

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 16**

**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**

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

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RESPONDENT'S CROSS-EXCEPTIONS TO THE DECISION OF THE  
ADMINISTRATIVE LAW JUDGE**

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Date: February 20, 2020

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## I. INTRODUCTION

In its Brief in Support of Cross-Exceptions to the Decision of the Administrative Law Judge, Respondent argues that Administrative Law Judge Robert Ringler (ALJ) erred during the hearing by excluding certain evidence and in his decision by failing to address certain alternative grounds for dismissal and for failing to discuss limits on the potential remedy. As discussed herein, Respondent's Cross-Exceptions should be denied.

The Complaint in this case involves two distinct, although somewhat intertwined, categories of Section 8(a)(5) violations. First, the Complaint alleges that Respondent failed to meet its pre-disciplinary bargaining obligations prior to terminating and suspending two employees. Second, the Complaint alleges that Respondent failed to meet its obligation to bargain in good faith to agreement or impasse prior to implementing a decision to layoff twelve employees.

With respect to pre-disciplinary obligations, Respondent makes three arguments. First, Respondent argues that the ALJ erred in applying the wrong case authority. Second, Respondent argues that the ALJ erred by excluding evidence related to a bargaining unit from another state. Third, Respondent argues that the doctrine of equitable estoppel precludes the Union from asserting its right to bargain over disciplinary decisions. As to Respondent's first argument, as noted in previously filed Exceptions, the General Counsel agrees with Respondent that *Total Security Management*<sup>1</sup> is the controlling law. However, as discussed below, Respondent's second and third arguments should be rejected.

With respect to the layoff bargaining obligation, Respondent puts forth several arguments. First, Respondent argues that the ALJ erred by revoking subpoenas served on the Union and

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<sup>1</sup> 364 NLRB No. 106 (2016). In the General Counsel's Brief in Support of Exceptions, the General Counsel submits an alternative argument that *Total Security Management* should be overturned but argues herein that Respondent violated Section 8(a)(5) under extant law.

individual employees which would have forced the subpoenaed parties to produce protected communications between the Union and its membership concerning bargaining information and strategy. As discussed, the ALJ rightly denied Respondent an opportunity to fish among irrelevant and protected communications. Second, Respondent argues for an “expedited” framework where economic exigencies arise and further, that under such a framework, it provided “more than sufficient” opportunity for the Union to bargain. Respondent fails to support its argued-for framework and misreads the economic exigency doctrine to imply a bright line rule in an area where the Board has specifically rejected one. Moreover, it ignores record evidence related to the substance of bargaining occurring from the time Respondent announced its intent to conduct a layoff until its implementation on April 21, 2017 that shows its notice and bargaining was insufficient under the circumstances. Third, Respondent argues that the Union pursued only effects bargaining, and that the layoff bargaining should therefore be examined under that framework. Here, Respondent fails in its attempt to overcome the evidence, including both the Union’s and its own proposals and internal communications, which provided for alternatives to layoff and clearly related to decisional bargaining. Fourth, Respondent argues that the judge failed to consider additional evidence which would show that the parties were at impasse. Here, Respondent attempts to build a past practice upon the foundation of a dismissed charge, to build good faith upon regressive proposals, to build disagreement on compromising words and gestures, and to find an understanding of impasse where one side continued to see an opportunity for agreement. Finally, Respondent argues that the remedy should be limited to that under *Transmarine* in light of its third argument, that the bargaining here was effects bargaining. The fifth argument fails with the third and Counsel for the General Counsel shall address them together herein.

After a discussion of the facts, this brief shall set forth analysis showing that each of Respondent's Cross-Exceptions fail. As discussed in the General Counsel's Brief in Support of Exceptions, the Board should find that Respondent violated Section 8(a)(5) of the Act as alleged.

## **II. FACTS<sup>2</sup>**

### **A. Respondent's Operations and Red Oak facility**

Respondent manufactures aircraft components at its Red Oak, Texas facility (JD slip op. at 2, LL. 7-9). Prior to the opening of Red Oak, between 1968 until 2013, the Union represented production and maintenance employees at Respondent's (and its predecessors') facilities at Jefferson Street in Dallas, Texas and Marshall Street in Grand Prairie, Texas (JD slip op. at 2, LL. 16-18). In 2013, Respondent decided to close its Jefferson Street facility<sup>3</sup> and open a new facility in Red Oak, Texas (JD slip op. at 2, LL. 17-18; J. Exh. Z at 2). In August 2013, Respondent implemented initial terms and conditions of employment at Red Oak, including a disciplinary policy and a reduction-in-force policy (RIF policy), and in October 2013, began transferring unit employees to Red Oak from the other facilities (JD slip op. at 2, LL. 28-29; J. Exh. Z at 4). The RIF policy provides that when a reduction in force is necessary, Respondent will determine the skills and abilities needed to perform remaining and future work, determine work units impacted by the reduction, and rate employees based on necessary skills and abilities (J. Exh. A). The Employer then assigns numerical rankings to each employee and selects employees for layoff starting with the lowest ranked (J. Exh. A). The parties refer to this procedure as the "Rack and Stack" system (RAS) (Tr. 176, LL. 15-25; 177, LL. 1-2; 278, LL. 1-7). The policy also provides

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<sup>2</sup> A similar account of the facts is also included in the General Counsel's Brief in Support of Exceptions. The facts as recounted herein are relevant to arguments covered in Respondent's Brief in Support of Cross-Exceptions and clarify certain factual discrepancies.

<sup>3</sup> In his decision, the ALJ incorrectly states that Respondent closed both its Dallas and Grand Prairie facilities (JD slip op. at 2, LL. 17-18). Respondent closed only its Dallas facility (Jefferson Street) in 2013.

that the company will typically notify employees of layoff one week in advance, but at management's discretion, employees may be notified and released on the same day (J. Exh. A).

In January 2014, Respondent recognized the Union as the representative of production and maintenance employees at Red Oak (JD slip op. at 2, LL. 18-19). The Union pursued unfair labor practice charges and arbitration advocating its view that the Jefferson/Marshall Street contract should extend to Red Oak employees, but was ultimately unsuccessful in those efforts (Tr. 239, LL. 1-9). On December 12, 2014, the Regional Director of Region 16 of the Board issued a Decision and Order in Case 16-UC-124945, finding that Respondent's existing Marshall Street unit excluded Red Oak, which constituted a separate, appropriate bargaining unit (J. Exh. A.2).

Red Oak mainly houses assembly and bonding operations for Respondent (Tr. 240, LL. 24-25; 241, LL. 1-11). Employees in the bond shop engage in the production of bonded airplane parts, which includes the cutting, laying, vacuuming, and fabricating of those parts (Tr. 77, LL. 14-23). Employees working in the assembly job family put the airplane parts together or support that function through various tasks such as drilling, riveting, painting, toolmaking, and maintenance (Tr. 77, LL. 24-25; 78, LL. 1-5; 243, LL. 16-19).

The parties began bargaining for a Red Oak contract in 2015, ultimately reaching agreement on March 25, 2018 (JD slip op. at 2, LL. 29-30). The events at issue in the Complaint occurred during the period in which Respondent recognized the Union as the representative of its employees, but prior to reaching a first contract with the Union at Red Oak.

#### **B. Respondent's discretionary decisions to discharge Smith and suspend Horn**

An understanding of the history of the changes to law is necessary to contextualize the facts at issue, and that history is briefly reviewed herein. When Respondent first recognized the Union as the exclusive bargaining representative of its Red Oak unit employees, the Board's decision in *Alan Ritchey*, 359 NLRB 369 (2012) was the leading authority as to an employer's obligation to

bargain about discipline in situations where the union represented employees but where a collective bargaining agreement was not yet in effect. However, the validity of *Alan Ritchey* was already questionable in light of *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). *Alan Ritchey* was later invalidated on procedural grounds on June 24, 2014 in *NLRB v. Noel Canning*, 573 U.S. 513 (2014). Thereafter, the General Counsel sought to revive the precedent of *Alan Ritchey* through a new case, which efforts culminated in the Board's decision in *Total Security*, 364 NLRB No. 106 (Aug. 26, 2016). *Total Security* remains the lead authority in this area.

On March 5, 2014, in response to a Union request, Respondent provided information regarding disciplinary notices, warnings, or records at Red Oak on or after January 13, 2014 (J. Exh. Z at 7; J. Exh. B). Respondent's Human Resources Director Danielle Garrett sent that correspondence to the Union's then-International Representative, Wendell Helms (J. Exh. B). Therein, Respondent offered to bargain over discipline-related issues upon request and offered to bargain an interim grievance procedure while the parties remained without a collective bargaining agreement (J. Exh. Z at 7; J. Exh. B). The Union, which was still contesting Respondent's refusal to apply the Marshall-Jefferson CBA to Red Oak, did not respond to the offer (J. Exh. A.2; Tr. 239, LL. 1-9).

Respondent continued to provide Helms with updates as to disciplinary actions issued at Red Oak after the discipline had already issued (J. Exh. Z at 8, 10; R. Exh. 10). The updates pointed out the Union's failure to provide Respondent with a representative the company should contact in the event of potential disciplinary action and noted that Respondent remained open to bargaining an interim notification and/or grievance procedure for discipline (R. Exh. 10). On August 26, 2016, the Board issued its decision in *Total Security*. Under that decision, employers were obligated to

provide notice and an opportunity to bargain prior to issuing discipline. However, Respondent continued to provide only after-the-fact reports.

When David Barker took over as International Representative in February 2016, Respondent began sending those letters to Barker, and copying Union president James Ducker (R. Exh. 2). On November 14, 2016, the Union, through Barker, sent a letter to Garrett informing her that it had recently come to the Union's attention that Respondent had failed to notify the Union and bargain over discretionary discipline issued to employees at Red Oak (J. Exh. Z at 11; J. Exh. D). The Union demanded that all impacted employees be made whole and requested to bargain over the discipline Respondent sought to impose "prior to imposing any further action" (J. Exh. D).

On November 17, 2016, Respondent suspended its employee Thomas Smith, pending investigation, without contacting the Union (J. Exh. Z at 12; R. Exh. 11). On November 29, 2016, Respondent notified Smith that he was terminated effective November 17, 2016 (J. Exh. Z at 13; R. Exh. 11; Tr. 65, LL. 17-25, 66, LL. 1-5). Respondent's decision to terminate Smith was discretionary (J. Exh. Z at 14). Respondent did not inform the Union about Smith's termination until February 7, 2017 (J. Exh. Z, at 17). At no point before the termination did Respondent notify the Union that it was contemplating disciplining Smith (Tr. 65, LL. 17-25, 66, LL. 1-5).

Respondent replied to Barker's November 14 letter on December 12, 2016 and requested contact information for a Union representative to receive information regarding potential discretionary discipline (J. Exh. Z at 15; J. Exh. E). On December 21, 2016, the Union sent Respondent a letter requesting to bargain disciplinary actions and attaching a chart of past discipline at Red Oak issued between May 24, 2016 and October 31, 2016 (J. Exh. Z at 16; J. Exh. F). Barker, who communicated frequently with management at Red Oak, including Garrett, told

her, in person, that Respondent should contact Ducker about potential discretionary disciplinary situations prior to implementation (Tr. 216, LL. 21-25; 217, LL. 14-25; 218, LL. 1-25; 219, LL. 1-16). The parties subsequently met on multiple occasions, in person, to discuss disciplinary actions taken against Red Oak employees (Tr. 320, LL. 4-24).

On April 3, 2017, Respondent suspended employee Rodney Horn for five days (J. Exh. Z at 23; R. Exh. 13). Respondent did not inform the Union about Horn's discipline until May 4, 2017, when it sent the Union a letter updating it on past disciplinary actions since April 3, 2017 (J. Exh. Z at 34; J. Exh. V; R. Exh. 14; Tr. 66, LL. 6-14). Respondent did not inform the Union it was contemplating suspending Horn prior to implementing that discipline (Tr. 66, LL. 6-14).

On May 26, 2017, the Union sent Respondent a letter requesting to bargain an interim notification process for discipline for Red Oak bargaining unit employees (J. Exh. Z at 35; J. Exh. W). The parties met for bargaining on June 2, 2017, and executed an agreement providing for the notification of specific Union officials when Respondent determined that discretionary discipline of an employee was potentially warranted (J. Exh. Z, at 36; J. Exh X).

**C. Respondent informs Union that it intends to lay off bond shop employees, Union requests bargaining and seeks relevant information**

In late 2016 and early 2017, Respondent's customers Bell Helicopter and Gulfstream cut back on their orders (JD slip op. at 5, LL. 3-4). Based on the slowing demand, Respondent determined that its bonding department was overstaffed, and that it would likely need to carry out a layoff in that area (JD slip op. at 5, LL. 4-6). On March 28, 2017,<sup>4</sup> Respondent notified the Union that it tentatively planned on laying off 12 bond shop employees, and that it was considering a layoff date of April 21 (JD slip op. at 5, LL. 8-14; JT Exh. G). Respondent explained that it planned to utilize its status quo RIF policy and that it had not yet identified which employees would be

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<sup>4</sup> All dates hereinafter are in 2017, unless otherwise noted.

selected under that policy. Respondent offered to discuss a potential departmental loan agreement with the Union in order to keep employees “gainfully employed”, and indicated it intended to make a final decision on layoffs by April 10 (JD slip op. at 5, LL. 19-27; JT Exh. G). The referenced departmental loan agreement would have allowed employees to avoid layoff by working in other departments. No reason was provided for the April 10 decision date.

The Union responded to Respondent’s letter on March 30, requesting to bargain over the proposed layoffs and requesting information from Respondent (JD slip op. at 5, LL. 31-44; JT Exhs. H, I). The Union requested: (1) a list of bond shop employees in order of seniority (time working for Respondent in a represented unit at any of its facilities); (2) a list of those Bond Shop employees who were not transferees from the other represented facilities and their dates of hire; (3) disciplinary actions that Respondent would use in the layoff evaluation process; (4) attendance cards for bond shop employees from April 1, 2016 to April 1, 2017; and (5) a list of employees separated by lead for bond shop assignments (JD slip op. at 5, LL. 33-42). The Union sought information about the company seniority and transfer history of the bond shop employees because seniority is a core union value and at a minimum the Union would need to consider the equity of any proposal in light of its consistency with that value. The Union sought disciplinary and attendance records because discipline affects employees’ rank in the RAS system. The Union sought information as to the reporting structure so that it could formulate proposals.

Respondent provided some of the requested information on March 31 (JD slip op. at 6, LL. 1-34). Respondent asked for clarification on the Union’s request for the list of bond shop employees not transferred from Marshall Street or Jefferson Street. Respondent did not provide the disciplinary records but simply stated that it proposed to consider “any and all active discipline” in response to the Union’s requests. Respondent argued the Union’s request for attendance unit

cards was burdensome and requested clarification as to why that information was necessary (JD slip op. at 6, LL. 3-34; J. Exh. J). Respondent eventually provided the timecards, but not until April 19 (JD slip op. at 6, L. 21 fn. 9).

**D. April 5 Bargaining Session: The parties meet to bargain, exchange proposals, loan agreement looks promising**

The parties discussed the proposed bond shop layoff and Respondent's stated interest in a loan agreement as an alternative to layoff (J. Exh. G; GC Exh. 2 at 4; R. Exh. 4 at 5; Tr. 250, LL. 4-24). Garrett testified that Respondent was interested in a loan agreement in order to avoid a layoff that would mean employees "losing their jobs, hitting the street." (Tr. 250, LL. 11-24). Ducker asked Garrett if Respondent had a loan agreement proposal (GC Exh. 2 at 4; R. Exh. 4 at 5). Garrett asked Ducker to step into the hall and reiterated that Respondent would like to enter a loan agreement (GC Exh. 2 at 4; R. Exh. 4 at 5; Tr. 262, LL. 22-25; 263, LL. 1-5).

At 9:58 a.m., while the parties were off the record,<sup>5</sup> Respondent passed a loan agreement proposal to the Union providing that, in lieu of layoff, the company would loan no more than 20 bond shop employees to other bargaining unit classifications and/or assignments for a period of up to six months; that loaned employees would not have their compensation affected, and that the company would maintain sole discretion to choose employees to be loaned and to determine to which job assignments they would be loaned (J. Exh. K; GC Exh. 2 at 6; Tr. 78, LL. 6-16; 263, LL. 6-9). The proposal also provided that if any employee refused to be loaned or to perform the tasks assigned, he would be deemed to have voluntarily terminated his employment (J. Exh. K). At the end of the April 5 session, the committee asked Garrett and Human Resources Manager

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<sup>5</sup> Respondent's notetaker, Wendy Bailey, did not regularly indicate within her bargaining notes when proposals were passed while the parties were off the record (Tr. 355, LL. 17-25; 356, LL. 1-4). The passage of Respondent's first loan proposal to the Union is one example (R. Exh. 4; Tr. 78, LL. 6-16; 263, LL. 6-9). Another example is Respondent's April 7 counterproposal, which was also passed off-the-record, but Bailey did not note that fact in her bargaining notes for that day (R. Exh. 6 at 21).

Porter about bond shop work projection, the length of time for the loan agreement, and the potential to train loaned employees in skilled trades in other job families (GC Exh. 2 at 8-9; R. Exh. 4 at 3-5). Specifically, Union committeeman Tommy Bulin asked Respondent what would happen with loaned employees if the dip in bond shop work, or ‘bathtub’, that Respondent was trying to address through a reduction in force, lasted for longer than six months (GC Exh. 2 at 8; R. Exh. 4 at 4). Porter responded that Respondent would be willing to revisit the letter of agreement and “see what’s best.” (GC Exh. 2 at 8; R. Exh. 4 at 4). Bulin next asked whether Respondent would be opposed to training loaned employees in skilled assembly functions rather than confining their work to less skilled functions (“5S/lean activities”) to allow employees to gain knowledge and experience in another skilled trade (GC Exh. 2 at 8; R. Exh. 4 at 4). Porter responded that he did not think Respondent was opposed to doing so, and that they wanted employees to remain gainfully employed and avoid situations in which they would struggle (GC Exh. 2 at 8; R. Exh. 5 at 5). After that discussion, the parties adjourned bargaining and Ducker told Respondent’s bargaining committee that the Union would get back to them about their loan agreement proposal (GC Exh. 2 at 9; R. Exh. 5 at 5).

**E. April 6 Bargaining Session: The parties continue to discuss a loan agreement proposal; Respondent unexpectedly withdraws its loan agreement proposal**

At their April 6 bargaining session, the Union gave Respondent a counterproposal to its initial loan agreement proposal, adding a provision that Respondent seek volunteers for the loan and collaborate with the Union, and a provision providing that if an employee refused to be loaned, he would be laid off for a period not to exceed six months (JD slip op. at 7, LL. 16-29; J. Exh. L).

After receiving the proposal, Garrett asked clarification questions of the Union’s bargaining committee (GC Exh. 3 at 3-6; R. Exh. 5 at 1-5). Addressing the provision requiring Respondent to seek volunteers for loan, Garrett asked the Union about a scenario where an

employee who volunteered for the loan was needed in his bond shop position (GC Exh. 3 at 3; R. Exh. 5 at 1). Ducker explained it was the Union's position that if those employees who volunteered for the loan were critical to a program, Respondent could keep that individual in his current job (GC Exh. 3 at 3; R. Exh. 5 at 1). Garrett testified at hearing that Respondent sought to loan out employees who did not have active bond shop work, who may not be the employees who volunteered for the loan (Tr. 266, LL. 16-23). Garrett next asked what the Union meant by "may be successful" and "every attempt", and what would happen if employees were not successful (GC Exh. 3 at 3; R. Exh. 5 at 2). The Union responded that Respondent could meet with the Union and managers (GC Exh. 3 at 3; R. Exh. 5 at 2). Garrett expressed concerns about the wording of the Union's proposed letter of agreement, as she believed it left open the possibility that employees could tell Respondent they did not want to be loaned or claim they did not know how to do a job to prevent being loaned (GC Exh. 3 at 3; R. Exh. 5 at 2). Ducker stated the Union was open to a counterproposal from Respondent, and in response to Garrett's concerns, the Union directed her attention to its last bullet point in the proposal which provided that employees who declined to be loaned would be laid off for a period of six months; the time frame flagged by Respondent as the period of concern for the bond shop headcount (GC Exh. 3 at 3-4; R. Exh. 5 at 2). Garrett expressed her concern that employees refusing to do a job would be rewarded with a job waiting for them after six months (GC Exh. 3 at 4-5; R. Exh. 5 at 3). The Union responded that it would save Respondent money if the employees refused the loan (GC Exh. 3 at 4; R. Exh. 5 at 3). Finally, Garrett asked what the Union contemplated in terms of collaboration to satisfy loans and discussed what those meetings would look like (GC Exh. 3 at 5; R. Exh. 5 at 4-5). Garrett agreed to get back to the Union on its proposal, expressing the parties' mutual desire not to 'send out' bond shop employees, and said she believed the parties were "pretty close." (GC Exh. 3 at 6; R. Exh. 5 at 5).

After going off the record, the parties caucused in separate rooms (GC Exh. 3 at 4). During that time, at approximately 1:31 p.m., Respondent representatives Wendy Bailey and Jorge Gil walked to the Union's caucus area and hand-delivered a counterproposal (J. Exh. M; GC Exh. 3 at 6; Tr. 85, LL. 1-14; Tr. 179, LL. 25; 180, LL. 1-5). Respondent's proposal included the same provisions for the loan in terms of time frames, unchanged compensation, Respondent's discretion to choose employees for loan, and voluntary termination upon refusal, but also incorporated the Union's desire for collaboration; providing that the company would meet with the Union regarding concerns about a loaned employee and/or the type of work an employee was assigned to try and reach a resolution (J. Exh. M). The proposal also included a provision allowing for collaboration between Respondent and the Union should the need arise to increase the number of employees loaned out (J. Exh. M).

After receiving Respondent's proposal, the Union representatives discussed its provisions for approximately 46 minutes, and at about 2:17 p.m., Garrett, Bailey, and Gil came to the Union's caucus room and informed the Union representatives that Respondent was rescinding its loan agreement proposal and had determined to go forward with a layoff on April 21 (GC Exh. 3 at 6; Tr. 87, LL. 7-21; 181, LL. 17-21; 182, LL. 3-8). The Union's notetaker, Lindsay Portier, was present for the caucus and wrote in her bargaining notes the time that Respondent passed the proposal, and below noted "Danielle, Wendy, and Jorge came down at 2:17 p.m. to let the Union know that 12 bond and 2 NDI will be permanently laid off and they will have to rescind their loan language. Will do on the record tomorrow once Danielle learns for sure if that will happen." (GC Exh. 3 at 6). Respondent's representatives did not explain to the Union why they were withdrawing the loan proposal, and the Union did not have the chance to discuss Respondent's latest proposal with Respondent prior to its withdrawal (Tr. 87, LL. 22-25; 88, LL. 1; 162, LL. 18-25; 182, LL.

9-12).<sup>6</sup> Garrett told the Union that she would rescind the proposal on the record the following day, but that never happened (GC Exh. 3 at 6; GC Exh. 4; Tr. 88, LL. 2-6). Before Respondent withdrew its proposal, the Union reasonably believed the parties were very close to reaching an agreement on the bond shop loans (Tr. 160, LL. 14-24; Tr. 180, LL. 24-25; 181, LL. 1-21).

**F. April 7 Bargaining Session: Parties continue to bargain; Union proposes transfers in light of withdrawn loan agreement**

The parties next met for bargaining on April 7 (JD slip op. at 8, LL 12-14). Because Respondent had withdrawn its loan proposal, the Union shifted its focus to other means of ensuring impacted bond shop employees remained employed with Respondent, and now proposed that employees be allowed to transfer to the assembly job family (Tr. 91, LL. 9-15).

Early in the April 7 session, the Union passed an information request pertaining to contractors and bargaining unit employees who had already gone through or were currently in assembly training class (J. Exh. N). The Union requested this information based on its belief that Respondent had moved contractors from the bond shop to assembly, and the Union wanted bargaining unit employees considered for those positions (Tr. 90, LL. 6-25; 91, LL. 1-3; 168, LL. 21-25). Garrett asked Ducker and Barker clarifying questions to ascertain the exact information

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<sup>6</sup> Garrett testified to a different series of events regarding Joint Exhibit M. After being asked whether the parties had follow-up discussions related to that proposal, Garrett testified,

“So the Union, again, they kind of discussed and talked about things in the lobby. We were in our room. You know, the Union was pretty adamant about the volunteers, and we had some off-the-record conversations. Well, basically, I said, “Look, guys. If – if you are going to insist on volunteers, and the Company can’t select, then I don’t know if this loan idea is going to work, and maybe we should focus on something different.”

(Tr. 269, LL. 9-21).

Garrett testified that she did not withdraw the loan proposal because she didn’t have to, and instead suggested that the parties focus on something different that they could agree on (Tr. 269, LL. 22-25; 270, LL. 1-4). Per her normal practice, Bailey did not make note of Respondent’s passage of Joint Exhibit M in Respondent’s bargaining notes, nor did she note that any off-the-record discussion occurred (R. Exh. 5 at 5; Tr. 355, LL. 17-25; 356, LL 1-4). Bailey did, per her normal practice, note the time at which Respondent passed its proposal to the Union on the proposal itself (J. Exh. M; Tr. 355, LL. 17-25; 356, LL 1-4).

the Union sought (GC Exh. 4 at 2-3; R. Exh. 6 at 2-4). The parties agreed Respondent would provide the Union with an updated list of any new hires since March 27, and a pay analysis for anyone hired in the assembly department since February (GC Exh. 4 at 3; R. Exh. 6 at 4). The parties also clarified that the Union was requesting that Respondent look through all new hires and determine whether they had previously worked in the bond shop, either as an employee or a contractor (GC Exh. 4 at 4; R. Exh. 6 at 5-6). Garrett confirmed she had a clear enough understanding to provide the Union this information (GC Exh. 4 at 4-5; R. Exh. 6 at 6). Respondent never provided the Union this information (Tr. 91, LL. 4-5; 169, LL. 1-10).

The Union passed a proposal to Respondent that morning providing that, in lieu of layoff, Respondent select employees for transfer to assembly by seniority, without changing their pay (JD slip op. at 8, LL. 14-21). During the remaining session time, Respondent expressed concern about bond shop employees maintaining their same rate of pay in the assembly department (JD slip op. at 8, LL. 23-25; GC Exh. 4 at 11; R. Exh. 6 at 15, Tr. 274, LL.7-15). The Union responded that the high-seniority employees made a commitment to Respondent and had minimal training in assembly (GC Exh. 4 at 12; R. Exh. 6 at 16). Notably, under the withdrawn loan agreement proposal, loaned employees would have similarly maintained their pay while working in other departments.

During the discussion related to the Union's proposal, David Barker noted; "[w]e started talking yesterday about something yanked out behind us of a short-term, temp (sic) loan – we was working on a lot of things then all of a sudden you're going to have to lay them off." (GC Exh. 4 at 11).<sup>7</sup> Respondent did not correct Barker or inform the Union it was still open to a loan agreement

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<sup>7</sup> Respondent's notes similarly state: "[w]e started out talking about yesterday that was yanked out behind us as far as I knew on a loan on a short term or temporary type of loan. We were working on a whole lot of different things and avenues and trying to work to that and all of a sudden you're going to have to lay them off..." (R. Exh. 6 at 15).

in response to his comment (GC Exh. 4 at 11; R. Exh. 6 at 15). Respondent told the Union it would look at its proposal and formulate a counter, but it did not reject the Union's proposal outright (GC Exh. 4 at 15; R. Exh. 6 at 21). Garrett explained that at that time, Respondent planned on laying off bond shop employees using RAS (GC Ex. 4 at 15; R. Exh. 6 at 21).

That afternoon, Barker and other committeemen had an off-the-record discussion with Garrett pertaining, in part, to the possibility of using modified RAS competencies to determine who would be impacted by the proposed reduction in force (GC Exh. 4 at 15; Tr. 184, LL. 24-25; 185 LL. 1-16). The Union's longstanding position on the RAS system was that many of the competency rating categories were far too subjective (Tr. 177, LL. 6-18; 185, LL. 10-25; 186, LL. 1-5). After their discussion, Respondent delivered a counterproposal that attached modified RAS competencies for rating employees and provided that employees impacted could apply for open positions in assembly (JD slip op. at 8, LL. 27-46; J. Exh. P). The RAS competencies attached included attendance, safety, quality, discipline, and skillset (JD slip op. at 9, LL. 2-3).

On Friday, April 7, at 1:07 p.m., Porter sent an email to Garrett, copying bond shop manager Eileen Rowe and bond shop director Terry Baggett, listing bond shop layoff numbers as seven (7) for April 21, assuming Respondent got its "paperwork complete and clean by then [and fulfilled] bargaining obligations"; and five (5) in June, to be evaluated in mid-May "to validate" (CP Exh. 1; Tr. 365, LL. 19-25; 366, LL. 1-25; 367, LL. 1-17). Garrett and Rowe had discussed the possibility of conducting two reductions in force as opposed to one, based on timing and headcount patterns (Tr. 362, LL. 5-14). Respondent did not notify the Union that it was considering conducting the layoff in two stages despite the fact that Respondent met with the Union that same day to discuss the bond shop layoff and would have spoken to Union representatives after receiving the email from Porter (Tr. 364, LL. 11-15; 365, LL. 19-25; 366, LL. 1-25; 367, LL. 1-25; GC Exh.

4 at 15). Garrett testified that Respondent did not inform the Union about the possible two-stage layoff because she “wasn’t considering that” and was told that Respondent was going to lay off twelve bond shop employees, but could not remember the date that Rowe told her this information (Tr. 364, LL. 11-21). When asked about her knowledge of a possible second-stage bond shop layoff in June, Garrett testified that she could not answer that question as she does not set the headcount (Tr. 365, LL. 4-9). Garrett then added “[t]here was a consideration of a couple of different layoffs. I don’t know the timing. Again, that’s – that’s beyond my scope of setting headcount.” (Tr. 365, LL. 11-13).

At 2:27 p.m. on April 7, Rowe sent an email to Garrett and other Respondent representatives, in which she discussed the implementation of a layoff. She informed them that it was time to conduct a ‘rack and stack’ review for bond shop employees and attached spreadsheets with the format for reviews, the rules for rankings, and a list of bond shop employees (GC Exh. 7). The spreadsheets attached included rankings from the previous year that Garrett had sent to Rowe to use as a guide for supervisors and managers conducting reviews in 2017 (Tr. 351, LL. 18-25). Rowe asked the representatives to work on the reviews and look out for a meeting notice for the following week, when they would “put it all together” (GC Exh. 7).

On April 13, as part of ongoing discussions related to the need to reduce headcount in the bond shop, industrial engineer Blake Mansfield sent an email to Rowe at 1:03 p.m. with the latest headcount analysis attached pertaining to the Red Oak bond shop (GC Exh. 10; Tr. 387, LL. 17-25; 388, LL. 1-25; 389, 1-2). In that email, Mansfield recommended a reduction of nine full-time bond shop employees, plus two contractors, to equal eleven total heads (GC Exh. 10). About one hour later, Mansfield sent a second email to Rowe, instructing her to let Baggett know that they had to change an assumption about the second reduction and reminding her that they had

previously planned on two reductions in force, rather than one, and that the second reduction in force had “wiggle room” in it (GC Exh. 10; Tr. 362, LL. 14-19). Mansfield told Rowe that he did not “see why [Respondent] could not make a reduction to the [reduction in force] at this point.” (GC Exh. 10). The chart attached showed, and Rowe testified, that the forecast showed a need to reduce manpower in the bond shop by eleven, including two contractors, with further reduction through May (GC Exh. 10; Tr. 389, LL. 3-25; 390, LL. 1-25). The chart does not indicate the exact date on which that reduction needed to occur. Rowe testified that April 21 was the date discussed for implementation but did not explain how Respondent arrived at that date (Tr. 391, LL. 1-7).

**G. April 14 Correspondence: The Union tries to keep negotiations moving while the parties are unable to meet**

In the week following the April 7 session, Respondent’s representative and Union representative Barker were unavailable due to bargaining obligations at Respondent’s Tulsa facility (represented by a different UAW local) (Tr. 94, LL. 12-20; 188, LL. 25; 189, LL. 1-7; 283, LL. 1-13). During that period, on April 14, the Union sought to keep negotiations moving and sent Respondent a letter in which it responded to Respondent’s latest proposal (J. Exh. Q; Tr. 95, LL. 10-25). In the letter, the Union rejected Respondent’s April 7 proposal, and rejected the proposed modified RAS competencies, asserting its opposition to the RAS philosophy (J. Exh. Q; Tr. 95, LL. 2-9). With its letter, the Union sought to open the discussion of other layoff alternatives (Tr. 95, LL. 16-25). The Union made another proposal for transfer that included Respondent offering a plant-wide retirement incentive to reduce headcount in the bond shop, bond shop employees impacted by layoff being given the opportunity to apply for open positions in assembly and being made offers at their current rates of pay, and giving impacted bond shop employees recall rights for the 15 months following the layoff (J. Exh. Q). The Union based its proposal for a retirement

incentive upon a similar incentive Respondent had offered in the past that had worked well in reducing headcount (Tr. 95, LL. 20-25; 137, LL. 25; 138, LL. 1-16, 188, LL. 12-22).

Garrett testified that she was confused about a few aspects of the Union's letter, but despite her averred confusion, she made no attempt to seek clarification prior to the next scheduled bargaining session on April 19 (Tr. 287, LL. 3-10; 289, LL. 12-17). Respondent did not respond in any manner to the Union's April 14 letter until April 19, when Garrett hand-delivered a letter to Barker rejecting its April 14 "demands" and indicating that Respondent had made a final decision to move forward with its layoff plan for 12 bond shop employees on April 21 (J. Exh. T).

#### **H. April 19 Bargaining Session: Respondent rejects Union's proposals, shuts down attempts at further conversation**

The Union and Respondent next met for bargaining over the proposed bond shop layoff on April 19 (Tr. 94, LL. 12-15). One day prior to that session, on April 18, the Union sent Respondent an information request seeking the evaluations of all bond shop employees, the competencies used in those evaluations, the identity of the evaluators of each employee, as well as that of anyone who had input in the employee ratings (J. Exh. R; Tr. 96, LL. 1-11). The Union arrived at the April 19 session prepared to continue negotiating an alternative for layoff in the bond shop, and asked Respondent if it had a response to the April 14 proposal, and information in response to its April 18 information request (GC Exh. 5 at 1; R. Exh. 7 at 1-2). While Respondent did provide the Union with the timecards it had requested on March 30, it did not provide information in response to the Union's April 18 request (GC Exh. 5 at 2; R. Exh. 7 at 2). Respondent did not respond to that request until April 20, the same day it informed impacted employees about the layoff (J. Exh. U; Tr. 97, LL. 1-9).

During the April 19 session, the parties discussed the Union's April 14 letter and proposal, and the Union reasserted its desire to continue to bargain about the proposed layoff (GC Exh. 5 at

2-4; R. Exh. 7 at 2-4). The Union reiterated that it was extremely important that the bond shop employees impacted by the reduction in force maintain employment with Respondent (Tr. 99, LL. 21-25). Ducker expressed that the Union believed there was still room for negotiations and proposals to be passed on both sides, and that while the Union was unwilling to agree to the terms of Respondent's last proposal that included modified RAS competencies, it was willing to continue to bargain modified categories that would be acceptable to the Union (GC Exh. 5 at 2-4; R. Exh. 7 at 2-4). Garrett expressed her confusion as to why the Union's April 14 letter stated that the Union is wholeheartedly opposed to the RAS philosophy, but the Union was willing to bargain a modified RAS system for the reduction in force (GC Exh. 5 at 3; R. Exh. 7 at 3). Ducker clarified that the April 14 letter intended to put other ideas in front of Respondent before the layoff was carried out under the initial terms and conditions, given that it appeared that Respondent had already completed employee evaluations and made decisions as to whom it would lay off (GC Exh. 5 at 3-4; R. Exh. 7 at 3-4). Ducker again asserted that the Union stood ready to continue to bargain the reduction in force (GC Exh. 5 at 4; R. Exh. 7 at 4). Garrett replied that the Union needed to clarify the ideas raised in the April 14 letter and, if they wanted to make a proposal, they needed to formulate one and provide it to the company (GC Exh. 5 at 4; R. Exh. 7 at 4-5). Garrett informed the Union that based on its April 14 communication, Respondent had finalized plans to move forward with the bond shop layoff as scheduled on April 21 (GC Exh. 5 at 5; R. Exh. 7 at 5). Barker protested that assertion, to which Garrett replied that Respondent had made its business decision to move forward with the layoff per the initial terms and conditions of employment, was finalizing the RAS rankings, and had scheduled the process for laying off employees for the following morning (GC Exh. 5, at 5; R. Exh. 7, at 5-6).

Garrett asserted that the Union had ample time to bargain, that the layoff was tentatively scheduled for the following morning, but if the Union had a proposal that could lead to agreement in the “11<sup>th</sup> hour” the company was willing to entertain it (GC Exh. 5 at 5; R. Exh. 7 at 5-6). In response, Bulin stated that he believed the parties were close on the transfer proposal. He also stated that Respondent had said it was open to a transfer to assembly. Bulin identified the outstanding issue as being only a matter of which employees would be selected and what they would be paid. He stated that the Union believed the parties might not be able to agree on selection criteria before Respondent’s deadline, but that he did not want to give up on the employees’ right to retain employment through an assembly position (GC Exh. 5 at 5; R. Exh. 7 at 6). Garrett explained that Respondent processed the layoff based on the initial terms and conditions of employment, that it had to do so absent agreement with the Union, and that the initial terms and conditions did not include moving employees from one job family to another (GC Exh. 5 at 5; R. Exh. 7 at 6). Garrett stated that either Respondent was going to go by the initial terms and conditions, or the parties would reach a modified agreement (GC Exh. 5 at 5; R. Exh. 7 at 6). Ducker responded that the Union was absolutely prepared to reach a modified agreement and would stay “as long as it takes” to reach agreement (GC Exh. 5 at 5; R. Exh. 7 at 6). Garrett requested a proposal, as the layoffs were scheduled for 10:00 a.m. the following morning (GC Exh. 5 at 5; R. Exh. 7 at 6).

Ducker requested that Respondent reconsider its time frame for layoffs, even by a couple of days, to allow the parties to negotiate further (GC Exh. 5 at 6; R. Exh. 7 at 7). Garrett responded that the company believed it was “humane” to let employees know they were being laid off the day before the layoff was implemented, so it planned on informing them the following day (GC Exh. 5 at 6; R. Exh. 7 at 7; Tr. 292, LL. 23-25; 293, LL. 1-4). Ducker expressed that the Union

believed it more humane to take the extra days to negotiate and proposed the parties negotiate for three more days before the layoff was carried out (GC Exh. 5 at 6; R. Exh. 7, at 8). Garrett responded that was not feasible, but when Ducker asked her to explain why not, she did not provide an answer, stating the Union needed to get the company a proposal rather than worrying about when the company was going to notify employees (GC Exh. 5 at 6; R. Exh. 7 at 8). Garrett said Respondent would not consider moving the timing for implementation until it received some idea about whether the parties would reach agreement or not (GC Exh. 5 at 7; R. Exh. 7 at 8).

The Union passed a proposal on the bond shop layoff at 1:14 p.m. (J. Exh. S; GC Exh. 5 at 8; R. Exh. 7 at 1). The proposal provided transfer rights for employees impacted by layoff, who would be chosen per the initial terms and conditions of employment, excluding active discipline if employed at Respondent for less than 48 months, or who had transferred from another facility within the past 48 months (J. Exh. S). This included all bond shop employees, who had all transferred from other facilities within the past 48 months (J. Exh. S; R. Exh. 7 at 1-2). The proposal also included that employees transferring to assembly would not have their seniority or pay impacted, would be subject to a 90-day probationary period, and provided for recall rights in the bond shop for the following 15 months (J. Exh. S). The Union explained to Respondent that the proposal excluded active discipline because the Union believed Respondent was not administering discretionary discipline equitably, and there were open disciplinary actions that could factor into the layoff decision (GC Exh. 5 at 8-9; R. Exh. 7, at 5).

Garrett expressed concern about Respondent properly evaluating attendance and safety performance without including active discipline (GC Exh. 5 at 9-10; R. Exh. 7 at 2-4). When the Union asked Garrett to clarify how the initial terms and conditions would work if there were no active disciplinary actions for employees, Garrett said that she was not going to get into

hypotheticals (GC Exh. 5 at 9; R. Exh. 7 at 3). The Union suggested that Garrett counter with a proposal keeping out safety discipline or something along those lines, but Garrett continued to ask the same questions regarding the exclusion of active discipline (GC Exh. 5 at 10; R. Exh. 7 at 3). Garrett next took issue with the provision allowing employees to transfer to assembly at their current rate of pay and asked for the Union's rationale (GC Exh. 5 at 10-11; R. Exh. 7 at 4-5). The Union explained that its position was that time spent working for the company should count for something, but that it remained open to negotiating the wages of employees moving to assembly and requested a counterproposal (GC Exh. 5 at 10-11; R. Exh. 7 at 4-6).

Garrett rejected the exclusion of active discipline in employee evaluations, asserting that Respondent's position was that it absolutely wanted to evaluate employees under the initial terms and conditions of employment (GC Exh. 5 at 12-13; R. Exh. 7 at 6-7). Garrett also rejected the inclusion of recall rights (GC Exh. 5 at 13; R. Exh. 7 at 7; 296, LL. 8-25; 297, LL. 1-3). Garrett testified that Respondent did not want to be obligated to bring back a poor performer, and therefore was unwilling to agree to recall rights for bond shop employees impacted by layoff (Tr. 296, LL. 23-25; 297, LL. 1-3). The Union asked if Respondent would be open to discussing the possibility of allowing bond shop employees who took assembly positions at a lower rate of pay to apply for bond shop positions in the future and, should they be hired into such, retain their former labor grade and rate of pay (GC Exh. 5 at 13; R. Exh. 7 at 7). Garrett responded that she could not answer that at the time but would be open to possibly applying retroactively any recall rights negotiated into a future collective bargaining agreement (GC Exh. 5, at 13; R. Exh. 7 at 7-8). The Union also asked whether Respondent would entertain a years-of-service multiplier for bond shop employees who took assembly positions, and Garrett responded that it would not, without explanation (GC Exh. 5 at 14; R. Exh. 7 at 8). Bulin asked if they could throw out more ideas, or go off the record,

and Garrett replied that she did not believe the parties were anywhere close (GC Exh. 5 at 14; R. Exh. 7 at 8-9). Garret reiterated that the layoffs were scheduled for the following morning at 10:00 a.m. and urged the Union to let her know if they could not get past the RAS per the initial terms and conditions of employment (GC Exh. 5 at 14; R. Exh. 7, at 8-9). Bulin then asked Garrett if Respondent would entertain a letter of agreement that included a provision that evaluation and discipline subject of the layoff would be open to the grievance procedure with the option of a full remedy available (GC Exh. 5 at 15; R. Exh. 7 at 9). Garrett replied that such was not their obligation under the law (GC Exh. 5 at 15; R. Exh. 7 at 9). Given that Garrett had rejected each of their proposals throughout that session, and the fact that Garrett appeared to be through with bargaining, the Union chose not to modify its proposal (GC Exh. 5 at 16; Tr. 141, LL. 21-25; 142, LL. 1-3).

In response to its April 18 information request, on April 20—the same day that Respondent informed its selected bond shop employees about the layoff—Respondent provided the Union with the bond shop employee rankings and evaluation criteria (J. Exh. U; Tr. 97, LL. 1-22; 105, LL. 1-2). Respondent did not provide the evaluations used to rank employees, but rather, the number rating each received and the ranking that resulted, with the bottom 12 employees being those ultimately subjected to layoff (Tr. 97, LL. 1-22). Respondent implemented the bond shop layoff on April 21 (Tr. 104, LL. 23-25; 105, LL. 1-6).

### **I. Post-layoff bargaining: The Union attempts to continue talking bond shop layoff, Respondent rejects it outright**

The parties continued first contract bargaining the week following the layoff. On April 24, the Union sent Garrett an information request, asking for the discipline files for the 12 employees impacted by the layoff (GC Exh. 12).<sup>8</sup> During their April 28 session, the Union presented

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<sup>8</sup> The information request includes a discrepancy in dates; indicating that it was sent on April 24, but that the Union received information on Rodney Horn on May 23 (GC Exh. 12). Respondent does not dispute receiving this information request and agrees that it provided Horn's information on May 23 (Tr. 415-416).

Respondent two information requests pertaining to the recent bond shop layoff (GC Exh. 11 at 2).<sup>9</sup> The first request sought information regarding the attendance records of certain individuals for the purpose of discussing their discipline and layoff (GC Exh. 13). In response to receipt of the information request, Garrett inquired about the reference to a layoff, and the fact that the Union was requesting information after the fact (GC Exh. 11 at 2-3). Garrett said her duty was to give the Union notice and an opportunity to bargain, which she believed she had done (GC Exh. 11 at 3).

Garrett also stated that Respondent had provided attendance cards prior to the layoff and complained that now the Union was deciding it needed more information (GC Exh. 11 at 3). Garrett asserted that the Union was just ‘exercising her’ and making her work for no reason (GC Exh. 11 at 3). Garrett said that the layoff had already been processed, and the Union had sufficient opportunity and notice to bargain and asked how the information being requested impacted the Union’s ability to bargain layoffs that had occurred one week prior (GC Exh. 11 at 3). Ducker responded that Respondent had rated employees on those items, and the Union had a right to see whether the discipline pertained to the layoff (GC Exh. 11 at 3). Garrett then asserted her belief that the information request is indicative of “James’ [Ducker] inherent need to have discipline that was properly given taken away” and that the Union was arguing that Respondent should not have disciplined employees (GC Exh. 11 at 4). Ducker stated that the Union believed there were inconsistencies and needed the information to prove it (GC Exh. 11 at 4).

The Union’s second information request made during that session pertained directly to the RAS ratings Respondent had utilized to determine which bond shop employees would be subject to layoff (GC Exh. 13; GC Exh. 11 at 4). Therein, the Union requested “a detailed explanation as to why each Bond Shop employee received the rating they did in each layoff evaluation category,”

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<sup>9</sup> Garrett testified at hearing that, during first contract bargaining the following week, on April 26, 27, and 28, the Union did not propose to return to bargain issues related to the layoff (Tr. 298, LL. 8-20).

along with documentation related to those ratings (GC Exh. 13). The Union also requested answers to a few questions related to the evaluation process, including whether those evaluations were completed individually or collaboratively, and whether managers were involved (GC Exh. 13). Garrett stated that she would take under advisement whether or not, or how to respond, and asked clarifying questions (GC Exh. 11 at 4).

Respondent responded to the Union's April 28 information requests on May 2 (GC Exh. 14). In response to the Union's first information request, Respondent asked that the Union update its request in an articulate, non-repetitive manner to include necessary detail and a time frame (GC Exh. 14). The Union sent a follow-up information request in response to this correspondence on May 8, clarifying its requests and explaining that while Respondent delivered attendance cards (unit cards) for the bond shop, it was also requesting all 2016 and 2017 TC-1 documentation, PAR requests (modification of time cards), and FMLA records in order to represent the bond shop employees in discipline and layoff evaluation to understand how discipline is applied to layoff and discipline justification (GC Exh. 15). In response to the second information request, and specifically, the Union's request for a detailed explanation into each specific rating and documentation, Respondent attached the RAS competencies and explanations thereof, and the employee rankings that it had already provided (GC Exh. 14). Respondent's reply did not include, as requested, any explanation or documents pertaining to employees' ratings (GC Exh. 14).

### **III. ANALYSIS**

As argued by Counsel for the General Counsel in its Brief in Support of Exceptions, under extant law, Respondent violated Section 8(a)(5) by failing to bargain prior to discharging and suspending employees Smith and Horn, and by failing to bargain to impasse prior to laying off Horn and eleven other employees. Respondent's Cross-Exceptions fail to establish otherwise.

**A. Respondent's Cross-Exceptions related to discipline allegations are without merit and Respondent did not meet obligations under *Total Security*<sup>10</sup>**

Respondent argues that during the hearing, the ALJ improperly excluded evidence about bargaining between a different union local and another out-of-state facility, and that the ALJ improperly failed to rely on Respondent's equitable estoppel argument. As discussed below, both of these arguments fail.

**1. The ALJ properly excluded evidence related to Respondent's Tulsa facility**

The ALJ properly excluded evidence related to Respondent's Tulsa facility. Respondent attempted to enter into the record an agreement between a different UAW local and Respondent's Tulsa facility regarding notification of employee discipline, arguing it is relevant to the Union's decision not to pursue pre-decision bargaining over discipline at Red Oak before May of 2017, as this would show the Union was ready and willing to engage in such bargaining. Consideration of an agreement made between Respondent and a different UAW local at a different facility operating under a distinct Collective Bargaining Agreement is clearly irrelevant to this case. While the facilities share a common denominator in International Representative David Barker, nothing about the bargaining history between Respondent and the Tulsa UAW local is relevant to considerations of the bargaining history of Respondent and the Union here. While purporting it will do so, Respondent fails to make any substantive argument in its brief concerning the relevance of that information to the Board's consideration of whether Respondent met its bargaining obligation at Red Oak (R. Brf. at 6, fn. 5). The ALJ properly excluded the documents as lacking relevance and probative value. *See, e.g., Dorsey Trailers, Inc.*, 327 NLRB 835 (1999) (finding no merit in respondent exception regarding judge's exclusion of evidence related to another facility

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<sup>10</sup> Counsel for the General Counsel makes this argument under extant law but reiterates its argument in its Exceptions that *Total Security* should be overturned. [Cross Exception 2]

as the documents involved events at a different facility with its own local management and separately established policies and procedures and represented by a different union). The Board will reverse a judge's evidentiary ruling only when the party urging the reversal demonstrates that the judge's ruling was both erroneous and prejudicial to its substantive rights. *See Ports America Outer Harbor, LLC*, 366 NLRB No. 76, slip op. at 3, n. 9 (2018) (citing *Monroe Mfg.*, 323 NLRB 24, 25 (1997)). Respondent has not stated with any particularity how it has been prejudiced by the ALJ's ruling on this issue, namely, how any of the judge's findings might be contradicted by material included in the offered evidence regarding the Tulsa facility. *Monroe Mfg.*, 323 NLRB at 25-26. The Board should therefore uphold the ALJ's decision to exclude this evidence.

**2. Respondent's equitable estoppel argument fails under *Total Security* [Cross Exception 3]**

In *Total Security Management*, the Board held that employers have a statutory obligation to provide a union notice and an opportunity to bargain before imposing discretionary discipline on unit employees when a union has been certified or lawfully recognized as its employees' exclusive collective bargaining representative but has not yet entered into a collective bargaining agreement with the employer. 364 NLRB No. 106, slip op. at 2 (2016). The employer's obligation includes providing the union with notice and an opportunity to bargain over discretionary decisions to implement serious discipline, which include actions that impact employees' tenure, status, and earnings, and include suspensions, demotions, and discharges. *See id.*, slip op. at 4. The Board's notice requirement entails "sufficient advance notice to the union to provide for meaningful discussion concerning the grounds for imposing discipline in the particular case, as well as the grounds for the form of discipline chosen" in addition to providing the union with relevant information if a timely request is made. *Id.*, slip op. at 11. The employer is not required to bargain with the union to impasse or agreement at this stage. *See id.* After the employer fulfills its pre-

imposition responsibilities, it may implement the discipline, but must continue to bargain about the disciplinary action to agreement or impasse. *See Total Security*, 364 NLRB slip op. at 12.

It is undisputed that on November 29, 2016, Respondent notified employee Thomas Smith that he was terminated effective November 17, 2016, after being placed on suspension pending investigation on that date. It is also undisputed that Respondent did not inform the Union about its decision to terminate Smith at that time, and that Respondent's decision to terminate Smith was discretionary. (See J. Exh. Z). Respondent did not inform the Union about its decision to terminate Smith until February 7, some three months later. Thus, Respondent did not provide the Union with notice and an opportunity to bargain over its discretionary decision to terminate Smith prior to implementing that discipline.

Similarly, it is undisputed that on April 3, Respondent issued its bond shop employee Rodney Horn a five-day suspension and did not notify the Union about this discipline at that time. It is also undisputed that the suspension issued to Horn was discretionary. Respondent did not provide the Union with notice and an opportunity to bargain over this decision before it disciplined Horn, and did not inform the Union about this discipline until May 4. In the meantime, Horn was laid off pursuant to Respondent's initial terms and conditions of employment, which included a RAS evaluation that took into account all active discipline, on April 21.

The Board recognizes that the principles of equitable estoppel apply to bargaining, and "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, 1223 (2005). Here, the Union did not acquiesce to Respondent's unilateral implementation of discretionary employee discipline. After the Union learned of the *Total Security* decision, on November 14, 2016, David Barker sent

Danielle Garrett an email informing her that Respondent had failed to notify and bargain with the Union regarding discretionary discipline of Red Oak employees. In that correspondence, the Union requested that Respondent bargain with the Union if it sought to discipline employees prior to imposing that action. Instead of complying, Respondent continued to send disciplinary information after that discipline was already implemented. Respondent did respond to the Union's November 14 letter requesting that the Union designate a Union representative to receive disciplinary information prior to its implementation. Barker testified that he let Garrett know, in person, that she should inform Union President Ducker. Further, Garrett had Ducker's contact information, including email address and cell phone number, and could provide that information to him. Providing pre-disciplinary notice to Ducker, in order to comply with its *Total Security* obligation to inform the Union about proposed employee discipline prior to implementation, would have taken comparable time and effort as writing disciplinary update letters to the Union.

Thus, Respondent fails to establish that the ALJ erred in precluding evidence of bargaining in foreign units and Respondent fails to establish that the ALJ should have found its failure to bargain excused by way of equitable estoppel.

**B. Respondent's Cross-Exceptions regarding the bond shop layoff are without merit**

Respondent failed to bargain to a good faith impasse prior to laying off twelve employees. Communications between the employees and the Union are irrelevant to the impasse issue and moreover were properly protected from discovery. Respondent broke off negotiations prematurely and its arguments for an expedited negotiations framework miss the mark. The negotiations, which included Respondent's own proposals for layoff alternatives, were decisional and not effects bargaining; the remedy should not be limited. Respondent's proffered additional grounds for finding a layoff are meritless.

**1. The ALJ properly granted the Union’s petition to revoke Respondent’s subpoenas issued to Charging Parties and the Union’s custodian of records [Cross Exception 4]**

Respondent issued subpoenas to each individual charging party, as well as the custodian of records for the Union, seeking information concerning communications between the Union and membership, including the charging parties, requests for representation, and the Union’s efforts to represent its membership (R. Exh. 1). The ALJ correctly found that the information sought encompassed protected communications between a union and its membership concerning bargaining information (R. Exh. 1 (citing *Berbiglia, Inc.*, 233 NLRB 1476, 1495 (1977))). As the ALJ recognized, subpoenas requesting a union’s records that include communications between the union and its membership, have been revoked in order to safeguard the bargaining process. *See Berbiglia, Inc.*, 233 NLRB at 1495 (quashing employer’s subpoena duces tecum seeking union records, including communications between union and members regarding reasons for strike as “requiring the Union to open its files to Respondent would be inconsistent with and subversive of the very essence of collective bargaining and the quasi-fiduciary relationship between a union and its members,” and because “[i]f collective bargaining is to work, the parties must be able to formulate their positions and devise their strategies without fear of exposure”); *Champ Corp.*, 291 NLRB 803, 817 (1988) (citing *Berbiglia*, as well as the subpoena’s overbreadth and facial deficiency, as grounds for revoking a respondent subpoena seeking all union notes or other records describing or recording collective-bargaining sessions), *enfd.* 933 F.2d 688 (9th Cir. 1990), *cert. denied*, 502 U.S. 957 (1991). Respondent has failed to show how its requests fall out of the realm of bargaining communications between a Union and its members.

**2. The Board considers the exigencies of distinct business situations when determining whether the amount of time and discussion was sufficient to meet a bargaining obligation; Respondent has failed to establish that its business situation necessitated layoff on April 21 [Cross Exception 12]**

In articulating the *Bottom Line* exception for economic exigencies compelling prompt action, but not the type that would entirely relieve the employer of its bargaining obligation, the Board noted, in *RBE*, that its application “attempts to maintain the delicate balance between a union’s right to bargain and an employer’s need to run its business” and therefore, the analysis is, of necessity, “not easily susceptible to bright line rules.” *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 82 (1995). An employer meets its bargaining obligation under these circumstances by providing the union adequate notice and an opportunity to bargain over the changes, and by bargaining to impasse over the matter. *Id.* The Board has recognized that “the amount of time and discussion required to meet a bargaining obligation is dependent on the exigencies of a particular business situation.” *Id.* Notably, the *RBE* Board makes clear that an employer is not excused from its obligation to bargain *in good faith* to impasse over an economically exigent matter, even though it does not require that bargaining to be protracted. *Id.* The *RBE* Board in no way creates an exception of the kind Respondent urges the Board to grant in its favor that would find employers compliant with Section 8(a)(5) of the Act as long as they provide unions a specific notice period and attend a specified number of bargaining sessions, no matter the content of those bargaining sessions. This is simply not the case; the Board has never announced an “expedited” framework for bargaining. The Board requires that an employer bargain in good faith to impasse or agreement over that particular issue. In this case, the ALJ was correct in focusing his analysis upon impasse bargaining, although his failure to properly consider and weigh critical facts resulted in an incorrect finding that the parties were at impasse, as articulated in the General Counsel’s Exceptions and Brief in Support (JD slip op. at 11-12).

By citing cases where the Board has found shorter notice and bargaining periods sufficient under economically exigent circumstances, Respondent suggests the existence of the precise bright line rule the *RBE* Board explicitly rejected. Contrary to Respondent's argument, the Board requires a look at the exigencies of different business situations and considers the time frame and notice period on a case-by-case basis. In this case, the particularities of Respondent's circumstances revealed in the record call into question the exigencies compelling Respondent to carry out the layoff precisely on April 21, and especially Respondent's refusal to delay notifying employees and continue bargaining until April 21, as the Union had requested. As late as April 7, Respondent's managers were contemplating a two-part layoff, with 7 employees being laid off on April 21, assuming Respondent got its "paperwork complete and clean by then [and fulfilled] bargaining obligations"; and 5 employees being laid off in June (CP Exh. 1; Tr. 365, LL. 19-25; 366, LL. 1-25; 367, LL. 1-17). As late as April 13, just one week before the scheduled layoff date, industrial engineer Blake Mansfield emailed Rowe the latest headcount analysis pertaining to the Red Oak bond shop (GC Exh. 10; Tr. 387, LL. 17-25; 388, LL. 1-25; 389, 1-2). In that email, Mansfield recommended a reduction of nine full-time bond shop employees, plus two contractors, to equal eleven total heads (GC Exh. 10). About one hour later, Mansfield sent a second email to Rowe, instructing her to let Baggett know that they had to change an assumption about the second reduction and reminding her that they had previously planned on two reductions in force, rather than one, and that the second reduction in force had "wiggle room" in it (GC Exh. 10; Tr. 362, LL. 14-19). Mansfield told Rowe that he did not "see why [Respondent] could not make a reduction to the [reduction in force] at this point" (GC Exh. 10).

During the parties' last bargaining session, the Union requested that Respondent delay notifying employees about the layoff until April 21 so that the parties might continue bargaining

for the next couple of days (GC Exh. 5 at 6; R. Exh. 7 at 7). Respondent refused to entertain this request, even though it would have been in harmony with its own RIF policy, which allows for notification and layoff on the same day (GC Exh. 5 at 6; R. Exh. 7 at 8; J. Exh. A). Respondent did not explain to the Union its denial of the request despite that it was exceedingly reasonable, would not result in significant delay, and would have allowed Respondent to maintain its original layoff date of April 21. Even if the Union had requested more than 2 to 3 extra days of bargaining, Respondent's refusal to grant the Union's request defies logic. Respondent has failed to put forth any evidence to support a conclusion that it was financially necessary to inform employees about the layoff on April 20. Under circumstances in which Respondent had the economic flexibility to reduce the number of employees scheduled for layoff just *one week* before its scheduled implementation, its refusal to delay implementation of the layoff and/or the notification of employees is unreasonable.

In keeping with its reluctance to provide a definitive time frame required for notice regarding layoff bargaining, the Board, in certain cases cited by Respondent, explicitly finds the length of advanced notice adequate *under those unique circumstances*. See, e.g. *KGTV*, 355 NLRB 1284, 1285 (2010) (“Here, the Respondent’s January 9 layoff notice issued 3 weeks in advance of the implementation date. In the circumstances, this was an adequate period for the parties to negotiate over the layoff decision”). Additionally, those cases are distinct where the unions involved that were notified of the impending layoff did not immediately request and voluntarily engage in meaningful bargaining as the Union did here. See, e.g. *KGTV*, 355 NLRB at 1285 (union failed to request bargaining over layoff decision announced three weeks in advance); *Paramount Liquor Co.*, 270 NLRB 339, 343 (1984) (Administrative Law Judge found Union did not pursue extensive bargaining besides one meeting when given 11 days’ notice of layoff); *Burns Ford, Inc.*,

182 NLRB 753, 754 (1970) (union given six days of advanced notice waited to request bargaining until one day before the proposed layoff). Here, the Union actively and immediately pursued bargaining (JD slip op. at 5, LL. 31-44; JT Exhs. H, I).

Respondent fails to explain the significance of the fact that the Union, not Respondent, ‘wanted to bargain for a deviation from the status quo procedures’ (R. Brf at 28). Indeed, upon receiving Respondent’s notification and bargaining offer regarding its proposed reduction in force, the Union immediately requested bargaining and pursued alternatives to layoff, including loan and transfer agreements, from the beginning of bargaining until Respondent’s imposed deadline (GC Exhs. 2-5; J. Exhs. L, O, Q, S). Respondent fails to expand upon its brief assertion that the ALJ somehow failed to reconcile his impasse finding with the fact it was the Union that wanted to bargain for a deviation from the status quo procedures. If an employer does opt to provide the union with notice and an opportunity to bargain over a potential layoff, as it is lawfully required to do under these circumstances of economic exigency, the employer is obligated to bargain in good faith to impasse or agreement. The ALJ properly undertook an impasse inquiry rather than focusing solely on the length of the notice period, which cannot, under these circumstances, constitute independent grounds for dismissing such an allegation. *RBE*, 230 NLRB at 82.

Finally, analysis of the exigency of Respondent’s distinct business situation in order to determine whether the amount of time and discussion was sufficient to meet its bargaining obligation requires consideration of Respondent’s conduct during bargaining that significantly shortened bargaining sessions. Respondent would have the Board consider that it bargained for four full bargaining sessions during a 24-day period. However, when considering the substance of the negotiations themselves, the April 5 and 6 sessions were rendered essentially worthless when Respondent rescinded its loan agreement proposal at the end of the April 6 session. Up until that

point, the parties had only discussed and negotiated a loan agreement, per Respondent's suggestion and asserted preference. The parties spent two full sessions on that subject and exchanged three proposals regarding loan agreements. All that progress, however, was effectively erased when Respondent abruptly, and without notice to the Union, withdrew its loan agreement proposal and informed the Union that it would be moving forward with a permanent layoff in the bond shop. From that point forward, the Union was forced to start over, knowing that Respondent would no longer consider a loan agreement, and instead pursued a transfer agreement that the parties discussed for the remaining two bargaining sessions. Considering Respondent's withdrawal of the loan agreement proposal, for practical purposes, the parties only met twice for bargaining regarding the bond shop layoff; on April 7 and 19. Additionally, the Union's attempt at continuing negotiations while the parties were unavailable to meet through its April 14 letter was met with silence from Respondent. Taking into account Respondent's refusal to delay layoff implementation for 2 to 3 days at the Union's request during the April 19 session, its conduct erasing progress after two full bargaining sessions, and the evidence outlined above showing significant leeway in Respondent's economic situation necessitating the shift in bond shop numbers, Respondent has failed to show the time and discussion it granted the Union before layoff implementation was reasonable and sufficient.

**3. The Union engaged in decisional bargaining including alternatives to layoff and did not pursue only effects bargaining; a make-whole remedy is appropriate [Cross-Exceptions 13 & 17]**

Respondent's argument that the Union pursued only effects bargaining about the layoff defies logic, and its suggestions that the layoff alternatives the parties negotiated throughout their bargaining sessions were effects bargaining topics is unavailing. From the first bargaining session and throughout those that followed, the Union pursued only alternatives to layoff; namely, methods

that would ensure impacted bond shop employees remained ‘gainfully employed,’ including loaning or transferring employees to other job families while work in the bond shop was slowed. The Board has listed several issues for discussion between parties that constitute “*alternatives to reducing labor costs through use of a layoff*” including; “modified work rules, nonpaid vacations, restricted overtime, job sharing, shortened workweek, and reassignment of work and job reclassifications.” *Toma Metals, Inc.*, 342 NLRB 787, 799 (2004) (quoting *Holmes & Narver*, 309 NLRB 146, 147 (1992)) (emphasis added). Job reclassification and reassignment are the alternatives to layoff discussed by the parties here at all four bargaining sessions; beginning with a loan agreement proposal, and after Respondent took that proposal off the table, continuing with a transfer agreement proposal (GC Exhs. 2-5; R. Exhs. 4-7; J. Exhs. K, L, M, O, P, Q, S). Garrett testified that Respondent proposed the loan agreement as Respondent:

“thought if there were alternatives, *instead of laying people off*, losing their jobs, hitting the street, could we put them into *different work scope* within the Red Oak facility that is meaningful and productive to the Company, also reduces the headcount, so eliminates the cost concerns about being overstaffed...”

(Tr. 250, LL. 11-24) (emphasis added).

One of those alternatives, Garrett stated, was the loan agreement (Tr. 250, LL. 17-18). The Union clearly and unequivocally pursued bargaining over the decision to implement the layoff, which included exploring alternatives to layoff; a loan agreement and transfer.

Respondent’s argument that the decision to eliminate employees from the bond shop is distinct from its decision of whether bargaining unit employees would be employed by Respondent after April 21 is undermined by its own record evidence. Respondent initially proposed a loan agreement “[i]n lieu of layoff”, providing that bond shop employees be loaned to other job classifications or assignments, which employees “*will not have their compensation affected for the duration of the loan.*” (J. Exh. K, M) (emphasis added). The parties’ initial proposals mark a clear

attempt at *avoiding* layoff by pursuing alternatives that would not reduce overall staffing levels in the company as a whole, but just in the bond shop. It is disingenuous for Respondent to now argue that its negotiations with the Union regarding avoiding layoff and in lieu of layoff involved only effects issues.

Respondent cites *Print Fulfillment Services, LLC* in support of its contention that the Union pursued only effects bargaining and should therefore be entitled to only a *Transmarine* rather than make-whole remedy. 361 NLRB 1243 (2014).<sup>11</sup> The facts of that case are inapposite. In that case, the Board held that a *Transmarine* remedy was appropriate where the union initially requested bargaining over both the decision and the effects of an announced layoff, but subsequently waived its right to bargain over the decision by pursuing only effects bargaining issues. *See id.* at 1247-48. The Board considered that after the union's initial request to bargain both the decision and its effects, the union expressly sought bargaining only on the effects of the layoff where a union representative testified that the purpose of the bargaining session regarding the layoff was to discuss and bargain over the effects of same, and the union's proposal passed at that meeting specified that the parties had met to discuss procedures to be followed in the reduction of force. *See id.* at 1247-1248, n. 25. In a subsequent email to the company, the representative agreed to meet the following day to bargain the effects of the company's decision to lay off employees. *See id.* at 1248, n. 25. Additionally, in that case, the complaint alleged only that the employer had failed to bargain over the effects of the layoff, and at hearing, Counsel for the General Counsel "explicitly disclaimed" an allegation that the employer failed to bargain over the decision, and

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<sup>11</sup> Respondent also cites *Tramont Manufacturing, LLC* in support of its position that a make whole remedy should not apply in this case. 365 NLRB No. 59 (2017). In that case, the regional office dismissed the underlying decisional bargaining case, and the Office of Appeals upheld that decision. *See id.*, slip op. at 1. Neither the ALJ nor the Board was presented with the facts or details concerning the decisional bargaining issue, and no conclusions or determinations were made based on that decision. *See id.* That case is therefore not helpful in determining whether a decisional or effects remedy is appropriate here.

affirmed he was only alleging that the employer had failed to bargain over the effects of the decision. *Print Fulfillment*, 361 NLRB at 1248. It is clear in that case that the parties did not bargain over any layoff alternative; rather, the union accepted that the employer would layoff certain employees and specifically focused bargaining on selection methods and layoff procedures. *Id.* at 1265-1268. No similar circumstances are present here, where the Union pursued bargaining over the layoff decision, seeking to come to agreement on some alternative to layoff that would keep bond shop employees gainfully employed.

In response to Respondent's notification to the Union that it was contemplating a reduction in force in the bond shop, the Union sent a letter on March 30 accepting "the opportunity to negotiate the anticipated layoffs" and requested dates (J. Exh. H). From the outset of the parties' first bargaining session on the subject, the Union expressed interest in a loan agreement, as initially proposed by Respondent, in order to keep impacted employees working. At that session Respondent provided a proposal that stated: "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 (6) months." (J. Exh. K) (emphasis added). The Union continued to express its interest in a loan agreement, in lieu of layoff, when it provided Respondent with a counterproposal during the parties' next session. Therein, the Union provided: "in lieu of layoff, the Company may loan not more than 20 bond shop employees to other job classifications and/or assignments associated with continuous improvement/lean activities for a period not to exceed (6) months." (J. Exh. L).

All discussions during bargaining on April 5 and 6 involved loaning employees to other job families, and manners of ensuring that bond shop employees remained employed with Respondent during the period of reduced work in the bond shop. Even after Respondent withdrew

its loan agreement proposal, the Union continued to seek options that would allow bond shop employees impacted by the period of reduced work to remain employed by Respondent, seeking the transfer of those employees to the assembly department. After the Union's shift to transfer proposals in response to Respondent's withdrawal of the loan agreement, the Union's next proposal provided: "In lieu of layoff, employees shall be selected in seniority order based off of job classification entry date" and that low senior employees would be transferred to the assembly job classification. (J. Exh. O). Here, unlike in *Print Fulfillment*, the Union never agreed, explicitly or implicitly, to bargain only the effects of Respondent's decision to conduct a bond shop layoff, and focused on solutions that would keep bond shop employees employed with Respondent, "in lieu of layoff."

When an employer fails to bargain to impasse or agreement over its decision to lay off bargaining unit employees, the Board has held that the appropriate remedy is a make whole remedy that includes reinstatement and backpay for impacted employees from the date of layoff. *See Print Fulfillment*, 361 NLRB at 1247 (citing *Eugene Iovine, Inc.*, 353 NLRB 400 (2008), reaffirmed 356 NLRB No. 134 (2011); *Pan American Grain*, 343 NLRB 318, 318 (2004), enfd. 558 F.3d 22 (1st Cir. 2009); *Wilco Mfg. Co.*, 321 NLRB 1094 (1996); *Plastonics, Inc.*, 312 NLRB 1045 (1993); *Porta-King Building Systems*, 310 NLRB 539 (1993), enfd. 14 F.3d 1258 (8th Cir. 1994); *Lapeer Foundry & Mach.*, 289 NLRB 952 (1988)). However, when an employer fails to bargain about only the effects of an employer's layoff decision, including the selection of employees for layoff, the Board typically orders a *Transmarine* remedy. *See id.* at 1247-1248 (citing *Transmarine Navigation Corp.*, 170 NLRB 389 (1968)). Here, Respondent failed to bargain to impasse or agreement over both the layoff decision and its effects, and therefore, a make whole remedy is appropriate.

The cases Respondent cites for the proposition that a *Transmarine* remedy is appropriate here are distinguishable from the case at hand. In those cases, the union failed to request bargaining over the layoff decision. *See KGTV*, 355 NLRB at 1283, 1286 (*Transmarine* remedy ordered where union requested effects bargaining only in response to layoff notice, employer failed to bargain effects); *Print Fulfillment*, 361 NLRB at 1247-48 (*Transmarine* remedy ordered where union waived its right to bargain over layoff decision, employer failed to bargain over effects per union's request); *Tramont Mfg., LLC*, 365 NLRB No. 59, slip op. at 9 (2017) (*Transmarine* remedy ordered in *Burns* successor case where employer refused to bargain about effects of layoff). As outlined above, in this case, the Union clearly and unequivocally accepted Respondent's offer to bargain about its decision to lay off bond shop employees, exploring solutions to ensure bond shop employees shifted departments rather than lost their jobs.

**4. Respondent mischaracterizes the record evidence it alleges supports an impasse finding before the April 21 layoff**

**a. The parties' bargaining history regarding the May 2015 layoff is irrelevant and does not support an impasse finding [Cross Exception 14]**

Without support in Board law, Respondent points to the parties' failure to reach agreement on a May 2015 bond shop layoff, based on several related documents it entered into evidence including the Regional Director's dismissal letter, as supporting an impasse finding (R. Exh. 8). First, the ALJ should have excluded evidence related to a May 2015 charge, where the parties were not given the opportunity to call witnesses and examine evidence related to the facts of that case, and where the information is completely irrelevant to the case at hand. Second, Respondent has no basis on which to conclude that the parties' failure to reach agreement on a May 2015 layoff—involving distinct facts, circumstances, and certain personnel—in any way supports a finding that the parties reached impasse here. Impasse findings are made on a case-by-case basis, based on the

totality of the parties' conduct throughout bargaining. *See Lapeer Foundry & Mach.*, 289 NLRB at 954 (to ensure meaningful negotiations regarding economically motivated layoff, the Board scrutinizes the "totality of the [parties'] conduct throughout the course of bargaining...") (quoting *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984)). A prior charge in which similar basic circumstances existed, but no evidence of actual bargaining circumstances is presented, does not support an impasse finding in this case. Further, and most importantly, it is well settled that a prior charge which is dismissed by a Regional Director, even where identical conduct is involved, does not constitute an adjudication on the merits, and no *res judicata* effect can be given to these actions. *See Walter B. Cooke, Inc.*, 262 NLRB 626, 636 (1982) (citing *Fanet Inc.*, 202 NLRB 409 (1973); *Omico Plastics Inc.*, 184 NLRB 767 (1970); *Cone Bros. Contract Co.*, 158 NLRB 86 (1966); *W. Ralston & Co. Inc.*, 131 NLRB (1961); *Swanson's Inc.*, 125 NLRB 407 (1959)). The record includes no information related to the actual bargaining that took place in May 2015, and merely shows certain correspondence that was exchanged between the parties during that period.

To the extent Respondent argues the May 2015 layoff establishes a past practice of implementing reductions in force in a specific manner, this argument is unavailing. The burden of proof to demonstrate past practice rests on the Respondent, who must show that the practice occurred "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." *Caterpillar, Inc.*, 355 NLRB 521, 522 (2010) (quoting *Sunoco, Inc.*, 349 NLRB 240, 244 (2007)). That is clearly not the case here. Respondent's argument that its May 2015 layoff is evidence of bargaining history supporting an impasse finding should be disregarded.

**b. The Union showed willingness to move on important issues; Respondent's unwillingness to engage and other actions frustrated bargaining [Cross Exception 15]**

Respondent's assertion that the parties disagreed on important issues oversimplifies the bargaining trajectory in a self-serving manner while ignoring record evidence revealing how close the parties were to reaching agreement before it changed the course of bargaining. Respondent's initial proposals involved loaning employees to other job families at their current rates of pay (J. Exhs. K, M). The parties agreed that impacted bond shop employees should "not have their compensation affected for the duration of the loan", as reflected in their early proposals (J. Exhs. K, L, M). Just before Respondent abruptly withdrew its loan agreement proposal, Garrett expressed the parties' mutual desire not to 'send out' bond shop employees and said that she believed the parties were "pretty close" (GC Exh. 3 at 6; R. Exh. 5 at 5). The Union appreciated Respondent's movement in its latest proposal, (J. Exh. M) but was unable to respond, either accepting, modifying, or rejecting it, as Respondent withdrew its proposal shortly after passing it to the Union. Only after Respondent abruptly withdrew its loan agreement proposal on April 6 did Respondent begin voicing its concern with maintaining bond shop employees at their same rates of pay in different positions, or while performing different roles within the company. While Respondent argues that under the loan agreement proposal, employees would be working in 5S/lean positions temporarily, while its transfer agreement proposals anticipated a permanent switch to the assembly job family, Respondent fails to explain its fundamental change in position from having the capacity to continue paying employees at their bond shop rates, to moving employees at significantly lower rates. Further, during the first two bargaining sessions Respondent itself discussed loaning employees to the assembly department. In response to the Union's question as to whether Respondent would be willing to train certain employees in

assembly to allow them to get a skilled trade under their belt, Respondent's Porter answered they would not be opposed, and sought to keep employees gainfully employed (GC Exh. 2 at 8-9). Additionally, during their April 6 discussion, the parties discussed collaborating with the Union and others who know more about employees' work experience in determining, for example, whether they are loaned to the tooling department or assembly department (GC Exh. 3 at 2). Based on this background, it was reasonable for the Union to remain firm in its position that bond shop employees should maintain their current rates of pay, and not be required to take what might be large pay cuts for certain employees.

Moreover, even when the Union suggested its willingness to compromise in this area, Respondent immediately shut down the discussion. On April 19, the Union suggested that bond shop employees transferred at a lower rate might have the opportunity to return to their former positions at their higher rates of pay. During that session, the Union questioned Respondent's openness to "talking about, let's say they go to [assembly], take a cut to \$13, \$12, whatever it is – would they be open to, in the future, when a position becomes available if the [employee] does apply, would they be willing to take a person that chooses to accept back at their former... rate of pay?" (GC Exh. 5 at 13). Garrett responded, "I can't answer that right now" and stated she may be willing to entertain recall language in CBA negotiations. *Id.* Even when suggesting resolutions giving Respondent their desired lower pay rate upon transfer, the Union was met with Respondent's refusal to consider its proposal and engage in meaningful bargaining that could bring the parties closer to agreement.

With regards to selection criteria, Respondent's argument in this area also ignores the Union's significant concession in its April 19 proposal related to the RAS selection methods. While true that the Union voiced its concerns with the RAS procedure throughout bargaining, it

ultimately conceded on this point in its final proposal passed on April 19, which would allow Respondent to evaluate employees for layoff under the RAS, excluding active discipline, who had been employed for less than 48 months, or who had transferred from another facility within the past 48 months, which included all bond shop employees (J. Exh. S; R. Exh. 7 at 1-2).<sup>12</sup> The Union explained it sought to exclude active discipline because there were outstanding disciplinary actions it had not yet had the opportunity to challenge that may be considered in those rankings (R. Exh. 7 at 2 (1:00pm)) (Garrett: “Why wouldn’t we include active discipline?” Ducker: “we believe that in light of how disciplines have gone at this point there is discretionary open disciplines that could very much be the deciding factors to these layoffs”). In response, Respondent stuck to its previous position, offered no counterproposal, and refused to engage with the Union when it offered further ideas and proposals.

Respondent’s conduct throughout bargaining, as articulated in detail in the General Counsel’s Brief in Support of Exceptions, especially its withdrawal of the loan agreement proposal, is important to consider in the context of disagreement between the parties. Respondent first proposed a loan agreement with respect to its proposed bond shop reduction in force in the initial correspondence it sent the Union on March 28, and its initial April 5 proposal included a provision that loaned bond shop employees would not have their compensation affected. The parties then focused all bargaining regarding the proposed reduction in force on a loan agreement for two complete bargaining sessions, during which each proposal passed involved loaning bond shop employees at their same rates of pay. On the afternoon of April 6, Respondent delivered a second loan agreement proposal to the Union in response to its counter. Just 46 minutes later,

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<sup>12</sup> The Union explained during the April 19 session that all bond shop employees had transferred to the Red Oak facility within the past 48 months, so all bonders were included (R. Exh. 7 at 1-2 (1:00pm)). Garrett confirmed this understanding at that bargaining session. *Id.*

Respondent's representatives rescinded their proposal without explanation, and informed the Union that Respondent would be carrying out a permanent layoff in the bond shop and would no longer consider a loan agreement. From that point forward, Respondent refused to entertain the Union's position that impacted bond shop employees should be transferred to the assembly department without having their compensation affected.

In addition to the loan agreement withdrawal, Respondent also failed to respond to certain Union information requests, delayed in responding to others until such a time at which it was too late for the Union to properly review the information and use it to formulate counterproposals, engaged in unfair labor practices impacting bargaining, and refused, without explanation, to delay informing impacted employees until April 21 to allow for further bargaining. These arguments are also articulated in the General Counsel's Exceptions and Brief in Support and reinforce a finding that Respondent did not engage in good faith bargaining, which weighs against an impasse finding.

**c. The Union did not believe the parties were at impasse and continued to put forth ideas during the April 19 bargaining session that were summarily rejected by Respondent [Cross Exception 16]**

Respondent argues that both parties understood they had reached impasse, however, the record reveals that the Union sought continued bargaining throughout the April 19 session, made significant concessions, and did not believe the parties had reached impasse. At the parties' final bargaining session on April 19, the Union made clear to Respondent from early on that it intended on continuing to negotiate the proposed bond shop layoff, and that it had anticipated Respondent would have a response to its proposals contained in the April 14<sup>13</sup> letter at that session. Throughout

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<sup>13</sup> The Employer's assertion that it did not consider the April 14 letter to be a proposal is contradicted by its own record evidence (R. Exh. 7 at 2). "I would like to talk about this April 14 letter signed by Barker. I know you are wanting me to respond, but I need to understand the union's proposal before I can do that." The Union proceeded to clarify its position and proposal as expressed in the letter, explaining "we are here to bargain whether it be a rack and stack at the end of the day or whether it be seniority based..." (R. Exh. 7 at 3). [Cross-Exceptions 6 and 7] Respondent's purported confusion about the April 14 letter and conclusion that it was not a true proposal does not mean it was not a proposal and does not explain Respondent's choice not to respond until five days after receipt.

the session, the Union attempted to engage Respondent in bargaining related to the layoff and any manner of keeping impacted bond shop employees gainfully employed in other job families. However, the Union's efforts on April 19 were consistently met with Respondent's rejection of its ideas and proposals, often without explanation.

Despite having the April 14 letter, Garrett requested a written, formal proposal, which the Union provided. Therein, the Union made significant concessions, including a provision that would allow Respondent to evaluate employees for layoff under the RAS (excluding active discipline) who had been employed for less than 48 months, or who had transferred from another facility within the past 48 months. This proposal allowed for evaluation of all bond shop employees under RAS, as all bond shop employees had transferred to the Red Oak facility within the past 48 months. The Union explained that its proposal excluded active discipline because the Union was challenging Respondent's disciplinary decisions, and there were open disciplinary actions that the parties had not bargained that could factor into the layoff decision. Garrett responded that Respondent would not be able to properly evaluate attendance and safety performance without including active discipline but refused to answer when the Union asked how the initial terms and conditions would work if there were no active disciplinary actions to allow for discussion regarding its proposal. Respondent refused to offer a counterproposal.

Even assuming the parties had reached impasse prior to or during the April 19 session, the Union's proposal, that included significant movement, would have broken that impasse. The Board has held that even if impasse is reached over an issue, it may be broken if one of the parties moves off its previously adamant position. *Tom Ryan Distributors*, 314 NLRB 600, 604-605 (1994), enfd. mem. 70 F.3d 1272 (6th Cir. 1995) (no impasse found where union demonstrated intent to move on key issue, parties had met only 8 times before employer declared impasse, and the key issue

had been discussed conceptually but not in detail). A significant concession by either party “precludes a finding of impasse even if a wide gap between the parties remains because under such circumstances there is reason to believe that further bargaining might produce additional movement.” *Hayward Dodge*, 292 NLRB 434, 468 (1989) (quoting *Old Man's Home of Philadelphia v. NLRB*, 719 F.2d 683, 688 (3d Cir. 1983)).

The Union’s first concession came with its April 19 proposal, and its other ideas expressed throughout that session continued to offer concessions that were met with rejection from Respondent. The Union displayed its willingness to compromise but was met with an insistence that bargaining had run its course, and that Respondent would carry out its layoff as it had planned from the beginning. *See PRC Recording Co.*, 280 NLRB 615, 640 (1986) (for impasse to exist, both parties must be unwilling to compromise). The Union continued to provide further ideas to get the parties closer to agreement after Respondent’s rejection of its proposal, including allowing bond shop employees who took assembly positions at lower rates of pay to apply for bond shop positions in the future at their former, higher rate of pay, a years-of-service multiplier for bond shop employees who took assembly positions, and a letter of agreement providing that the evaluation and discipline subjects of the layoff would be open to the grievance procedure with a full remedy option available. Garrett refused to engage the Union on those suggestions, rejecting them for the purposes of this bond shop reduction in force. Garrett told the Union she did not think they were anywhere close and urged the Union to let her know if they could not get past the RAS.

The Union’s conduct at the April 19 session is strongly indicative of a lack of impasse, especially its demonstrated concessions and flexibility, voiced desire for agreement, and willingness to extend bargaining for a few more days. *See Grinnell Fire Protection Systems Co.*, 328 NLRB 585, 585-586 (1999) (no impasse where employer expressed unwillingness to move

from position, union had not offered specific concessions, but had declared its intention to be flexible, sought another bargaining session, and indicated a willingness to involve a Federal mediator), *enfd.* 236 F.3d 187 (4th Cir. 2000), *cert. denied* 534 U.S. 818 (2001). Given the Union’s demonstrated willingness to make further compromises on major issues, Respondent “‘might reasonably be required to recognize that negotiating sessions might produce other or more extended concessions.’” *Royal Motor Sales*, 329 NLRB 760, 772 (1999) (quoting *NLRB v. Webb Furniture Corp.*, 366 F.2d 314, 316 (4th Cir. 1966), *enfd.* 152 NLRB 1526 (1965)). Instead, Respondent summarily rejected the Union’s proposals and request to extend bargaining. The Union was not required to bargain against itself—its decision not to modify its proposal or create a new proposal at the end of the April 19 session does not undermine its lack of impasse argument where Respondent failed to provide a counterproposal or respond in substance to its ideas.

The evidence is clear that the parties disagreed about the state of negotiations at the end of the April 19 bargaining session. While Respondent voiced that the parties were not anywhere close to reaching agreement, the Union expressed the contrary sentiment, showing its willingness to compromise with concessions and further suggestions that were met with outright rejection by Respondent. Without having received a written counterproposal from Respondent or any indication of their willingness to compromise, and without information it had requested during bargaining, the Union did not make a further counterproposal at that session. However, the Union clearly expressed its willingness to compromise and stay as long as it took to reach agreement. Respondent, in contrast, refused.

Contrary to Respondent’s assertion, the Union indeed pursued more bargaining after Respondent had implemented the layoff. In fact, on April 24 and 28, the Union requested information from Respondent related to the layoff, including the discipline files for the 12

employees impacted by the layoff (GC Exh. 12), information regarding the attendance records of certain individuals for the purpose of discussing their discipline and layoff, and “a detailed explanation as to why each Bond Shop employee received the rating they did in each layoff evaluation category,” along with documentation related to those ratings (GC Exh 13; 11 at 2). Upon receipt, Garrett inquired about the reference to a layoff, and said the Union was requesting information after the fact, asserting she had fulfilled her obligation to give the Union notice and an opportunity to bargain (GC Exh. 11 at 2-3). Garrett said the Union was just ‘exercising her’ and making her work for no reason, the layoff had already been processed, and the Union was given sufficient notice and opportunity to bargain (GC Exh. 11 at 3). Ducker responded that Respondent had rated employees on those items, and the Union had a right to see whether the discipline pertained to the layoff (GC Exh. 11 at 3). Garrett then asserted her belief that the information request is indicative of “James’ [Ducker] inherent need to have discipline that was properly given taken away” and that the Union was arguing that Respondent should not have disciplined employees (GC Exh. 11 at 4). After some exchange regarding the April 28 requests, including clarification by the Union, Respondent ultimately responded half-heartedly with information the Union already possessed about the employee performance rankings (GC Exh. 14).

Respondent’s response to the Union’s attempt to continue to discuss the bond shop layoff stifled any potential discussion and effectively prevented the Union from continuing to bargain this topic. The Union’s attempts to request information for the purpose of continuing bargaining with Respondent after the layoff show its continued interest in bargaining. These attempts were met with hostility from Garrett, who expressed that she had fulfilled her bargaining obligation and no longer needed to engage with the Union about a layoff that had already happened.

#### IV. CONCLUSION

Based on the above arguments, the General Counsel respectfully requests that the Board deny Respondent's Cross-Exceptions. The General Counsel also reiterates its request from the General Counsel's Exceptions and brief in support thereof that the Board find Respondent violated the Act as set forth therein. The General Counsel also requests the Board grant any relief it deems appropriate.

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Date: February 20, 2020

## CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing Counsel for the General Counsel's Answering Brief to Respondent's Cross-Exceptions to the Decision of the Administrative Law Judge has been served this 20th day of February 2020, via electronic mail upon each of the following:

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