

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

STEPHENS MEDIA GROUP – WATERTOWN, LLC

**Cases 03-CA-226225
03-CA-227946**

and

STEPHENS MEDIA GROUP – MASSENA, LLC

Case 03-CA-227924

and

**NATIONAL ASSOCIATION OF BROADCAST
EMPLOYEES AND TECHNICIANS –
COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO**

**RESPONDENTS STEPHENS MEDIA GROUP- MASSENA, LLC AND STEPHENS
MEDIA GROUP- WATERTOWN, LLC'S BRIEF ON EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Counsel for Stephens Media Group – Watertown, LLC (“SMG Watertown”) and Stephens Media Group – Massena, LLC (“SMG Massena”, and collectively, “SMG”), pursuant to Section 102.46(b) of the Board’s Rules and Regulations, submits the following brief in support of SMG’s exceptions to the January 24, 2020 decision of Administrative Law Judge, Charles J. Muhl (“ALJ”).

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ARGUMENTS AND AUTHORITIES

I. FACTUAL OVERVIEW RELEVANT TO BARGAINING AND IMPASSE.

a. Stephens Media Group

SMG owns and operates radio stations in Watertown and Massena, New York. The National Association of Broadcast Employees and Technicians-Communications Worker of America, AFL-CIO (the “Union”) is the exclusive bargaining agent for the employees in two separate bargaining units, at the Watertown and Massena stations. At the time SMG acquired the Watertown and Massena stations, the stations had collective bargaining agreements (CBAs) with the Union. [Tr. 528:22-529:2, 529:8-11]¹ (two additional Watertown stations were thereafter added to its bargaining unit). When the existing CBAs expired, SMG and the Union bargained for new CBAs. The most recent CBAs commenced on May 1, 2015, and expired April 30, 2018. [J-1; J-2; Tr. 529:24-530:6]. SMG received notice of the Union’s intent to bargain in February 2018. [CP-1; Tr. 33:3-6].

b. Commencement of Negotiations with the Union.

SMG’s attorney, Mike King, and business manager, Penny Woolf, were the lead negotiators for the new CBAs. The Union negotiator was initially William Murray, replaced by Ronald Gabalski after Murray’s retirement. King, due to scheduling conflicts, asked Murray to provide the Union’s initial proposal before May 1, 2018. [R-1, p. 45; Tr. 308:24-309:10]. Murray emailed the Union’s initial proposal May 2, 2018. [R-1, p. 46-94; D. 4:34-36]. The proposal sought increases in wages and other compensation. [R-1, p. 70-78, 146-154; D. 4:38-5:3]. After email exchanges in May 2018 and the first week of June 2018, King emailed SMG’s counter

¹ Citations to the ALJ transcript use “Tr.” (with page and line numbers), “J” for joint exhibits, “GC” for General Counsel’s exhibits, “CP” for Charging Party’s exhibits, and “R” for Respondent’s exhibits followed by the page.

proposals to Murray on June 7, 2018. [R-1, p. 95-142; D. 5:18-6:9]. King’s proposal signaled (i) SMG’s desire to modernize, and (ii) the developing changes in the industry. For instance, equipment at SMG was “a little antiquated” and automated weekend broadcast would occasionally go “offline” and require a “reset”. [Tr. 255:2-7]. SMG’s competitors (local stations) had expanded to satellite radio and online streaming services. [Tr. 530:11-21]. SMG stations utilized live, on-air disc jockeys for nearly all shows in contrast to the industry standard that had largely abandoned live broadcasts in favor of “voice tracking,” which uses technology to pre-record disc jockey commentary to mimic live broadcasting. [Tr. 152:11-15, 533:10-534:1; D. 1]. Voice tracking improves efficiency by replacing live-segments, recording segments in a fraction of the time, and devoting remaining time to other projects or extra shows. Voice tracking radio stations can use both local and the best talent available regardless of location. [Tr. 372:3-5] (“talent drives revenue” in the broadcast industry). SMG’s expected modernization would thus improve the station’s product so as to increase the stations’ advertising revenue, and in turn increased opportunity and wages for those employed by SMG. [Tr. 372:15-17]. Modernization would also expand SMG’s talent to the online world of the Internet. [Tr. 539:8-540:6].

Based on SMG’s modernization plan, SMG, through King, proposed changes to Article V of the CBAs governing layoffs. The expired Article V forbade SMG from layoffs of full or part-time employees during the first year of the CBA and mandated SMG to make layoff decisions based on seniority rather than talent. [J-1; J-2]. SMG’s June 7, 2018 proposal eliminated the ban on layoffs during the first year of a new CBA and allowed SMG to layoff on the basis of talent and need. [R-1, p. 133-4]. SMG’s proposal also eliminated the requirement that it maintain at least one full time union employee at each station. SMG also proposed to eliminate the Union security clause as it appeared in Article II (e) so (i) SMG could hire out-of-

state talent because pre-recorded voice-tracked shows could be produced anywhere, (ii) the CBA would reflect the modernized realities of radio operations and create new employment categories at SMG as a result, and (iii) SMG could make decisions regarding on-air personalities based on talent, not seniority². [R-1, p. 130; Tr. 436:8-23; D. fn. 54]. SMG also proposed a recognition clause, Article II(a), to clarify the Union was the exclusive bargaining agent for the employees at the “physical location” of the stations. [R-1, p. 129]. Other SMG proposals included: (i) allowing the Company to use employees not covered by the CBA to keep the stations on-air in the event of a strike, (ii) employees working after their shift or on their day off would be paid time worked plus 30 minutes for travel rather than a minimum of 4 hours, (iii) elimination of payment of the remote broadcast fee by SMG if the client failed to pay, (iv) elimination of the requirement that SMG fill on-air employee absences with a part-time Union member, (v) elimination of the requirement that an employee be paid for scheduled hours if a live event is cancelled, (vi) elimination of the requirement that employees with 5+ years’ service be allowed to take allotted vacation weeks consecutively and SMG being able to reschedule an employee’s vacation if hospitalized during vacation, (vii) SMG being allowed to use non-Union personnel on-air during exigent circumstances if necessary, (viii) elimination of the requirement that Grievance Committee members be paid during meetings with SMG while “on a tour of duty,” (ix) other various technical corrections, (x) language regarding social media obligations, and (xi) that the Watertown and Massena CBAs be included under a single CBA. [R-1, p. 125-142; D. 5:23-6:9].

c. August, 2018 Negotiations.

Murray responded to SMG’s proposal by email on June 7, 2018, informing King that face-to-face negotiations would be required to discuss SMG’s proposal and advised to contact

² See expired Article V(d). [R-1, p. 7].

Murray's replacement, Gabalski, regarding scheduling. [R-1, p. 143]. On June 13, 2018, Gabalski emailed his contact information to King and promised to get back to King about SMG's proposals. [R-1, p. 163]. Six days later, Gabalski emailed King but did not provide specific responses to the proposals but rather informed King that face-to-face bargaining would be required. [R-1, p. 165]. The parties agreed to (i) bargain in Watertown on August 15 and 16, 2018 and to hold August 17, 2018 open if an extra day was needed, and (ii) bargain on Watertown on August 15, 2018 and Massena on August 16, 2018. [R-1, p. 165-89; D. 7:7-9]. King also attempted preliminary telephone or email negotiations with Gabalski (similar to Murray) on items where there appeared no serious disagreement but Gabalski declined. [Tr. 319:16-320:3].

At bargaining on August 15, 2018, SMG was represented by King and Woolf. The Union was represented by Gabalski, Dianne Chase (Union president), and Union stewards, Alan Walts, and Ashlee Tracey. [Tr. 61:5-10]. In opening, King was upfront with the Union about SMG's need to modernize operations by (i) implementing voice tracking for all shows at both locations (except morning drive shows) after necessary equipment was purchased, and (ii) stating SMG needed flexibility in Article V of the CBA governing layoffs as a result of the voice tracking. [Tr. 64:3-7, 330:10-25, 331:1-5; D. 8:2-13]. The parties discussed the Watertown CBA, although it was King's understanding that bargaining would yield a CBA encompassing Massena as well. [Tr. 330:6-14]. King's understanding was supported by the fact that Union representatives assured King "that day that they spoke for both bargaining units." [Tr. 330:6-14]. Negotiations concluded the 15th at 5:00 p.m. with the understanding the Union would provide a proposal first thing the following morning regarding Article V. [Tr. 331:6-15]. Gabalski later emailed King a summary of the Union's counterproposal offered during the negotiations, which

did not include a counterproposal for the layoff clause other than rejecting SMG's proposed changes to Article V. [R-1, p. 197-202].

On August 16, 2018, Gabalski emailed King to request information regarding SMG's health insurance plans and the premium, which King promptly provided. [R-1, p. 203-6]. King also sent a response to the counterproposals which Gabalski had emailed the previous evening that included changes to SMG's initial proposal. [Tr. 336:24-338:19; R-1, p. 207-12]. With regard to Article V, however, King made it clear that the "Company declines to modify proposal." [R-1, p. 207-212]. Face-to-face negotiations then commenced with the same individuals as on August 16, 2018, except at the request of the Union, David Romigh was present as Union steward from Massena. [Tr. 340:14-341:2]. The parties discussed insurance and the Union's proposals regarding check-off of dues and hours of work and overtime. [Tr. 341:12-18; R-1, p. 213-220]. King also continued to repeatedly request that the Union make a counterproposal on Article V but was met with outright rejections by the Union. [Tr. 342:10-343:4, 344:16-345:5]. Gabalski repeatedly assured a comprehensive counterproposal would be forthcoming after he first spoke with possibly the national or international Union. [Tr. 350:4-10].

Late in the day, King emailed Gabalski another email summarizing where he believed the parties were in their negotiations. [Tr. 345:18-346:13; R-1, p. 223-8]. Some items were noted "TA" (i.e. tentative agreement). However, with regard to Article V, the summary continued to note "Union rejects this proposal" and "Company declines to modify proposal." [R-1, p. 223-228]. Despite its promise to do so, the Union offered no counterproposal to Article V on August 16, 2018. With the promise that a comprehensive proposal to Article V would be coming from the Union first thing the next day King agreed to stay over and continue the bargaining. The parties then met again on August 17, 2018. [Tr. 321:10-17, 350:11-22].

On August 17, 2018, King and Woolf arrived at the bargaining session with the expectation of receiving the promised comprehensive proposal from the Union regarding Article V, which the Union had repeatedly assured King would be one the company would be “happy with.” [Tr. 352:8-10, 355:2-6]. Gabalski repeatedly assured a comprehensive counterproposal would be forthcoming. [Tr. 349:20-349:25]. The Union advised it had a counterproposal but would not submit it until Walts arrived at 10:30 a.m. and approved the proposal. [Tr. 352:11-353:7]. The Union had already advised it would be leaving the bargaining at 1:00 p.m. that day. [Tr. 354:10-11]. Meanwhile, King and Gabalski had some discussions about wage increases but decided to table those discussions until they determined whether the employees were exempt from New York’s minimum wage laws. [Tr. 353:16-354:1]. When Walts finally arrived around 11:00 a.m., the Union representatives caucused for approximately an hour and ten minutes, returned, and announced without explanation that the Union would not present their proposal. [Tr. 354:9-14]. However, Gabalski told King that he would submit the proposal by 5:00 p.m. on August 20, 2018 after consulting the national or international Union. [Tr. 355:7-18; R-1, p. 237-238].

Gabalski emailed the long-awaited Union proposal regarding Article V to King on August 20, 2018 at 5:01 p.m. [R-1, p. 239-42; Tr. 355:22-357:20]. The Union’s Article V proposal did not offer any compromises but instead regressed by demanding even more restrictions on SMG’s right to layoff expanding those which had existed under the expired CBA’s Article V. For example, instead of prohibiting layoffs during only the first year of the CBA as the original had provided, the Union’s proposal mandated SMG could not lay off for the entire length of the CBA and further required all layoffs to be based on seniority rather than merit. [R-1, p. 240].

d. Impasse and Voice Tracking Implementation.

King wrote to Gabalski on August 22, 2018 expressing frustration with the Union's regressive proposal:

Mr. Gabalski, it appears the Union position, rather than moving towards compromise, is moving further away from the Company's proposal and from what was previously contained in the agreement which expired May 1, 2018.

...
Given the significant differences that still exist between the Company and the Union with regard to the proposals above that were addressed, and those that were not addressed, if the Union's position is firm it appears as though we are at an impasse with regard to these substantive provisions and in our attempts to reach a new agreement going forward.

[R-1, p. 243-5]. Despite the impasse, King invited Gabalski to continue their discussions "if the Union has some additional proposals it would like to discuss, or if further conversation would be of some assistance." *Id.* Gabalski responded on August 23, 2018 and denied the parties were at impasse but did not offer new proposals or give indication the Union would move from its opposition to merit-based layoffs. [R-1, p. 246-7]. On August 24, 2018, King assured Gabalski that SMG was "not foreclosing the possibility of further negotiations" but first required "some indication we still have something to talk about." [R-1, p. 249-50].

The Union made no new proposals regarding Article V and gave no indication that further discussions would be anything other than futile. Also, on August 23, 2018, SMG accelerated its plans to implement voice tracking because Tracey, an on-air host and daughter of Chase, verbally put in her two-week' notice to move to North Dakota. [Tr. 23:9-11, 142:13-18]³. Tracey's resignation would require SMG to either delay implementation of voice tracking and hire a temporary replacement or move forward with implementation. David Stephens chose the latter, believing the parties were at impasse over Article V. Stephens directed his staff to (i)

³ Tracey resigned August 20, 2018. [D. 14:22-24].

accept Tracey's resignation that day and pay her for the remainder of her two-week notice as was customary in the industry, and (ii) implement voice tracking for all shows (except week-day morning drive programs by temporarily utilizing out-of-state station voices from Tulsa, Oklahoma). [Tr. 546:21-547:1, 547:5-15; GC-2].⁴ This elimination of shifts necessitated adjustment of some part-time employees who were filling those shifts. [Tr. 46:8-11, 547:16-17]. SMG's voice tracking implementation affected the shifts of on-air bargaining unit personalities, including Chase, Frank Laverghetta, Michael Stoffel, Brian Best, Holly Gaskin, and Jeffrey Shannon.⁵ [Tr. 29:22-30:3, 30:14-21, 124:11-15, 192:20-23, 273:19-20, 278:19-21, 279:8-9, 292:17-22]. Although their shifts were eliminated, SMG made efforts to provide them with continued employment, promotion opportunities, and increased pay. [Tr. 51:9-19, 226:10-25, 276:13-20, 287:2-22, 288:5-10, 293:5-294:25, 548:22-549:23].

The Union, through Gabalski, subsequently requested more face-to-face negotiations. [R-1, p. 246]. King responded that while he was not foreclosing further negotiations he repeatedly asked for something from Gabalski to indicate that the parties were still not at impasse. [R-1, p. 249-50; Tr. 366:10-13]. Even though no such indication was provided by the Union, King exchanged emails with Gabalski and agreed to meet on October 22, 2018 and again on October 23 and 24 for bargaining, if necessary. [R-1, p. 314]. On October 22, 2018, the Union finally made a verbal proposal regarding Article V that permitted SMG the final decision regarding layoffs and basing layoffs on merit rather than seniority as long as SMG agreed to a pre-layoff

⁴ Typically, when a station implements voice-tracking, it continues to have live shows during the morning drive so that live news, traffic, etc. can be aired. For that reason, the implementation of voice tracking in Watertown and Massena was limited to the mid-day and afternoon programs. [Tr. 547:18-22]

⁵ Laverghetta was provided the benefits available to full-time employees. [Tr. 41:15-42:10]. The non-eliminated morning-drive personalities were Kreutter (manager), Sobeleski (supervisor), and Walts. [Tr. 286:3-14]. Many management employees at Watertown were also on-air personalities and had been "for a long, long time." [Tr. 576:4-9].

cooling period, then consulted with the Union about the layoffs so the Union could make proposals that would allow the Company to achieve its goals without layoffs. [Tr. 374:10-25, 697:3-25]. King accepted this offer and agreed to serve as the “scrivener” to reduce it to writing. [Tr. 374:21-25, 698:3; D. 17:24-18:5, D. fn. 42]. King later wrote up the agreement and emailed it to Gabalski on December 21, 2018, explaining that he was attaching a copy of the “tentative agreement from October 22” per the parties’ discussions. [R-1, p. 420-7]. Gabalski did not dispute that a tentative agreement had been reached but merely replied on January 2, 2019, “Thanks, I’ll take a look.” [R-1, p. 431].

Approximately a month and a half later, Gabalski suddenly denied that any agreement had been reached. [Tr. 379:25-380:3]. In a letter dated February 22, 2019, Gabalski referred to what King had sent him as a “counter-proposal” that was “intended for review only and would not require a response away from the Bargaining table,” and claimed the Union was not “waiving [its] right to Bargain in person.” [R-1, p. 438-9]. On February 28, 2019, King reminded Gabalski that what King had previously sent was “not a proposal but a draft of the agreement we entered into on October 22nd.” [R-1, p. 440]. In spite of the Union’s repudiation, King proposed they meet between March 5 and March 22, 2019. *Id.* Gabalski refused [R-1, p. 448]. On March 7, 2019, King proposed mediation but Gabalski refused. [R-1, p. 451-452]. King then requested in a letter dated April 17, 2019, that Gabalski send proposed dates for a meeting “if it is your position that the Union needs further discussion on the current draft of the agreement reached on October 22nd.” [R-1, p. 453-4]. On May 1, 2019, Gabalski replied that the earliest he could meet was around July 9-12 or July 15-17. [R-1, p. 455]. King proposed other dates in his July 10, 2019 letter to Gabalski. [R-1, p. 456]. Rather than agree to the dates proposed by King or propose alternatives Gabalski suddenly broke off all negotiations in a letter dated July 16, 2019 and

issued a brand new ultimatum, which was no negotiations until SMG (i) reinstated all of the bargaining unit members who had been terminated approximately 11-months earlier with backpay, and (ii) rescinded its decision to implement voice tracking. [R-1, p. 457]. King responded with assurances that SMG remained committed to reaching a new CBA and restated the dates he was available. [R-1, p. 458]. Nevertheless, the Union did not respond and to this day refuses to discuss the draft of the CBAs the parties reached on October 22, 2018.

II. THE ALJ ERRED AS A MATTER OF LAW BY FINDING SMG VIOLATED THE NLRA BASED UPON THEIR BARGAINING, DECLARATION OF IMPASSE, AND ACTIONS THEREAFTER [Exception Nos. 1-44, 73-76].

a. SMG and the Union were at lawful impasse on or after August 23, 2018, and SMG Watertown did not unlawfully make unilateral changes to unit employees' terms and conditions.

The conduct of the Parties prior to and during bargaining in August 2018 demonstrated an actual lawful impasse and that the Union intended to frustrate the bargaining process and to bargain regressively and in bad faith.⁶ For these reasons, SMG's declaration of impasse was valid and lawful.

The pre-bargaining and face-to-face bargaining proposals between the parties are set out in detail in the factual allegations above. The expired Article V in the collective-bargaining agreements (CBAs) forbade SMG from layoffs of any full or part-time employee during the first year of the agreement and mandated the company make layoff decisions on the basis of seniority rather than talent. [J.E. 1]. The expired Article V conflicted with SMGs' desire to modernize

⁶ The parties' October 2018 bargaining session further demonstrated that the Union was not bargaining in good faith. King required "some indication [the parties] had something to talk about" by the Union before SMG would agree to continue bargaining. [Tr. 366:10-13; R-1, p. 309, 314]. Gabalski did not respond to this request, but the parties met to "try to get off of impasse on section 5." [Tr. 369:12-13, 372:20-373:4]. The parties arrived at a tentative agreement (R-1, p. 420, 431), but the Union reneged on the agreement characterizing it as proposal by SMG Watertown, rejected it without counter four-months later, and refused to mediate on the remaining issues (Tr. 379:18-391:19; R-1, p. 438-9).

and implement voice tracking rather than maintaining its antiquated use of live on-air personalities. Therefore, SMG proposed changes to Article V (layoffs) of the CBAs which would require SMG to lay off employees on the basis of seniority only in the absence of a valid reason otherwise to be determined by SMG in good faith. [Tr. 450:12-452:17]. The record describes that the parties made progress on “peripheral issues” and reached tentative agreements on minor issues but the Union refused to bargain on the main issue, layoffs, and the Union pushed back and rejected discussing layoffs when SMG attempted to steer the bargaining back to that main issue. [D. 22:24-25; Tr. 339:7-340:3, 543:14-22].

King testified that the Union “promised” to provide package proposals to SMG on (i) the morning of August 16, 2018, (ii) the afternoon of August 16, 2018, (iii) the mid-afternoon of August 16, 2018, (iv) the evening of August 16, 2018, (v) the morning of August 17, 2018, (vi) the mid-morning of August 17, 2018, (vii) the afternoon of August 17, 2018, and (viii) on August 20, 2018. [Tr. 349:20-349:25]. As will be shown below, these promises were empty, and intentionally so.

The Union failed to provide package proposals to SMG on August 16 or 17, 2018. [Tr. 350:1-3]. King expressed his frustration to Gabalski regarding the continual broken promises to provide a comprehensive package proposal, especially after King agreed to extend his stay based upon the Union’s assurances of an impending comprehensive counter. [Tr. 354:18-22]. After three-days of no counterproposals on the layoff provision despite knowing SMG’s position on voice tracking and layoffs and SMGs’ needs related to the modernization/restructuring, the Union told King on August 17, 2018, that it would submit a counterproposal that SMG would “be happy with.” [Tr. 354:24-355:18]. Rather than receiving a comprehensive package proposal as promised by the Union with which SMG would “be happy,” the Union regressively bargained

and submitted on August 20, 2018 a counterproposal with no layoffs for the term of the CBA (3-5 years) without offering good faith concessions. [Tr. 355:22-356:20] [J.E. 3, 19] (Union’s May 2, 2018 proposal did not change the 1-year layoff provision); [D. 23:13-14] (the Union thought by leaving the original language of Article 9 in the CBA, the Union was providing “great concessions”).

King declared impasse based upon (i) the bargaining process to that date, (ii) the proposals and face-to-face bargaining by the Union, (iii) the continued failures of the Union to provide counterproposals to the layoff provisions in the bargaining process and thereafter submitting a bad faith and regressive bargaining proposal, and (iv) the fact the bargaining sessions had led to the parties moving further away rather than closer to an agreement. [R-1, at p. 243-45] [Tr. 361:4-6, 362:4-23]. King stated to the Union that if they responded with some indication there were further issues to bargain about, then he would not foreclose the possibility of further negotiations. [Tr. 366:10-13; R-1, p. 249-50].

In response, Gabalski emailed King on August 23, 2018 making the conclusory allegation that the parties were “miles away from impasse,” but Gabalski failed to (i) explain why there was no impasse, (ii) submit counterproposals to SMG demonstrating a continued effort to break from the impasse, and (iii) demonstrate there were further issues about which the parties could bargain. [R-1, p. 246-47; JE-21]. *H&H Pretzel Co.*, 277 NLRB 1327 (1985) enf’d *NLRB v. H&H Pretzel Co.*, 831 F.2d 650 (6th Cir. 1987) (ALJ found the parties were at impasse and that “the union’s expressed willingness to continue talks was a mere token offer made for the ulterior purpose of delaying the inevitable unilateral imposition of pay cuts”).⁷

⁷ See fn. 5.

b. SMG declared lawful impasse.

A “single-issue impasse” occurs if the party asserting impasse shows (i) “first, the actual existence of a good-faith bargaining impasse: second, that the issue as to which the parties are at impasse is a critical issue; third, that the impasse on this critical issue led to a breakdown in the overall negotiations--in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved.” *CalMat Co.*, 331 NLRB 1084, 1097 (2000). SMG met the three requirements under *CalMat Co.* when it lawfully declared “single-issue” impasse. First, the ALJ found the layoff issue was critical thereby satisfying the second element for a single-issue impasse. [D. fn. 51]; [D. 24:20-21] (“it would be difficult to think of a more significant issue” than layoffs). The ALJ erred in finding SMG could not meet the first and third elements. *Id.*

In *CalMat Co.*, the Board used the factors set out in *Taft Broadcasting Co.*, 163 NLRB 475 (1967) (“*Taft*”), to determine if the parties had reached a good-faith bargaining impasse as to the single-issue. 331 NLRB at 1099. In *Taft*, the Board explained that impasse occurs when “good faith negotiations have exhausted the prospects of concluding an agreement.” *Taft*, at 478. Whether impasse exists is “a matter of judgment.” *Id.*; see also *Laborers Health & Welfare Tr. Fund For N California v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539, 541 fn. 5 (1988) (impasse is “state of facts in which the parties, despite the best of faith, are simply deadlocked”); *Matanuska Elec. Ass’n., Inc.*, 337 NLRB 680, 682-3 (2002) (“Impasse in negotiations is a fact specific determination that further bargaining would be futile, and absent some intervening act (for instance economic pressure) there is no reasonable likelihood of the parties reaching an agreement”). *Taft* provided factors to guide the inquiry as to whether impasse exists, which include “ [t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement,

[and] the contemporaneous understanding of the parties as to the state of negotiations.” *Taft*, at 478. “Another factor that is considered is the parties’ demonstrated flexibility and willingness to compromise in an effort to reach agreement.” *Cotter & Co.*, 331 NLRB 787, 787 (2000). The relevant factors set forth in *Taft* and *Cotter* weigh heavily in favor of a valid and lawful impasse. Further, the Union’s continued rejection to respond to SMG’s proposal on layoffs, bad faith, regressive counterproposal on August 20, 2018, and bad faith bargaining thereafter demonstrated the Union had no intention of ever reaching an agreement on layoffs. The Union would not bargain to permit SMG any amount of flexibility in laying off employees, implementing voice tracking, or the right to base layoffs on anything other than seniority.

The bargaining history of the parties revealed both CBAs for SMG existed and were in effect prior to 2008 when David Stephens acquired those stations. [Tr. 528:17-529:5]. The ALJ attempted to distinguish the 2018 bargaining sessions of SMG Watertown and SMG Massena by analyzing King and Gabalski’s bargaining experience but Penny Woolf, SMG’s business manager, was present in two bargaining sessions prior to 2018 and she attended the 2018 bargaining sessions on behalf of SMG based upon her “information on the... contracts” and because she “was familiar with what was going on at the station.” [Tr. 679:6-14, 680:9-14]. Prior bargaining reflected “no difficulty” in reaching new CBAs. [Tr. 530:5-6]. Woolf, who had a history of bargaining with the Union, expressed great frustration in the Union’s failure to negotiate in good faith and the Union’s constant delays [Tr. 686:12-688:4].

The administrative record shows SMG bargained in good faith and was met with the Union’s constant empty promises of “soon to come” package proposals over the course of three-days and bad faith regressive bargaining. The ALJ found King’s testimony credible when King testified he “actually believed the parties were at impasse.” [D. 34:18-19]. The Union showed

not only no flexibility and willingness to compromise in an effort to reach agreement, but also regressed on its counterproposals following face-to-face bargaining by requesting a ban on all layoffs for the life of the CBA except for exigent circumstances. [D. 23:14-16] (“The big picture proposal put the company further away from being able to voice track a portion of its daily broadcasts as it desired to do”) [J.E. 19].

In *Nat’l Gypsum Co.*, a case synonymous to the bargaining of the parties herein, National Gypsum Company (“NGC”) and its union attempted to negotiate a new labor agreement set to expire at the end of the month. Prior negotiations between the parties were unremarkable and without significant resistance. NGC made a “last, best, final offer” in late March 2011, which was rejected by the union. Nine-months later, the parties had still not reached a new agreement. *National Gypsum Co.*, 2012 NLRB LEXIS 577, *1-4, 2012 WL 3904672 (2012). The union alleged violations of §§ 8(a)(5) and/or (3) of the NLRA based upon NGC’s bargaining conduct, including (i) unlawfully making unilateral changes with respect to health insurance premiums/safety procedures in April and June 2011, (ii) in early September 2011, NGC refusing to continue bargaining with the union by prematurely declaring impasse and requiring the union to submit its “last, best, final offer” to a vote to end the impasse, and (iii) several days later, NGC locking out all union employees, approximately 80-82 in number, in support of its bargaining position. *Id.* The ALJ found NGC unlawfully made unilateral changes with respect to employee health insurance premiums/safety procedures, but recommended dismissal of the remaining allegations. *Id.* In so finding, the ALJ analyzed the case through the *Taft* factors and found (i) the parties’ prior bargaining history was successful and expeditious, (ii) the parties met on 12 occasions over 9-months, though the meetings were “quite short”, and (iii) both parties offered proposals and counterproposals, and the union did not allege NGC’s bargaining was unlawful or

in bad faith. *Id.*, at 72-4. The ALJ found there was “no evidence that the Union had anything more to offer on September 2 that would have altered [NGC’s] steadfast position on [the main] issues” in dispute. *Id.*, at 74. For instance, in the final bargaining sessions, the Union’s proposals “primarily consisted of the Union withdrawing proposals or agreeing or moving closer to the Company’s other proposals” which “simply highlight[ed] both how ineffectual such moves were in resolving the two critical issues, and how little there was left for the Union to move on.” *Id.* A union representative testified at the hearing that he had been “prepared to continue bargaining” with NGC but the ALJ rejected this position as an “empty offer.” *Id.*, at 75. In further support of the finding of impasse, the ALJ noted, “Nothing is clearer from the record than that no contract could or would be reached with the Union without a favorable ratification vote, and that [NGC] was well aware of this.” *Id.*, at 77.

The Board upheld the ALJ’s finding that the parties reached lawful bargaining impasse, which was a result of NGC’s “proposals to replace the defined benefit pension with a defined contribution plan and to allow [NGC] to unilaterally suspend matching contributions to employee 401(k) accounts.” 359 NLRB 1058, 1058 (2013). The Board noted the ALJ found two significant circumstances that supported impasse:

- (i) the Union offered economic concessions, but NGC “flatly rejected that proposal and gave no indication that it would accept any concessions in return for withdrawing its 401(k) and defined contribution proposals”; and,
- (ii) on the date of impasse, the union’s international representative proceeded to speak out against NGC’s retirement proposals. The representative stated, “the Union would not accept them and that such proposals were ‘wrong,’ ‘shortsighted,’ ‘self-destructive,’ and ‘an attack on the middle class.’” NGC countered by stating “the Union had accepted the

same proposals at four other facilities.” The Union’s representative stated the Union should not have done so and that the Union would “do everything it could to ‘reverse the trend.’”

Id., at 1058. Because NGC was unwilling to accept other concessions from the Union to divert from its position on the main issues, the Union’s intent to “reverse the trend” on the main issues, and the ALJ’s analysis under *Taft*, the Board agreed lawful impasse existed. *Id.*, at 1073.

SMG’s declaration of impasse is factually similar to that of *Nat’l Gypsum Co.* Both NGC and SMG’s prior bargaining histories with their respective Unions were unremarkable. Both NGC and SMG declared impasse with their respective Unions on a limited number of issues and implemented their last, best, and final offers resulting in unfair labor practice charges.

NGC made known to its union its steadfast position on the remaining main issues during bargaining. This is similar to SMG’s unwavering position on its proposal regarding voice tracking and modernization/restructuring, a fact well-known to the Union. See also [D. 34:12-15] (“... King stuck to his position that the company needed contract provisions enabling it to implement voice tracking...”). The Union was made well-aware and understood in the opening statements at the August 2018 bargaining session the needs of SMG, the attempts to modernize/restructure by going to voice-tracking, and that the stations required layoff flexibility to accomplish those goals to both SMG and the Union’s benefits. [Tr. 325:21-326:2, 543:23-544:8; D. 8:2-13, 33:38-40]; see also [Tr. 354:24-355:18] (when discussing the layoff and seniority provisions, Gabalski told King that he would “be happy with” the Union’s counterproposal).

NGC’s union continued to withdraw proposals/agreements, similar to the Union continuously rejecting offers from SMG on layoffs, and both NGC and SMG’s unions thereafter

regressively bargained further from an agreement immediately prior to impasse. [D. 34:10-11] (“the parties did not make any progress on the layoffs provision during the first 3 days of bargaining, because the Union had not submitted a counterproposal to King”). Despite the Union’s understandings of SMG’s position on voice tracking, the Union submitted regressive bargaining proposals in bad faith. [J.E. 20]; see also [R-1, p. 298] (King advising Gabalski that the Union promised the comprehensive proposal “would address those expressed needs of the Company”); *Phillips 66*, 2020 NLRB LEXIS 39, *114 (2020) (“a party who enters into negotiations with a predetermined resolve not to budge from an initial position demonstrates ‘an attitude inconsistent with good-faith bargaining’”); *Okla. Fixture Co.*, 331 NLRB 1116, 1124 (2000) (“[I]t is well established that the withdrawal of a proposal ... without good cause is evidence of an intent to frustrate the bargaining process where the proposal has been tentatively agreed on, or when acceptance ... appears to be imminent... Such an intent may also be inferred, even in the absence of tentative agreements or imminent acceptance of proposals ... when the [proposing party] fails to offer any legitimate explanation or justification for its regressive proposals”). “Other factors too may contribute to the entrance of bad faith and can include, among myriad variations, failure to invest the spokesman with that authority enabling meaningful give-and-take⁸; altering the substance of proposals and renegeing on tentative agreements; summarily rejecting the others’ proposals on a broad scale; advancing proposals at once unreasonable and predictably without prospect of acceptance.” *United Bhd. of Carpenters & Joiners of Am.*, 244 NLRB 277, 287 (1979).

The negotiator for NGC’s union made “empty offers” of continued bargaining. This is similar to Gabalski stating SMG and the Union were “miles away from impasse,” which was also

⁸ Gabalski gave the impression to SMG that he may not have authority to “make a deal” and that he was “uncomfortable making agreements by himself.” [Tr. 351:1-15].

an empty offer as shown in this administrative record. See [R-1, p. 239-54, 265-277; J.E.-21]. The international union representative in *Nat'l Gypsum Co.* also stated that its union would not ratify NGC's proposal, similar to Dianne Chase declaring to SMG that the "Union would never vote" or ratify the contract in reference to SMG's bargaining proposal on layoffs and moving to merit-based seniority. [Tr. 687:19-688:2; 705:7-12].

The negotiations and bargaining that took place following August 2018 strengthen SMG's position that the Union bargained in bad faith and had an intent to frustrate the bargaining process. Despite no new proposals from the Union the parties resumed face-to-face bargaining in October 2018 and the parties arrived at what SMG believed to be a tentative agreement on October 22, 2018, including flexibility for the layoff provision. [Tr. 376:10-16, 379:18-24; D. 18:3-5, fn. 42]. King agreed to serve as scrivener for the tentative agreement, but when that agreement was put into writing Gabalski, on behalf of the Union, reneged and denied the Union ever made any such agreement essentially making the October session a complete waste of time. [R-1, p. 414-15, 438-40]. Further, the Union refused to engage in any further bargaining unless SMG "reinstated, with backpay" the laid off employees from 2018 along with the rescission of the voice tracking. [R-1, p. 457]. As such, the Union's continued bad faith and regressive bargaining following August 2018 demonstrates the parties were and always have been at impasse, and that the Union never intended to bargain on the issue of layoffs to an agreement.

c. SMG did not unlawfully change unit employees' working conditions or terms and conditions of employment.

SMG Watertown did not unilaterally change unit employees' working conditions because it had implemented its last, best, and final offer after declaring lawful impasse. "An employer can implement its last, best, and final offer if "impasse on a single or critical issue creates a

complete breakdown in the entire negotiations.” *Master Window Cleaning, Inc.*, 302 NLRB 373, 379 (1991). The original language of Article 5(g) in the CBA provided: “For the purpose of this contract, a layoff shall be defined as a reduction of the working force, due to the elimination of the need of an Employee’s services for reasons beyond the control of the Company or the Employee.” [J.E. 1]. The last, best, and final offer made by SMG to the Union leading to impasse “propose[d] to strike language ... ‘for reasons beyond the control of the company or Employee’ and add ‘for a valid business reason to be determined by Company in good faith.’” [J.E. 12]. The ALJ properly concluded that SMG had a valid business reason for the layoffs (D. 3:27-28), but erred in finding that SMG Watertown unilaterally changed employees’ working conditions (D. 25:2-29:6). Because the parties were at lawful impasse, as shown above, SMG Watertown did not violate the NLRA by converting the live on-air segments to voice tracking, a good faith valid business reason for layoffs under SMG’s Article V proposal. [Tr. 442:4-443:7] (voice tracking and modernization considered a good faith “valid business reason” by SMG).

d. To the extent the parties were not at lawful impasse, SMG nevertheless did not unlawfully change employees’ working conditions because those changes were not mandatory bargaining subjects.

In *First Nat’l Maint. Corp. v. NLRB*, the U.S. Supreme Court held that “[t]he harm likely to be done to an employer’s need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union’s participation in making that decision. The decision itself is not part of § 8(d)’s ‘terms and conditions of employment’ over which Congress has mandated bargaining.” 452 U.S. 666, 667, 101 S. Ct. 2573, 2575 (1981). The Court described three categories of managerial decisions which may affect terms and conditions of employment, which include:

- (i) decisions such as “advertising and promotion, product type and design, and financing arrangements, [which] have only an indirect and attenuated impact on the employment

relationship.” *Id.*, at 676-77. This decision does not require bargaining with the Union due to the companies’ entrepreneurial discretion;

(ii) decisions “such as the order of succession of layoffs and recalls, production quotas, and work rules, [which] are almost exclusively ‘an aspect of the relationship’ between employer and employee.” *Id.*, at 677. This decision is a mandatory subject of bargaining with the Union; and,

(iii) due to an employer’s need for unencumbered decisionmaking, decisions that are fundamental to the business enterprise so long as “the benefit[] for labor-management relations and the collective-bargaining process, [does not outweigh] the burden placed on the conduct of the business.” *Id.*, at 679.

The three above decisions involve a change in the scope and direction of the enterprise and, according to *First Nat’l Maint. Corp.*, are akin to a decision as to whether to remain in business despite an effect of the decision may be to terminate employment. *Id.*, at 677. SMG’s decision to modernize and restructure its radio broadcasting operations fit within the first and third categories set forth in *First Nat’l Maint. Corp.*

The companies’ decision to adjust its live on-air radio broadcast to voice-tracking constitutes a management decision affecting a “product type or design,” and the decision had an indirect and attenuated impact on the employment relationship between the Companies and the Union. [D. 30:29-36]. All Union members laid off as a result of the modernization/restructuring were free to apply to new positions with the respective radio stations. [Tr. 218:5-8, 226:10-15, 328:13-23]. Some employees sought rehire while others did not. See, e.g. [CP-3; Tr. 369:23, 567:5-7; D. fn. 35]. As shown above, this decision by SMG management is not a mandatory subject of bargaining.

SMG also meets the third category of a decision that is fundamental to the business enterprise. [D. fn. 57]. The benefit for labor-management relations and the collective-bargaining process did not outweigh the burden placed on the conduct of the business given the testimony in the record of the major investment of capital in the modernizing of equipment and the decision being one of a “‘basic operational change’ in the scope or direction of an enterprise.” *First Nat’l Maint. Corp.*, 452 U.S. at 673. The intent of the modernization/restructuring was to benefit both SMG and the Union employees, and the laid off Union employees were each provided an opportunity to apply for new jobs, some of which were higher pay and offered more hours. *Supra*, p. 8; [Tr. 326:3-8]. In *NLRB v. Pan Am Grain Co.*, the 1st Circuit explained:

To say that an employer must bargain about whether to make layoffs caused by modernization does not seem far from saying, in substance, that it must bargain about whether to modernize. Perhaps there is some reason to distinguish between the two, but it is easy to see how the two steps are linked in practice. Often enough, an employer who cannot recoup costs of modernizing by reducing employment will have little reason to invest... In all events, we do not understand the Board’s rationale for classifying this case as one where the employer had (in the Board’s words) an “obligation to bargain both over the decision [the layoffs] and its effects.”

432 F.3d 69, 74 (1st Cir. 2005). On remand, the Board in *Pan Am Grain Co.* held the issue of modernization was a mandatory subject of bargaining because the layoffs were based in part on economic reasons, such as reduction in consumer demand. 351 NLRB 1412, *3 (2007). Unlike the employer in *Pan Am Grain Co.*, the SMG layoffs were the direct result of the elimination of the afternoon and weekend live shows. [Tr. 28:6-20]. The afternoon and weekend live shows were eliminated due to the company’s modernization, and the implementation of the voice tracking therefore did not “replace employees in an existing bargaining unit” as contended by the ALJ. [Tr. 547:16-548:8, 563:19-21; D. 27:5-28:1].

The third type of decision-making identified in *First Nat’l Maint. Corp.* is present here in that while SMG’s decision to modernize and restructure directly impacted and inexorably

eliminated employment as a consequence of the layoff decisions, the companies' elimination of live afternoon and weekend broadcasts had as its focus the need to modernize and improve profitability to benefit management and employees. *First Nat'l Maint. Corp.*, 452 U.S. at 677 (“The present case concerns a third type of management decision, one that had a direct impact on employment, since jobs were inexorably eliminated by the termination, but had as its focus only the economic profitability of the contract with Greenpark, a concern under these facts wholly apart from the employment relationship”).

The ALJ contends *Torrington Ind.*, and *Fibreboard* supports the finding that SMG unilaterally changed the employees' working conditions because that work had been “replaced” by a subcontractor. [D. 26:40-28:1]. *Torrington Ind.*, 307 NLRB 809 (1992); *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203, 204 (1964). In *Fibreboard*, the Supreme Court held “the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment -- is a statutory subject of collective bargaining.” Therein, Justice Stewart stated in his concurring opinion, “Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.” *Id.*, at 223. SMG's use of a subcontractor, Annette Miller, to fill a new voice tracking position, did not “replace[] employees in the existing bargaining unit.” Rather, SMG's modernization and restructuring fit within the parameters of a “‘basic operational change’ in the scope or direction of an enterprise” set forth in *First Nat'l Maint. Corp.* 452 U.S. at 673. There is no evidence in the record that voice tracking had been performed by members of the

bargaining unit, and therefore the subcontractor could not “do the same work under similar conditions of employment” as the bargaining unit. Further, SMG’s modernization and restructuring also fit within the scope of the “entrepreneurial control” articulated by Justice Stewart because, as previously argued, SMG’s decision to voice track and eliminate certain live on-air shifts of personalities was a managerial and valid business decision relating to investment in the business.⁹

Torrington Ind. is inapposite to SMG because Torrington Ind. (“Torrington”) laid off Union employees and transferred tractor-trailers to its other facilities (an employment practice common to Torrington), which Torrington contended was based primarily on the seasonal nature of its business and mechanical breakdowns. 307 NLRB at 809-11. The Board found Torrington violated the NLRA by laying off unit employees without prior notice and an opportunity to bargain with the Union. *Id.*, at 809. The Board explained Torrington had merely replaced the unit employees, which was “not the result of elimination of the type of work they performed,” and that Torrington’s decisions were not entrepreneurial. *Id.*, at 810. However, the Board noted “we are not fashioning a per se rule that any subcontracting decision that does not involve a significant change in scope and direction of the enterprise is a mandatory subject of bargaining... we are dealing with only those cases, factually similar to *Fibreboard*, in which virtually all that is changed through the subcontracting is the identity of the employees doing the work.” *Id.*, at 811. SMG’s matter is factually dissimilar because SMG bargained until impasse, implemented its last, best, and final offer, and alleges bad faith against the Union, issues not raised in *Torrington Ind.* Further, as shown above, SMG’s use of subcontract work was a result of a

⁹ The ALJ improperly speculated that (i) voice tracking “presented SMG Watertown with multiple avenues to reduce labor costs,” and (ii) SMG was motivated to lower labor costs, therefore SMG’s voice tracking was based in part on economic reasons. [D. 28:3-4, 28:18-20].

change in scope and direction of its business, and SMG did not change the identity of the employees through a subcontractor.

As shown above, the ALJ erred in concluding (i) SMG's "decision to implement voice tracking and eliminate live broadcasting for certain of its radio broadcasts [were] not a change in the scope and direction of its business," (ii) SMG was not privileged from the unilateral changes noted herein, and (iii) SMG's unilateral changes violated § 8(a)(5). [D. 29:2-6]. The significant changes in the scope and direction of the enterprises of SMG Watertown and SMG Massena due to the modernization and restructuring were not mandatory bargaining subjects and therefore SMG did not unlawfully change employees' working conditions.

e. The Union waived its statutory right to bargain over layoffs.

The Board has held that "when an employer notifies a union of proposed changes in terms and conditions of employment, it is incumbent upon the union to act with due diligence in requesting bargaining." *Taft Coal Sales & Assocs.*, 360 NLRB 96, 100 (2014) (citation omitted). "To establish waiver of a statutory right to bargain over mandatory subjects, there must be a clear and unmistakable relinquishment. A waiver can be gleaned from: express contract language; or conduct (i.e., past practice, bargaining history, action or inaction). A party asserting waiver has the burden of establishing its existence." *Id.* (internal citations omitted); *Ciba-Geigy Pharms. Div. & Int'l Chem. Workers' Union, Local No. 9*, 264 NLRB 1013, 1017 (1982) (after receiving timely notice that employer intends to change condition of employment, Union must promptly request employer bargain over the issue). As King testified, the Union was well-aware of the impending layoffs during the August 15-18, 2018 bargaining sessions:

What I told them was that there might be some initial layoffs or changes in job responsibilities that -- but the hope here was that this was going to expand opportunity for the station and for the employees; and that ultimately, the station's vision was that it would create additional employment opportunities so that there would be no net job loss.

[Tr. 465:4-9]. Despite this understanding, the Union repeatedly rejected SMG's attempts to bargain on the layoff issue thereby constituting a waiver, which was cloaked as constant rejections and a regressive and bad faith counterproposal to the layoff provision following face-to-face bargaining. [Tr. 350:1-3, 354:25-355:18, 705:13-21].

f. The ALJ erred as a matter of law by finding SMG Massena violated §§ 8(a)(5) and (1) because SMG Massena attempted to bargain a successor collective-bargaining agreement with the Union at reasonable times.

The Parties' collective conduct inferred the Parties were negotiating and bargaining both CBAs simultaneously thereby precluding a finding that SMG Massena failed to meet at reasonable times with the Union to bargain a successor CBA. "Section 8(d) of the Act requires that an "employer and the representative of the employees... meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment..." The Board considers the totality of the circumstances when determining whether a party has satisfied its duty to meet at reasonable times." *Garden Ridge Mgmt.*, 347 NLRB 131, 132 (2006).

The ALJ found that "[t]he parties never held a session to bargain a successor contract for SMG Massena" (D. 35:34), but the totality of the circumstances demonstrates that SMG Massena was bargaining collectively with the Union via email, phone, and face-to-face in between approximately May to October 2018. [Tr. 59:17-19; R-1, generally]; see also [Tr. 270:1-270:6; 691:4-691:11] (Romigh at the Union's request, attended and bargained the SMG Massena CBA on behalf of the Union for "approximately a day and a half"). As shown below, the conduct of the Union demonstrated it acquiesced to SMG's request to merge the bargaining of the SMG Watertown and SMG Massena agreements, which is contrary to the ALJ's findings. [D. 35:34-36, 36:20-28].

On May 2, 2018, Murray submitted CBAs proposals to King. [R-1, p. 46-94]. On June 7, 2018, King responded to Murray with a counterproposal indicating the SMG Watertown CBA

could serve as a baseline for SMG Massena's CBA. [R-1, p. 126-142]. This proposal was reasonable considering the SMG Watertown and SMG Massena employees are "all in the same local" Union, Local 24. [Tr. 54:3-15]¹⁰. In response, Murray said he saw "no answer to the Massena proposals." [R-1, p. 143]. King advised Murray to review his June 7, 2018 letter, which "specifically addresses [his] proposal on Massena contract," wherein the SMG Watertown CBA would serve as a baseline for the SMG Massena CBA [R-1, p. 155].¹¹

On June 8, 2019, Murray responded to King indicating the SMG CBAs could be merged and jointly bargained by stating that "merging both contracts may be acceptable in the end but it will require time and comparison and I believe it is permissive." [R-1, p. 159; Tr. 315:11-316:25] ("while ... there was no real need to have two separate agreements... And we just agreed we'd do that with Watertown and then use it in Massena, as opposed to do it with Massena and use it at Watertown. We could have done it either way").

Gabalski stepped in for the Union to conduct further bargaining on the CBAs, and acknowledged face-to-face bargaining would be required to merge the CBAs given the number of differences between the two contracts. [R-1, p. 165]. At no point did Murray or Gabalski refuse to merge the CBAs or have the SMG Watertown CBA serve as a baseline for the SMG Massena CBA. Gabalski agreed SMG and the Union agreed that the SMG Watertown CBA would serve as a baseline for the SMG Massena CBA. [Tr. 126:11-15]. The Parties discussed dates and times for face-to-face bargaining. On July 27, 2018, King advised Gabalski that he "would like to do them both at the same location in Watertown. We have 3 days reserved, if we

¹⁰ There were separate CBAs for Watertown and Massena because they had been owned by different owners before SMG purchased them. [Tr. 315:15-24].

¹¹ This testimony contradicts the ALJ's finding that King did not respond to Union's initial May 2 proposal (D. 36:17-18), and in fn. 65 where the ALJ stated King provided "no specifics concerning how he came to that understanding."

need a portion of the second day for Watertown we would not waste any of the day traveling and could start right in on Massena.” [R-1, p. 191]. This email demonstrates King voiced his intent to the Union to collectively bargain both CBAs at Watertown. Gabalski replied, “Thanks,” further demonstrating acquiescence to King’s proposal about bargaining both CBAs in Watertown. *Id.*

King followed up to Gabalski on August 3, 2018, memorializing the Parties’ understanding that the SMG Watertown CBA would be bargained on August 15, 2018 and partially into August 16, 2018, if needed, and that the SMG Massena CBA would be bargained on August 16, 2018 and into August 17, 2018, if needed. Gabalski agreed. [R-1, p. 194]. Prior to bargaining, Gabalski requested certain information, such as seniority lists, job titles/positions, and wage information, for both SMG companies further indicating intent to collectively bargain both CBAs. [R-1, p. 196; Tr. 323:9-323:14].

Negotiations in Watertown, New York, began on August 15, 2018. Romigh, the Union steward for SMG Massena, attended the August 16-17, 2018 sessions, and anticipated and hoped to bargain the SMG Massena CBA that day after bargaining the SMG Watertown CBA. [Tr. 74:1-8, 126:23-127:9, 270:1-9]¹². King testified that he was initially concerned about Romigh’s presence given his recent discharge, but all parties agreed that Romigh could remain so long as he remained on the topic of SMG Massena. The Union caucused and agreed Romigh would stay so long as he bargained for SMG Massena and would not be presenting “personal issues.” [Tr. 127:4-6, 324:11-325:8, 690:11-22]. King testified that over the following days, he was “assured that [the Union] spoke for both bargaining units” (Tr. 330:10-331:5), he felt they “were talking

¹² It is inexplicable as to why the Union would ask to have Romigh sit in on the negotiations on behalf of SMG Massena, and SMG acquiesced, if the Union believed the Company was refusing to bargain on SMG Massena.

about both” and that the Union did not expressly indicate otherwise (Tr. 340:17-20). King “never deviated from that” plan. [Tr. 324:8-10]. At the bargaining table, King further described to the Union SMG’s attempt to modernize both SMG Watertown and SMG Massena because those stations “were way behind what was typically going on in the radio marketplace” and that the bargaining efforts would be a “good opportunity ... to streamline some of the things that [SMG] were doing, to restructure some of the things [SMG] were doing, and that was the station’s desire.” [Tr. 325:21-326:2]. Woolf agreed with King that the language used in the SMG Watertown CBA would be used in the SMG Massena CBA. [Tr. 690:8-22, 693:3-9]. The stated intent of SMG Massena and the Union was to collectively bargain the SMG Watertown CBA and incorporate those changes into the SMG Massena CBA as evidenced by Romigh’s presence and participation in the bargaining sessions in August 2018. [Tr. 691:4-691:11]. King extended his trip in New York into August 17, 2018 to continue the negotiation process including SMG Massena, which further demonstrates SMG Massena conducted good faith collectively bargaining to arrive at a successor CBA. [Tr. 321:10-17, 350:11-22]. Gabalski testified that he supposed he “could have said, let’s talk about Massena,” but did not do so, which further indicates the Parties were bargaining both CBAs simultaneously. [Tr. 126:16-22]. Thus, SMG Massena attempted to bargain a successor CBA with the Union at reasonable times.

King thereafter continued to attempt to bargain on behalf of SMG Massena in October 2018. During the October 2018 face-to-face bargaining, King recognized Romigh was not present and inquired who from the Union would be bargaining on behalf of SMG Massena. The Union responded, “we have the authority to bargain for both units. We can do that.” [Tr. 367:23-368:24; D. 17:13-14]. Knowing the Union’s complaints about SMG Massena allegedly not bargaining in August 2018, King wrote “Massena” at the top of the sign-in sheet for the

bargaining session on October 22, 2019. [J.E. 10; Tr. 105:13-17, 367:23-369:2].

The ALJ concluded that SMG Massena violated § 8(a)(5) by not meeting at reasonable times to negotiate a successor CBA, and that “[t]he parties never held a session to bargain a successor contract for SMG Massena.” [D. 36:24-25, 35:34]. Despite the above testimony and evidence in the record, the ALJ improperly rejected SMG’s argument that the Union agreed to use the SMG Watertown CBA as a baseline for the SMG Massena CBA. This rejection is also contrary to Gabalski’s testimony:

Q. Now, at some point in time, it’s my understanding that the Union and the company agreed that you would do Watertown and try to get it as a base to, then, do Massena; is that incorrect?

A. There was conversation to that effect.

[Tr. 126:11-15]. The ALJ further erred by finding King did not respond to the Union’s initial May 2, 2018 SMG Massena CBA proposal when the conduct of King described above shows both SMG Massena and the Union intended to and were bargaining both CBAs over the course of multiple months beginning in May 2018. [D. 36:17-18; R-1, generally]. The requirement to meet at reasonable times and confer in good faith pursuant to § 8(a)(5) “*does not compel either party to agree to a proposal or require the making of a concession.*” *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 106, 90 S. Ct. 821, 825 (1970) (emphasis in original) (citation omitted).

An examination of the totality of the circumstances shows SMG Massena satisfied its duty to meet at reasonable times to arrive at a successor CBA and had not violated § 8(a)(5).

III. THE ALJ ERRED AS A MATTER OF LAW BY FINDING SMG WATERTOWN VIOLATED THE NLRA FOR DIRECTLY DEALING AND INTERROGATING EMPLOYEES [Exception Nos. 45-57, 73-76].

- a. SMG Watertown did not interrogate employees about Union activities because Curry’s actions toward Laverghetta were lawful under the NLRA, or in the alternative, such interrogation(s) were a de minimus violation.**

The ALJ erred in finding SMG Watertown interrogated employees about Union activities

because (i) no interrogation occurred, and (ii) the record is devoid of any threat, restraint, or coercion thereby precluding a finding of an NLRA violation. For these reasons, the § 8(a)(1) allegation that Glenn Curry interrogated employees about Union activities should have been dismissed.

Curry and Frank Laverghetta¹³, admittedly friends, talked often at the workplace. [Tr. 281:2-4, 630:25-631:6, 632:3-8]. Neither party disputes Curry had discussions with Laverghetta about the Union. On August 16, 2018, Curry and Laverghetta both testified to private conversations about the Union. Curry and Laverghetta's recollections of who initiated the conversation about the Union are disputed, but Curry testified that Laverghetta was the one that would come into his office for conversations, similar to that of August 16, 2018. [Tr. 282:20-22, 632:23-24]. Curry testified that Laverghetta was apprehensive about the Union negotiations, that Laverghetta was concerned about job security, so Laverghetta asked Curry, "hey... you know what's next." [Tr. 631:7-10]. Curry also described Laverghetta as "worried," being in a "similar situation before," and, to ease Laverghetta's worries, Curry stated, "if something does happen, I would love to have you back in this organization in one capacity or in another." [Tr. 631:14-19; 633:2-3].

According to Laverghetta, Curry had expressed his opinion that "the market was too small" for a Union, that Curry said that negotiations were not going well, that "if there was any kind of a strike, it would be a working strike," and that the employees "would have to do it on [their] own time." [Tr. 281:8-25]. Laverghetta contends Curry then asked him if he would be someone "that would cross the picket line to keep working." [Tr. 282:4-5]. Curry on the other hand testified that he "never asked [Laverghetta] across the picket line" and that he "just

¹³ Laverghetta's on-air personality is also known as "Joe Monroe."

wouldn't say that." [Tr. 630:13-16; 631:20-22]. Laverghetta testified that he did not respond to these remarks. [Tr. 282:7]. Laverghetta then testified that the following day Curry said the negotiations were heated¹⁴ and that Curry had told David Stephens that Laverghetta was one of two people that he knew of who would cross the picket line and work. [Tr. 283:12-22]. Laverghetta testified that he again did not respond. [Tr. 283:18-19]. The ALJ found Curry had improperly interrogated Laverghetta in violation of § 8(a)(1) during the above conversations on August 16-17, 2018.

To determine the lawfulness of an interrogation, the Board inquires if "under all circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act." *Rossmore House*, 269 NLRB 1176, 1177 (1984).

The Board will examine the interrogation(s) on a:

... case-by-case analysis of various factors... (1) the background, i.e., whether the employer has a history of hostility toward or discrimination against union activity; (2) the nature of the information sought, i.e., whether the interrogator appears to have been seeking information on which to base taking action against individual employees; (3) the identity of the interrogator, i.e., his or her placement in the Respondent's hierarchy; (4) the place and method of the interrogation; and (5) the truthfulness of the interrogated employee's reply. As to the fifth factor, employee attempts to conceal union support weigh in favor of finding an interrogation unlawful.

Camaco Lorain Mfg. Plant, 356 NLRB 1182, 1182 (2011). In this instance, the record contains no evidence of Curry having a history of hostility or discrimination toward Union activity. [Tr. 530:5-6, 679:6-14, 680:9-14; D. 37:34-42]. *Sax v. NLRB*, 171 F.2d 769, 773 (7th Cir. 1948) ("Mere words of interrogation or perfunctory remarks not threatening or intimidating in themselves made by an employer with no anti-union background and not associated as a part of a pattern or course of conduct hostile to unionism or as part of espionage upon employees").

¹⁴ The comment about the negotiations being heated only followed the second conversation. [D. 37:14-15; Tr. 283:20-22].

In *Sax*, a Union went on strike and the company hired replacements. 171 F.2d at 773. The Union alleged the employer interrogated employees concerning their union membership and organizational activities. Despite the trial examiner finding no such violation, the Board agreed with the Union and issued a cease and desist against the employer. The 7th Circuit reversed the Board's decision on appeal. The 7th Circuit described the issue as a supervisor speaking with one of the employee strikers within the supervisor's office at the plant. The supervisor (Stone) inquired upon the employee striker (Patton) as follows:

Stone asked Patton whether she was "for the union," and upon Patton's response that she was Stone further questioned Patton as to her reasons therefor. On March 9, 1946, when Lucy Arnold and Dorothy Blanks sought to return to their jobs, Stone asked them why they had signed union cards. On the same day, Stone also asked Dorothy Blanks, "Why didn't you come to us if you wanted to have a union?" Forelady Lynn admittedly addressed a familiar question to Goldie Russell on March 7, as the Trial Examiner found.

Id., at 772. The 7th Circuit found these statements by the employer were "mere words of interrogation or perfunctory remarks not threatening or intimidating in themselves made by an employer with no anti-union background and not associated as a part of a pattern or course of conduct hostile to unionism or as part of espionage." *Id.*, at 773. The Court set aside the Board's order and denied enforcement. *Id.*

Curry allegedly asked whether Laverghetta would cross a picket line in the event of a strike, which is much less confrontational than the inquiry by Stone in *Sax* as to whether employees were "for the union." Also similar to the company in *Sax*, the incident involving Curry and Laverghetta (i) did not contain any threatening or intimidating interrogations, (ii) Curry had no anti-union background, and (iii) Curry was not associated with a pattern or course of conduct hostile to unionism or as part of espionage and was not involved in bargaining.

Laverghetta testified he provided no response to Curry's question(s). [Tr. 282:7, 283:19].

The ALJ improperly inferred without any evidence in the record that the Laverghetta's lack of responses correlated to "fear," and therefore the statements by Curry were coercive. [D. 37:29-32]. In light of the *Camaco Lorain Mfg. Plant* factors, when viewed under all the circumstances, the questions posed by Curry, if any, were not meant to restrain or interfere with Laverghetta's exercise of rights guaranteed by the NLRA. Curry and Laverghetta's conversations, including those about the Union, allegedly occurred when Laverghetta approached Curry. The personal conversations at the station between the two friends were meant to comfort Laverghetta about his job security concerns. [Tr. 631:14-19]; *Graham Architectural Prods. Corp. v. NLRB*, 697 F.2d 534, 541 (3d Cir. 1983) ("To hold that any instance of casual questioning concerning union sympathies violates the Act ignores the realities of the workplace").

To the extent the isolated incident described herein are found to be a violation of § 8(a)(1), the isolated nature of the communication and lack of express threat, restraint, or interference to Laverghetta should result in a *de minimus* finding. *J.J. Newberry Co. v. NLRB*, 442 F.2d 897, 901 (2nd Cir. 1971) (despite anti-union animus and "ill chosen" words by employer, Court found *de minimus* violation of NLRA due to "the isolated nature of the conversation and the company's otherwise circumspect conduct").

The ALJ found "Curry was attempting to discover if Laverghetta would obviate the need to bring in at least one replacement employee in the event of a strike" and that "Laverghetta did not respond to Curry in either of the conversations, indicating unease with the subject matter even though he was not an open union supporter." [D. 37:39-42]. The ALJ's speculative conclusions are misplaced because it is based mostly upon evidence not in the record. In essence, the ALJ allowed the "failure of General Counsel to create a factual record [to] support[] a finding that General Counsel met its burden of proof." The ALJ's speculation from a gap in the record

cannot “cut in favor of the one who bears the burden of proof.” *NLRB v. Louis A. Weiss Mem’l Hosp.*, 172 F.3d 432, 446 (7th Cir. 1999) (citation omitted); see also *Metro. Reg’l Council of Carpenters*, 358 NLRB 325, 325, fn. 1 (2012) (Board rejected ALJ’s “speculation concerning how employees would have been affected”).

It is well-established law that “Interrogation of employees is legal, when the questioning is not accompanied by any explicit threats... if under all the circumstances coercion is not implicit in the questioning.” *NLRB v. Firedoor Corp. of Am.*, 291 F.2d 328, 331 (2d Cir. 1961). *Transportation Management*, 257 NLRB 760 (1981), relied upon by the ALJ to find that questioning an employee about a right to strike is inherently coercive, is inapposite to this matter. In *Transportation Management*, the employer directed supervisors “to circulate a poll among” the employees, which “effectively... compelled to waive their right to strike.” *Id.*, at 763. For that reason, the ALJ found the employer’s poll was inherently coercive. *Id.*, at 768. Unlike *Transportation Management*, no “poll” took place by SMG or Curry, nor was there any conversation which can arguably be characterized as asking a Union member to waive their right to strike, and therefore the *Preterm, Inc.* explanations were not required or applicable. 240 NLRB 654, 656 (1979).

b. SMG Watertown did not directly deal with Stoffel in violation of § 8(a)(1).

SMG owed no duty to bargain with the Union prior to employing Stoffel as production and social media director, because filling such a position is not a mandatory subject of bargaining. Direct dealing under § 8(a)(5) is found if the following criteria are met: “(1) that the [company] was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union’s role in bargaining; and (3) such communication was made to the exclusion of the Union.” *The Permanente Med. Group, Inc.*, 332 NLRB 1143, 1144

(2000). However, “the general rule is that employers are entitled to make their own nondiscriminatory decisions as to how best to supervise their operations. As triers of fact we may not simply substitute our own subjective judgment of what we would have done were we in the [company’s] position.” *The Bridgeport & Port Jefferson Steamboat Co.*, 313 NLRB 542, 545 (1993). The ALJ found “the company was free to create a supervisory¹⁵ position involving new social media duties” but erred in finding that SMG “was not free to unilaterally move Stoffel’s bargaining-unit work to the new supervisory position [which] changed Stoffel’s conditions of employment, including his job duties and wages.” [D. 30:41-31:2]. As previously argued, one aspect of SMG’s efforts to modernize and restructure its antiquated radio broadcasts was to create, implement, and fill a position devoted to social media. [Tr. 548:24-549:8]; see also [CP-3] (Curry stated “The whole station is energized to have [Stoffel] back as a result of our jobs restructuring initiative...”). SMG implemented its last, best, and final offer regarding voice tracking and layoffs after declaring lawful impasse ultimately resulting in the layoff of Stoffel. After appropriate posting as required by the FCC, Stoffel thereafter reapplied for and was offered a management position, which did not necessitate going through or bargaining with the Union. [Tr. 548:12-549:10].

IV. FACTUAL OVERVIEW RELEVANT TO ROMIGH.

Romigh was an on-air personality for a station at SMG Massena who worked from 4:30 a.m. to 12:30 p.m. and served as the Union’s “shop steward.” [Tr. 164:20-165:4, 249:10-13, 250:17-19]. Romigh had a long-standing history of job performance issues throughout his employment by SMG Massena, including insubordination and fraud, which ultimately led to his

¹⁵ No witness testified and no evidence was introduced at trial that established Stoffel’s position was that of a “supervisor” as defined in § 2(11) of the NLRA. See *Cooper/T. Smith, Inc. v NLRB*, 177 F.3d 1259, 1263 (11th Cir. 1999) (“In proceedings before the NLRB, the burden of establishing the supervisory status of employee is on the party asserting such a status”).

discharge on June 8, 2018. [GC-21; GC-23; D. 38:23-24; R-2]. Examples of Romigh's continual job issues included:

1. Falsification of time cards (i.e. insubordination), which, according to the Union, was grounds for immediate termination. [Tr. 599:22-23, 196:11-18; D. 39:2-6]. Romigh turned in a time card on which he claimed that he arrived to work at 4:30 a.m. on June 4, 2018 (GC-23, p. 9). Elijah Winfrey arrived that day around 4:56 a.m. but Romigh was not there. [Tr. 775:23-25]. Winfrey took a picture of the parking lot documenting Romigh's absence. [R-2, p. 161; GC-23, p. 4; Tr. 775:15-776:13].¹⁶

2. Pictorial evidence and testimony that Romigh fell asleep 10+ times during live on-air broadcasts resulting in "dead air" for up to 15 minutes, which was often not recognized until listeners called to complain. [Tr. 601:22-602:14, 724:18-725:18, 730:17-22]. On June 8, 2018, the date of termination, Romigh fell asleep during live broadcasts on two occasions. [Tr. 725:16-726:3; R-2, p. 135; GC-23]. Even Romigh admitted that he fell asleep "from time to time." [Tr. 256:15-19]. Romigh was verbally admonished repeatedly to stay awake during his broadcasts. [Tr. 165:8-11, 181:13-15, 198:15-199:4, 257:2-5, 730:17-731:2].

3. Romigh's failure to appear at an event in May 2018 for Port Theatre in Cornwall, Ontario (SMG Massena's third-biggest advertiser). As a result of Romigh's unexcused and uninformed absence, SMG Massena had to provide "a lot of free advertising" to Port Theatre. [Tr. 726:9-728:20].

4. Despite being told by Dianne Chase, Union president, that David Stephens

¹⁶ Romigh admitted to frequently not correcting false time cards because "oftentimes, it wasn't worth the headache and hassle." [Tr. 254:5-9]. The ALJ properly found Romigh's testimony on the time cards to be unconvincing. [D. fn. 67]; see also [Tr. 253:16-254:1, 746:9-19] (Romigh testified to estimating his time card "around the 7th of June, 2018," after he had already worked his June 4, 2018 shift).

(station-owner) was investigating Curry for an oral argument with Ashlee Tracey, Romigh told other employees that Curry was being investigated for sexually harassing “a couple of the on-air jocks in Watertown.” [Tr. 202:3-203:2, 262:15-263:9].

5. Discussing personal problems on-air, such as issues involving his girlfriend, resulting in complaining listeners. [Tr. 636:8-23].

6. Unknowingly complaining to a local hospital’s executive secretary about his dislike for the same local hospital. The hospital was one of SMG Massena’s primary advertisers, which resulted in a complaint. [Tr. 640:17-641:13].

7. Submitting late Federal Communications Commission (FCC) reports on a consistent basis. [GC-23; GC-25].

8. Arbitrarily extending his live on-air show to the detriment of other on-air personalities. [GC-23].

V. THE ALJ ERRED AS A MATTER OF LAW BY FINDING SMG MASSENA VIOLATED THE NLRA WHEN IT DISCHARGED ROMIGH [Exception Nos. 58-76].

SMG Massena’s discharge of David Romigh was lawful and not a violation of §§ 8(A)(3) or (1). Romigh was lawfully discharged from SMG Massena for insubordination and not for engaging in protected concerted activities for the purpose of mutual aid or protection. As shown above, the ALJ properly acknowledged Romigh was “far from a model employee” and failed to meet “the most basic requirement that any employer could have of an employee.” [D. 46:24-47:1]. The ALJ further found that Romigh’s testimony was consistently not credible. See [D. fn. 67 (“testimony unconvincing”); [D. fn. 73] (testimony about Port Theatre “hesitant and untrustworthy” and “illogical”); [D. fn. 76] (Romigh’s testimony about poor job performance was “unconvincing”).

The Complaint alleges that Romigh's termination was a result of union and protected concerted activity in violation of §§ 8(a)(1) and (3), namely, that Curry's decision to terminate Romigh was his spreading of rumors about Curry regarding the Union wanting to take action against him because of the argument between Curry and Tracey. [Tr. 657:1-14]. The above argument occurred months earlier in February 2018, and was personally investigated by David Stephens. As a result of his investigation, David Stephens ordered Curry to undergo anger management training. [Tr. 571:23-573:12]. Chase thereafter told Romigh that Curry had to take anger management classes because of "verbal abuse of an employee." [Tr. 202:3-203:2]. However, Romigh told his fellow employees that Curry was "under investigation for sexual harassment of a couple on-air jocks in Watertown [and] had been told to take anger management classes." [Tr. 262:15-23].

Romigh acknowledged at the hearing that he made these defamatory statements to other employees in April 2018 well before any negotiations of the successor collective-bargaining agreement. [Tr. 263:5-9]. Regarding this April 2018 communication, the ALJ found, "No information was provided concerning the context of the conversation, including where this conversation took place, what specific individuals participated in it, what prompted the discussion, and what other unit employees said in response to Romigh's disclosure." [D. fn. 83]¹⁷. Romigh testified as to a second communication with other Union employees about Curry in May 2018, when informal bargaining had just begun. [Tr. 263:11-12]. When asked about the second instance, Romigh explained:

It wasn't an official, okay, sit down I have something to tell you. It was the three of us in the air studio with the door closed with music playing. And I let it be

¹⁷ The ALJ acknowledges the testimony on the content of conversation between Romigh and the other employees was "bare bones," but nevertheless improperly found the testimony "establish[ed] protected union activity." [D. 46, fn. 83]

known that I was upset that Mr. Curry had made an appointment with me and then, hadn't shown up for most of a half an hour after that. When he came in, he seemed rather blasé about the fact, and I reminded him that, you know, your day doesn't start nearly as early mine does, Glenn. You know, I've been up since 3 a.m. I've got another job after this. My time's important. If that means that I, little nap in between, fine.

[Tr. 263:14-23]. According to *Wright Line*, an employee's discharge constitutes a violation of § 8(a)(1) and (3) under the NLRA if the General Counsel demonstrates by a preponderance of the evidence that the employee's protected conduct was a motivating factor for the employment termination. *Wright Line, A Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980). To make such a showing, the General Counsel must show (1) the employee's protected activity; (2) the employer's knowledge of that activity; and (3) the employer's animus. *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1205 (2014). It is an affirmative defense for the employer to show "the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB at 1089.¹⁸

a. Romigh's conduct was not protected concerted Union activity.

The General Counsel failed to meet its burden of showing Romigh's conduct rose to the level of a protected concerted union activity, which is fatal to the § 8(a)(3) allegation. *Ind. Gear Works v. NLRB*, 371 F.2d 273, 276 (7th Cir. 1967) ("It has been held that a complaint or gripe by an employee is not a concerted activity... even though addressed to other employees"); see also [Tr. 785:19-24] (Elijah Winfrey testified that Romigh made "negative comments" about Curry).

¹⁸ Contrary to the *Wright Line* test, the ALJ improperly employed a heightened standard upon SMG Massena by finding:

SMG Massena had an obligation to show more than that it had legitimate reasons for discharging Romigh. It had to demonstrate that it previously discharged employees under similar circumstances or never before encountered a situation like Romigh's. SMG Massena presented no evidence to establish either thing.

[D. 47:9-12].

Romigh's testimony above, in addition to the spreading of defamatory rumors about Curry, clearly establishes complaining or griping to the other employees, which is by law not a concerted activity. To prove protected concerted union activity, the General Counsel must show the conduct was "necessary to demonstrate that the activity was for the purpose of inducing or preparing for group action to correct a grievance or a complaint." *Ind. Gear Works*, 371 F.2d at 276. The General Counsel failed to call the other bargaining employees with whom Romigh communicated to testify at trial or elicit any testimony as to Romigh's communication intending to induce group action to correct a grievance or a complaint about Curry or SMG.¹⁹ Without this testimony or evidence, the ALJ improperly speculated as to the other employees' reception of the information. [D. 45:9-20] ("That harassment of an employee by a high-level supervisor would concern other employees is self-evident"). Again, there is no evidence in the record to suggest the other employees were "concerned" as the ALJ speculated, or that there were any pending grievances or complaints in relation thereto. *Sax*, at 772 ("We are not unmindful of the right of the Board to draw inferences... but the inferences must be reasonable and based upon evidence") (internal citation omitted). Even had there been testimony to that effect, being "concerned" about certain behavior of a manager does not lead to a finding that the Union met its burden of proof to establish Romigh made the comments "to correct a grievance or a complaint." *Alstate Maint., LLC*, 2019 NLRB LEXIS 8, *16, 2019 LRRM 10222, 367 NLRB No. 68, (2019) ("Where a statement looks forward to no action at all, it is more than likely mere griping...").

Though not required under the SMG Massena CBA, Curry notified Chase of SMG Massena's intent to discharge Romigh. [Tr. 599:8-23]. Curry provided Chase, upon request, with detailed information and documentary evidence supporting the company's decision to terminate

¹⁹ SMG called Elijah Winfrey (one of the employees with whom Romigh spoke about Curry) for the limited purpose of authenticating photographs. [Tr. 775:15-777:2].

Romigh. The ALJ determined that Curry “perceived that Romigh engaged in union activity” because Curry had disclosed to Chase that the “rumors” about Curry were in reference to the Union looking to take action against him. [Tr. 657:4-14; GC-23]. Regardless of what Curry perceived, the totality of the circumstances weighs heavily in favor that Romigh’s for cause termination by SMG Massena was lawful.

b. Curry’s actions did not demonstrate Union animus.

Romigh’s termination occurred on June 8, 2018 at a time when SMG Massena and the Union had gone no further than *discuss* face-to-face bargaining dates. There is no evidence in the record demonstrating either Romigh or Curry were aware of the informal discussions between King and Murray in early June 2018. See, e.g., [Tr. 631:10-13]. Further, the General Counsel failed to elicit testimony or introduce evidence that Romigh’s discharge was related to Union animus, that Curry was hostile toward the Union, or that either Romigh or Curry had been involved in discussions of potential bargaining. The decision to terminate Romigh was purely a business decision based on performance issues. [GC-21]; *George L. Mee Mem’l Hosp.*, 348 NLRB 327, 332 (2016) (the Board will not substitute its own judgment for the employer’s regarding what discipline would be appropriate). The ALJ improperly focused on Romigh spreading false rumors which was grounds enough for firing while ignoring the numerous performance issues, including Romigh being caught twice sleeping on the job the very morning he was terminated. [D. fn. 71; Tr. 572:3-6]. The General Counsel failed to establish any Union animus by Curry surrounding the Romigh firing.

The ALJ stated that Curry “ratcheted up his monitoring of Romigh’s job performance” after he learned of Romigh spreading rumors (D. 3:18-20), but (i) there is no evidence of this finding in the record, and (ii) Romigh’s job performance issues (including sleeping on the job, falsifying his time card, and undermining the efficient operation of the station) and his personnel

file introduced into evidence at the hearing paint a different picture. The communication about the Curry rumors took place in April 2018. [D. 40:10-11]. Romigh had been counseled in 2017 for the local hospital-related complaint, failed to stay awake while live on air from 2017 to the date of his termination, and discussed inappropriate personal issues on the radio since July 24, 2017, all of which occurred *prior* to the April 2018 rumor allegation and therefore do not relate to “ratcheting up” monitoring. [GC-23; Tr. 785:12-22].

The ALJ incorrectly surmised without proof that Romigh’s disclosure of the harassment allegation against Curry and the requirement that he take anger management training was directly related to Union members’ employment concerns. [D. 45:9-11]²⁰. The ALJ speculated that “harassment of an employee by a high-level supervisor would concern other employees is self-evident,” and that, due solely to Romigh’s position as steward, his communication of the rumor to other employees constituted protected union activity. [D. 45:9-20]. No witness testimony, including that of Romigh, corroborates the ALJ’s speculation.

The ALJ finding that SMG Massena’s discharge of Romigh would not have taken place absent protected conduct and that Romigh had not been disciplined by SMG Massena finds no support in the record. [D. 3:15-16, 25-29, 47:14]. On June 4, 2018, Romigh was late to work and thereafter falsified a time card on June 7, 2018. [Tr. 626:5-9]. On June 8, 2018, the date of Romigh’s discharge, Romigh fell asleep on-air twice. [Tr. 725:22-726:3]. The prior job performance issues coupled with the tardiness and falsification of timecards in the week of his termination demonstrates SMG Massena would have discharged Romigh regardless of protected conduct. [Tr. 171:7-21, 773:6-9]. Curry testified that he advised Chase the “last straw” was the

²⁰ The decision appears to fault SMG Massena for discharging Romigh the day following Curry’s return to work after he completed anger management training. [D. 3:20-21]. There is no evidence in the record to suggest this chronology correlates to Romigh’s firing or Union animus. SMG could not control the fact Romigh fell asleep on the job twice on the day of his firing.

falsification of timecards. [Tr. 599:18-23].

c. Romigh lost his NLRA protections when he knowingly communicated materially false and slanderous statements about Curry.

Romigh's false allegations against Curry, which rise to the level of defamation *per se*, do not render him untouchable under the NLRA based upon his title as Union steward. See Restat. 2d of Torts, § 574, Slanderous Imputations of Sexual Misconduct (“One who publishes a slander that imputes serious sexual misconduct to another is subject to liability to the other without proof of special harm”). In *Lutheran Soc. Serv. of Minn., Inc.*, the Board stated that it has long held:

... there is a line beyond which employees may not go with impunity while engaging in protected concerted activities and that if employees exceed the line the activity loses its protection. That line is drawn between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such a character as to render the employee unfit for further service.

250 NLRB 35, 43 (1980); *NLRB v. Blue Bell, Inc.*, 219 F.2d 796, 798 (5th Cir. 1955) (holding same, and “[a]n employee, by engaging in concerted activity, does not acquire a general or unqualified right to use disrespectful epithets toward or concerning his or her employer”); *Greif Packaging, LLC*, 2016 NLRB LEXIS 497, *31 (2016) (even if discharge motivated by union or protected, concerted activity, insubordination and verbal assault on a supervisor led to termination and not any unproven union or protected concerted activity).

Romigh lost his NLRA protections when he communicated the materially false and slanderous statements about Curry with knowledge of their falsity since he had been previously advised by Chase that the incident involved only “verbal abuse” of a single employee. *Kvaerner Phila. Shipyard*, 347 NLRB 390, 395 (2006) (“A statement alleged to be libelous or defamatory will ... lose its protection [if] is made ‘with knowledge of its falsity, or with reckless disregard of whether it was true or false.’”). For these reasons, and as a matter of public policy to protect the

private rights of other SMG managers/supervisors, Romigh's slanderous rumors of Curry were not protected under the NLRA, and the totality of the circumstances of Romigh's poor job performance, insubordination, and falsification of time cards demonstrates Romigh was lawfully discharged for a valid business reason.

VI. THE ALJ ERRED AS A MATTER OF LAW BY RECOMMENDING THE REMEDIES AND ORDERS SET FORTH IN THE DECISION [Exception Nos. 35, 44, 71, 74, 76]

a. The proposed remedy recommended by the ALJ for Romigh violates the NLRA and must be rejected.

The ALJ ordered SMG Massena to (i) fully restore Romigh "to his former job or, if his job no longer exists, to a substantially equivalent position," (ii) make Romigh whole, (iii) compensate Romigh for his search-for-work and interim employment expenses, if any, (iv) remove from its files any references to Romigh's discharge, and (v) advise Romigh the action against him "will not be used against him in any way." [D. 49:4-21].

The ALJ's recommended remedy is contrary to the law. Sec. 10(c) of the NLRA states, "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." SMG Massena cannot be ordered by the Board to "make-whole" Romigh based upon his "for cause" discharge for insubordination and fraud, among the other lawful reasons described herein. In *Taracorp, Indus., a Div. of Taracorp Inc.* the Board found the make-whole doctrine may be appropriate when an employee is terminated for engaging in union or other protected concerted activities. However, the Board continued:

Conversely, an employee discharged or disciplined for misconduct or any other nondiscriminatory reason is not entitled to reinstatement and backpay even though the employee's Section 7 rights may have been violated by the employer in a context unrelated to the discharge or discipline. This principle is embodied in the remedial restriction in Section 10(c) of the Act, which provides: No order of the Board shall require the reinstatement of any individual as an employee who has

been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. Thus, when an employee is discharged for “cause” the Board, normally, is precluded from imposing a make-whole remedy.

273 NLRB 221, 222 (1984) (citation omitted) (emphasis added). “Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids.” *NLRB v. McGahey*, 233 F.2d 406, 413 (5th Cir. 1956) (citations omitted). As previously explained, the ALJ’s findings described ample evidence to support SMG Massena’s for cause termination of Romigh:

... it must be acknowledged initially that Romigh was far from a model employee. Staying awake during work—in particular, if your work is broadcasting a live radio program—is the most basic requirement that any employer could have of an employee. Romigh’s other transgressions, including showing up late to work, not completing work that supervisors assigned him on a timely basis, skipping a remote broadcast, and bad mouthing one of the company’s largest advertisers, likewise do not paint a flattering picture.

[D. 46:24-47:4]. Thus, pursuant to the NLRA and *Taracorp, Indus.*, the ALJ’s recommendation to make Romigh whole is contrary to law and may not be applied to Romigh.

b. The Union’s remedies against SMG Watertown are limited to the *Transmarine* remedies.

To the extent the Board determines SMG failed to bargain in accordance with the NLRA, *Transmarine* provides the appropriate remedy. *Transmarine Navigation Corp.*, 170 NLRB 389, (1968). “A *Transmarine* remedy, typically granted when an employer fails to bargain over the effects of closing a facility or otherwise removing work from the bargaining unit, requires the employer to bargain over the effects of its decision and to provide employees with limited backpay from 5 days after the date of the Board’s decision until the occurrence of one of four specified conditions.” *Rochester Gas & Elec. Corp.*, 355 NLRB 507, 508 (2010) (citations omitted).

The Parties bargained with knowledge that the SMG companies were moving toward modernization and restructuring to keep a competitive edge in the radio market, and which would remove work from the bargaining unit. [Tr. 465:4-9]. SMG had no duty to bargain over the management decision to modernize and restructure and to eliminate certain live broadcasts. The central theme to SMG's negotiations going into the bargaining was ensuring the effects of the modernization and restructuring would be contained in the successor agreements. Thus, the bargaining between SMG and the Union were "effects bargaining" as contemplated in *Transmarine*, and which flowed from earlier management decisions. [D. 29, fn. 58]; see *N. Star Steel Co.*, 347 NLRB 1364, 1371 (2006) (company had bargaining obligation, but "the obligation was an effects bargaining obligation because the [layoffs] flowed from the earlier decision to implement a new scrap-handling system using front-end loaders"), citing *Fast Food Merchandisers, Inc.*, 291 NLRB 897, 899-902 (1988) (make-whole relief inappropriate to remedy a bargaining violation where the layoff decision is an effect of an earlier management decision that is not a mandatory subject of bargaining); *Litton Bus. Sys.*, 286 NLRB 817, 821-822 (1987).

The *Transmarine* remedy doctrine applies to this matter, and the ALJ erred in recommending a "make-whole" and restoration remedy.

c. SMG Watertown and SMG Massena are entitled to introduce evidence showing the recommended remedies are unduly burdensome and/or that the laid off employees failed to mitigate damages.

The ALJ's decision requires SMG to, "[a]t the Union's request, restore all terms and conditions of employment for unit employees" existing prior to the layoffs. [D. 51:8-13]. SMG requests pursuant to *Lear Siegler, Inc.*, to be permitted to introduce evidence at the compliance stage, if any, that the ALJ's recommended remedy would be unduly burdensome for SMG given the systematic changes implemented through its modernization/restructuring. 295 NLRB 857,

861 (1989); [Tr. 571:16-19] (David Stephens testified that SMG Watertown has already implemented the restructuring/modernization).

Further, to the extent the Board finds employees laid off by SMG were terminated unlawfully, the employees are required to mitigate their damages. *Int'l Bhd. of Teamsters Local 25*, 2018 NLRB LEXIS 203, *5 (2018) (“The General Counsel bears the burden of establishing the gross backpay due to a discriminatee. Once the General Counsel has met this burden, the Respondent may establish an affirmative defense that would reduce its liability, including, for example, willful loss of earnings... The Board may toll backpay during any portion of the backpay period in which a discriminatee failed to mitigate her losses”).

CONCLUSION

Based upon the arguments and authorities set forth herein and the administrative record, the ALJ’s recommended findings, conclusions of law, and proposed remedies adverse to SMG should be revised in accordance with the arguments and authorities set forth herein.

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STATEMENT OF SERVICE

The undersigned certifies that on the 20th day of March, 2020, the foregoing was e-filed with the National Labor Relations Board and a true and correct copy was emailed to the following:

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