

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

TRIUMPH AEROSTRUCTURES, LLC,

and

Cases 16-CA-197912

LAWRENCE HAMM, An Individual,

and

16-CA-198055

RODNEY HORN, An Individual,

and

16-CA-198410

THOMAS SMITH, An Individual,

and

16-CA-198417

**INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE AND
AGRICULTURAL WORKERS OF
AMERICA, LOCAL 848,**

**UNION'S REPLY TO RESPONDENT'S ANSWERING BRIEF TO UNION'S
EXCEPTIONS TO ALJ DECISION AND RESPONSE TO RESPONDENT'S
MOTION TO PARTIALLY STRIKE UNION'S EXCEPTIONS**

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Table of Contents

Table of Contents i

I. Introduction..... 1

II. Triumph’s Motion to Partially Strike Should be Denied (Reply to Respondent’s Brief at 5-7)..... 2

A. Union Exceptions 1-2 and Union Brief Pages 1, 37-38..... 2

B. Exceptions 4, 20-22 and Brief Pages 1, 39-43 3

III. The ALJ’s Decision Does Not Provide an Adequate Basis for the Board’s Review (Reply to Respondent’s Brief at 7-9)..... 5

IV. The ALJ Erred in Finding the Purported Existence of an Economic Exigency (Reply to Respondent’s Brief at 9-13) 8

V. The ALJ Erred in Finding That the Parties Bargained the Bond Shop Layoffs to a Good Faith Impasse by April 21, 2017 (Reply to Respondent’s Brief at 13-24) 9

I. Introduction

This is a straightforward case involving the application of well-established Board precedent in which the General Counsel has established that Respondent, Triumph Aerostructures, Vought Aircraft Division (*Triumph* or *Company*), violated the National Labor Relations Act when it unilaterally implemented the layoff of 12 bond shop unit employees without first bargaining to a valid impasse while negotiations for an initial collective bargaining agreement for Triumph's Red Oak facility were ongoing. Administrative Law Judge Robert A. Ringler issued his bare-bones *Decision* (JD-74-19) on September 30, 2019, recommending that the General Counsel's complaint be dismissed on grounds that "Triumph did not violate the Act in the manner alleged in the complaint." ALJD 13:16.¹

On December 27, 2019, Charging Party, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 848 (*UAW* or *Union*), filed its *UAW Local 848's Exceptions to ALJ's Decision and Recommended Order (Union's Exceptions)* and its accompanying *UAW Local 848's Brief in Support of its Exceptions to the ALJ's Decision (Union's Brief)*. The Union refers the Board to its Brief for a comprehensive statement of both the parties' stipulated facts and the substantial evidence that was presented to Judge Ringler at the hearing to show that the parties did not reach a valid bargaining impasse on the bond shop layoffs.

Respondent filed *Triumph's Answering Brief in Response to UAW Local 848's Exceptions to the Decision of the Administrative Law Judge and Motion to Partially Strike UAW Local 848's Exceptions and Brief (Respondent's Brief)* on January 27, 2020. Pursuant to Board Rule 102.46(e),

¹ The following citation abbreviations will be used throughout this brief: *ALJD* to refer to ALJ Ringler's *Decision*, and citations to the pages and line numbers of the *Decision* are given as, for example, "1:2-3," where the number before the colon is the page number and the numbers following the colon are the line numbers. *U. Exc.* and *U. Br.* refer to the Union's Exceptions and Brief, respectively. *Resp. Br.* refers to Respondent's Brief.

the Union files this document as both its reply in support of its exceptions and its opposition to the motion to partially strike exceptions.

II. Triumph's Motion to Partially Strike Should be Denied (Reply to Respondent's Brief at 5-7)

Preliminarily, Triumph requests that the Board strike Union Exceptions 1, 2, 4, and 20-22 and the corresponding argument on pages 37-38 and 39-43 of the Union's Brief. For the reasons set forth below, Triumph's motion to partially strike exceptions should be denied in all respects.

A. Union Exceptions 1-2 and Union Brief at Pages 1, 37-38

By its first and second exceptions to the *Decision* and its related briefing at pages 37-38 of the Union Brief, the Union argued that the *Decision* does not provide an adequate basis for the Board's review and the case should therefore be remanded to the ALJ for the preparation of a supplemental opinion due to the ALJ's failure to comply with Board Rule 102.45(a). The Rule requires that an administrative law judge's "decision will contain findings of fact, conclusions of law, and the reasons or grounds for the findings and conclusions...." U. Br. at 38.

Specifically, the Union pointed out that the *Decision* fails to provide an adequate basis for the Board's review for two reasons. First, the ALJ failed to make a single witness credibility determination as to disputed testimony despite the fact that the General Counsel devoted nearly six pages of his post-hearing brief to identifying for the ALJ those factual disputes requiring credibility determinations, and arguing that those credibility determinations should be resolved in favor of the General Counsel's witnesses. U. Exc. 1; U. Br. at 37-38. Second, the ALJ failed to provide a sufficient explanation with respect to the specific evidence that he relied on in resolving the material fact issues in dispute as well as the factual basis for each of his findings supporting his conclusion that Triumph did not violate the Act. U. Exc. 2, U Br. at 38.

Triumph's sole argument for moving the Board to strike Exceptions 1 and 2 and the Union's related briefing is that the Union has no standing to ask the Board for a remand for further findings or for the preparation of a supplemental opinion because the General Counsel has not itself made these arguments and requested that relief. Resp. Br. at 6. In support of this argument, Triumph puts misplaced reliance on the Board's well-established rule that the General Counsel's theory of the case is controlling, and that a charging party may not enlarge or change the General Counsel's theory, nor may a charging party's exceptions and briefing go beyond the General Counsel's theory of the case. *See* Resp. Br. at 5-6. While the Union does not dispute that a charging party is bound by the General Counsel's substantive theory of the case as set forth in the General Counsel's live complaint, that rule has no application to Union Exceptions 1 and 2 because they do not even touch on any substantive issue at all. Instead, they are limited to the procedural deficiencies in the ALJ's *Decision*.

B. Exceptions 4, 20-22 and Union Brief Pages 1, 39-43

The Company also moves the Board to strike Union Exceptions 4, 20-22 and the Union's related briefing, which relate to Judge Ringler's erroneous and unnecessary finding that "Triumph . . . satisfied its burden of demonstrating an *economic exigency*." ALJD 12:23-25. *See* U. Ex. at 2, 6. The Company's motion to strike these four exceptions is premised on the existence of Joint Stipulation of Fact No. 19 between the General Counsel and the Company:

In late 2016 and early 2017, Respondent experienced a decrease in anticipated orders from customers Bell and Gulfstream that impacted bond shop staffing needs, which triggered the business rationale for the March 28, 2017 letter (Joint Exh. G) and offer to bargain. **The 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.**

Jt. Ex. Z, No. 19. (emphasis added). *See* Resp. Br. at 6-7. Notably, the General Counsel did not concede in the joint stipulation that exigent circumstances *did in fact exist*; rather, the General Counsel merely agreed in the nature of a plea of *nolo contendere* that it did not “*allege* that Respondent’s business rationale failed to qualify as exigent circumstances.” *Id.* (emphasis added).

The General Counsel’s concession that it did not *allege* the lack of exigent circumstances was significant for the Company’s presentation of its case to the ALJ because where, as here, an employer proposal is presented to the union while the parties are engaged in negotiations for a comprehensive labor contract, the employer has a duty to refrain from implementing any unilateral change in the overall terms and conditions of employment unless and until an *overall impasse* has been reached on bargaining for the agreement as a whole. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). One of the limited exceptions to that rule is “when economic exigencies compel prompt action.” *Id.* The burden of proving an *economic exigency* is on the employer, and “the exception is limited only to those exigencies in which time is of the essence and which demand prompt action.” *Id.* *See* U. Br. at 42.

Thus, the General Counsel’s stipulation that it would not allege the lack of an economic exigency saved the Company from having to prove that it satisfied the economic exigency exception, as it is undisputed that there was no overall impasse. The General Counsel perhaps made the joint stipulation in view of the fact that the Union had voluntarily chosen in March and April 2017 to accommodate Triumph by bargaining diligently and in good faith on the layoffs issue without insisting that the parties first bargain to an overall contract impasse without regard

to whether the economic exigency exception was satisfied. The Union's accommodation allowed the Company to proceed with bargaining the layoff issues without waiting until the conclusion of the parties' first contract negotiations, whether by an overall impasse or by execution of a CBA. Accordingly, there was no need for the ALJ to make a finding as to whether the Company had proved the existence of an economic exigency that could not wait for the finalization of a collective bargaining agreement under *Bottom Line Enterprises* and its progeny, and indeed, the ALJ erred in doing so because there was absolutely no evidence presented to support such a finding. Rather, the evidence presented made clear that the bond shop layoffs were nothing more than a garden-variety business decision made solely for the purpose of the temporary maximization of profit. *See* U. Br. at 39-43.

The Company's motion to strike is apparently based on a misreading of the intent of the Union's exceptions to the ALJ's economic exigency findings. *See* Resp. Br. at p. 7. Contrary to the Company's argument, the Union's exceptions to the economic exigency findings are not an effort to overturn the General Counsel's Joint Stipulation No. 19, *i.e.*, the Union does not argue that the Company had a duty to first bargain to agreement or overall impasse before implementing the bond shop layoffs. *Id.*² Rather, the Union lodges these exceptions to the extent that the ALJ's unnecessary and erroneous findings of an economic exigency have implications for the analysis of the separate and central issue that was before the ALJ: Whether there was a genuine bargaining impasse in the layoff negotiations in particular. U. Br. at 40.

III. The ALJ's Decision Does Not Provide an Adequate Basis for the Board's Review (Reply to Respondent's Brief at 7-9)

² The Company notes that the Union took the opportunity in its Brief to call to Judge Ringler's attention to the fact that the General Counsel's agreement to Joint Stipulation No. 19 could have been withdrawn as a result had the General Counsel chosen to do so, in light of the Company's eleventh hour production of documents going to the issue of economic exigency on the morning of the hearing. However, the Union only mentioned the fact of the late production in passing, and did not intend to suggest that Joint Stipulation No. 19 was no longer binding on the General Counsel as a result in the absence of a withdrawal.

The Union argued that the ALJ's *Decision* does not comply with Board Rule 102.45(a), which requires that the administrative law judge's "decision will contain findings of fact, conclusions of law, and the reasons or grounds for the findings and conclusions ..." in two respects. First, the *Decision* does not address the credibility of any of the four witnesses who testified at the hearing. This is so even though the General Counsel devoted nearly six pages of his post hearing brief to identifying for the ALJ those factual disputes requiring credibility determinations, and arguing that those credibility determinations should be resolved in favor of the General Counsel's witnesses. *Counsel for the General Counsel's Brief to the Administrative Law Judge* at pp. 30-35. Second, the *Decision* fails to fully discuss the testimonial and documentary evidence and address the parties' contentions in light of the credited evidence.

Because these deficiencies in the *Decision* leave the Board without an adequate basis for review, the Union argued that the Board should remand this matter to Judge Ringler for the preparation of a supplemental opinion, citing *Aramark Corp.*, 353 NLRB 993, 993 (2009) (declining to pass on the merits and remanding the case to the administrative law judge for further findings of fact, analysis, and conclusions of law in conformity with the Board's rules and regulations), and *Webb Furniture Enterprises*, 272 NLRB No. 56 (1984) (remanding the case for the issuance of a supplemental opinion in compliance with Rule 102.45(a)).

The Company contends that the *Decision* and the hearing record is "more than adequate" for the Board's review without the need for a further evidentiary hearing or the issuance of a supplemental opinion. Resp. Br. at 7-8. It asserts that neither *Aramark Corp.* nor *Webb Furniture Enterprises* "is applicable here," because unlike in those cases, Judge Ringler "discussed the substantial record evidence regarding the parties' bargaining proposals and bargaining sessions" and "cited ample record evidence supporting his conclusion that the parties reached impasse

regarding the RIF.” Resp. Br. at 8. However, even a quick review of the cursory *Decision* belies these purported distinctions. In fact, the ALJ’s discussion of the evidence is largely limited to quoting documents. He barely even makes reference to any of the specific testimony from the two-day hearing, makes no credibility determinations, and cites very little evidence in support of his conclusion on the fact-intensive impasse issue.³

Next, without citing any legal authority for the proposition, the Company argues that the *Decision* is not necessarily inadequate because although the Union complains that the judge did not address witness credibility, the Union has not identified any *material* factual disputes that required the judge to make an express credibility determination, nor has it identified any *material* testimonial or documentary evidence that Judge Ringler failed to address. Resp. Br. at 9. Even assuming that the Union was required to identify each of the material fact disputes, testimony, and documentary evidence that Judge Ringler failed to address as a prerequisite to complaining about the bare-bones nature of the Decision (which the Union denies), the Union did in fact point out in its Brief substantial material disputes that Judge Ringler failed to address. *See, e.g.*, U. Br. at 39 (citing to the nearly six pages of the General Counsel’s brief to the ALJ that identified for the ALJ the factual disputes requiring credibility determinations); U. Br. at 48 (in addition to failing to evaluate and weigh the evidence relevant to the *Taft* factors in a meaningful manner, the ALJ also

³ When evaluating the sufficiency of the depth of the ALJ’s discussion of the evidence and his analysis of the parties’ contentions (or lack thereof), it is important to keep in mind that the twelve and one-half page length of the *Decision* is deceptive. Although approximately nine of those pages are devoted to the Bond Shop layoffs, the great bulk of those nine pages consists of nothing more than block quotations at length of the parties’ various proposals and related correspondence. ALJD 4:16-13:25. Not considering the mere quotations of documents, the statements in the facts section total only approximately one page in length, and then only if one were to cobble together the few sentences transitioning between the many document quotations to form the one page. *Id.* at 4:18-11:18. The section setting out the relevant legal precedents is approximately one page (ALDJ 11:20-12:16) and, most egregiously, the entire section devoted to the discussion of the application of the governing law to the facts is less than one-full page (ALDJ 12:20-13:8), despite the fact-intensive nature of a proper analysis of the various *Taft* factors used for determining whether an impasse existed.

ignored the substantial and compelling evidence that the parties had not exhausted bargaining efforts and also that Triumph had negotiated in bad faith).

IV. The ALJ Erred in Finding the Purported Existence of an Economic Exigency (Reply to Respondent's Brief at 9-13)

In Section C of its Answering Brief, Triumph asserts that the ALJ correctly found that the employer faced economic exigencies that necessitated the bond shop layoffs. It begins by continuing to argue that by its challenge to the ALJ's findings regarding the alleged existence of an economic exigency, the Union is attempting to attack the General Counsel's Stipulation No. 19. As explained in detail above, this is not the case. Rather, the Union excepts to the ALJ's erroneous and unnecessary findings and conclusions that an economic exigency actually existed only for the reason and to the extent that if those unfounded findings are allowed to stand, they might impact the Board's weighing of the *Taft* factors to the issue of whether the parties bargained to a good faith impasse on the bond shop layoffs when conducting its de novo review.

The Union's Brief outlines the overwhelming evidence that there was no true economic emergency driving the layoffs, but rather, a garden-variety effort to cut costs. Of course, the Union does not dispute that the Company "was entitled to make business decisions and run its business in a profitable manner." (Resp. Br. at 11). However, that entitlement is subject to the Company's duty to bargain in good faith under the Act. The fact that "[f]ailing to take action would have resulted in Triumph paying approximately 10 percent of the bond shop to do nothing productive after April 21" (*id.*) is hardly the type of economic hardship (especially for an employer of the magnitude of Triumph) that would in any way justify Triumph's failure to bargain to a good faith impasse over the bond shop layoffs, and it especially would not justify its refusal to delay its arbitrary April 21 layoff date for the mere three days that the Union had requested.

V. The ALJ Erred in Finding That the Parties Bargained the Bond Shop Layoffs to a Good Faith Impasse by April 21 (Reply to Respondent’s Brief at 13-24)

In addition to a comprehensive 28-page exposition of the stipulations, testimony, and documentary evidence that was presented to the ALJ, which overwhelmingly demonstrates that there was no genuine impasse in bargaining over the layoffs, the Union also devoted another nearly six pages of its Brief to an analysis of how the ALJ’s cursory *Totality of the Circumstances* analysis using the *Taft* factors led him to his erroneous finding that a genuine impasse existed. *See* U. Br. at 6-37, 43-49. In the face of this overwhelming evidence revealing that no genuine impasse existed and that several indicia of Triumph’s bad faith were present, the Company unsuccessfully attempts to spin select evidence and documents in an effort to support the ALJ’s erroneous finding that that a genuine impasse existed. Resp. Br. at 13-24. As page limitations preclude the Union from directly refuting each of the Company’s evidence-based arguments in this reply, the Union refers the Board to its earlier Brief in support of its exceptions, which relies not just on select evidence favoring the Union’s position, but which provides a chronological and comprehensive statement of all of the relevant evidence presented at the hearing, and also includes a compelling chronological timeline of the negotiations from the time the Company gave notice of the bond shop layoffs until April 21, the date that it implemented them. *See* U. Br. at 32-33. There is no question that the totality of this evidence of the circumstances using the *Taft* factors weighs strongly in favor of finding that no genuine impasse existed.

Notably, Triumph emphasizes that whether a valid impasse existed is a “matter of judgment” of the administrative law judge who heard the testimony and reviewed the record evidence, and then asserts that Judge Ringler properly exercised his judgment in finding that the parties had reached a valid impasse. Resp. Br. at 14 (citing *EAD Motors E. Air Devices, Inc.*, 346

NLRB 1060, 1063 (2006)). Unfortunately, in this case, in light of the ALJ's bare-bones *Decision*, the parties and the Board are unable to evaluate whether the ALJ properly exercised his judgment in finding a valid impasse. This is especially so with respect to the lack of any credibility determinations, which leaves the parties and the Board unable to evaluate whether the ALJ properly exercised his judgment in crediting or discrediting the testimony of the several witnesses who testified at the hearing. In any event, the hearing record establishes that no impasse was reached.

Dated February 10, 2020.

Respectfully submitted,

/s/Rod Tanner
Rod Tanner

Certificate of Service

The undersigned attorney for International Union, UAW and Local 848 certifies that on February 10, 2020, he served a copy of the foregoing document on the parties via electronic mail.

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