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

| | | |
|---|---|---|
| **BS&B Safety Systems, LLC,** | ) | |
| | ) | |
| | ) | |
| **Respondent,** | ) | |
| | ) | |
| **and** | ) | |
| | ) | **Case No. 14-CA-249322** |
| **United Steel, Paper and Forestry,** | ) | **Case No. 14-CA-252717** |
| **Rubber, Manufacturing, Energy** | ) | **Case No. 14-CA-252718** |
| **Allied Industrial and Service** | ) | |
| **Workers International Union,** | ) | |
| **AFL-CIO/CLC** | ) | |
| | ) | |
| **Charging Party.** | ) | |

# RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND BRIEF IN SUPPORT

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES
### CASES

Pursuant to the Rules and Regulations of the National Labor Relations Board § 102.42, Respondent BS&B Safety Systems, LLC ("BS&B" or "Respondent") respectfully submits its Proposed Findings of Fact and Conclusions of Law for the hearing conducted by Judge Carter on March 3-4, 2020.

## INTRODUCTION

The present case arises from three separate cases (14-CA-249322, 14-CA-252717, 14-CA-252718) brought by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union, AFL-CIO/CLC (the "Charging Party" or "Union") against BS&B. On February 19, 2020, the Board entered its Order Consolidating Cases, Consolidated Complaint and Notice of Hearing ("Consolidated Complaint") in which it consolidated the above cases and set forth Charging Party's allegations. The Respondent, the Charging Party and Counsel for the General Counsel are in agreement that the allegations in this consolidated case apply only to the P&M unit and not the Inspectors' unit at the Respondent's facility.

## FINDINGS OF FACT

BS&B's primary business is the design, development, manufacture, and sale of pressure relief devices, often referred to as rupture disks. Rupture disks are designed to provide pressure relief that is required by BS&B's customers as part of the customers' safety strategies. In other words, rupture disks are used in pressurized vessels; if a vessel becomes over-pressurized the disk blows releasing the pressure, thus, preventing the entire vessel from exploding. They are essential safety components used in a broad range of industries, including nuclear, petro-chemical, pharm chemical/biotech, medical devices, engineering, aerospace, infrastructure, oil and gas, equipment manufactures, fire protection, electrical infrastructure equipment, and aviation.

## I. The 2018 Unfair Labor Practice Charges and the Subsequent Settlement Agreement

On August 7, 2014, the Union and BS&B entered into a collective bargaining agreement ("CBA"), which expired on August 6, 2017. (GC Ex. 2.) BS&B and the Union's bargaining committee negotiated and reached a new agreement, but it was ultimately not ratified by the Union membership. (Tr. 30:3-6; 42:4-7.) BS&B remains willing to negotiate a new agreement, but negotiations have not resumed due to logistical issues with scheduling a time to negotiate. (Tr. 41:17-42:3.) Accordingly, the parties are still operating under the expired CBA.

The CBA provides BS&B "may schedule vacations according to its work requirements for any employee or group of employees. . . ." (GC Ex. 2, Article 10, Section 6.) It further provides BS&B may schedule "the vacation of any employee during a slack period of work." *Id.* Beginning in 2017, BS&B began experiencing a higher number of "past dues" and backlogs in its completion of customer orders. (Tr. 343:4-24.) A "past due" is a customer order that has not been completed even though the date it was scheduled to be delivered/shipped to the customer has passed. (Tr. 50:25-51:7; 135:11-19; 343:8-11.) In February 2018, BS&B implemented a policy that limited the number of Labor Grade 9 employees who can be on vacation at one time. (Tr. 117:2-11; 342:23-344:1.) The purpose of this policy was to address the number of past dues and backlogs. (Tr. 117:2-11; 3126:1-8; 42:23-344:1.)

In 2018, the Union took issue with BS&B's vacation policy. (Tr. 31:16-21; 90:2-25; 344:2-348:7.) It filed multiple unfair labor practice charges challenging BS&B's right to implement the policy. (Tr. 90:6-25; 119:2-24; 344:2-8.) On or around October 17, 2018, the parties entered into a Settlement Agreement to resolve the charges. (Tr. 344:5-345:19; GC Ex. 3, pp. 22-28) In an Addendum to the Settlement Agreement ("Settlement Addendum"), the parties agreed as to the type of information BS&B would be required to furnish to the Union going forward

concerning backlogs and past dues. (Tr. 344:2-348:7; GC Ex. 3, p. 27.) Specifically, the Settlement Addendum provided BS&B would produce to the Union "documentation of the backlogs and past-dues." (Tr. 344:2-348:7; GC Ex. 3, p. 27.)

Subsequently, a dispute arose among the parties as to the meaning of the phrase "documentation of the backlogs and past-dues." (Tr. 344:5-348:7.) On December 18, 2018, the Charging Party, the Regional office of the NLRB and the Respondent negotiated and entered into a Clarification of the Settlement Addendum ("Clarification Agreement") with BS&B. (Tr. 344:5-345:348:7; GC Ex. 3, pp. 29-30.) In the binding Clarification Agreement, the Union agreed to the following provision:

> (1) The "documentation of all backlogs and past-dues" to be provided to the Charging Party ***shall be*** copies of all schedules and SQDIP reports used by the Respondent [BS&B] to determine the backlogs and past-dues at the time notice to the Charging Party is given[.]

(GC Ex. 3, p. 29) (***emphasis added***). This provision unequivocally defined (and limited) the entire universe of documents BS&B had to furnish to the Union regarding past dues and backlogs. (*Id.*)

It is undisputed that BS&B has produced all documents required under the Clarification Agreement. (Tr. 44:22-45:7; 57:13-20;344:5-350:13; Resp. Ex. 1). As Vincent Clark ("Clark"), the Union Representative, testified:

> Q. Is the Company, in your opinion, has the Company complied with the Settlement Addendum [the Clarification] reached between the Company and the Union in December of '18?
> A. And once again, I would say if you are referring to them sending me, whenever they have to have – when they claim that there is a restriction, and they send me an email saying that there is a restriction, the [SIC] I would say yes.
> Q. So, in other words, they provided the data to you required by the Settlement Addendum?
> A. Yes.

(Tr. 44:22-45:7.)

## II. BS&B's Fair Treatment of Jesse Snelson ("Snelson").

In October and November 2019, Snelson, a Labor Grade 9 employee, displayed a sign on his desk that read "That wasn't Free" (Tr. 206:7-23.) Snelson admits the sign was not union related, and a person viewing it would have no reason to think it was union related. (Tr. 206:7-23.) During the same time period, Snelson had attached "Fair Contract Now" stickers to sunglasses displayed on his desk. (Tr. 206:7-23.) On or around November 12, 2019, BS&B had an "important" outside customer coming to visit BS&B's facility. (Tr. 163:1-7.) Snelson's "That wasn't Free" sign and sunglasses were displayed in a "prominent location" that would be in view of the customer during their visit. (Tr. 163:1-7.)

Alan Roberts ("Roberts), BS&B's Production Manager, quietly approached Matt McAfee ("McAfee"), a Union member who was on the negotiating and grievance committees at the time, to discuss the materials in or near Snelson's work area. (Tr. 140:9-141:3; 159:3-12; 162:20-163:12; 261:7-13; 266:9-21.) Roberts politely informed McAfee about the important visitor coming to the facility and said he would prefer if Snelson removed the "That wasn't Free" sign and sunglasses from his desk. (Tr. 163:1-12; 266:9-267:8; GC Ex. 24.) Roberts expressly told McAfee he had no intention of this being a disciplinary issue, which is why he wanted McAfee, as opposed to a member of management, to discuss the issue with Snelson. (Tr. 266:9-267:8; GC Ex. 24.) In other words, Roberts went out of his way to assure McAfee he was not threatening Snelson with disciplinary action. (Tr. 266:9-267:8 GC Ex. 24.)

McAfee agreed to speak with Snelson. (Tr. 163:23-25; 266:9-267:8.) He relayed Roberts' request and Snelson agreed to remove the sign and sunglasses. (Tr. 207:17-18; 266:9-267:8.) There is no evidence that McAfee made any mention of discipline when he spoke to Snelson. Snelson was never disciplined and no member of management ever spoke with Snelson about the

issue. (Tr. 208:19-25; 216:20-217:3.) In addition, there is no evidence that BS&B's request for Snelson to not prominently display the sunglasses applied at anytime other than when the important outside visitor was at the facility.

In November 2019, an incident occurred in which Snelson reported that he could complete a customer order by the end of the workweek, but he was unable to do so because he did not have all the parts (gaskets) for the order. (Tr. 314:15-316:3.) Snelson had failed to check that he had all the parts before he committed to finishing the order by week's end. (Tr. 314:15-316:3.) It was the third time in two weeks that Snelson affirmatively stated he could complete an order by the end of the week only to discover he did not have all the necessary parts. (Tr. 315:22-316:3.) A necessary component of a Labor Grade 9's job is to check to make sure he has all the parts needed for an order before committing to the order being completed by a certain date. (Tr. 269:8-16; 315:1-13.)

As part of BS&B's routine procedure, Ian Slattery ("Slattery"), Snelson's supervisor, wrote up the incident on a Counseling Report as a means to document the issue, although no discipline had actually been issued to Snelson for this incident. (Tr. 313:9-14; 314:15-316:25; 318:3-7; GC Ex. 20.) Misha Spalding ("Spalding"), BS&B's HR Manager, Slattery, and Roberts then met with Snelson to obtain his explanation as to what had occurred. (Tr. 171:10-20; 172:5-11; 185:8-21; 209:2-11; 211:19-212:11; 267:24-12; 320:11-13; 357:12-358:24.) Spalding testified the meeting was not a disciplinary meeting. (Tr. 322:23-232:3.) McAfee was also present at the meeting as a Union representative on behalf of Snelson. (Tr. 357:12-358:24.)

During the meeting, Snelson and McAfee explained the missing inventory was not Snelson's fault nor was it his fault that he did not know about the missing inventory. (Tr. 171:10-20; 172:5-11; 185:8-21; 211:19-212:11; 358:5-12.) After speaking with Snelson, BS&B

determined the mistake was not his fault. (Tr. 172:5-11; 185:8-21; 211:19-212:11; 358:17-24). Thus, the Company did not issue any discipline to Snelson related to the inventory issue. (Tr. 172:5-11; 185:8-21; 211:19-212:11; 217:11-21; 358:17-24;318:19-21.) In fact, BS&B did not issue any discipline to Snelson in 2018 or 2019, and has not issued discipline to him in the current year. (Tr. 185:8-186:1; 217:11-21.)

Unrelated to any of the above, Snelson was temporarily reassigned to work in the Shipping Department in 2019. (Tr. 173:24-174:2; 197:3-12; 358:25-359:18.) The reassignment lasted for only one-and-a-half weeks, and it was done for the purpose of cross-training Snelson so that he would be capable of working in shipping if needed. (Tr. 173:24-174:2; 197:3-12; 213:6-8.) BS&B often cross-trains Labor Grade 9 employees. (Tr. 151:8-14; 178:13-19). In or around November 2019, the same time at which Snelson was cross-trained, BS&B temporarily reassigned McAfee to different work areas, including shipping. (Tr. 151:8-14; 178:13-19). McAfee testified that the purpose of his reassignment was to cross-train him. (Tr. 151:8-14; 178:13-19; 179:2-4.).

Shipping duties are contained within the job description of a Labor Grade 9 employee, such as Snelson. (186:19-187:6; 218:2-8; GC Ex. 21.) Indeed, Labor Grade 9 employees perform almost all types of work in BS&B's shop, including shipping. (Tr. 145:24-146:10.) It is only logical for BS&B to cross-train Labor Grade 9 employees to ensure they can perform all the functions of their job. Finally, Snelson experienced no decrease in pay or benefits as a result of the temporary, one-and-a-half week reassignment.

**III. Campanella Steele's ("Steele") Vacation Request**

The Settlement Agreement entered into by the Union and BS&B in October 2018, contemplates that BS&B will treat vacation requests from Labor Grade 9 employees separately from other labor grades. (GC. Ex. 3, p. 27). The Settlement Agreement does not dictate when

BS&B may grant vacations to other labor grades. (360:5-25; GC. Ex. 3, p. 27). Roberts is responsible for overseeing production work schedules at BS&B, including granting employees' vacation requests. (Tr. 261:14-25.)

Pursuant to the CBA, Labor Grade 9 employees are permitted to "lock-in" vacation dates from February 14 to February 28 each year. (GC Ex. 2, p. 11.) The Settlement Agreement provided BS&B would continue this practice. (GC Ex. 3, p. 27.) The lock-in procedure works as follows: between February 14 and February 28 an employee can go into BS&B's system and request a full week of vacation for that year. The employee can then request that the vacation dates be locked-in. The employee is entitled to take vacation on the lock-in dates as long as a more senior employee has not also selected the dates for his or her lock-in vacation. Once the employee is granted the locked-in dates (i.e., a more senior employee does not submit a request for the date between February 14 and February 28), then a more senior employee cannot come along later and claim those dates. (Tr. 143:3-144:5.)

In an effort to comply with the Settlement Agreement, Roberts considers vacation requests only within the context of the labor grade of the employee making the request. (Tr. 265:1-8) (Roberts explaining "Labor Grade 9" vacation requests). Indeed, issues related to Labor Grade 9 employees taking vacation are not the same as issues related to employees in other labor grades. (Tr. 303:14-18.) In other labor grades, such as tool and die (Labor Grade 14), maintenance (Labor Grade 12) and welders (Labor Grade 11), there are only two employees. (Tr. 361:7-25.) BS&B's practice is to only allow one of these employees to be on vacation at a time (i.e., only one of the two welders, only one of the maintenance persons and only one of the two tool and die employees can take vacation on a specific date). (Tr. 361:7-25.) Roberts is permitted to grant non-Labor

Grade 9 employees a vacation day regardless of vacation granted or denied to Labor Grade 9 employees for the same date. (Tr. 364:4-11.)

In 2019, Steele, a Labor Grade 9 employee, requested to take a day of vacation on July 5, 2019. (Tr. 248:24-249:2; 252:9-13; 279:10-25.) Steele made the request on April 5, 2019, which means it was not his locked-in dates. (GC Ex. 23, p. 9.) However, Brenda Skinner ("Skinner"), another Labor Grade 9 employee, had already locked in July 5, 2019, as her vacation date. (Tr. 270:5-277:24; GC Ex. 23, p. 8) (identifying July 5, 2019, as part of Skinner's "lock in week"). At this time, BS&B permitted only one Labor Grade 9 employee to take vacation on any given day. (Tr. 117:2-5; 205:20-25) (demonstrating the one per day vacation restriction was in place from February 2018 to December 2019); (Tr. 364:4-11) (demonstrating the restriction only applied to Labor Grade 9 employees). Accordingly, Roberts denied Steele's request because he was not entitled to take vacation when another Labor Grade 9 employee had already locked-in the same day for her vacation.

## CONCLUSIONS OF LAW

### I. BS&B Did Not Violate Section 8(a)(1) and (5) of the National Labor Relations Act ("Act") by Complying Precisely with the Clarification Agreement Executed by the Union.

It is true that an employer has a duty to produce relevant information necessary for the union to fulfill its duties as the employees' collective bargaining representative. However, a union's right to information is not absolute. *See NLRB v. U.S. Postal Service*, 660 F.3d 65, 69 (1st Cir. 2011); *Resorts Intern. .Hotel Casino v. NLRB*, 996 F.2d 1553, 1556 (3d Cir. 1993) (citing *New Jersey Bell Tel. Co. v. NLRB*, 720 F.2d 789, 790-91 (3d Cir. 1983)). A union can waive its right to relevant information if it does so clearly and unmistakably through an agreement. *Gannett Rochester Newspapers, a Div. of Gannett Co. Inc. v. NLRB*, 988 F.2d 198, 204 n.2 (D.C. Cir.

1993); *Sw. Bell Tel. Co. v. N.L.R.B.*, 667 F.2d 470, 476 (5th Cir. 1982) ('The second question to be answered in this case is whether a right that is granted to the unions by the NLRA may be waived in a settlement agreement. This question must also be answered in the affirmative. The Supreme Court has indicated that the union's right to information may be expressly waived. ").

A union, through a settlement agreement, may waive its right to obtain information from the company. *See Sw. Bell Tel. Co.*, 667 F.2d at 476. Such a waiver may be inferred from the structure of an agreement or from the parties' bargaining history. *See Gannett Rochester Newspapers, a Div. of Gannett Co. Inc.*, 988 F.2d at 204 n.2. The relevant inquiry is whether the subject matter to be waived was "consciously explored" or "fully discussed" prior to the agreement. *See id.*

Here, the record demonstrates the Union has clearly waived its right to seek documentation related to backlogs and past dues beyond what is set forth in the Settlement Addendum and Clarification Agreement. In late 2017 or early 2018, BS&B implemented a vacation policy that restricted the number of Labor Grade 9 employees that can take vacation leave on any given workday. (Tr. 342:23-344:1.) The Union's purported frustration with BS&B's vacation policy began in early 2018. (Tr. 90:6-25; 344:2-8.)

In response to the vacation policy, the Union bombarded BS&B with unfair labor practice charges. (Tr. 90:6-25; 344:2-8.) In October 2018, the parties were scheduled to begin a trial on those charges. (Tr. 344:5-345:19.) The ALJ overseeing the trial strongly encouraged the parties to resolve their dispute through a settlement agreement. (Tr. 344:5-345:19.) Accordingly, the parties fully discussed the issues in dispute, including the information the Union desired regarding past dues and backlogs. (Tr. 344:5-345:19.) On or around October 17, 2018, the parties entered into a Settlement Agreement and Settlement Addendum that expressly addressed the vacation

policy. (Tr. 344:5-345:19; GC Ex. 3, pp. 22-28.) The Settlement Addendum provided that BS&B would provide the Union with "documentation of the backlogs and past dues." (GC Ex. 3, p. 27.)

Subsequently, a dispute arose as to the exact information BS&B must produce regarding past dues and backlogs. In December 2018, the parties again fully discussed the issue and entered into a Clarification Agreement setting forth the entire universe of documents BS&B would have to produce to the Union regarding this issue. (Tr. 344:5-345:348:7; GC Ex. 3, pp. 29-30.) Specifically, the Clarification Agreement states the phrase "documentation of the backlogs and past dues" shall be defined as "all schedules and SQDIP reports used by [BS&B] to determine the backlogs and past-dues at the time notice [of vacation restrictions] to the Charging Party is given. . . ." (GC Ex. 3, p. 29.)

In other words, at the time it executed the Clarification Agreement, the Union had been raising, considering, and discussing with BS&B the issue of the documentation it needed to fulfill its representative duties for an entire year. It had filed multiple unfair labor practice charges on the issue, and crafted and executed the Settlement Agreement and Settlement Addendum to state it wanted certain documentation. Then, in December 2018, it voluntarily agreed that "documentation of backlogs and past-dues" would be limited by the definition set forth in the Clarification Agreement.

There is no question the issue of what documentation BS&B must produce regarding backlogs and past dues had been fully discussed and consciously explored by the parties prior to the Clarification Agreement. The Union's attempt to argue that the Clarification Agreement does not define all documentation related to backlogs and past dues is disingenuous. Indeed, it exposes the Union's bad faith in its dealings with BS&B. Apparently, the Union's strategy all along was to lure BS&B into an agreement by representing to BS&B that the definition in the Clarification

Agreement would be the entire universe of information it would have to produce on the subject of backlogs and past dues. Then, when BS&B produced all such documents required by the Clarification Agreement , the Union, in an apparent fit of "buyer's remorse" about the agreements that it voluntarily entered, filed the present unfair labor practice charge in a brazen attempt to shirk the terms and obligations of the Settlement Addendum and Clarification Agreement.

The phrase "documentation of backlogs and past-dues" has been defined and agreed to by the parties. The Union has clearly and unmistakably waived its right to any other documents that might fall into a broader definition of that phrase. Moreover, it is undisputed BS&B has complied with the Clarification Agreement and produced all documents requisite thereunder. Therefore, there is no basis in law or fact to find that BS&B violated Section 8(a)(1) and (5) by only producing the information required under the Settlement Addendum and Clarification Agreement.

## II. BS&B's Treatment of Snelson Did Not Violate Section 8(a)(1) of the Act.

The Union alleges BS&B violated Section 8(a)(1)[1] of the Act by requesting, through a Union leader, that Snelson remove certain non-BS&B material from his desk for a short duration of time. The Union also baldly alleges BS&B threatened Snelson with discipline. However, the totality of the record evidence demonstrates BS&B treated Snelson with nothing but professionalism and respect. It did not threaten him, nor did its treatment of him violate Section 8(a)(1).

### A. BS&B Did Not Violate Section 8(a)(1) by Requesting Snelson Temporarily Remove Non-BS&B Material from a Prominent Viewing Location.

Even though employees have a right to wear or display union insignia in the workplace, that right is not absolute. *See Wal-Mart Stores Inc.*, 368 NLRB No. 146, at *2 (Dec. 16, 2019).

[1] Section 8(a)(1) prohibits an employer from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in [Section 7.]"

Employers have the right to manage their workplace to ensure efficient and orderly operations. *See NLRB v. Floridan Hotel of Tampa, Inc.*, 318 F.2d 545, 547 (5th Cir. 1963). Section 8(a)(1) should be interpreted to create a proper balance of these rights. *See Wal-Mart Stores Inc.*, 368 NLRB No. 146, at *2. The analytical framework applicable to a workplace rule limiting the display of non-company materials depends on the nature of the rule. *See id.* If an employer enforces a rule banning *all* union insignia, then it must demonstrate "special circumstances" justifying the prohibition. *See id.*

The analytical framework is different if the employer's rule limits, but does not entirely prohibit, non-company displays in the workplace. *See Wal-Mart Stores Inc.*, 368 NLRB No. 146, at *2. In such cases, the Board applies the balancing test set forth in *Boeing Co.*, 365 NLRB No. 154 (2017). *See id.* Pursuant to this framework, the tribunal must balance "(i) the nature and extent of the potential impact on NLRA rights, *and* (ii) [the company's] legitimate justifications associated with the [workplace rule]." *Boeing Co.*, 365 NLRB No. 154; *see also Wal-Mart Stores, Inc.*, 368 NLRB No. 146, at *2. The workplace rule violates Section 8(a)(1) only if the employer's justifications are outweighed by the adverse impact on Section 7 rights. *Boeing Co.*, 365 NLRB No. 154; *Wal-Mart Stores, Inc.*, 368 NLRB No. 146, at *2.

As stated above, BS&B has a legitimate interest in managing its workplace to ensure orderly operations. It is only logical that such interest includes presenting itself to important visitors and customers as having an orderly workplace. In preparation for the visit of just such a person, Roberts, BS&B's Production Manager, implemented a rule that non-BS&B material be removed from prominent viewing areas during the visit. (Tr. 140:9-141:3; 159:3-12; 162:6-163:12; 261:7-13; 266:9-21.) The rule was facially neutral because it applied to non-union material (i.e., Snelson's "That wasn't Free" sign, which was not union-related). (Tr. 140:9-141:3;

159:3-12; 162:6-163:12; 206:7-23; 261:7-13; 266:9-21.) Therefore, the rule should be analyzed under the *Boeing* framework.

Roberts' request was narrowly tailored to avoid intruding upon employees' Section 7 rights. It did not ban all union, or other non-BS&B, displays. It only asked that they be relocated from prominent viewing areas. It did not request employees to remove the displays indefinitely. It only asked that they be relocated for the duration of the visit. (Tr. 140:9-141:3; 159:3-12; 162:6-163:12; 261:7-13; 266:9-21.) Indeed, there is no evidence BS&B asked Snelson to relocate his sunglasses from his desk indefinitely. Similarly, there is no evidence Snelson had to relocate his sunglasses during every customer visit. The only request only applied to the short duration of one very important visit by an outsider. At all other times, Snelson was free to display his stickers in prominent locations as he obviously had in the past, up until the moment he was asked to remove them due to the upcoming customer visit.

The manner in which Roberts made the request ensured the request would not be misinterpreted as intrusive. Roberts politely spoke with McAfee, a Union committee member, and asked him to speak with Snelson. (Tr. 140:9-141:3; 159:3-12; 162:6-163:12; 261:7-13; 266:9-21.) The Union's accusation that Roberts' request was a threat of discipline is completely wrong. Roberts never threatened Snelson. He never even spoke to Snelson about this issue. (Tr. 216:20-217:3; 266:9-267:8.) Roberts expressly told McAfee this was not a disciplinary issue—he only wanted non-BS&B material out of prominent viewing areas for the important customer's visit. (Tr. 140:9-141:3; 159:3-12; 162:6-163:12; 261:7-13; 266:9-21.) Moreover, there is no evidence McAfee mentioned anything about discipline to Snelson.

A reasonable person would not have viewed Roberts' comment to McAfee as threatening. Quite the opposite: a reasonable person would interpret Roberts' comment as a good faith attempt

to resolve the issue professionally and in a manner that the Board should certainly encourage. The Board should in fact precisely and directly encourage this type of cooperative interaction between management and the Union and its membership.

Finally, BS&B anticipates the Union will allege Roberts' singled Snelson out because the Union is not aware of any other person asked to move items from their desk. The Union failed to present evidence at trial that any other employee had non-BS&B material displayed in prominent viewing areas that would have affected the customer's visit. The Union's allegation that Roberts treated Snelson differently than other employees is nothing more than speculation. It is not based on record evidence.

The limited nature of the rule, plus the manner in which BS&B implemented it, demonstrates that the rule did not pose a serious threat to Section 7 rights. BS&B's limited, one-time workplace rule was implemented to further a legitimate business interest that significantly outweighed any alleged *de minimis* impact on Section 7 rights. Therefore, BS&B did not violate Section 8(a)(1) by requiring Snelson to temporarily relocate his sunglasses.

### B. BS&B Did Not Violate Section 8(a)(1) in Its November 2019 Investigation Involving Snelson.

In the Consolidated Complaint, the Union alleges BS&B violated Section 8(a)(1) by threatening Snelson with discipline. It appears this allegation centers on BS&B's investigation into the incident in November 2019 in which Snelson said he would have a project finished at the end of the week but was unable to do so due to lack of inventory. The Union's allegation is unsupported by record evidence and applicable law.

To prove an employer's conduct was a threat in violation of Section 8(a)(1), the charging party has the burden to demonstrate a *reasonable* person would view the employer's conduct as an effort to proscribe future protected activity. *See Dover Energy, Inc. v. NLRB*, 818 F.3d 725,

730 (D.C. Cir. 2016). In other words, the standard is an objective one. *See Advanced Life Systems Inc. v. NLRB*, 898 F.3d 38, 44-45 (D.C. Cir. 2018). It is not based on whether the employee at issue, or the charging party, believed the conduct was a threat. *See id*; *Dover Energy*, 818 F.3d at 730. The proper inquiry is whether a *reasonable* employee, based on the totality of the circumstances, would view the comment as such. *See Advanced Life Systems*, 898 F.3d at 44-45; *Dover Energy*, 818 F.3d at 730; *McClatchy Newspapres, Inc. v. NLRB*, 131 F.3d 1026, 1036 (D.C. Cir. 1997) (finding alleged conduct was not an unlawful threat and explaining "'the Board must consider whether the conduct in question had a reasonable tendency in the totality of the circumstances to intimidate'") (quoting *NLRB v. Nueva Eng'g, Inc.*, 761 F.2d 961, 965 (4th Cir. 1985)).

Here, it exceeds the limits of credulity to believe a reasonable person would view BS&B's treatment of Snelson as threatening, let alone a violation of Section 8(a)(1). It is uncontested that Snelson, on numerous occasions, represented he could finish a customer order by a date certain only to later discover he did not have the parts necessary to complete the order. (Tr. 315:22-316:3.) His supervisor, Slattery, testified Labor Grade 9 fabricators, like Snelson, are supposed to ensure they have all the necessary parts to complete a customer order. (Tr. 269:8-16; 315:1-13.)

In November 2019, Snelson again promised to finish a customer order by a date certain but failed to do so due to a lack of inventory. (Tr. 314:15-316:3.) BS&B's treatment of Snelson in response to this incident was not only fair; it is the way the Board should encourage employers to treat their employees. BS&B had a sincere, good-faith conversation with Snelson. Slattery, Roberts, and Spalding met with Snelson and asked him to explain the incident. (Tr. 211:19-21; 267:24-12; 320:11-13; 357:12-358:24.) To assure both a good faith conversation and legal compliance, McAfee attended the meeting as the Union representative. (Tr. 357:12-358:24.)

In the meeting, Snelson and McAfee explained why the inventory check was not Snelson's fault (in fact, the gaskets that he had in his possession were faulty). (Tr. 211:19-212:11; 358:5-12.) Roberts, Slattery, and Spalding listened to Snelson and McAfee and concluded Snelson had not done anything wrong. (Tr. 211:19-212:11; 358:17-24). Accordingly, no discipline was issued to Snelson. (Tr. 211:19-212:11; 217:11-21; 358:17-24;318:19-21.) In fact, Snelson admits in 2018, 2019, and in the current year he has received no discipline. (Tr. 217:11-21.) There is no evidence of any comments made before, during, or after the meeting about Snelson's alleged protected activity. And, there was nothing about the meeting or events leading up to the meeting that would cause a reasonable employee to think BS&B was attempting to threaten Snelson to prevent him from engaging in protected activity in the future.

BS&B's treatment of Snelson would only cause a reasonable employee to be reassured that when there is a potential issue with job performance, BS&B will treat him or her fairly. If anything, the message that the Company sent in this case was that it will provide employees (and the Union) with an opportunity to explain any issues from their viewpoint and sincerely consider that explanation before making any workplace decision. The entire incident was a model of how labor and management should interact with one another—with respect, professionalism, and mutual communication.

BS&B treated Snelson exactly how the Board should encourage employers to treat employees. BS&B should not be punished for its behavior; it should be lauded for it. The Board should encourage employers to continue communicating openly and honestly with their employees and the Union before making any decisions regarding those employees. Regardless, there is no basis in law or fact to determine BS&B violated Section 8(a)(1) in its treatment of Snelson regarding this production issue.

## III. BS&B Did Not Violate Section 8(a)(1) and (3) of the Act by Cross-Training Snelson.

In the Consolidated Complaint, the Union alleges BS&B violated Section 8(a)(1) and (3) of the Act when it temporarily (for less than two (2) weeks) reassigned Snelson to the Shipping Department. The Union's allegation is completely unfounded.

An allegation that an employer violated Section 8(a)(1) and (3) by transferring an employee is analyzed under the framework set forth in *Wright Line*, 251 NLRB 1083, 1089. Pursuant to *Wright Line*, the Union has the burden to "make a showing *sufficient* to support an inference that the [employee's] union or protected concerted activities were a motivating factor in the employer's challenged adverse employment action. *See PPG Industries, Inc. and International Union, United Automobile, Aerospace and Agriculture Implement Workers of America, UAW*, No. 25-CA-25475, 1999 WL 33453698 (Aug. 24, 1999) (emphasis added). "It is axiomatic that the burden of proof rests on the [charging party] to establish antiunion animus was a motivating factor in the [challenged employment decision]." *Frierson Bldg. Supply Co.*, 328 NLRB 1023, 1024 (1999).

In step-one of the *Wright Line* analysis, the charging party has the burden of establishing "the employee's protected conduct was a substantial or motivating factor in the [challenged employment] decision. . . ." *Interstate Builders, Inc.*, 351 F.3d at 1027. This requires the charging party to establish a *prima facie* case of unlawful discrimination. *See Atelier Condominium and Cooper Square Realty*, 361 NLRB 966, 993, 201 LRRM 1809 (2014). If the charging party establishes all elements of a *prima facie* case, employer may rebut the charging party's attempt to demonstrate the employee's protected conduct was a substantial or motivating factor in the discharge decision. If the employer's rebuttal is successful, then the inquiry ends and the employer must prevail. *See NKC of Am.*, 291 NLRB 683, n.4, 130 LRRM 1408 (1988) (explaining that "[o]f course a respondent can defend an 8(a)(3) charge by rebutting the General Counsel's prima facie

case—i.e., by showing the alleged discriminatee's protected activity played no part in its allegedly discriminatory activity. . . ."). If the charging party presents enough proof to move past step-one, the burden shifts to the employer to demonstrate it would have taken the same action regardless of the employee's protected activity. *See Interstate Builders, Inc.*, 351 F.3d at 1027.

### A. The Union Failed to Establish a *Prima Facie* Case.

In order to establish a *prima facie* case, the charging party must demonstrate three elements, each of which the charging party must demonstrate by a preponderance of the evidence: (1) the employee engaged in protected concerted activity, (2) the employer was aware of that activity, and (3) the activity was a substantial or motivating reason for the employer's action. *See Atelier Condominium and Cooper Square Realty*, 361 NLRB 966, 993, 201 LRRM 1809 (2014). As demonstrated below, the Union failed to establish a *prima facie* case at trial.

#### 1. The Union Failed to Prove BS&B was Aware of Snelson's Vocal Complaints about Vacation Issues.

A charging party cannot satisfy its burden under *Wright Line* by relying on "flimsy evidence, mere inference or guesswork" to establish discriminatory motive. *NLRB v. First Nat. Bank of Pueblo*, 623 F.2d 686, 693 (10th Cir. 1980); *see also Sioux Quality Packers, Div. of Armour & Co.*, 581 F.2d at 157. This means "'mere suspicion cannot substitute for proof' of unlawful motivation.'" *Frierson Bldg. Supply Co.*, 328 NLRB at 1024. Therefore, to prove the second element of a *prima facie* case under *Wright Line*, the Union must present actual proof that the members of BS&B's management that made the decision to transfer Snelson were aware of his protected conduct. *See id.*

The Union alleges BS&B transferred Snelson to the Shipping Department—for less than two weeks—because he voiced frustrations about BS&B's vacation policy to a co-worker and Union member, Kyle Gibson ("Gibson"). (Tr. 191:22-192:12; 202:24-204:14.) The Union's

allegation is fatally flawed because it is based on mere speculation that members of BS&B's management were aware of Snelson's comments. As an initial matter, the Union failed to prove exactly which member of management made the transfer decision. Regardless, there is no evidence any member of management was aware of Snelson's comments.

Snelson admits the only way he voiced his opinion about the vacation issue was "just sarcastically to Kyle." (Tr. 204:13-14.) He alleges he made the comments at his work station when members of management were meeting nearby, but admits he never voiced these comments directly to management. (Tr. 204:1-205:13.) His testimony also revealed he has no knowledge that any member of management actually heard his comments. (Tr. 204:1-205:13.) Instead, he only speculates management heard him because he could sometimes hear people talking in the management meeting. (Tr. 204:1-205:13.) Gibson, who made similar comments at the same time as Snelson, also admits he is not aware as to whether management heard his and Snelson's comments. (Tr. 193:22-196:19; 198:25-199:1; 203:1-8; 204:1-18.)

There is no evidence in the record demonstrating members of management paid any attention to Snelson's conversation with Gibson, much less that they actually heard Snelson's comments. To the contrary, it is unlikely that a group of individuals engaged in their own conversation in a meeting would be listening to the myriad conversations going on around them in the facility. The Union's allegation that BS&B was aware of these comments is flimsy speculation. Therefore, Snelson's purported comments cannot satisfy the second element of step-one of the *Wright Line* analysis.

**2. The Union Failed to Prove Snelson's Alleged Protected Activity Was a Motivating Factor in His Temporary Reassignment.**

In order to meet the motivating factor requirement of the *Wright Line* analysis, the charging party has the burden to demonstrate "that but for his union activities or membership" the

complained of employment action would not have occurred. *Southern Bakeries, LLC v. NLRB*, 2019 WL 4280367, at *4 (8th Cir. Sept. 11, 2019) (quoting *Nichols Alum. LLC*, 797 F.3d at 554). In other words, there must be a nexus between the union activity and the employment decision. *Id.* (quoting *Nichols Alum., LLC*, 797 F.3d at 555) (Melloy, J., concurring)); *see also NLRB v. GATX Logistics, Inc.*, 160 F.3d 353, 356 (7th Cir. 1998) ("the Supreme Court has repeatedly explained that the General Counsel must persuade the factfinder [by a preponderance of the evidence] that the employee's protected activity motivated the [employment] decision at least in part.") (citing *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400, 103 S.Ct. 2469, 2473, 76 L.Ed.2d 667 (1983)).

"Simple animus toward the union 'is not enough'" to satisfy the charging party's burden of persuasion. *Nichols Alum., LLC*, 797 F.3d at 554 (quoting *Carleton Coll. v. NLRB*, 230 F.3d 1075, 1078 (8th Cir. 2000)). "[G]eneral hostility toward the union does not itself supply the element of unlawful motive." *Id.* at 554 (quoting *Carleton Coll.*, 230 F.3d at, 1078). Indeed, it is reversible error to find a charging party has satisfied its burden based solely on allegations of generalized union hostility by a member of management. *See Tschiggfrie Properties, Ltd.*, 896 F.3d at 886-87. Such a finding would improperly eliminate the "motivating factor" requirement from the *Wright Line* analysis. *See id.*

Here, the Union has completely failed to present sufficient evidence demonstrating Snelson's comments about the vacation restrictions were a substantial or motivating factor in BS&B's decision to transfer him temporarily to the shipping department. In fact, the Union has presented no *direct evidence* that BS&B temporarily reassigned Snelson to the Shipping Department because of his alleged protected activities. But, a charging party may demonstrate anti-union motivation through circumstantial evidence. *Ready Mixed Concrete Co. v. NLRB*, 81

F.3d 1546, 1550-51 (10th Cir. 1996). Often, courts look for the following factors to determine if circumstantial evidence of anti-union animus exists: an employer expressing hostility towards unionization combined with knowledge of union activities, inconsistencies between the termination reason and other actions taken by the employer, deviation from past practices in terminating the employee, and proximity in time between the employee's union activities and the employment decision. *FiveCAP, Inc. v. NLRB*, 294 F.3d 768, 778 (6th Cir. 2012) (citing *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995)).

Here, the Union has not presented sufficient circumstantial evidence to demonstrate the motivating factor element of a *prima facie* case. First, the totality of the record demonstrates BS&B went out of its way to treat Union members, Snelson in particular, with respect. When Roberts wanted to address Snelson's non-BS&B displays on his desk, he did so in a respectful manner. (Tr. 140:9-141:3; 159:3-12; 162:6-163:12; 261:7-13; 266:9-267:8.) He spoke with McAfee, a Union leader, in an attempt to resolve the situation professionally and without any hint of confrontation. (Tr. 140:9-141:3; 159:3-12; 162:6-163:12; 261:7-13; 266:9-267:8.) Roberts even made sure McAfee knew BS&B was not threatening Snelson with discipline. (Tr. 266:9-267:8.)

Later, when BS&B was concerned with Snelson's possible failure to check his inventory, it treated him fairly and with respect. Management met with Snelson, sincerely listened to and considered his side of the story, gave him the benefit of the doubt, and did not discipline him. (Tr. 211:19-212:11; 217:11-21; 267:24-12; 318:19-21; 320:11-13; 357:12-358:24.) The record does not demonstrate BS&B had anti-union animus. It demonstrates BS&B treated Snelson with dignity and professionalism.

Second, BS&B's temporary reassignment of Snelson was consistent with its treatment of other employees. BS&B temporarily reassigned Snelson to the Shipping Department for the purposes of cross-training him in the shipping process. McAfee testified he has been temporarily reassigned multiple times for the purpose of cross-training. (Tr. 197:3-12; 213:6-8.) Moreover, performing shipping duties is one of Snelson's defined job duties as set forth in the Labor Grade 9 job description (GC Ex. 21.) BS&B's decision to cross-train Snelson is consistent with its treatment of other employees and logical in light of BS&B's written job duties for Snelson's position. (Tr. 151:8-14; 178:13-19) There is no inconsistency between BS&B's cross-training Snelson and its normal business practices.

On the other hand, the Union's allegation is inconsistent with the record evidence. The Union alleges BS&B transferred Snelson to the Shipping Department to get him off the floor and away from other employees because he voiced frustration with BS&B's vacation policy. It alleges this was motivated, at least in part, by Snelson's sarcastic comments to Gibson. The Union ignores that Gibson testified he made similar loud remarks in his conversation with Snelson. (Tr. 198:25-199:1; 204:1-205:13.) However, there is no evidence BS&B moved Gibson away from other employees. (Tr. 198:25-199:1; 204:1-205:13.) It would be nonsensical for BS&B to go to the trouble of removing Snelson from other employees because of his comments, but leave Gibson in place.

In addition, the fact that BS&B cross-trained Snelson for less than two weeks disproves the Union's motivating factor theory. BS&B's cross-training of Snelson should not even be considered a job transfer—it was a temporary assignment to a job duty that was already included in Snelson's job description. After that short time period, he was moved back in his normal location. There is no evidence that he suffered any loss or reduction in compensation or other

benefits due to this very temporary assignment. The Union's apparent theory (that BS&B wanted to remove Snelson from an area where he could influence others regarding the vacation issue) only makes sense if the time period in which it assigned Snelson to shipping corresponded with an important event regarding the vacation dispute for which BS&B did not want Snelson influencing others. However, there is no evidence that any change in the BS&B vacation policy issue occurred during the one-and-a-half weeks Snelson worked in shipping. If BS&B really wanted to remove Snelson from other employees, it would have done so for an extended period of time, or at least until the vacation issue was resolved.

Finally, BS&B anticipates the Union will focus in its brief on the relatively close temporal proximity from Snelson's alleged protected activity and his reassignment. However, the temporal proximity alone does not demonstrate animus when the totality of the circumstances is taken into consideration. *Thornton Fractional High Sch. Dist. No. 125 v. Illinois Educ. Labor Relations Bd.* 404 Ill. App. 3d 757, 768, 936 N.E.2d 1188, 1198 (2010) (explaining that temporal proximity alone cannot sustain an unfair labor practice charge); *See Moon v. Transport Drivers, Inc.,* 836 F.2d 226, 229 (6th Cir.1987) (temporal proximity alone will not support an inference of discriminatory motive in light of compelling evidence to the contrary). BS&B cross-trained Snelson at the same time it cross-trained other employees. At most, the timing was a coincidence. The totality of the circumstances however, demonstrates unequivocally that Snelson's alleged protected activity was not a factor in BS&B's decision to cross-train Snelson.

Therefore, the Union has not established a *prima facie* case under *Wright Line*.

### B. BS&B Would Have Temporarily Re-assigned Snelson Regardless of His Alleged Union Activity.

Even if the Court determines the Union has established anti-union motivation, BS&B still must prevail because it has demonstrated "it would have reached the same decision absent the

Tool and die is Labor Grade 14. (Tr. 361:7-25.) BS&B's practice is to only allow one of these employees to be on vacation at a time (i.e., only one of the two welders, only one of two maintenance personnel and only one of the two tool and die employees can take vacation on a specific date). (Tr. 361:7-25.) In other words, Steele was entitled to seniority preference over other Labor Grade 9 employees who had not locked-in a specific date, but he was not entitled to seniority over Labor Grade 14 employees.

Because BS&B's treatment of Steele was in accordance with the CBA and Settlement Agreement, the Union's claim, whether couched as Section 8(a)(1) or (3), must fail.

## CONCLUSION

For the foregoing reasons, all the Union's claims against BS&B must fail and the Consolidated Complaint and every allegation in it must be dismissed as a matter of law.

Respectfully Submitted,

R. Mark Solano
R. Mark Solano, PLLC
Attorney for Respondent
BS&B Safety Systems, LLC
400 S. Muskogee Ave.
Claremore, OK 74017
(918) 724-8200
mark@dogcreekgroup.com

CERTIFICATE OF SERVICE

I hereby certify that the above Proposed Findings of Fact, Conclusions of Law and Brief in Support were e-filed on April 8, 2020 with copies served via email on the following:

Rebecca Proctor
Field Attorney
NLRB | Subregion17
8600 Farley St., Suite 100
Overland Park, KS 66212
Rebecca.Proctor@nlrb.gov

Sasha Shapiro
Assistant General Counsel
United Steelworkers
60 Boulevard of the Allies, Room 807
Pittsburgh, PA 15222-1214
sshapiro@usw.org

Vincent Clark
United Steelworkers
P.O. Box 1410
206 W. Carpenter Street
Benton, AR 72018
vclark@usw.org

Date: 04/08/2020

R. Mark Solano