UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BS&B SAFETY SYSTEMS, L.L.C.

and **Cases 14-CA-249322**
14-CA-252717
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO/CLC **14-CA-252718**

COUNSEL FOR THE GENERAL COUNSEL'S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE

Rebecca Proctor
Counsel for the General Counsel
National Labor Relations Board, Subregion 17
8600 Farley—Suite 100
Overland Park, KS 66212

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I. STATEMENT OF THE CASE

This case was heard by Administrative Law Judge Geoffrey Carter on March 3-4, 2020, based on a Complaint that BS&B Safety Systems, L.L.C. (Respondent) violated Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the National Labor Relations Act (Act). The Consolidated Complaint and Notice of Hearing was issued by Region 14 on February 19, 2020, alleging Respondent violated Sections 8(a)(1) of the Act by requiring employees to remove union stickers from their work areas and by threatening employees with discipline because they engaged in union or other protected, concerted activities; violated Sections 8(a)(1) and 8(a)(3) of the Act by applying vacation restrictions only to Labor Grade 9 employees and by moving employee Jesse Snelson to a different work area; and violated sections 8(a)(1) and 8(a)(5) of the Act by changing its vacation scheduling practices by granting employee vacation by labor grade instead of by seniority and by failing to furnish necessary and relevant information requested by the Union.

Respondent filed a timely answer on March 2, 2020 acknowledging the Board's jurisdiction, the Union's status as a Labor Organization, and the Supervisor/Agent status of all alleged supervisors therein. Although the Union represents two units at Respondent's Tulsa facility, all parties agree that the allegations in this case relate solely to the Production and Maintenance (P&M) Unit.

II. RELEVANT FACTS

Bargaining Relationship/CBA

Respondent and Steelworkers Local 4992 (Union) have a long-standing bargaining relationship with the most recent collective bargaining agreement (CBA) effective 2014-2017. (GC Ex. 2). In 2017, the parties went to the table to negotiate a new CBA. Despite extending

the CBA twice, the parties were unable to reach agreement and the CBA expired in November 2017. (Tr. 40:14-17). The parties have not reached a new agreement, and employees continue to work under the terms of the expired CBA. (Tr. 40:14-17). A tentative agreement was reached in October 2019, but was voted down by the bargaining unit during the first part of November 2019. (Tr. 40:21-25, Tr. 41:1-8). Negotiations are ongoing and impasse has not been declared. (Tr. 41:6-10). Respondent regularly submits a list to the Union reflecting the name and contact information of every bargaining unit member; the list also indicates which bargaining union members are dues paying Union members. (Tr. 32:3-16; GC Ex. 6).

Labor Grade 9 Fabricators

The bargaining unit contains approximately thirty employees, with the majority of bargaining unit members classified as Labor Grade 9 Fabricators; the bargaining unit also includes Maintenance (2 employees), Tool and Die (2 employees), and Welders (2 employees) who are in higher labor grades. (Tr. 228:9-14). Higher labor grade employees have the ability to work down and do Labor Grade 9 work. (Tr. 304:7-11). Previously there were lower Labor Grades, but during the early 1980's all of the lower Labor Grades were consolidated into Labor Grade 9. (Tr. 232:5-15). At the time of the consolidation, the Union was concerned that there could be problems with vacation with that many people within a Labor Grade unless Respondent conducted significant cross training. (Tr. 232:16-20). Although Respondent originally did provide cross training, the cross training program did not last and was phased out. (Tr. 232:21-25; Tr. 233:1-4).

Labor Grade 9 Fabricators do not all perform the same tasks and do a variety of different work. (Tr. 114:9-25; Tr. 115:1-10; Tr. 146:1-20; Tr. 220:4-12). There are between twelve to fifteen different work areas. (Tr. 146:11-20). Most work areas are covered by one Labor Grade

9 Fabricator; if the Labor Grade 9 Fabricator assigned to a particular area is out, work in that area generally waits for the employee's return and is not completed or picked up by another Labor Grade 9 Fabricator. (Tr. 115:2-25; Tr. 147:4-16; Tr. 203:13-20; Tr. 220:9-15). Traceability regulations and guidelines applicable to Respondent's product can restrict the ability of one Labor Grade 9 Fabricator to complete another Fabricator's work. (Tr. 115:16-25; Tr. 116:1-20; Tr. 155:1-4).

Chad Vincent was the United Steelworkers Staff Representative assigned to Local 4992 from 2014 through mid-June 2019 when the assignment transitioned to Staff Representative Vincent Clark. (Tr. 30:3-9).

2018 PCA and Unfair Labor Practice Charges

Following the CBA's expiration, in early 2018 bargaining unit members engaged in a series of protected, concerted activities centered around the CBA. (GC Ex 5, p. 4-5). Respondent's took action in response to the bargaining unit's activities by, among other things, changing the vacation policy to limit the number of Labor Grade 9 Fabricators who could utilize vacation leave on any given day from three per day to one per day. (Tr. 90:14-20; Tr. 117:1-5; Tr. 141:17-22). Respondent contended the vacation limitation was related to a high number of backlogged and past due orders. (Tr. 90:14-20, Tr. 117:6-11).

During July 2018, Union filed a grievance related to vacation denials, requesting as a remedy that Respondent follow contract language and past practices regarding vacation policy and provide evidence and justification for the changes in vacation approval. (Tr. 119:3-25; Tr. 120:1-24; GC Ex. 11). Respondent denied the grievance. Following the grievance's Step 2 meeting and denial, then local Union President Michael Stroup requested information request seeking information supporting Respondent's position on the alleged extreme workload. (Tr.

120:19-25; Tr. 121:1-25; GC Ex. 12). Respondent replied to the information request, but did not provide the requested information. (Tr. 124:2-20, GC Ex. 13). Union President Stroup then sent a follow up email outlining why the Union did not believe the information request had been fulfilled. (Tr. 125:4-11, GC Ex. 14). The Union sought information about extreme or excessive workload because those were the terms used by Respondent's supervisors/agents during the Step 2 grievance meeting, and Union wished to clarify and prove those terms. (Tr. 126:1-16). Union never received the requested information.

The Steelworkers Union filed a series of charges related to Respondent's actions, resulting in issuance of a Complaint and Notice of Hearing. (Tr. 90:14-25). The allegations in the Complaint and Notice of Hearing were resolved during settlement discussions ordered by Administrative Law Judge Christine Dibble and a settlement agreement was reached (Tr. 91:1-2; GC Ex. 3). The Settlement Agreement's provisions regarding vacation required Respondent to return to the practice of allowing three Labor Grade 9 employees to schedule vacation on any given day and allow up to three Labor Grade 9 employees to lock in vacation for the same week during the lock in period. (GC Ex. 3; Tr. 142:17-20; Tr. 143:3-7). If work requirements were such that a vacation restriction was required, the settlement agreement required Respondent to provide documentation of backlogged and past due orders to the Union to verify the need for vacation limitations. (GC Ex. 3; Tr. 142-22-25). The settlement agreement also provided a time limit regarding how long vacation limitations could be in effect without additional documentation of backlogged and past due orders being provided. (GC Ex. 3; Tr. 91:12-16). Union Staff Representative Chad Vincent was the onsite Union representative during settlement discussions. (Tr. 91:3-7). The settlement discussions did not include any changes to seniority

considerations in vacation requests or any changes in the Union's ability to request information. (Tr. 92:16-24).

Union and Respondent subsequently disagreed about the settlement agreement's requirements regarding vacation limitations, and in December 2018 met with representatives of Region 14 of the NLRB via conference call to clarify those terms; that call contained no discussion of Respondent's use of seniority in evaluating vacation requests or of the Union's ability to request relevant information. (Tr. 94:11-25, Tr.95:1-25). The parties reached a clarifying agreement which was reduced to writing and signed by both parties. (GC. Ex. 3).

Following negation of the settlement and addendum clarification, Michael Stroup, then Local Union President, was responsible for enforcing the settlement agreement. (Tr.96:12-25, Tr.97:1-3). Mr. Stroup was subsequently discharged by Respondent; his discharge was found by Administrative Law Judge Sharon Levinson Steckler to be discriminatory and in violation of Sections 8(a)(1), 8(a)(3), and 8(a)(4) of the Act. (GC Ex. 5).

July 2019 Information Requests

When Vincent Clark became the Union Staff Representative for Local 4992, during the summer of 2019, he collaborated with the previous Union Staff Representative, Chad Vincent, to prepare and submit a request for information. (Tr. 33:14-21; GC Ex. 7). With Clark taking over responsibility for negotiating the collective bargaining agreement, Vincent wanted to determine if there was any way to resolve the vacation restriction issue. (Tr. 100:7-15). The request for information was dated July 12, 2019, and it inquired about changes to the production process, about when employees began being given a production schedule rather than working orders by the due date, about backlogs and past dues before and after the change to the production process, about who made the decision to make the change to the production process, the information used

to make the decision to change the production process, and the reason for changing the production process. (GC Ex. 7).

Clark and Vincent believed the information sought was relevant to the representational duties because the parties were still negotiating the collective bargaining agreement, and the Union wanted to try to find solutions that would allow vacation restrictions to be lifted. (Tr. 34:6-8). Clark and Vincent believed there had been a change to the production process because there had not previously been issues with past dues, that employees had worked orders by the due date. (Tr. 34:13-20; Tr. 101:1-8). Prior to February 2018, neither Respondent nor employees had ever raised issues regarding backlogs and past dues. (Tr. 98:14-25; Tr. 99:1-2). Clark and Vincent sought information on backlogs and past dues to quantify whether past due numbers had in fact increased since Respondent had moved away from manufacturing orders by the due date and to determine if there was some way a bargainable solution. (Tr. 35:1-6; Tr. 101:13-19). Clark and Vincent sought the name of the decision maker to determine if the decision to change had been made locally and could be subject to bargaining. (Tr. 35:8-13). Clark and Vincent sought the documents used to make the decision to change and the reason for the change to see if the decision was data based. (Tr. 35:14-24).

Respondent timely responded to the request for information, but did not provide all requested information. (Tr. 36:6-10, GC Ex. 8). Respondent's response stated that the information request was unclear, that Respondent regularly modifies its production process, and the ability to do so is a management right. (GC Ex. 8). The response went on to say that employees have been given schedules for a number of years, and that the schedule is driven by customer due dates and requirements. (GC Ex. 8). The response then clarified that employees have been given schedules for the last five years or so where emergency and premium orders are

given priority. (GC Ex. 8). The response stated that all requests were unclear, overly broad, and that no response was required because the information sought related to decisions Respondent can make unilaterally. (GC Ex. 8).

Clark sent a clarification of his request on July 31, 2019. (GC Ex. 9). Respondent provided a timely response but again did not provide all requested information. (Tr. 38:22-25; Tr. 39:1-4; GC Ex. 10). The response claimed that the Union's right to request information is limited by the 2018 settlement agreement. (GC Ex. 10). The response then claimed that Union's clarified requests numbers one and two were based on an invalid premise, that Respondent has always set production schedules by due date. (GC Ex. 10). The response claimed that because all other requests were based on requests one and two, all requests are based on an invalid premise and that Respondent cannot provide documentation of changes that did not occur. (GC Ex. 10).

Respondent's Production Scheduling Process

Production schedules are created by Respondent's Scheduler, Jason Evans. (Tr. 324:13-18). To build the schedule, Evans pulls input from supervisors, quality, purchasing, floor employees, from an electronic database system, TMS. (Tr. 324:19-25; Tr. 325:1-14). TMS automatically populates the current open orders for the week "as well as any past due orders that were not scheduled prior." (Tr. 325:10-14). There are past due orders that are not put on the weekly schedule, times when the production scheduler does not schedule past due orders to be worked. (Tr. 325:15-18; 326:1-4; Tr. 350:18-23). Evans builds the weekly schedule based on historical data reflecting what dollar amount of product can be built per week. (Tr. 326:6-9). The Area Reports used to build the schedule are run by clicking a checkbox in TMS. (Tr. 333:3-15). All data within a specified week pulls on the Area Report. (Tr. 333:16-25; Tr. 334:1-25).

Each week Labor Grade 9 Fabricators are given a list of orders and instructed to add orders to the list that the Fabricators believe can be completed in that week. (Tr. 126:17-25). Then the Fabricators return the list to either their direct supervisor or to Production Scheduler Jason Evans. (Tr. 127:5-11). Jobs scheduled do not focus on past due orders, but are based instead on the monetary value of each order. (Tr. 127:12-25). Each Monday Fabricators are provided with a schedule of jobs Respondent wants completed that week. (Tr. 149:4-5). Jobs not completed in a week roll over to the next week. (Tr. 127:12-25; Tr. 149:20-25; Tr. 150:1-3). Respondent sometimes has premium orders that a customer wishes to receive faster than the normal or quoted lead time. (Tr. 149:6-12). Premium orders take precedence over other jobs, including past due orders. (Tr. 149:13-19). Premium orders can bump a past due order off of the schedule. (Tr. 350:24-25; Tr. 351:1-4). Each different fabrication area has its own work potential with backlog and past dues. (Tr. 351:8-10). If an employee is not working in an area with a past due, it does not impact the facility's past due numbers. (Tr. 352:2-7).

During mid to late 2017, Respondent's supervisors started pushing schedule attainment. (Tr. 128:19-23). Schedule attainment is based on working the orders scheduled for a particular week; working only past due orders, if those orders are not scheduled for that week, could result in zero percent schedule attainment. (Tr. 128:3-18). Past due orders show at the top of the schedule color-coded as past due; new jobs that were added and counted towards schedule attainment were not color-coded. (Tr. 137:11-23). Past due orders carried over and not specifically scheduled for a given week do not count towards schedule attainment. (Tr. 150:4-8). Respondent's supervisors are measured and evaluated based on schedule attainment. (Tr. 150:15-25). No one at Respondent's Tulsa facility is evaluated based on numbers of backlogs and past dues. (Tr. 150:23-25; Tr. 151:1-3).

Backlogged orders do not show up on Fabricator query sheets and Labor Grade 9 Fabricators do not have any opportunity to see or address the backlog. (Tr.130:1-14). Supervisors usually instruct Fabricators to focus on the dollar value of each order. (Tr. 138:1-3). Orders can be moved and not worked until after the due date based on dollar value, piece value, or sales priority. (Tr. 138:4-11).

Prior to mid to late 2017, orders were generally worked by the due date. (Tr. 128:24-25; Tr. 129:1). The push for schedule attainment began at roughly the same time the parties were beginning negotiations for a new collective bargaining agreement. (Tr. 130:7-11). Following the 2018 charges, Respondent took no steps other than the vacation restriction to address the backlogs and past dues. (Tr. 131:11-15; Tr. 151:4-14). Respondent continued to push schedule attainment instead, adversely impacting backlogs and past dues. (Tr. 132:16-20). Because only one employee works most areas and because there is not significant cross training, a blanket vacation restriction cannot address backlogged and past due orders. (Tr. 154:21-25; Tr. 155:1-14). Respondent's vacation restrictions limiting the number of employees off on any given day apply only to Labor Grade 9 Fabricators. (Tr. 303:14-25; Tr. 304:1-3).

Vacation Practices and Policies

Article 10, Section 6 of the CBA contains the parties' bargained language regarding vacation requests. (GC Ex. 2). That section reads:

> The Company may schedule vacation according to its work requirements for any employee or group of employees and the vacation of any employee during a slack period of work. In granting vacations, the Company will grant vacations by shift and will give preference to the senior employee on each shift, except in those instances where the request is received within the thirty-day calendar period preceding the vacation, in which case preference will be given to the employee's request as they are received.

This language has been in the parties' collective bargaining agreement for as long as employees can remember, going back over forty years. (Tr. 141:11-22, Tr. 222:7-11; Tr. 233:18-22; Tr. 244:1-6; Tr. 250:22-25; Tr. 251:1). The first provision, allowing Respondent to schedule vacation according to work requirements, is intended and has been used for Respondent to require employees to use vacation time during slow periods in order to avoid layoff. (Tr. 222:12-125; Tr. 223:1-4; Tr. 234:1-8). This provision has also been used to have employees work a reduced schedule to avoid layoff. (Tr. 251:2-12). The second provision regarding granting vacations is the provision that applies to employee-initiated vacation requests; those requests have always been granted on seniority basis. (Tr. 223:5-9; Tr. 235:1-3; Tr. 235:9-12; Tr. 252:1-2). Under the collective bargaining agreement's language and under the parties' established practice, "Scheduling" vacation and "Granting" vacation are separate and distinct functions. (Tr. 235:4-8).

Respondent also had a long-standing and established practice that up to three Labor Grade 9 employees could be off on any given day. (Tr. 142:1-3). Because vacation requests are granted by seniority, if a senior Labor Grade 9 was denied vacation, a lower seniority employee in a different labor grade requesting the same day would be denied as well. (Tr. 142:4-10; Tr. 176:3-21; Tr. 238:1-8; Tr. 304:15-25; Tr. 305:1-4). Employees in higher Labor Grades can work down to cover Labor Grade 9 work. (Tr. 176: 15-21). Unused vacation time is paid out to employees; it cannot be carried from year to year. (Tr. 154:17-20). All employees in the bargaining unit, regardless of Labor Grade, are included in the same process for requesting vacation. (Tr. 302:20-25; Tr. 303:1-12).

Article 10, Section 6 also provides what employees refer to as a lock-in week. (GC Ex. 2; Tr. 143:5-21). The portion of the Article/Section pertaining to lock in reads:

> Notwithstanding the foregoing, from February 14 through February 28 of each year, the Company will allow employees, by seniority, to select one week of available vacation (that is, a week not previously selected/scheduled by an employee with more seniority), for that calendar year from which they cannot be bumped. Once so scheduled, this one week of pre-scheduled vacation can only be cancelled by the employee completely (not partially) and then the regular, established vacation policy will apply.

The language regarding the lock-in week was added to the collective bargaining agreement during negotiations in 2011. (Tr. 235:13-18). The lock in language was intended to insure that all employees, even those with less seniority, could have at least one week of vacation time guaranteed so the employees could plan vacations. (Tr. 235:19-25; Tr. 236:1-2). The lock in week was not designed for a junior employee to be able to bump more senior employees from requested vacation dates, so appropriate clarifying language was added that lock in could not be booked over time previously selected by a more senior employee. (Tr. 236:11-25; Tr. 237:1-12; Tr. 237:24-25).

Production Manager Alan Roberts determines if a lock-in request is granted. (Tr. 143:22-25; Tr. 144:1-2). Lock in weeks, like other vacation requests, are based on seniority. (Tr. 144:3-5). Employees bid for lock in weeks through ADP, Respondent's payroll and leave system. (Tr. 144:6-14). There is a peer calendar in ADP that allows employees to view all pending employee leave request, but the peer calendar does not differentiate which request are lock in requests. (Tr. 144:6-14). At the time lock in weeks are requested, employees cannot tell what time has already been locked in. (Tr. 144:15-19). Employees are told verbally by Roberts if their lock in time is denied; approvals are sent by the ADP app via email. (Tr. 144:20-25; Tr. 145:1-2). During the 2019 lock in period, up to three labor grade nine employees should have been able to lock in per any given week per the settlement agreement, but bargaining unit members did not know how many employees were actually allowed to lock in. (Tr. 145:3-7)

2019 Vacation Requests and Grievances

Employees became aware Respondent was not granting vacation according to the CBA and established practice at the end of June 2019, when Campanella Steele was denied a requested vacation day on July 5. (Tr. 223:10-18). Steele is a forty-five year employee and dues-paying union member and is number two on the seniority list. (Tr. 223:16-18; Tr. 249:1-10; GC Ex. 6).

Steele works in Respondent's Custom Engineered Products (CEP) division. (Tr. 24:14-17). No other employees normally cover Steele's area when he is gone. (Tr. 249:22-25). On April 5, 2019, Steele put in a vacation request for July 5, 2019. (Tr. 252:8-13, GC Ex. 23). Under the contract language and the parties' established practice, Steele expected to have the request granted once it was within thirty days. (Tr. 252:14-17). Steele requested the time to visit his mother, who was ill, and worked with Geneva Waresback, the only person ahead of him on the seniority list to insure she would not bump him off of his requested. (Tr. 254:12-25; Tr. 255:1-8). Steele's request was denied on June 26, 2019. (GC Ex. 22, GC Ex. 23).

Ira Bowen, not a dues paying union member and the lowest employee on the seniority list, was granted the vacation day denied Steele. (Tr. 224:1-6; Tr. 255:9-14, GC Ex. 6, GC Ex. 23). Bowen's vacation request was submitted on June 6, 2019 and granted on June 26, 2019, the same day Steele's request was denied. (GC Ex. 23).

Steele has previously been told his seniority has knocked employees out of vacation time, even if those other employees are in different labor grades. (Tr. 255:1-25; Tr. 256:1-10). Steele only requested four days off during 2019, including the denied July 5, 2019 request. (GC Ex. 23). Prior to 2019, Steele had not previously had any vacation requests denied. (Tr. 256:11-14). Steele does not have any backlogs or past dues. (Tr. 257:18-24). Mr. Steele's area is currently

working ahead. (Tr. 257:23-25; Tr. 258:1). Mr. Steele remains subject to vacation restrictions. (Tr. 258:2-6).

Union member Matthew McAfee filed a grievance on June 26, 2020 related to senior Labor Grade 9 employees being denied vacation on days that were granted to less senior employees in different labor grades. (Tr. 152:13-25; Tr. 153:1, GC Ex. 16). Of the approximately thirty employees in the bargaining unit, seventeen were signatory to the grievance. (Tr. 153:2-9, GC Ex. 16). The requested remedy was a meeting between Human Resources and employees so everyone could discuss and clarify the issues around how vacation was being granted. (Tr. 153:10-17, GC Ex. 16). Respondent denied the grievance and never held the requested meeting with employees. (Tr. 155:15-25). Steele tried to have a conversation with Human Resource Director Hart about the denial, but Hart told Steele since a grievance had been filed Hart could not discuss the issue. (Tr. 257:1-17).

Around Labor Day 2019, another situation arose where senior Labor Grade 9 employees were denied vacation days subsequently granted to less senior employees in other Labor Grades. (Tr. 156:19-25). On July 29, 2019, Deborah Miller, a forty-year employee and dues paying Union member, requested vacation days on August 30, 2019 and September 3, 2019. (Tr. 244:11-17; GC Ex. 6, GC Ex. 23). Miller is number seven on the seniority list. (Tr. 244:18-20). Her request was denied on August 5, 2019. (GC Ex. 23).

Union activist and dues paying union member Matthew McAfee on July 29, 2019, requested vacation for August 30, 2019 and September 3, 2019. (GC Ex. 6, GC Ex. 23). McAfee's request was denied on August 5, 2019. (GC Ex. 23).

On August 21, 2019, Joe Sedlar, junior to both Miller and McAfee and not a dues paying Union member, submitted a vacation request for August 30, 2019; his request was granted on

August 27, 2019. (GC Ex. 6, GC Ex. 23). Sedlar's request was granted the same day he emailed Human Resource Director Hart about being unable to get a vacation day. (GC Ex. 26).

The Union filed another grievance, this time requesting as a remedy that vacation be granted according to the collective bargaining agreement. (Tr. 157:6-10; GC Ex. 17). No resolution was reached. Bargaining unit employees believed vacation restrictions were being used as a punishment and to harm solidarity. (Tr. 158:12-16).

Additional issues with vacation not being granted based on seniority arose during the 2019 Christmas holidays. Labor Grade 9 Fabricator Brenda Skinner is number three on the seniority list. (Tr. 223:19-20). In February 2019, shortly after her anniversary date, Skinner put in for vacation days on December 23, 26, 27, and 30, 2019. (Tr. 224:7-13; GC Ex. 23). It was a regular vacation request, and not a lock in request, but under the collective bargaining agreement's language, no junior employee should have been able to lock in time over Ms. Skinner's request. (Tr. 224:17-25; Tr. 225:1-5). Given the contract language and Ms. Skinner's position on the seniority list, Ms. Skinner should have received her requested days off. (Tr. 225:10-14). Ms. Skinner's vacation request was denied on December 2, 2019. (GC Ex. 23). Ms. Skinner was unable to use all of her vacation time and had to sell time back due to the denials. (Tr. 227:20-24). Prior to 2019, Ms. Skinner, a 43-year employee, had rarely if ever had to sell back time. (Tr. 219:17-8; Tr. 227:1-4).

At any given time, Ms. Skinner normally has sixty to seventy lots in process on her workstation. (Tr. 220:23-25). Ms. Skinner's area is slow, with only around thirty lots currently in process; she is still subject to vacation restrictions. (Tr. 221:3-8). Ms. Skinner generally keeps her work caught up. (Tr. 221:9-13).

Four employees junior to Ms. Skinner were granted days off she was denied. (Tr. 226:7-16). Joe Sedlar, less senior to Ms. Skinner and not a dues paying Union member, was off on December 23, 3019, after submitting a vacation request on December 3, 2019, the day after Ms. Skinner's request was denied. (GC. Ex. 6, GC Ex. 23). Shon Scott, less senior to Ms. Skinner and not a dues paying Union member, was off December 26 and December 27, 2019 after requesting the days on December 2, 2019, the same day Ms. Skinner was denied. (GC Ex. 6, GC Ex. 23). Ira Bowen, less senior to Ms. Skinner and not a dues paying Union member, was off December 26 and 27, 2019, after submitting his vacation request on December 5, 2019. (GC Ex. 6, GC Ex. 23). Randy Wolf, less senior to Ms. Skinner and not a dues paying Union member, was off December 23 and December 30, after submitting his vacation request on November 14, 2019. (GC Ex. 6, GC Ex. 23).

Geneva Waresback, a dues paying member who is number one on the seniority list, requested Christmas week 2019 as her lock-in week; her request was granted. (GC Ex. 6, GC Ex. 23). Herb Sarty, number 6 on the seniority list and a dues paying union member, also requested Christmas week 2019 as his lock-in week; he was told lock-in was full for that week, and his request was denied. (Tr. 309:7-25; GC Ex. 6). Production Manager Roberts told Sarty that three employees had already locked in. (Tr. 310:1-7). Sarty chose to let the request ride in case someone else cancelled their time. (Tr. 310: 8-13). His request for lock in during Christmas week was subsequently approved in March 2019. (GC Ex. 23).

Shelley Brazille, a forty-two year employee, and dues-paying Union member, was also denied requested vacation time over Christmas/New Year's 2019 (Tr. 295:10-11; Tr. 298:4-7, GC Ex. 6, GC Ex. 23). On November 26, 2019, Brazille requested vacation on January 2 and January 3, 2020; her request was denied on December 5, 2019. (GC Ex. 23). Geneva

Waresback, Herb Sarty (both dues paying union members) and Shon Scott (not a dues paying union member) had approved vacation over these dates as part of their lock-in weeks. (GC Ex. 6; GC Ex. 23). Brazille put in her vacation request because Respondent had posted that it was upping the number of Labor Grade 9 employees allowed to be off on any given day from one to two. (Tr. 298:8-14). Work in Respondent's Tulsa facility was slow during the fall of 2019, but Respondent still maintained vacation restrictions. (Tr. 151:15-25).

Jesse Snelson Threatened With Discipline and Moved to Shipping

Bargaining unit member Jesse Snelson was particularly vocal about vacation restrictions. (Tr. 158:18-23). Mr. Snelson works on the shop floor across the aisle from Kyle Gibson, another Labor Grade 9 Fabricator. (Tr. 192:16-25; Tr. 202:24-25). From August to November 2019, Snelson and Gibson began regularly discussing Respondent's vacation restrictions. (Tr. 194:1-6). Snelson and Gibson began having daily discussions after Snelson and Gibson both called in and missed work on the same day in August 2019. (Tr. 194:7-21). Snelson had requested that particular day off because it was his youngest child's very first day of school. (Tr. 203:13-16). Snelson was frustrated about having his time denied. (Tr. 203:23-25). Upon return to work, Snelson and Gibson overheard it was being said their absence was a planned action, spurring them to regularly discuss the vacation restrictions. (Tr. 194:7-21). Snelson discussed his frustration about not being able to get time off with Gibson, at first every day for a week and thereafter at least a couple of times per week. (Tr. 204:1-8).

Every day at 9:00am, Respondent's management team holds a stand-up meeting near Snelson's work area. (Tr. 194:17-25; Tr. 204:15-25). Both Production Supervisors and all of the Managers are present for the meeting. (Tr. 195:5-7; Tr. 204:23-25). Snelson and Gibson began making loudly making comments such as "It would be nice to have a day off" and "It would be

nice to get to use our vacation" during the daily management meeting so that management could overhear. (Tr. 195:8-13; Tr. 205:5-9). Gibson and Snelson picked up the frequency of their comments in November 2019, around November 12, after Gibson was denied a day off and had to take points and because Respondent modified the vacation restrictions, allowing two Labor Grade 9 Fabricators off instead of one. (Tr. 197:21-25; Tr. 198:1-2; Tr. 206:1-6). The change was frustrating because in Snelson and Gibson's view nothing about the workload had changed and they couldn't understand what had motivated the change. (Tr. 206:1-6). Snelson can overhear said during the daily stand up meeting because of the meeting's proximity to his workspace. (Tr. 205:10-13). Snelson made his comments in a sarcastic and loud voice to be overheard. (Tr. 205:14-16).

The parties returned to the table for bargaining in October 2019, and a tentative agreement was provided to the bargaining unit for ratification during the first week of November 2019. The bargaining unit failed to ratify the tentative agreement. Approximately one week after the vote, on November 12, 2020, Production Manager Alan Roberts approached Union Representative Matt McAfee and asked McAfee to meet with him. (Tr. 159:3-12).

Once in Roberts' office, Roberts told McAfee there was an issue with Snelson that would lead to discipline if it could not be addressed. (Tr. 162:6-10). Roberts went on to say that there were "Fair Contract Now" and "Solidarity" stickers in Snelson's work area as well as a sign reading "They Wasn't Free." (Tr. 163:6-25). Roberts went on to say Respondent didn't know what the sign meant and "The Company doesn't want to know. We have deemed it inappropriate and it is going to have to be removed." (Tr. 163:17-25). McAfee responded that he didn't have knowledge of the sign, but that there were other similar stickers throughout the work area. (Tr.163:1-7). Roberts replied that Snelson's stickers were in a prominent location, an

important visitor was expected, and Snelson would face discipline if the stickers and sign were not removed. (Tr. 163:1-7). McAfee then again raised that there were several other stickers throughout the shop and asked why Snelson's stickers in particular had to be removed. (Tr. 163:8-12). Roberts reiterated that an important visitor was expected. (Tr. 163:10-12). Respondent maintains no policies limiting the ability to display union stickers or signage in the work area. (Tr. 163:17-21; Tr. 208:9-18). No other employees were asked to remove union stickers. (Tr. 163:13-17; Tr. 208:1-8).

Following the meeting with Roberts, McAfee approached Snelson and relayed what Roberts had said about removing the stickers/sign or facing discipline. (Tr.164:1-12). Snelson said he felt like he was being unfairly singled out, but removed the stickers and threw away the sign. (Tr. 164:1-12). McAfee then communicated to Roberts that the stickers/sign had been removed. (Tr. 164:13-15). Following notification that the stickers/sign were removed, Roberts emailed HR Director Charles Hart, Operations Manager Dennis Amend, and outside counsel Mark Solano summarizing what occurred and stating the sign/stickers were removed. (GC Ex. 24).

Later that same week, McAfee was approached to provide Union representation for Snelson during a disciplinary meeting. (Tr. 165:2-9). In attendance at the meeting were McAfee, Snelson, Human Resource Manager Misha Spalding, Production Manager Alan Roberts, and Snelson's direct supervisor Ian Slattery. (Tr. 165:10-14). Slattery has been a Production Supervisor for just under three years. (Tr. 313:18-21). Slattery opened the meeting, stated that there was a verbal discipline for Snelson, and placed the form on the table. (Tr. 165:16-18; Tr. 209:12-18: GC Ex. 20). The disciplinary form stated that Snelson was receiving

a verbal warning for substandard performance and policy/procedure violation for failing to check parts were verified in stock. (Tr. 169:1-3; GC Ex. 20).

Slattery prepared the proposed discipline. (Tr. 314:15-17). No investigation was conducted prior to holding the disciplinary meeting. (Tr. 362:5-22; Tr. 363:1-23). Prior to the disciplinary meeting, Slattery initiated an email chain with Human Resource Director Hart and Human Resource Manager Spalding. (Tr. 317:17-22; GC Ex. 25). In his three years as Production Supervisor, Slattery had not previously issued discipline to a Fabricator. (Tr. 318:2-10). Spalding responded that the discipline would have to go through Hart because it was a union issue. (GC Ex. 25). Spalding's job encompasses handling discipline for both union and non-union employees. (Tr. 322:2-16).

Checking part inventory is not a Labor Grade 9 Fabricator job responsibility and is not included in the Labor Grade 9 Fabricator job description. (Tr. 169:4-9; Tr. 169:14-23; Tr. 210:19-25; Tr. 211:1-6; GC Ex. 21). The majority of parts used in fabrication are stored in a locked stockroom area to which most Labor Grade 9 Fabricators, including Mr. Snelson, do not have access. (Tr. 170:1-11; Tr. 211:7-14). Part inventory is normally verified in Purchasing or one of the other front departments and not in fabrication. (Tr. 170:12-22; Tr. 210:1-5). Respondent's inventory system has had ongoing issues with incorrect inventory of custom gaskets, the specific part at issue in Snelson's proposed discipline. (Tr. 171:1-7).

McAfee and Snelson raised the ongoing gasket inventory issues and Snelson explained the circumstances surrounding the particular order that resulted in the proposed discipline. (Tr. 171:1-20). Roberts asked a few questions and ultimately suggested that the proposed discipline be withdrawn and not issued; Slattery agreed. (Tr. 172:2-11; Tr. 212:5-9). Slattery has not previously proposed discipline for any other employee he supervises. (Tr. 187:11-18).

Within a few weeks of the disciplinary meeting, Snelson was moved out of his assigned fabrication area and into the Shipping Department. (Tr. 172:12-17; Tr. 212:12-15). The Shipping Department is located in its own separate addition and is not open to the shop floor. (Tr. 173:2-15; Tr. 212:16-24). Accessing the Shipping area requires key card access. (Tr. 173:10-15). Employees working in the Shipping Department cannot interact with employees on the shop floor unless those employees are let into the Shipping area. (Tr. 173:16-20; Tr. 231:1-3). Snelson's workload in the AV area, his usual work assignment, was average and not slow at the time he was moved; Respondent was still maintaining vacation restrictions. (Tr. 214:9-18). The workload in Shipping was slow and there often was not sufficient work to last the full day. (Tr. 214:19-23; Tr. 295:22-24). During his time in Shipping, Snelson was unable to talk with Gibson. (Tr. 214:24-25; Tr. 215:1-3). While Snelson was working in Shipping, Respondent had Don Hayes, another Labor Grade 9 Fabricator, cover his work area. (Tr. 214:7-13). In Snelson's nearly year working in the AV area, this was the first time another employee was assigned to cover his work. (Tr. 214:17-25).

III. ARGUMENTATION AND ANALYSIS

A. Respondent Violated Section 8(a)(1)

1. Legal Standard—8(a)(1)

When analyzing 8(a)(1) violations, the basic test is whether considering all of the circumstances, the Employer's conduct would reasonably tend to restrain, coerce, or interfere with employee rights provided under Section 7 of the Act. *Mediplex of Danbury*, 314 NLRB 470, 472 (1994). Additionally, "it is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) does not turn on the employer's motive or whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may

reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways Co.*, 124 NLRB 146, 147 (1959). In determining whether a remark made by an employer's agent rises to the level of a threat, the appropriate test is whether the remark can be reasonably interpreted by the employee as a threat. *Smithers Tire and Automotive Testing of Texas, Inc.*, 308 NLRB 72 (1992). Threats to subject employees to closer scrutiny because of union activity also violate Section 8(a)(1). *Oldfield Tire Sales*, 221 NLRB 1275, 1276 (1975). If an employer makes a statement that an employee reasonably understands to threaten discipline for future protected activity, the employer violates the Act. *DaimlerChrysler Corp. v. NLRB,* 288 F.3d 434, 444 (D.C. Cir. 2002). "Employer's motive and actual effect of its statements are irrelevant. Instead, the test is whether the employer's statements may reasonably be said to have tended to interfere with employees' exercise of their Section 7 rights." *Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 975 (D.C. Cir. 1998).

2. Requiring Snelson to Remove Stickers/Signage Violated Section 8(a)(1)

Production Manager Roberts, through Union Representative McAfee, on November 12, 2019, required Snelson to remove signage and Union related stickers from his cubicle or face discipline. That undisputed fact is established by both testimony and Roberts's own email (General Counsel Exhibit 24). Discipline was explicitly mentioned, so both McAfee as the Union representative and Snelson as the employee potentially facing discipline could reasonably interpret Roberts's comments as a threat of discipline. As there is no policy preventing display of stickers or union signage, Snelson being threatened with baseless discipline if he failed to remove the stickers/signs is inherently coercive and interferes with the exercise of Section 7 rights. No other employee was required to remove the same stickers, the threat was exclusive to Snelson, making Roberts's threat of discipline also a threat of closer scrutiny.

Three significant events happened close in time with Roberts's threat to Snelson: The bargaining unit voted down the tentative agreement, Snelson increased his comments about Respondent's vacation restrictions, and the Administrative Law Judge issued her decision in Union President Stroup's discharge case. The circumstances are particularly important. Respondent has a pattern of disciplining, or at least appearing to discipline, employees engaged in Union activity/protected activity, a pattern visible to employees. The 2018 settlement agreement required Respondent to remove discipline issued to the three employee members of Union's bargaining committee. (GC Ex. 3). Union President Michael Stroup was discharged, and Administrative Law Judge Sharon Levinson Steckler found that discharge in violation of Section 8(a)(1), 8(a)(3), and 8(a)(4). (GC Ex. 5). Union activist Matt McAfee testified that after Stroup's discharge, a number of employees stopped speaking out but Snelson remained "very, very vocal." (Tr. 158:21-23). Under these circumstances, employees would reasonably believe that Snelson was being singled out, was the next targeted union supporter. All factors and circumstances considered, Respondent's actions in requiring Snelson to remove his stickers and signage under threat of discipline cannot be interpreted as anything other than coercive and violative of Section 8(a)(1).

3. The November 15, 2019 Disciplinary Threat Violated Section 8(a)(1)

Three days after being told to remove his stickers/signage or face discipline, Snelson was called into a disciplinary meeting for failing to verify gasket inventory, a task that is not part of the Labor Grade 9 Fabricator job description and a task that Snelson lacks necessary access to complete. This was not an investigatory interview; Snelson's direct supervisor Ian Slattery had already prepared a disciplinary form and placed it on the table to open the meeting.

In three years as a supervisor, Slattery had never previously, not once, issued discipline to an employee. Before preparing the discipline, Slattery sought guidance from Human Resource Manager Misha Spalding, who handles disciplinary actions for both union and non-union employees; Spalding told Slattery that "union related items" must go to Human Resource Director Charles Hart. Although both Human Resources and Production Manager Alan Roberts were involved before discipline was prepared, no one, not Hart, not Roberts, not Slattery, conducted any sort of investigation to get Snelson's side of the story. In fact, during the disciplinary meeting, when Snelson and McAfee as his Union representative, presented Snelson's side of the story, the management team determined discipline was not warranted and would not be issued.

As the proposed discipline came just three days after Snelson was threatened with discipline if he didn't remove his sticker/signs, all of the same relevant circumstances discussed above apply to this proposed discipline as well. Just as with the stickers/signs, there was no policy or basis for the proposed discipline, something Respondent knew or should have known. If in fact Respondent's management team had questions about Snelson's actions or the parts and orders at issue, the management team could, and should, have conducted an investigatory interview. It did not.

Instead, Respondent contends that neither its Production Manager nor its Production Supervisor knew before putting a completed disciplinary form in front of Snelson that the discipline was completely unwarranted. That Slattery, a supervisor who has never previously issued any discipline to his direct reports, determined Snelson's particular action regarding custom gaskets is the first employee action he has seen in three years warranting discipline. This contention is simply not credible. Snelson, a vocal union supporter, was targeted with baseless

discipline twice in a single week. As other employees had had similar gasket issues, as Slattery had not issued discipline to any other employee in three years, the proposed discipline is not only a disciplinary threat, but again also threatens closer monitoring.

Whether the discipline actually issued is immaterial. Snelson was called into a disciplinary meeting and a prepared piece of baseless, written discipline, prepared without investigation, was placed before him. Again considering Respondent's history of issuing discipline or appearing to issue discipline in retaliation for Union activity/protected activity, as well as Human Resource Manager Spalding characterizing Snelson's discipline as a "union issue" there is no way to interpret Respondent's actions as anything other than a coercive threat violative of Section 8(a)(1).

B. Respondent Violated Sections 8(a)(1) and 8(a)(3)

1. Legal Standard--8(a)(3) and 8(a)(1) Discrimination

To establish unlawful discrimination under Section 8(a)(1) and 8(a)(3) of the Act, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" is decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994) clarifying *NLRB v. Transportation Management*, 462, U.S. 393, 395, 403 n. 7 (1983); *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Proving animus and discriminatory motivation is a fact-based inquiry which may be based on direct evidence or inferred from circumstantial evidence. *SCA Tissue North America LLC*, 371, F.3d983, 988-989 (7th Cir. 2004), enfg. 338 NLRB 1130 (2003); *Robert Orr/Sysco*

Food Services, 343 NLRB 1183, 1184 (2004); *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1428-1429 (11th Cir. 1985). As direct evidence of unlawful motivation is seldom available, General Counsel may rely upon circumstantial evidence to meet the burden. *NLRB v. Health Care Logistics*, 784 F.2d 232, 236 (6th Cir. 1986), enfg. in part 273 NLRB 822 (1984). Factors that may support an inference of antiunion motivation include employer hostility toward unionization, other unfair labor practices committed by the employer contemporaneous with the adverse action, the timing of the adverse action in relation to union activity, the employer's reliance on pretextual reasons to justify the adverse action, disparate treatment of employees based on union affiliation, and an employer's deviation from past practice. *Purlolator*, 764 F.2d at 1429; *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995), denying rev. 311 NLRB 1118 (1993). Animus can be inferred from the relatively close timing between an employee's protected, concerted activity and his discipline. *Corn Brothers, Inc*., 262 NLRB 320, 325 (1982); *Sears Roebuck & Co.*, 337 NLRB 443, 451 (2002); *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002). *The Sheraton Anchorage*, 363 NLRB No. 6 (2015).

Once the General Counsel has established that the employee's protected activity was a motivating factor in the employer's decision, the employer may defeat a finding of a violation by establishing, as an affirmative defense, that it would have taken the same adverse action even in the absence of the protected activity. See *NLRB v. Transportation Management*, 462 U.S. at 401. The employer has the burden of establishing the affirmative defense.

2. Respondent Discriminatorily Applied Vacation Restrictions

Although the bargaining unit contains multiple Labor Grades, all of the dues paying union members are Labor Grade 9 Fabricators, a fact well-known to Respondent as Respondent provides the Union with the list reflecting who is and is not a dues paying member. (GC Ex. 6).

An employee's status as a dues payer is protected Union activity and marks him/her as a Union supporter. Respondent has actual knowledge of who the dues paying members are, and the Labor Grades in which those employees fall.

Respondent had an established past practice, testified to by multiple employees, of not allowing less senior employees in a higher labor grade to take vacation leave on a day denied to a more senior Labor Grade 9 Fabricator. Employer deviated from that practice during 2019, granting non-dues payer Ira Bowen vacation on July 5, 2019, the day denied to more senior Union dues payer Campanella Steele, by granting non-dues payer Joe Sedlar the days around Labor Day denied to more senior Union dues payers Deborah Miller and Matthew McAfee, and granting non-dues payers Joe Sedlar, Shon Scott, Ira Bowen, and Randy Wolf the days around Christmas denied to more senior dues payer Brenda Skinner. This is deviation from past practice, disparate treatment of union members, and clear, specific evidence of animus. While dues paying Union members struggle to get any vacation time at all, non-dues payers Bowen and Sedlar managed to get time off adjacent to multiple holidays, despite being near the bottom of the seniority list. All record evidence regarding the established past practice, deviation from that practice, and the disparate treatment of union members went completely unrebutted.

Lock in weeks do not explain the deviation. Over July 5, 2019, Labor Grade 9 Fabricator Brenda Skinner was on vacation as part of her lock in week. On April 5, 2019, Campanella Steele submitted his request for vacation on July 5, 2019. If Respondent had simply denied Steele's request, stating the days were full subject to the current vacation restriction, there is no issue. The issue arises not because Steele's request was denied, but because Steele's request was pended and then denied on June 26, 2019, the same day a vacation request for July 5, 2019, submitted on June 6, 2019 by less senior employee and non-dues payer Ira Bowen was granted.

Evidence of animus also comes from the pretextual nature of Respondent's reasons for the vacation restriction. Respondent contends Labor Grade 9 Fabricators have vacation restricted due to high amounts of backlogs and past dues. Yet Respondent's Production Scheduler and Operations Manager both acknowledged past due orders are not always even placed on the schedule to be worked, that the weekly schedule is built based on dollar value. If the past due orders are not placed on the schedule, Fabricators choosing to work those past due orders do not reach their schedule attainment goals which focus only on the orders scheduled for that week.

Labor Grade 9 Fabricators tend to work one per production area, are not generally crossed trained to cover each other's jobs, and are often in fact prohibited by regulation from finishing each other's work. When a Labor Grade 9 Fabricator is out on vacation, work in that Fabricator's area normally sits and awaits the Fabricator's return. If a Fabricator with a high number of past due orders is on vacation, that Fabricator's past dues are only addressed if another Fabricator crossed trained in that area covers, something which seldom occurs due to lack of cross training. A blanket restriction on all other Labor Grade 9 Fabricators has zero impact on past dues, a fact acknowledged in testimony by Respondent's Operations Manager. Restricting vacation for higher Labor Grades would actually be a more effective way of covering vacation/addressing past dues. As employees in higher Labor Grades have the ability to work down, assigning one of those employees to cover the work of a vacationing Labor Grade 9 Fabricator would keep all Fabrication areas working.

Respondent tries to argue that its practices for granting vacation were modified in attempt to comply with the 2018 settlement agreement, addendum, and clarification. The argument lacks merit. The 2018 settlement agreement does not address any Labor Grade other than Labor Grade

9, and merely requires Respondent to restore its previous practice of allowing three Labor Grade 9's to take vacation on any given day or to lock in vacation on any given day. Both Production Manager Roberts and Operations Manger Amend conceded that the settlement agreement does not address other labor grades or contain any language modifying the collective bargaining agreements provisions regarding granting vacation requests based on seniority.

Respondent presented no evidence that it would have taken these same actions absent Union activism. Respondent has applied its vacation restrictions discriminatorily to Union supporters, and its actions violate Sections 8(a)(1) and 8(a)(3) of the Act.

3. *Respondent Moving Snelson to Shipping Was Retaliatory*

Jesse Snelson was an active Union supporter, demonstrated by his frequent vocal criticism of Respondent's vacation restrictions and by his display of Union stickers in his work area. Snelson has also previously held Union office, serving as Treasurer. Respondent was very aware of Snelson's activities. First, Respondent's Production Manager Alan Roberts requested Snelson remove union stickers from his work area. Second, Respondent's Human Resource Manager Misha Spalding and Ian Slattery, Snelson's direct supervisor, identified the disciplinary meeting with Snelson on November 15, 2019 as a "union issue." As Spalding testified she usually handles discipline for both union and non-union employees, the "union issue" tag and Spalding passing off the issue to Dr. Hart indicates clear knowledge and acknowledgement of Snelson as a Union activist. Third, the daily stand up management meeting is held adjacent to Snelson's work area, and he regularly and loudly heckled management during the daily meeting about his inability to utilize vacation time.

Respondent purportedly moved Snelson to Shipping for cross training, but its reasoning is both pretextual and contradictory. Respondent does not have an established system of cross

training, and testimony established most Labor Grade 9's are not cross-trained. When Snelson was moved to Shipping, Respondent was still maintaining vacation restrictions, allowing only two Labor Grade 9 employees to take vacation on any given day purportedly due to backlogs and past dues. Snelson's Fabrication area was not slow at the time; another Fabricator was assigned to cover the work while Snelson worked in Shipping. By contrast, the Shipping Department was slow, and lacked enough work to keep employees busy for a full day. Respondent was purportedly so past due heavy it had to restrict vacation, but still believed it appropriate to shift Labor Grade 9 Fabricators around in order to cross train Snelson in Shipping at a time when Shipping was low on work. As only one employee generally covers each fabrication area, assigning another employee to Snelson's work left a different fabrication area uncovered, the very situation Respondent claims it must avoid by limiting vacation usage.

Shipping is a contained, secured area off of the production floor and at the far end of the shop from where Snelson's previous work area was located. Snelson's move took him from what Respondent admits is a high traffic area on a main aisle (the reason Snelson supposedly had to remove his stickers) to a secured workspace away from both the daily management meeting and away from Kyle Gibson, with whom Snelson regularly engaged in protected, concerted converstaion. The move was made less than a month after Respondent twice in one week threatened Snelson with baseless discipline. Respondent provided no evidence that Snelson's move was part of a planned or established cross training initiative or that Snelson would have been moved to Shipping, at this particular point in time, absent his Union activity.

While Shipping is included in Labor Grade 9 job responsibilities, the issue is not simply that Respondent moved Snelson to Shipping. It is the circumstances and timing surrounding that move. At the time of Snelson's move, Respondent was committing other unfair labor practices,

specifically refusal to respond to Union's information request, discriminatory application of vacation restrictions, and unilateral change of vacation procedures. The move was retaliatory, discriminatory, and violative of Sections 8(a)(1) and 8(a)(3).

C. Respondent Violated Sections 8(a)(1) and 8(a)(5)

1. Legal Standard--8(a)(1) and 8(a)(5) Refusal to Provide Information

The duty to provide information is triggered when a request is made by the Union. *NLRB v. Boston Hearld-Traveler Corp.*, 210 F.2d 134 (1st Cir. 1954). Both the NLRB and the courts grant the scope/subject of the request significant leeway, and an employer must not ignore an unambiguous request received from a union. *Beth Abraham Health Services*, 332 NLRB 1234 (2000). The Supreme Court has described the relevance standard of information requested by a union as a liberal, "discovery-type" standard. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 437 (1967). See also *Pfizer, Inc.*, 268 NLRB 916, 918 (1984), enf'd sub nom. *NLRB v. Electrical Workers (IBEW) Local 309*, 763 F.2d 887 (8th Cir. 1985) (applying the same "liberal, discovery-type" standard of relevance when a union requests information concerning matters outside the bargaining unit).

As such, "the threshold for relevance is low." *Country Ford Trucks, Inc., v. NLRB*, 229 F.3d 1184, 1191 (D.C. Cir. 2000). The question is whether there is a "probability that the desired information is relevant and that it would be of use to the union in carrying out its statutory duties and responsibilities." *Acme Industrial*, 385 U.S. at 437. Moreover, "information related to the wages, benefits, hours, and working conditions" of unit employees is presumptively relevant. *Country Ford Trucks, Inc*. at 1191. An employer must respond to the information request in a timely manner. *Amersig Graphics, Inc.*, 334 NLRB 858, 885 (2001); *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992).

2. Respondent Failed to Provide Relevant Requested Information

The Union's July 12, 2019 and July 31, 2019 requests for information sought relevant information. The parties were still trying to reach agreement on a collective bargaining agreement. Vacation is a bargained benefit, and most bargaining unit employees had been unable to access that benefit for nearly a year and a half. Union had heard from employees that Respondent had modified its production scheduling process, that orders were being scheduled based on factors other than due date. Because Respondent maintained its vacation restrictions were due to backlogs and past dues, Union sought information related to whether Respondent was following a production scheduling process that was exacerbating past dues and artificially creating justification for vacation restrictions.

Respondent's responses provided contradictory information about production changes. In its initial July 19 response, Respondent contended it is regularly modifying the production process, and that due dates are always considered when building production schedules. In its August 16, 2019 response, Respondent contended that there had not been any changes to the production process, and that all of the Union's requests for information were based on a false premise. Respondent also tried to argue that somehow the 2018 settlement agreement limits, in perpetuity, the information Union can request form Respondent. This contention is blatantly false, demonstrated by the settlement agreement's express language.

The Settlement Addendum executed by the parties on October 22, 2018 reads:

> Respondent agrees to return to its prior practice of allowing three Labor Grade 9 Fabricators to simultaneously utilize vacation time on any given day and of allowing three Labor Grade 9 Fabricators to "lock in" vacation for any given work week during the February "lock in" period. Should backlogs and past dues require a reduction in the number of Labor Grade 9 Fabricators allowed to utilize vacation time on any given day Respondent will provide Charging Party thirty-day notice of the reduction accompanied by documentation of the backlogs and past-dues. Such reductions may not last more than sixty days without additional

> timely notice and documentation of the past dues/backlogs being provided to the Charging Party. Respondent agrees that even if such notice is provided, it will not cancel or in any other way impact locked in vacation time.

The Settlement Addendum clarification executed by the parties on December 18, 2018 clarifies what information constitutes "documentation of backlogs and past dues" under the Settlement and Addendum, and how and to whom the documentation is to be provided. The Settlement Agreement, Addendum, and Clarification place all burden on Respondent. If Respondent believes vacation restrictions are necessary due to backlogs and past dues, it is Respondent's obligation to provide the Union notice and the specified documentation. The obligation is triggered by Respondent's planned implementation or continuation of vacation restrictions. The Settlement Agreement, Addendum, and Clarification in no way waives, limits, or constrains the Union's ability to request information, about backlogs, past dues, or any other issue.

Record testimony at hearing establishes Respondent did indeed make a production/production scheduling change during 2017, right around the time the parties began bargaining a new collective bargaining agreement, as this was when the schedule attainment system was implemented. The schedule attainment system does move away from processing orders by the due date, focusing instead on dollar value. As previously noted, both Production Scheduler Evans and Operations Manager Amend acknowledge under this system past due orders are not always put on the schedule to be worked. Employer first claimed problems with backlog and past dues in February 2018, within about six to nine months of schedule attainment's implementation.

Union's information requests were not based on an invalid premise, but were instead based on correct and valid information from employees about how Respondent's production and scheduling process was failing to address backlogs and past dues, the very reasons bargained

vacation benefits were being limited. According to Production Scheduler Evans, all of the production data is contained in Respondent's TMS database, and pulling reports from that database is not cumbersome; it only requires checking a box. As such, it is not overly burdensome for Respondent to pull the backlog and past due data the Union requested. Indeed, as a multinational company with multiple government contracts, Respondent should already be tracking how its production and scheduling changes impact its ability to timely deliver product to customers.

The name of person(s) who made the decision to change the production process is also relevant. As noted by both Staff Representative Vincent and Staff Representative Clark, this is a multinational company. Without knowing at what level the decision was made, the Union cannot evaluate its ability to propose and bargain potential solutions. Additionally, if the decision was solely made at the local level, it potentially provides the Union evidence that Respondent has been purposely manipulating backlogs and past dues through its scheduling process to avoid granting bargained vacation benefits. The materials used to make the decision to implement the change, and the reason for the change, are relevant so the Union can look at both to determine if the intended goals of the change could be met through alternate means that would also allow employees to utilize their vacation time.

Given Respondent has maintained vacation restrictions for two years (a year and a half at the time of the information requests), and given that the parties are still seeking to bargain a new agreement, the information requested by the Union is relevant and not overly burdensome. Respondent's failure to provide the requested information violates Sections 8(a)(1) and 8(a)(5).

3. Legal Standard—8(a)(1) and 8(a)(5) Unilateral Change

"Generally, an employer has a statutory obligation to continue to follow the terms and conditions…in an expired contract until a new agreement is concluded or good faith bargaining leads to an impasse." *R.E.C. Corp*, 296 NLRB 1293 (1989); See also *Cisco Trucking Co.*, 289 NLRB 1149 (1988); *Hen House Market No. 3*, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970). When changes are made after a contract's expiration, Employer may not rely on management rights language as a basis for the change. *Valley Hospital Medical Center*, 368 NLRB No. 139 slip op at 2 (Dec. 16, 2019). The Board's contract coverage standard, adopted in *MV Transportation, Inc.*, 368 NLRB No. 66 (Sept. 10, 2019), does not effect "the status of contract provisions authorizing unilateral employer action after the contract containing the provisions has expired." *MV Transportation* at p.15 n.36. It is well-established that an employer may not unilaterally change an established past practice absent a bargaining impasse or waiver by the Union. *The Sacramento Union*, 258 NLRB 840, 841 (1989). During contract negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain, it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for an agreement as a whole. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enforced sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1991).

4. Respondent Unilaterally Changed Vacation Practices

The parties' collective bargaining agreement expired in 2017, and bargaining unit employees have been working under the terms of the expired contract. The parties are still bargaining and have not reached impasse. As such, Respondent has a duty to refrain from implementing any unilateral changes. Article 10, Section 6 of the CBA is clear: vacation requests

are granted by shift, with preference given to the senior employee on each shift, except in the circumstance where the requested vacation day is within thirty days of the request, in which case vacation requests are granted on a first-come, first-served basis. This language has been contained in the parties' collective bargaining agreement for over forty years, and vacation has always been granted by seniority and not by Labor Grade or any other factor. As detailed above, Employer made a unilateral change to the bargained practice of granting vacation by seniority when it denied vacation to Steele and granted it to Bowen, denied vacation to Miller and McAfee and granted it to Sedlar, and denied vacation to Skinner and granted it instead to Sedlar, Scott, Bowen, and Wolf. Respondent's own vacation database provides clear, indisputable evidence of the change.

Respondent also violated the 2018 settlement agreement with its handling of the 2019 lock in period. The settlement agreement requires Respondent to allow three Labor Grade 9 Fabricators to lock in vacation per any given week, and forbids Respondent from cancelling that time regardless of what vacation restrictions may be in place. Per the collective bargaining agreement, no employee is supposed to be able to lock in time already requested by a more senior employee. Brenda Skinner is number 3 on the seniority list. In February 2019, right around the time of the lock in period, she requested vacation for Christmas 2019. Skinner's was a regular vacation request, not a lock in request, but under the contract's express language no junior employee should have been able to overbook her time.

Three employees were subsequently granted lock in: two Labor Grade 9's (Geneva Waresback and Herb Sarty) and one employee, Shon Scott, from a different Labor Grade. Only Waresback was more senior to Skinner; both Sarty and Scott are below Skinner on the seniority list. When Sarty initially made his lock in request, he was told Christmas week was full.

However, General Counsel Exhibit 23 shows Waresback, Sarty, and Scott all had their requests approved on the same date, March 1, 2020. Skinner was subsequently denied her requested time.

Based on the contract, Waresback as number one on the seniority list should have been able to lock in. Skinner, as number three on the seniority list, should have had her requested days protected by her seniority; no other employee should have been able to lock those days as Skinner had already requested them. That left a third slot for Sarty, who should have been granted the time instead of being told it was full. Although Sarty did end up receiving his requested time, it was not done by contract. Again, Respondent's actions constitute a clear unilateral change.

As the collective bargaining agreement has expired, the Board's new contract coverage test from *MV Transportation* is not applicable. Even assuming the Board's new contract coverage test were applicable, Respondent's actions are not supported by the language of the expired collective bargaining agreement or the 2018 settlement agreement.

The collective bargaining agreement contains a broad management rights article granting Respondent the exclusive authority, *inter alia*, to schedule "work and hours of work" and decide "the size of the working force." The management rights article also states twice that the Respondent "agrees that in the administration of its prerogatives," the provisions of the collective bargaining agreement will apply. Examining the collective bargaining agreement provision explicitly addressing vacation requests, Respondent has the authority to "schedule vacation according to its work requirements . . . and the vacation of any employee during a slack period." The paragraph then states that Respondent "will grant vacations by shift and will give preference to the senior employee on each shift," provided requests are received more than thirty days in advance. Further, during the February lock-in period, the collective bargaining agreement states that employees may only reserve a week "not previously selected/scheduled by an employee

with more seniority." Giving effect to all the provisions contained in this paragraph, and acknowledging record testimony, it is clear that *scheduling* vacation is a distinct function from *granting* vacation requests initiated by the employee. There is no evidence that Respondent was experiencing a slack period or that there were other circumstances prompting Respondent to schedule vacations. Rather in each case, employees with higher seniority made timely requests to utilize a vacation day or "lock in" a vacation week. And, Respondent denied those requests in favor of employees with lower seniority. By granting vacation requests without regard to employee seniority, Respondent's conduct was not within the compass or scope of the agreement.

Respondent tries to claim some sort of waiver based on the 2018 Settlement Agreement and Addendum. Applying the Board's traditional waiver analysis, Respondent did not establish a waiver either by language in the contract, settlement agreement/addendum, bargaining history or past practice. *See E.I. DuPont de Nemours & Co*., 367 NLRB No. 145, slip op. at 4 (June 21, 2019); *E.I. DuPont de Nemours & Co.*, 368 NLRB No. 48, slip op. at 5 (Sept. 4, 2019). The contract provisions discussed above – including the management rights provisions – do not support finding a waiver. *Cf. Weyerhaeuser NR Co.*, 366 NLRB No. 169, slip op. at 3 (Aug. 22, 2018) (the party asserting waiver must establish that the parties "unequivocally and specifically express[ed] their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply."); *Rockford Manor Care Facility*, 279 NLRB 1170, 1174 (1986) (finding a broad management-rights clause and zipper clause, when read together, clearly and unmistakably waived a union's right to bargain over employment terms not specifically set by contract). Moreover, Respondent has not relied on any evidence of past practice or bargaining history to support finding a waiver; it has

relied solely on the contract's language. In any event, past practice would not support finding waiver because the Employer's conduct in 2019 marked a departure from the Employer's past practice of granting vacation requests by seniority. According to long-time unit employees, the Employer has always granted vacation requests by seniority, permitting those with greater seniority to "bump" employees with lower seniority. In these circumstances, where the parties' past practice remained an established term or condition of employment, Respondent had no right to unilaterally alter that practice without bargaining with the Union. Regardless of what standard or test is applied, Employer violated Section 8(a)(5) by unilaterally changing its vacation approval policies.

IV. NOTICE READING IS APPROPRIATE

Counsel for the General Counsel seeks an Order requiring that at a meeting or meetings scheduled to ensure the widest possible attendance, Respondent's Representative Charles Hart to read the notice to employees in English on work time in the presence of a Board Agent. Alternatively, Counsel for the General Counsel seeks an Order requiring that Respondent promptly have a Board agent read the notice to employees during work time in the presence of Respondent's supervisors and agents. The Board has discretion to fashion a just remedy to fit the circumstances. *Excel Case Ready*, 334 NLRB 4, 5 (2001) quoting *Maramount Corp*., 317 NLRB 1035, 1037 (1995). Notice reading may be imposed where "upper management has been directly involved in multiple violations of the Act." *Veritas Health Servs., Inc. v. NLRB*, 895 F.3d 69, 86 (D.C. Cir. 2018). Operations Manager Amend, Production Manager Roberts, and Human Resources Director Hart were all directly involved in the various unfair labor practices alleged in the instant case as well as the in unfair labor practices found by the Administrative

Law Judge related to the discharge of Union President Stroup. Respondent's pattern of unfair labor practices and the serious nature of those unfair labor practices warrant a notice reading.

V. CONCLUSION

The record overwhelmingly demonstrates Respondent violated Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the Act as alleged in the Consolidated Complaint. Counsel for the General Counsel seeks all relief as may be just and proper to remedy the unfair labor practices alleged, as well as the notice reading pled in the Consolidated Complaint and addressed in the above section.

Dated: April 8, 2020

Respectfully Submitted,

/s/ Rebecca Proctor_____

Rebecca Proctor
Counsel for the General Counsel
National Labor Relations Board, Subregion 17
8600 Farley St Ste 100
Overland Park, KS 66212-4677
(913) 275-6523
Rebecca.Proctor@NLRB.gov