an employer's ability to discipline union-represented employees. 364 NLRB No. 106. Former Member Miscimarra dissented, explaining the majority's decision was inconsistent with fundamental labor law principles and decades of NLRA case law. *Id.*, slip op. at 17-41. Triumph asserts that *TSM* should be reversed for the reasons set forth in former Member Miscimarra's dissent and as argued by the General Counsel's Exceptions in this case (see GC Exceptions Br. at 18-32). The Board should return to its pre-*TSM* standard, under which an employer was not obligated to bargain with the union before discretionary discipline, so long as the discipline issued did not constitute a change in the employer's preexisting employment rules and disciplinary system. *See Fresno Bee*, 337 NLRB 1161, 1186-87 (2002).

Here, it is undisputed that Triumph's discipline policies were lawfully implemented in 2013, Jt. Exh. A, and there is no evidence or allegation that Triumph altered its status quo policies or procedures in terminating Smith or suspending Horn. Rather, Smith's termination was consistent with Triumph's policy regarding disciplinary actions for "Major Offenses" and involved progressive discipline. Prior to his November 2016 termination, Smith had received a number of disciplines, including a June 24, 2016 final written warning and suspension for gross negligence (a major offense). R. Exh. 11. Thus, his subsequent November 2016 termination for

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well as testimony from Union witnesses that the Union was not interested in pursuing pre-discipline bargaining – is sufficient to support Triumph's estoppel defense, to the extent the Board disagrees, Triumph will be prejudiced if it is unable to obtain additional relevant evidence.

gross negligence was consistent with the code of conduct, which provides that the penalty for a second major offense is discharge. Jt. Exh. A at 9. Horn's April 2017 5-day suspension also was consistent with Triumph's code of conduct. Horn was suspended for two major offenses – gross negligence and failure to report errors to supervision. R. Exh. 13. The code of conduct provides that an employee's first major offense may result in a written final warning and disciplinary suspension. Jt. Exh. A at 9.

Although Triumph's disciplinary policies reserved to Triumph a degree of discretion, Triumph's decisions to terminate Smith and to suspend Horn were well within that discretion. Therefore, Triumph did not alter its status quo disciplinary procedures, and it was not required to give the Union notice and an opportunity to bargain before implementing its discipline decisions. *See Fresno Bee*, above. Accordingly, these allegations can be dismissed under the Board's pre-TSM discipline bargaining standard.<sup>23</sup>

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<sup>23</sup> If the Board ultimately finds any discipline bargaining violation, Triumph reserves the right to present evidence in compliance in support of its affirmative defenses to back pay and/or reinstatement – including evidence showing Smith's termination and Horn's suspension were "for cause" within the meaning of Sec. 10(c) and relevant evidence showing Triumph satisfied its post-discipline bargaining obligations. The General Counsel did not consolidate the compliance specification with the complaint here, and no party disagreed with Triumph's counsel that these issues were reserved for compliance as needed. *See* Tr. 323:19-25, 329:16-20.

## CONCLUSION

In the end, the judge reached the correct conclusion in dismissing the Complaint in its entirety. He listened to the witnesses, reviewed the stipulated and admitted exhibits, and analyzed the parties' post-hearing briefs. He found the claims "meritless." The judge, however, bypassed numerous legal and factual grounds for dismissal that the Company respectfully submits, through cross-exceptions and this supporting brief, for the Board's consideration in deciding this case.

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Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Supporting Brief for Triumph's Cross-Exceptions was filed today, January 27, 2020, using the NLRB's e-filing system, and was served via electronic mail on:

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