

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

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

**TRIUMPH’S REPLY BRIEF TO COUNSEL FOR THE GENERAL COUNSEL’S
ANSWERING BRIEF TO TRIUMPH’S CROSS-EXCEPTIONS TO THE DECISION OF
THE ADMINISTRATIVE LAW JUDGE**

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Respondent Triumph Aerostructures (“Triumph” or “Company”) files this reply brief in support of Triumph’s cross-exceptions to Administrative Law Judge Robert A. Ringler’s September 30, 2019 decision (“ALJD”). Triumph’s cross-exceptions present *additional grounds* to affirm the judge’s dismissal of the Complaint. As to the layoff allegation, this reply brief responds to the General Counsel regarding the narrower scope of bargaining required, the Union’s waiver of decision bargaining, and impasse. As to the discipline allegations, the General Counsel fails to refute the evidence demonstrating equitable estoppel applies.

I. The Relevant Bargaining Framework for Layoffs Motivated by Economic Exigencies is Expedited.

Critically, this is not a traditional “contract bargaining” case. Here, traditional contract bargaining concepts – and when impasse is reached – have to be reconciled with the Board’s “economic exigency” doctrine and expedited bargaining framework. “In such time sensitive circumstances, ... bargaining, to be in good faith, need not be protracted.” *RBE Electronics*, 320 NLRB 80, 82 (1995). In fact, the Board requires that such negotiations “occur in a timely and speedy fashion.” *Lapeer Foundry & Machine*, 289 NLRB 952, 954 (1988).

The judge easily found impasse under the *traditional standards* in dismissing the bond shop layoff allegation, but he did not cite the exigency bargaining precedent. While Triumph agrees with the judge’s impasse analysis, it is even clearer that Triumph satisfied its bargaining obligation under the economic exigency framework. Despite this precedent and the parties’ joint stipulation on exigent circumstances (Jt. Exh. Z at 19), the General Counsel now asserts Triumph had “economic flexibility” to delay the layoff and provide more than 24 days’ notice and opportunity to bargain (GC Br. at 33). Not only does this position second-guess Triumph’s business judgment, which is supported by unrebutted record evidence (R. Br. at 9-10), but it seeks to elevate a last-minute request for delay from the Union on April 19, 2017 over all of the

prior notice and bargaining opportunity dating back to March 28, 2017. Throughout this span, Triumph never declined a Union meeting request, never blocked a Union proposal, and made numerous compromise offers that the Union chose not to accept. The General Counsel's *post hoc* assertions that Triumph not only *economically* could delay the layoff, but that it *legally* had to do so to achieve impasse, should be rejected.

The economic exigency framework, and its narrower scope of bargaining, is reinforced by the Company's status quo reduction-in-force (RIF) policy. The Company lawfully established the policy before Local 848 gained recognition rights (by virtue of *Gitano* transfer-based recognition) in January 2014. The General Counsel asserts the Company "fails to explain the significance of the fact that the Union, not Respondent, wanted to bargain for a deviation from the status quo procedures" (GC Br. at 34), but it should be undisputed that during a first contract bargaining period an employer's legal obligation is to maintain status quo policies and procedures. The status quo RIF policy defined the steps to take and procedures to follow where a given department or unit was overstaffed, including in exigent circumstances.¹ Triumph invoked that RIF policy in March 2017, and the Company provided early notice and opportunity to bargain before the April 21 implementation date on issues like loan terms, transfer rights, and alternative selection methods because it knew the Union disagreed with the RIF policy.

In cases involving analogous facts, the Board has limited the scope of the employer's pre-implementation bargaining obligation, or imposed *no* decision bargaining obligation at all. *See*,

¹ The RIF policy provides Triumph will "assess[] the remaining and future statement of work and determine the skills and abilities needed to perform the remaining and future statement of work ... [and] then determine the RIF units and classifications where reductions will occur." ALJD at 4:20-41; Jt. Exh. A. It also provides selection will be based on the "rack and stack" performance ranking method using identified factors. *Id.* The parties stipulated that the General Counsel does not allege this policy "involved the exercise of impermissibly broad discretion." Jt. Exh. Z at 33.

e.g., Monterey Newspapers, Inc., 334 NLRB 1019, 1020-21 (2001) (holding successor employer had *no* duty to bargain before setting new hire wages rates where it followed its lawfully-implemented status quo policy, despite the discretion involved in setting starting wage rates within pay bands); *Tramont Mfg., LLC v. NLRB*, 890 F.3d 1114, 1117 (D.C. Cir. 2018) (noting that “[t]he Board’s General Counsel declined to take any enforcement action” based on charges challenging employer’s decision to implement layoffs without providing *any notice or bargaining* before implementation because “Tramont had permissibly ‘set initial terms and conditions of employment,’” including a layoff policy that set forth a selection procedure and “the layoff decisions complied with these terms”) (citing Letter from Richard F. Griffin, Jr., General Counsel, NLRB (Aug. 21, 2015)). Here, the General Counsel effectively ignores the economic exigency framework *and* the status quo RIF policy to claim Triumph failed to achieve impasse by April 21 and therefore violated its bargaining duty. However, the Board can find Triumph satisfied its pre-implementation bargaining obligations given the 24 days’ advance notice and opportunity to bargain and RIF policy, without reaching the judge’s impasse analysis.

II. The Union Never Pursued Bargaining Over Alternatives to Keep the Bond Shop Fully Staffed, and Thus Waived Decision Bargaining Here.

Assuming, despite the exigent circumstances and status quo RIF policy, Triumph still had to engage in fulsome decision bargaining before implementing the layoff on April 21, the layoff allegation lacks merit because the Union waived *decision* bargaining and focused on *effects* bargaining instead, and the parties did not need to reach impasse on effects prior to the April 21 implementation. Whether a waiver occurred turns on properly defining the decision, which was: whether the Company’s bond shop would lose employees – not whether the impacted employees could find alternative jobs within the Company.

From the start, in its March 28, 2017 letter, Triumph made clear that it needed to reduce bond shop headcount due to insufficient customer work after April 21. ALJD at 5:8-29; Jt. Exh. G. This undisputed fact contradicts the General Counsel's assertion that the parties' discussions regarding loans and transfers to other departments involved "decision" bargaining. Bargaining over a layoff decision generally encompasses alternatives that would keep *headcount the same* in the affected group, such as wage reductions, job sharing, part-time hours, and/or overtime reductions. The Union never pursued *any* of these decision topics to keep bond shop headcount level; the Union never questioned Triumph's need to reduce bond shop headcount from 97 to somewhere in the range of 82 to 91 as announced on March 28. *See* R. Br. at 11. Instead, the Union offered and received proposals on effects issues such as selection methods, loans, transfer rights, and recall rights for the impacted department. Those proposals exchanged would have found, in many cases, alternative work for the impacted employees, but none of the proposals would have prevented a reduction in bond shop headcount.² The scope of decision bargaining here matters because there is no duty to reach impasse on effects issues prior to implementation.³

² *Toma Metals, Inc.*, 342 NLRB 787 (2004), does not support the General Counsel's assertion that loans and transfer rights must be considered decision bargaining topics. In adopting the judge's finding that the employer violated the Act by laying off employees without providing the union with adequate notice and opportunity to bargain, the Board in *Toma* relied on the judge's finding that the union did not learn of the layoff until the date it occurred and did not discuss the judge's generic reference to "reassignment of work and job reclassifications" as potential "alternatives to layoff," which the judge never defined because he was not addressing whether specific proposals involved decision or effects topics *Id.* at 787 fn. 4, 799 (quotation omitted). In any event, here, none of the proposals regarding loans or transfers would have kept the bond shop staffed with 97 employees, meaning the parties did not discuss "reassignment of work and job reclassifications" as alternatives to the bond shop layoff but instead as rights for the impacted employees to stay with the Company in other jobs.

³ The General Counsel, unlike the Union, does not challenge Triumph's position in its cross-exceptions brief that effects bargaining need not be completed prior to implementing a decision, and meaningful effects bargaining can continue post-implementation. *See* R. Br. at 29-30.

Here, the parties engaged in extensive bargaining over effects issues, which was all that was required under the Act.

Defining the “decision” here more broadly than bond shop staffing levels – to include subjects such as loan arrangements or transfer rights and associated details such as *how to* select employees and *what rights* they would have – would enable unions to substantially prolong bargaining and inject uncertainty for employers in these situations, in direct conflict with the Board’s instruction that layoff bargaining be “timely and speedy.” Because effects bargaining can occur before and after implementation, properly defining the decision in this case strikes the proper balance between the Union’s right to bargain *and* an employer’s right to run its business.

The General Counsel’s position in this case also conflicts with *Tramont*, where the employer, while first contract bargaining was ongoing, provided *no* notice or opportunity to bargain before implementing a layoff pursuant to its status quo RIF policy, yet only an *effects* bargaining violation was alleged, despite no noticeable difference in the underlying facts or charges. *See Tramont v. NLRB*, 890 F.3d at 1117. The General Counsel dismisses this inconsistency out of hand as a “prosecutorial decision,” but fails to adequately reconcile the much harsher treatment of Triumph here – including the General Counsel’s pursuit of a decision bargaining violation and attendant full back pay remedy. In fact, the General Counsel does not cite *any* analogous case where the Board awarded a full back pay remedy for conduct other than a total refusal to bargain. *See GC Br.* at 39. To award such a remedy in a case with 24 days’ notice and extensive good faith bargaining would effectively confer a benefit on the Union it failed to achieve in bargaining (a full back pay and reinstatement remedy), despite the Union rejecting numerous offers to find alternative jobs for the impacted bond shop employees. The General Counsel’s positions on decision bargaining and make whole relief are legally unsound

and bad public policy, and these defects provide alternative grounds to dismiss the layoff allegation.

III. The Parties Reached Impasse over the Layoff Decision, However Defined.

Further, on the bond shop layoff, Triumph's cross-exceptions present additional evidence and grounds not cited by the judge that show impasse existed on April 19, assuming impasse was required to implement the bond shop RIF on April 21. R. Br. at 34-40. Although the evidence cited in the judge's decision was sufficient, these additional grounds confirm there was "no realistic possibility that further negotiations ... would have been fruitful." *Phillips 66*, 369 NLRB No. 13, slip op. at 7 (2020).

The General Counsel's answering brief relies on cherry-picked facts and conclusory assertions that Triumph should have delayed bargaining and/or made more proposals to reach impasse. However, there simply is no evidence as to what the Union would have bargained about after the April 19 session had there been a delay. At the hearing, Local 848 President James Ducker was asked this question and came up with nothing. Tr. 141:14-23, 172:1-6. The General Counsel's reliance on superficial statements of flexibility by Union bargaining committee members (GC Br. at 31-33) fail because a union's bare assertion of flexibility does not block impasse. *See Phillips 66*, above at 8-9. Similarly, the Union's request for delay on April 19 cannot alone legally suffice to block impasse, especially when that request was followed by the Union's decision not to make another proposal or request more bargaining. The General Counsel's subjective view that Triumph was "unreasonable" (GC Br. at 33) is not enough.

The General Counsel's arguments regarding the substance of the parties' bargaining should also be rejected. The General Counsel asserts Triumph made the April 5 and 6 sessions "worthless" due to the purported withdrawal of the loan program (GC Br. at 34), a disputed

claim, and in any event ignores the undisputed evidence that on April 14 the Union made worthless the April 7 discussions and the Company's good faith compromise proposal on alternative selection methods and transfer rights. Far from moving the negotiations forward, the Union's April 14 letter "withdrew" from any compromise regarding selection procedures and stated the Union was "wholeheartedly opposed" to performance-based selection. Jt. Exh. Q.

The General Counsel further attempts to blame the lack of an agreement on Triumph's "failure to provide a counterproposal" or "indication of its willingness to compromise." GC Br. at 48. Triumph understands the Union "was not required to bargain against itself" (*id.*) on or after April 19, but neither was Triumph required to make even more compromise offers after its prior offers were rejected and the Union made unacceptable demands on selection procedures, transfer rights, and other issues on April 19. Essentially, the General Counsel is asking the Board to sit in judgment upon the substantive terms of bargaining and "decide the good faith or bad faith of the parties based on the correctness or incorrectness of the reasons they put forward in support of their bargaining positions," which the Board does not do. *Phillips 66*, slip op. 5 (citing *NLRB v. American National Insurance Co.*, 343 U.S. 395, 404 (1952)). The General Counsel's suggestion that Triumph was required to make yet another proposal to reach impasse is contrary to what the Act requires. Here, Triumph and the Union "bargained in good faith but were unable to reach agreement on the key issues. The Act requires nothing more." *Id.* at 9 (citation omitted).

IV. The Discipline Bargaining Allegations Should Be Dismissed Under the Equitable Estoppel Doctrine

Assuming *Total Security Management* ("TSM"), 364 NLRB No. 106 (2016), remains extant law governing this case, the Board should dismiss the discipline allegations under the equitable estoppel doctrine. It is undisputed that the Union had *several years* and *over 30*

opportunities to pursue pre-discipline bargaining but never did so prior to May 2017. The General Counsel raises two arguments to claim the equitable estoppel doctrine should not apply. Both fail under the record evidence and applicable law.

First, the General Counsel claims, based on limited, vague and evasive testimony from Union International Representative David Barker, that Barker told Senior Director of Labor Relations Danielle Garrett to contact Local 848 President Ducker about Red Oak discipline. GC Br. at 6-7. Barker did not provide specifics as to when this purported conversation occurred, and his testimony was contradicted by Garrett's strong denial. Tr. 318:4-319:5. There is no record evidence of any written communication making or confirming this request, despite the parties' practice of exchanging letters, emails, and texts. Tr. 219:3-4, 221:3-4. In addition to the lack of any objective evidence, Ducker himself admitted *he was not interested* in pre-discipline bargaining until May 2017 (well after the two disciplines at issue in this case). Tr. 156:24-157:18. Thus, Barker's purported verbal request to contact Ducker is insufficient to overcome the evidence demonstrating the Union acquiesced in Triumph's practice of providing post-discipline notification through periodic update letters.

Second, the General Counsel claims the Union requested pre-discipline bargaining in a November 14, 2016 letter (Jt. Exh. D). At best, however, the letter merely protested *previously-issued* disciplinary actions and requested *post-imposition bargaining* (which, as discussed below, the parties engaged in). The letter also did not specifically request pre-discipline bargaining, as confirmed by Triumph's timely efforts to seek clarification from the Union. A union's mere protest of or objection to a unilateral change is not an adequate substitute for requesting bargaining. *See Associated Milk Producers*, 300 NLRB 561, 564 (1990) (“[I]t was incumbent on the Union to request bargaining – not merely to protest or file an unfair labor practice charge.”);

Clarkwood Corp., 233 NLRB 1172, 1172 (1977) (unilateral changes found lawful where union officials “contacted Respondent and protested its contemplated actions,” but “at no time did employee representatives request Respondent to bargain about [the proposed changes]”), *enfd.* 586 F.2d 835 (3d Cir. 1978); *Windsor Redding Care Center, LLC*, 366 NLRB No. 127, slip op. at 1 fn. 3, 26 (2018) (affirming judge’s dismissal of pre-discipline failure to bargain allegation where the union “assert[ed] vanilla, bland, cryptic, general propositions that amount[ed] to nothing more than the Union’s request to have a participatory voice generally in the employee *disciplinary* process and not specific requests to engage in before-the-fact bargaining”), *enfd.* in relevant part 944 F.3d 294 (D.C. Cir. 2019).

The Union’s subsequent conduct after November 2016 confirms the Union was not seeking pre-discipline bargaining. Triumph’s December 12, 2016 response letter (Jt. Exh. E) requested (yet again) a Union contact to receive pre-discipline notice, but the Union’s December 21, 2016 response (Jt. Exh. F) ignored that longstanding offer and instead asked to bargain over *previously-issued* disciplines at the parties’ initial contract bargaining sessions. The parties thereafter regularly met and bargained over disciplines without objection for months. Tr. 318:4-319:5.13; Tr. 320:9-321:6. In sum, before May 2017, the Union acquiesced in Triumph’s practice of providing routine notification through periodic update letters, and it – and thus the General Counsel – is now estopped from asserting Triumph’s failure to provide notice before terminating Thomas Smith and suspending Rodney Horn violated the Act.

V. **Should the Board Find the Current Record Insufficient to Affirm the Judge, the Board Should Reverse the Rulings Regarding Subpoenas and Respondent’s Rejected Exhibit 3.**

In its cross-exceptions, Triumph also excepted to the judge’s rulings (1) granting the Union’s petition to revoke Triumph’s subpoenas (R. Exh. 1; Tr. 7:6-19, 9:9-11:7); and (2) rejecting evidence (R. Exh. 3) of the parties’ letter memorializing their pre-discipline notice and

bargaining arrangement for Triumph's Tulsa facility (Tr. 213:5-215:22). The Board should reverse these rulings if the judge is not affirmed on the existing factual record.

As explained in Triumph's opposition to the Union's petition to revoke the subpoenas, the subpoenas sought information directly relevant to the Section 8(a)(5) bargaining issues in this case and did not seek privileged bargaining or related information. *See* R. Exh. 1.

The Tulsa letter is relevant to Triumph's equitable estoppel defense, assuming *TSM* remains extant law. The letter – which involves the same Union (the UAW, although a different local), same International Union Representative (Barker), same Company (Triumph), same Company representative (Garrett), and same context (first contract bargaining period) – *is relevant* as further evidence the Union *chose* not to pursue pre-discipline bargaining at the Red Oak facility before May 2017. The General Counsel's reliance on *Dorsey Trailers, Inc.*, 327 NLRB 835 (1999), *enfd.* 233 F.3d 831 (4th Cir. 2000), is misplaced because Triumph is not asserting the Tulsa letter is relevant to interpreting an agreement at the Red Oak facility or to establish a past practice defense. Rather, the Tulsa letter is additional evidence showing that if the Union desired to engage in pre-discipline bargaining at Red Oak, it was aware Triumph was ready and willing to engage in such bargaining upon acknowledgment by the Union and identification of a specific contact point(s).

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Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief for Triumph's Cross-Exceptions was filed today, March 5, 2020, using the NLRB's e-filing system, and was served via electronic mail on:

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