

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

**STEPHENS MEDIA GROUP – WATERTOWN,  
LLC**

**and**

**STEPHENS MEDIA GROUP – MASSENA, LLC**

**and**

**Cases 03-CA-226225  
03-CA-227924  
03-CA-227946**

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

**GENERAL COUNSEL’S ANSWERING BRIEF  
TO RESPONDENTS’ EXCEPTIONS TO THE DECISION OF THE  
ADMINISTRATIVE LAW JUDGE**

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Table of Contents

**I. PRELIMINARY STATEMENT** ..... 4

**II. ARGUMENT** ..... 5

**a. The ALJ properly found that Respondent SMG Watertown violated Section 8(a)(1) of the Act when its general manager, Glenn Curry, unlawfully interrogated an employee about whether he would cross a picket line in the event of a strike. (Respondents’ Exceptions 50, 51, 52, 53, 54, 55, 56, 57)**..... 5

**b. The ALJ properly found that Respondent SMG Watertown violated Section 8(a)(1) and (5) of the Act by prematurely declaring impasse. (Respondents’ Exceptions 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 21, 23, 25)**..... 8

**c. The ALJ properly found that Respondent SMG Watertown violated Section 8(a)(1) and (5) of the Act by implementing unilateral changes after its premature declaration of impasse. (Respondents’ Exceptions 7, 22, 24, 26, 28, 29, 30, 32, 33, 34, 35)**..... 13

**d. The ALJ properly found that Respondent SMG Watertown violated Section 8(a)(1) and (5) of the Act by dealing directly with an employee to the exclusion of the Union when it offered him a position that included performing bargaining unit work. (Respondents’ Exceptions 27, 31, 45, 46, 47, 48, 49)** ..... 18

**e. The ALJ properly found that Respondent SMG Massena violated Section 8(a)(1) and (3) of the Act by discharging its employee David Romigh because he engaged in protected union activity. (Respondents’ Exceptions 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72)**..... 20

**f. The ALJ properly found that Respondent SMG Massena violated Section 8(a)(1) and (5) of the Act by failing and refusing to meet and bargain with the Union to negotiate a successor collective-bargaining agreement. (Respondents’ Exceptions 36, 37, 38, 39, 40, 41, 42, 43, 44)**..... 26

**g. The ALJ properly sanctioned Respondents’ attempt to rely on evidence Respondents failed to produce in response to the General Counsel’s subpoena. (Respondents’ Exception 19)** ..... 31

**h. Those Exceptions which do not comport with the Board’s Rules should be disregarded. (Respondents’ Exceptions 73, 74, 75, 76)** ..... 33

**III. CONCLUSION** ..... 33

## Table of Authorities

<i>American, Inc.</i> , 342 NLRB 768 (2004).....	5
<i>Armour Con-Agra</i> , 291 NLRB 962 (1988).....	16
<i>Bottom Line Enterprises</i> , 302 NLRB 373 (1991).....	13
<i>Cotter &amp; Co.</i> , 331 NLRB 787 (2000).....	10, 11
<i>Detroit Local 13 v. NLRB</i> , 398 F.2d 267 (D.C. Cir. 1979).....	11
<i>El Paso Electric Co.</i> , 355 NLRB 544 (2010).....	19
<i>Fibreboard Paper Products Corp. v. NLRB</i> , 379 U.S. 203 (1964).....	16
<i>First National Maintenance Corp. v. NLRB</i> , 452 U.S. 666 (1981).....	14
<i>Fresno Bee</i> , 339 NLRB 1214 (2003).....	14
<i>Fuqua Homes (Ohio), Inc.</i> , 211 NLRB 399 (1974).....	33
<i>Gross Electric</i> , 366 NLRB No. 81 (2018).....	21
<i>H&amp;H Pretzel Co.</i> , 277 NLRB 1327 (1985).....	12
<i>Hyundai Motor Mfg. Alabama, LLC</i> , 366 NLRB No. 166 (2018).....	22
<i>International Metal Co.</i> , 286 NLRB 1106 (1987).....	32
<i>Intersystems Design and Technology Corp.</i> , 278 NLRB 759 (1986).....	17
<i>Jerry Rice Builders</i> , 352 NLRB 1262 (2008).....	32
<i>KGTV</i> , 355 NLRB 1283 (2010).....	15
<i>Larsdale, Inc.</i> , 310 NLRB 1317 (1993).....	13
<i>McAllister Towing &amp; Transportation Co.</i> , 341 NLRB 394 (2004).....	32
<i>Multi-Ad Services</i> , 331 NLRB 1226 (2000).....	6
<i>Nexeo Solutions, LLC</i> , 364 NLRB No. 44(2016).....	10
<i>NLRB v. Universal Camera Corp.</i> , 179 F.2d 749 (2d Cir. 1950).....	32
<i>O.G.S. Technologies, Inc.</i> , 356 NLRB 642 (2011).....	14
<i>RBE Electronics of S.D., Inc.</i> , 320 NLRB 80 (1995).....	13
<i>Regal Cinemas</i> , 334 NLRB 304 (2001).....	16
<i>Renmuth, Inc.</i> , 195 NLRB 298 (1972).....	22
<i>Rossmore House</i> , 269 NLRB 1176 (1984).....	5, 6
<i>SBM Site Services, LLC</i> , 367 NLRB No. 147(2019).....	21
<i>Standard Dry Wall Products, Inc.</i> , 91 NLRB 544 (1950).....	5, 11, 29
<i>Stein Industries</i> , 365 NLRB No. 31 (2017).....	11
<i>Taft Broadcasting Co.</i> , 163 NLRB 475 (1967).....	9
<i>The Marlin Firearms Company</i> , 116 NLRB 1834 (1956).....	22
<i>Torrington Industries</i> , 307 NLRB 809 (1992).....	16
<i>Transmarine Navigation Corp.</i> , 170 NLRB 389 (1968).....	18
<i>Transportation Management</i> , 257 NLRB 760 (1980).....	7
<i>Tschiggfrie Properties, Ltd.</i> , 368 NLRB No. 120 (2019).....	20
<i>Winchell Co.</i> , 315 NLRB 526 (1994).....	15
<i>Wright Line</i> , 251 NLRB 1083 (1980).....	20
<i>Yorkaire, Inc.</i> , 297 NLRB 401 (1989).....	16, 22

Pursuant to Section 102.46(b)(1) of the Board’s Rules and Regulations, Counsel for the General Counsel (General Counsel) submits this Answering Brief to Stephens Media Group – Watertown, LLC (Respondent SMG Watertown) and Stephens Media Group – Massena, LLC (Respondent SMG Massena) (together, Respondents’) Exceptions to the Decision of Administrative Law Judge Charles J. Muhl (ALJ). It is respectfully submitted that in all respects, the findings of the ALJ are appropriate, proper, and fully supported by credible evidence.

**I. PRELIMINARY STATEMENT**

The ALJ found Respondent SMG Watertown violated Section 8(a)(1) of the Act by interrogating an employee, and Section 8(a)(1) and (5) of the Act by prematurely declaring impasse in bargaining with the National Association of Broadcast Employees & Technicians – Communications Workers of America, AFL-CIO (the Union), implementing a slew of unlawful unilateral changes after declaring impasse, and dealing directly with an employee to the exclusion of the Union. (ALJD 3:5-7).<sup>1</sup> The ALJ found that Respondent SMG Massena violated Section 8(a)(1) and (3) of the Act by discharging its employee David Romigh in retaliation for his union activity, and Section 8(a)(1) and (5) of the Act by failing and refusing to meet with the Union to bargain a successor collective-bargaining agreement (CBA). (ALJD 3:7-8, 23-29).

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<sup>1</sup> References to the ALJ’s decision shall be designated (ALJD \_\_:\_\_) showing the page number first, followed by the line numbers; to the Respondent’s Brief as (R. Brief \_\_) where the blank is the page number; to the transcript as (Tr. \_\_); to the General Counsel’s Exhibits as (GC Exh. \_\_); to Respondents’ Exhibits as (R. Exh. \_\_); and to Joint Exhibits as (J. Exh \_\_).

## II. ARGUMENT<sup>2</sup>

- a. **The ALJ properly found that Respondent SMG Watertown violated Section 8(a)(1) of the Act when its general manager, Glenn Curry, unlawfully interrogated an employee about whether he would cross a picket line in the event of a strike. (Respondents' Exceptions 50, 51, 52, 53, 54, 55, 56, 57)**

Respondents' Exceptions 51, 52, and 54 relate to the ALJ's decision to credit the testimony of General Counsel witness and former employee Frank Laverghetta instead of Respondents' witness, Respondent SMG Watertown general manager Glenn Curry. (ALJD 11:6-13). The ALJ's credibility resolutions are precluded from reversal unless "a clear preponderance of all the relevant evidence" convinces the Board that they are wrong. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951); *American, Inc.*, 342 NLRB 768 (2004) (Board relies on the judge, as finder of fact, to make determinations regarding credibility of witnesses whose testimony is in conflict.) The ALJ explained his decision to credit Laverghetta over Curry, stating that "[w]hen testifying about what occurred, Laverghetta appeared certain and matter-of-fact. In contrast, Curry's demeanor appeared unreliable and his account of their conversation was inconsistent and implausible." (ALJD 11 fn. 24). The ALJ's credibility determination should be upheld, and Respondents' Exceptions 51, 52, and 54 should be dismissed.

Next, Respondents' Exception 53 excepts to the ALJ's application of *Rossmore House*, 269 NLRB 1176 (1984), to find that Curry's conversations with Laverghetta constituted

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<sup>2</sup> Respondents' Exception 20 objects to the ALJ's failure to acknowledge certain correspondence between the parties, and failure to find that the communications between the parties did not establish bad faith on the part of the Union. The context of those findings was an allegation that Respondent SMG Watertown engaged in surface bargaining. The ALJ dismissed that allegation, and neither the General Counsel nor the Charging Party Union took exception to the ALJ's conclusion. Because it would not alter any of the legal conclusions reached by the ALJ, Respondents' Exception 20 should be dismissed.

interrogations. Contrary to Respondents' Exception, the ALJ properly cited *Rossmore House* and correctly concluded that Curry interrogated Laverghetta. The ALJ cited *Rossmore House* for the well-established proposition that "an unlawful interrogation is one which reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act, under the totality of the circumstances." 269 NLRB at 1178 fn. 20. (ALJD 36:37-40). The ALJ also noted the test is objective and does not rely on the subjective question of whether an employee was actually intimidated. *Multi-Ad Services*, 331 NLRB 1226, 1227-1228 (2000), *enfd.* 255 F.3d 363 (7th Cir. 2001) (ALJD 37:1-2). The ALJ properly applied the *Rossmore House* factors to this case, noting that Curry is the general manager of SMG Watertown which is the highest-level position at the facility. Both of his conversations with Laverghetta were one-on-one. Despite the parties' past successful bargaining relationship, the current bargaining, which was happening on the same days Curry spoke to Laverghetta, was heated. (Tr. 283). Moreover, as Laverghetta was uneasy, he did not respond openly to Curry about whether he would cross a picket line. (Tr. 282). The ALJ properly applied *Rossmore House* and found that Curry's coercive statements violated Section 8(a)(1) of the Act. (ALJD 37:34-42). The ALJ's finding should be upheld, and Respondents' Exception 53 should be dismissed.

Respondents' Exception 50 excepts to the ALJ's finding that SMG Watertown violated the Act by interrogating employees about union activities, and Respondents' Exception 55 excepts to the ALJ's failure to find that Curry's interrogation of Laverghetta was de minimis and therefore did not violate the Act. Based on his credibility findings, discussed above, the ALJ found that "as negotiations were ongoing, Curry asked Laverghetta...if he would cross a picket line in the event of a strike. The next day, Curry told Laverghetta he had informed Stephens that Laverghetta would cross a picket line." (Tr. 281-283) Both comments were accompanied by

Curry's statements that negotiations were heated and not going well. (ALJD 37:11-15). Contrary to Respondents' assertion that Curry's statements were either not coercive or were so de minimis as to fail to constitute a violation of the Act, the ALJ properly noted that "questioning employees regarding their intention to participate in a strike...is inherently coercive and tends to interfere with employees' Section 7 rights." *Transportation Management*, 257 NLRB 760, 767 (1980) (ALJD 37:17-18). As the ALJ discussed, no evidence was presented to explain why Curry assumed a strike might be in the works. Curry did not explain why he asked Laverghetta that question. Curry also failed to assure him his response would not result in reprisals, which the ALJ noted was a concern of Laverghetta's given his lack of response to Curry's questions. (ALJD 37:31-32). The ALJ properly evaluated the facts under *Rossmore House* and correctly determined that Curry interrogated Laverghetta in violation of Section 8(a)(1) of the Act. Therefore, the ALJ's findings should be upheld and Respondents' Exceptions 50 and 55 should be dismissed.

Respondents' Exception 56 objects to the ALJ's conclusion of law that Respondent SMG Watertown violated the Act by interrogating employees about union activities, and Respondents' Exception 57 objects to the ALJ's recommended order relating to that interrogation. The ALJ properly found that Curry interrogated Laverghetta in violation of Section 8(a)(1) of the Act. Aside from objecting to the finding itself, Respondents do not put forth any argument as to why the ALJ's conclusion of law and recommended order relating to that allegation are improper. Therefore, as the ALJ's finding was correct, the ALJ's conclusion of law and recommended order relating to the interrogation should be upheld and Respondents' Exceptions 56 and 57 should be dismissed.

**b. The ALJ properly found that Respondent SMG Watertown violated Section 8(a)(1) and (5) of the Act by prematurely declaring impasse. (Respondents' Exceptions 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 21, 23, 25)**

Respondents' Exceptions 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 21, and 23 all relate to the ALJ's finding that Respondent SMG Watertown violated Section 8(a)(1) and (5) of the Act by prematurely declaring impasse on August 22, 2018. Respondents' argue that the parties were at a lawful impasse and therefore it was justified in implementing several unilateral changes (discussed *infra*). This argument is not persuasive. The ALJ properly concluded that Respondent SMG Watertown failed to meet its burden of proving impasse. (ALJD 23:37-38).

As the ALJ noted, the Union sent initial proposals for both contracts to Respondents in May 2018. (ALJD 4:34-5:3). King responded with a Watertown proposal in June. (ALJD 5:18-19; J. Exh. 5). The scope of Respondent SMG Watertown's proposed changes to the contract – including removing layoff protection, removing layoff by seniority, and deleting the union security clause – led the Union to deem face to face bargaining necessary. (ALJD 6:11-17; J. Exh. 6). As the ALJ correctly noted, the parties did meet to bargain on August 15, 16, and 17.<sup>3</sup> (ALJD 7:7-9, 31; 10:12; 11:8). While they made progress on peripheral matters, the Union refused to agree to Respondent SMG Watertown's proposal to eliminate layoff by seniority. The Union initially agreed to present a counter proposal on layoffs on August 17 but was unable to do so as the bargaining committee was uncomfortable with the language drawn up by Gabalski

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<sup>3</sup> Respondents' Exception 9 excepts to the ALJ's finding that the parties did not discuss layoffs on August 16, 2018. However, the ALJ based this finding in part on the testimony of Respondents' own witness, King, who testified that every time he tried to steer discussions on August 16 back to layoffs, the Union would say it was working on it and continue discussing other provisions. (ALJD 10:37-38; Tr. 339-340). Because the record demonstrates that the parties did not in fact bargain over layoffs that day, the ALJ's finding should be upheld and Respondents' Exception 9 should be dismissed.

and wanted further time to discuss it.<sup>4</sup> (ALJD 11:16-19; Tr. 88). On August 20, the Union delivered a package proposal to Respondent SMG Watertown. (ALJD 12:1-2; Tr. 90; J. Exh. 19). In that proposal, the Union included language previously proposed by Respondent SMG Watertown that would expand its ability to use non-bargaining unit employees to perform bargaining unit work, in return for strengthened layoff protection for bargaining unit employees. (ALJD 12:3-12). Dissatisfied with the Union’s proposal, and despite several outstanding proposals and issues, Respondent SMG Watertown declared impasse on August 22. (ALJD 13:5-12; J. Exh. 20).

As the ALJ noted, “[a] bargaining impasse occurs when good-faith negotiations have exhausted the prospects of reaching an agreement.” *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967). The ALJ properly evaluated the facts under *Taft Broadcasting*, and found that impasse did not exist on August 22. (ALJD 21:23-24). The ALJ noted that though the parties previously had an uneventful bargaining history, both sides now had new representatives bargaining for the first time. (ALJD 21:24-30). The ALJ noted that Respondent SMG Watertown’s proposal sought “major changes in unit employees’ working conditions.” (ALJD 21:36). He noted that the parties bargained face to face for only two and a half days, and that during that time, the parties did not discuss all the issues that were in dispute. For example, Respondent SMG Watertown had never

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<sup>4</sup> Respondents’ Exception 10 excepts to the ALJ’s failure to find that the parties ‘wasted’ half a day on August 17 waiting for union bargaining committee member Walts to approve the proposal and that the Union’s insistence on waiting for Walts evinced bad faith. The ALJ addressed this issue. (ALJD 10:8-19). Respondents’ own witness testified that while they were waiting for Walts, they discussed other issues such as wage increases and compliance with New York State minimum wage laws – hardly a ‘waste’ of time since those issues remained outstanding. (Tr. 352-354). Respondents’ Exception 10 should be dismissed.

responded to the Union's initial proposals on issues such as holidays and a 401(k) match for unit employees. (ALJD 22:10-13).

Importantly, as the ALJ acknowledged, there was no evidence that both parties believed they were "at the end of their rope." *Nexeo Solutions, LLC*, 364 NLRB No. 44, slip op. at 12 (2016). (ALJD 21:18-19). Indeed, it was quite the reverse. After receiving Respondent SMG Watertown's August 22 letter declaring impasse, the Union responded that "we are miles away from impasse" and requested future dates to continue bargaining. (ALJD 22:15-19; J. Exh. 21).

Finally, Respondents' argument against impasse rests on the supposition that because the Union's August 20, 2018 proposal offered less than what Respondent SMG Watertown wanted, the Union was necessarily bargaining in bad faith, and therefore the parties were at an impasse even though myriad other issues were still outstanding and proposals had been successfully exchanged over the three days of face to face bargaining. The ALJ was correct to reject this argument.<sup>5</sup> He noted that while Respondent SMG Watertown's frustration was understandable, it was also understandable that the Union would need time to come up with a counterproposal in light of King's stating, for the first time at the table, that the company wanted to implement voice tracking and that it was possible layoffs would occur.<sup>6</sup> (ALJD 23:5-10; Tr. 465). And,

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<sup>5</sup> Respondents except to the ALJ rejecting its contention that the Union bargained in faith when union bargaining committee member Dianne Chase commented that the membership "would never go for" a contract that did away with layoff by seniority. "It is commonplace that experienced negotiators make concessions cautiously and that negative initial reactions are later reconsidered in order to obtain agreement." *Cotter & Co.*, 331 NLRB 787, 787 (2000). The ALJ correctly found that Chase's statement at the bargaining table did not mean that the Union was foreclosing the possibility completely. (ALJD 23:25-29). Therefore, Respondents' Exception 14 should be dismissed.

<sup>6</sup> Respondents' Exception 3 excepts to the ALJ's decision to credit King's testimony on cross-examination, wherein he testified that he told the Union there might be layoffs, over his testimony on direct examination, wherein he testified that he "did not think there would be job loss." (Tr. 328, 465), and to the ALJ's determination that King did not specifically tell the Union

although the concessions made by the Union in its August 22 proposal were not “huge concessions,” the package (which was the Union’s initial counterproposal on layoffs) did open the door to the company’s use of voice tracking. (J. Exh. 19). The ALJ noted that “the Union’s decision to take a hard position at the outset of the negotiations does not mean it would refuse to yield later in the process after future bargaining. *Stein Industries*, 365 NLRB No. 31, slip op. at 3-4 fn. 8 (2017); *Detroit Local 13 v. NLRB*, 398 F.2d 267, 273 (D.C. Cir. 1979) (ALJD 23:20-24).

The ALJ also noted that the bargaining sessions the parties held in August involved the normal back and forth of bargaining, with the parties reaching tentative agreements. (ALJD 22:21-25). He noted that even though the tentative agreements were on minor subjects, they demonstrated that instead of acting in bad faith, the Union was exhibiting flexibility and willingness to compromise to reach an agreement. This supported a conclusion that there was no impasse on August 22.<sup>7</sup> *Cotter & Co*, 331 NLRB at 787. (ALJD 22:25-27).

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that Respondent SMG Watertown intended to implement voice tracking for all shows except the morning shows. (Tr. 325-328). The ALJ’s credibility determination should be upheld. *Standard Dry Wall Products, Inc.*, 91 NLRB at 545. Moreover, the ALJ’s recognition that though King told the Union that Respondent SMG Watertown wanted to modernize, he did not lay out the specifics of the plan, should also be upheld as it is supported by the evidence. (ALJD 8 fn. 14; Tr. 462-464). Therefore, Respondents’ Exception 3 should be dismissed.

Respondents’ Exception 11 excepts to the ALJ’s finding that Respondent SMG Watertown adopting voice tracking would mean less unit work for on-air employees. Given that the reason Respondent SMG Watertown wanted to implement voice tracking was so that unit employees would produce the same amount of content (a morning radio show) in less time resulting in reduced hours of work, it is inconceivable that the ALJ could come to any other conclusion. (Tr. 588-589). This exception should be dismissed.

<sup>7</sup> Respondents’ Exception 15 excepts to the ALJ’s failure to find that an impasse occurred because the Union did not respond to Respondent SMG Watertown’s attempt to negotiate on layoffs after the August 2018 bargaining. This assertion is incorrect as the Union sent a proposal to Respondent SMG Watertown on August 20, after the three days of face to face bargaining, that did address layoffs. (J. Exh. 19). Moreover, no further negotiation over layoffs could have happened after Respondent SMG Watertown declared impasse on August 22 given that it went

Finally, the ALJ correctly distinguished *H&H Pretzel Co.*, 277 NLRB 1327 (1985), upon which Respondents relied, from the instant case. In that case, the employer made its layoff proposals because of its financial woes and the union proposed wage and benefit increases without regard for the company's financial distress. That is not the case here. First, Respondents make no argument that Respondent SMG Watertown planned to implement voice tracking because of any financial hardship. Second, in *H&H Pretzel Co.* the union rejected both proposals out of hand and by membership vote. Here, the Union did not reject Respondent SMG Watertown's initial proposal out of hand but made a counterproposal.

Having found that Respondent SMG Watertown prematurely declared impasse on August 22, 2018, the ALJ's recommended order requires it to, upon request, continue bargaining with the Union before implementing any changes to unit employees' wages, hours, or other terms or conditions of their employment. Respondents except to this recommended order but do not argue that the order itself is inappropriate, just that the underlying findings are incorrect. As the ALJ's findings were correct, the ALJ's recommended order is appropriate and should be upheld. Respondents' Exception 25 should be dismissed.

For the foregoing reasons, the ALJ's findings relating to Respondent SMG Watertown's premature declaration of impasse should be upheld in their entirety, and Respondents' Exceptions 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 21, 23, and 25 should be dismissed.

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forward with its plan to lay off bargaining unit employees the very next day. (Tr. 216-217). Respondents' Exception 15 should be dismissed.

**c. The ALJ properly found that Respondent SMG Watertown violated Section 8(a)(1) and (5) of the Act by implementing unilateral changes after its premature declaration of impasse. (Respondents' Exceptions 7, 22, 24, 26, 28, 29, 30, 32, 33, 34, 35)**

After prematurely declaring impasse on August 22, on August 23, 2018 Respondent SMG Watertown laid off certain full-time employees, eliminated the regularly scheduled shifts of three part-time employees,<sup>8</sup> reduced the hours of two part-time employees,<sup>9</sup> and transferred bargaining unit work to non-bargaining unit employees. (ALJD 25:19-24). Where parties are engaged in collective bargaining, an employer's obligation to refrain from unilaterally changing employees' terms and conditions of employment encompasses a duty to refrain from such changes absent overall impasse on bargaining for the agreement as a whole. *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). (ALJD. 25:10-15). As the ALJ noted, "any unilateral change to employees' terms and conditions of employment without a valid impasse violated Section 8(a)(5)." *Larsdale, Inc.*, 310 NLRB 1317, 1318-1319 (1993). (ALJD 25:15-17). As discussed above, the ALJ properly found that Respondent SMG Watertown prematurely declared impasse.

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<sup>8</sup> Respondents' Exception 29 objects to the ALJ's finding that part-time employee Holly Gaskin was not rehired. This finding is correct and is fully supported by the record. It is true that after being laid off, Gaskin's supervisor did ask if she would be interested in part-time work if it was available in the future. However, Gaskin was never actually rehired and never worked for Respondent SMG Watertown again. (Tr. 273-276, 551-552, 586-589; R. Exh. 5). The ALJ's finding should be upheld, and Respondents' Exception 29 should be dismissed.

<sup>9</sup> Respondents' Exception 28 objects to the ALJ's finding that part-time employee Brian Best's work hours decreased and the failure to acknowledge that Best's wages increased. The ALJ's finding that Best's work hours decreased is fully supported by the record, including the testimony of Respondents' own witness. (Tr. 45-47; GC Exh. 6). The fact that Best's wages increased is irrelevant to the determination that Respondent SMG Watertown unilaterally changed his terms and conditions of employment specifically by decreasing his hours. The ALJ's finding was correct and is supported by the record. It should be upheld, and Respondents' Exception 28 should be dismissed.

The ALJ also was correct in concluding that Respondent SMG Watertown failed to meet its burden of showing that the unilateral changes were in some other way privileged. (ALJD 25:27-31), citing *Fresno Bee*, 339 NLRB 1214, 1214 (2003). Respondents argue that under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 676-678 (1981), its decision to eliminate live broadcasts and automate them instead via voice tracking constituted a change in scope and direction of its business and therefore was not a mandatory subject of bargaining. The ALJ properly rejected this argument. Under the Supreme Court's *First National* framework, an employer's management decisions fall into three categories. First, those that have only an "indirect and attenuated" impact on the employment relationship and therefore are not mandatory subjects of bargaining; second, those that "are almost exclusively an aspect of the relationship between employer and employee" and therefore are mandatory subjects; and third, those that have "a direct impact" on employment but are focused "only on the economic profitability" of the business. Decisions in the third category are mandatory subjects of bargaining only if the benefit of bargaining outweighs the burden on the conduct of the business. (ALJD 25:39-46:9).

The ALJ correctly found that *First National Maintenance* did not apply in this case because Respondent SMG Watertown did not close a line of business or reduce its existing business, but instead continued to broadcast the same number of shows from the same stations with the same morning drive hosts. Moreover, listeners could not tell whether a program was live or had been voice tracked and pre-recorded. The actual work performed by the on-air personalities – talking to the audience between songs, going on commercial breaks – did not change. The only difference was that the work was pre-recorded instead of performed live. The ALJ properly found that Respondent SMG Watertown changed its operation by degree, not kind. (ALJD 26: 40-41). *O.G.S. Technologies, Inc.*, 356 NLRB 642, 644-645 (2011) (outsourcing of

unit work to subcontractor which utilized more advanced technology and resulted in layoff of one employee and reassignment of another to supervisory position was not change in scope and direction); *Winchell Co.*, 315 NLRB 526, 526 fn. 2 (1994) (investment in desktop computers which reduced unit work and resulted in layoffs was not change in scope and direction, where company continued to perform all but the initial steps of its production process.)

The ALJ properly found that Respondents' reliance on *KGTV*, 355 NLRB 1283 (2010) was misplaced. In that case, a television station did not violate the Act when it eliminated a Sunday morning news cast and laid off three employees. Here, Respondent SMG Watertown did not eliminate any of its programs. As the ALJ pointed out, the employer's actions in *KGTV* were akin to a partial closure of its business, and therefore *First National Maintenance* would apply. But here, there was no closure, partial or whole, of Respondent SMG Watertown's business.

Instead, the ALJ correctly looked at the actual changes Respondent SMG Watertown made. First, Respondent SMG Watertown subcontracted with an out-of-state worker to produce two on-air broadcasts formerly assigned to unit employees.<sup>10</sup> (ALJD 27:5-8; GC. Exh. 5). The ALJ recognized that an employer's decision to replace employees in an existing bargaining unit with those from an independent contractor to do the same work under similar conditions of employment is a mandatory subject of bargaining. *Torrington Industries*, 307 NLRB 809, 810-

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<sup>10</sup> Respondents' Exception 24 objects to the ALJ's finding that the use of "best talent" would be a mandatory subject of bargaining, and that Respondent SMG Watertown using talent from out of town would have "nothing to do with talent." The ALJ correctly noted that even if the Union had agreed to allow Respondent SMG Watertown to subcontract bargaining unit work out to whoever it could find that was most talented, replacing a unit employee with non-unit "best talent" would still be a mandatory subject of bargaining as it directly concerns employees' wages, hours, and working conditions. Further, the ALJ noted that Respondents did not present any evidence that the use of on-air personalities located in Tulsa, Oklahoma, where Respondents are headquartered, was based on talent. (ALJD 28 fn. 54, Tr. 547). The ALJ was correct in both respects, and Respondents' Exception 24 should be dismissed.

811 (1992) (employer's layoff of two unit drivers and replacement of them with a non-unit employee and an independent contractor was a mandatory subject of bargaining); *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964) (employer's decision to subcontract work of employees, unaccompanied by any substantial commitment of capital or change in the scope of business, is not at the core of entrepreneurial control and is thus subject to bargaining). (ALJD 27:8-18). Furthermore, Respondent SMG Watertown laid off a morning show host and almost immediately rehired him to a newly created supervisory position where he continued to perform the same radio broadcast he did as a unit employee, but through voice tracking. (ALJD 27:18-21; Tr. 567). As discussed by the ALJ, transferring bargaining unit work to supervisors is a mandatory subject of bargaining where it impacts unit work. *Regal Cinemas*, 334 NLRB 304, 304 (2001). (ALJD 27:21-28:1).

Respondents argument that the changes made by Respondent SMG Watertown after declaring impasse were not mandatory subjects of bargaining lacks merit. The ALJ correctly rejected this argument and his findings should be upheld. Respondents' Exceptions 7, 22, and 30 should be dismissed.

In Exception 32, Respondents except to the ALJ's failure to find the Union waived its right to bargain over the August layoffs. This is the first time the Respondents argue the Union waived bargaining over this issue. "A contention raised for the first time in exceptions before the Board is ordinarily untimely raised and, thus, deemed waived." *Yorkaire, Inc.*, 297 NLRB 401, 401 (1989); *Armour Con-Agra*, 291 NLRB 962 fn. 1 (1988). Because Respondents failed to make this argument in their Answer to the Complaint, at the hearing before the ALJ, or in their brief to the ALJ, it should be rejected as untimely. Even if the argument were timely raised, Respondent SMG Watertown fails to recognize that because it failed to provide notice and an

opportunity to bargain over its plan to lay off full time employees, reduce part time hours, cut part time schedules, and transfer unit work to non-unit employees, and instead presented the Union with a *fait accompli*, the Union was not obligated to request bargaining. *See Intersystems Design and Technology Corp.*, 278 NLRB 759, 759-760 (1986). Respondents argue that Respondent SMG Watertown gave the Union notice when King told the Union at bargaining that Respondent SMG Watertown wanted to reach a contract that would allow it to modernize. This does not constitute proper notice as King did not tell the Union that Respondent SMG Watertown wanted to lay off full-time employees, and, at the same time, part-time employees would have their regularly scheduled shows eliminated and their hours reduced, and that Respondent SMG Watertown would transfer bargaining unit work to non-unit employees. Moreover, the Union clearly objected even to the outline of the ‘modernization’ plan that King did set forth, and the parties were in the process of bargaining over that issue. The Union certainly did not waive its right to bargain over Respondent SMG Watertown’s ability to lay off employees, reduce hours, cut shifts, and transfer unit work out of the unit. Respondents’ Exception 32 should be dismissed.

Respondents’ Exception 26 excepts to the ALJ’s finding that Respondent SMG Watertown unilaterally changed unit employees’ terms and conditions of employment and working conditions. For the reasons discussed in the foregoing paragraphs, the ALJ’s conclusion that Respondents violated Section 8(a)(1) and (5) of the Act by unilaterally changing employees’ terms and conditions of employment should be upheld, and Respondents’ Exception 26 should be dismissed. Further, as Respondents’ Exceptions 33 and 34 take issue with the conclusions of law and recommended order not because they themselves are deficient but only because Respondents’ except to the underlying findings, those exceptions should be dismissed as well.

Respondents' Exception 35 objects to the ALJ's proposed remedies based on his findings that Respondent SMG Watertown both prematurely declared impasse and unilaterally changed employees' terms and conditions of employment. Specifically, Respondents argue the ALJ erred in proposing a make whole remedy instead of limiting the remedy to two weeks under *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). The ALJ's proposed remedies are correct. Respondent SMG Watertown did more than just fail to bargain over the effects of its decision, but also failed to bargain over the decision itself to implement its voice tracking plan. It prematurely declared impasse in bargaining and unilaterally laid off employees without providing notice or an opportunity to bargain to the Union. The ALJ was correct in determining that because Respondent SMG Watertown's bargaining obligation was not limited to bargaining over the effects of its decision to implement voice tracking, a *Transmarine* remedy would be inappropriate in this matter. (ALJD 49 fn. 85). Therefore, Respondents' Exception 35 should be dismissed.

**d. The ALJ properly found that Respondent SMG Watertown violated Section 8(a)(1) and (5) of the Act by dealing directly with an employee to the exclusion of the Union when it offered him a position that included performing bargaining unit work. (Respondents' Exceptions 27, 31, 45, 46, 47, 48, 49)**

Respondents' Exceptions 27, 31, 45, 46, 47, 48, and 49 relate to the ALJ's finding that Respondent SMG Watertown dealt directly with employee Michael Stoffel in violation of Section 8(a)(1) and (5) of the Act, including the findings that the supervisory position Respondent SMG Watertown created and offered employee Michael Stoffel involved the performance of bargaining unit work and therefore was a mandatory subject of bargaining; and that Respondent SMG Watertown was not free to unilaterally move bargaining unit work to the supervisory position. Further, Respondents except to the ALJ's conclusions of law and recommended order relating to those allegations.

Each of Respondents' exceptions must fail. As the ALJ pointed out, the supervisory position created by Respondent SMG Watertown involved some of the bargaining unit work Stoffel performed before being laid off. (ALJD 30:30-41; Tr. 567). Because the position involved the transfer of bargaining unit work to non-bargaining unit personnel, it was a mandatory subject of bargaining. (ALJD 31:38-40). Respondents take exception to the ALJ's finding that the new position was supervisory in nature, noting that no testimony was offered relating to Stoffel's 2(11) status. Respondent fails to understand that if the position was not supervisory in nature it would still be a mandatory subject of bargaining as it included performing bargaining unit work. And further, any argument that the position was truly a supervisory position was Respondents' burden to establish.

After concluding that the position was a mandatory subject of bargaining, the ALJ looked to *El Paso Electric Co.*, in which the Board held that an employer deals directly with an employee where 1) the employer communicates directly with union-represented employees; 2) the discussion is for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining; and 3) the communication is made to the exclusion of the Union. 355 NLRB 544, 545 (2010). Applying those factors, the ALJ noted that Respondent SMG Watertown communicated directly with Stoffel to offer him the new position which, as it involved bargaining unit work, was a mandatory subject of bargaining; the offer resulted in a change to his terms and conditions of employment; and the discussion took place with no notice to the Union. (AJLD 30:38-44, 31:1-3; Tr. 27). The ALJ properly determined that Respondent SMG Watertown engaged in direct dealing in violation of Section 8(a)(1) and (5) of the Act. The ALJ's finding that Respondent

SMG Watertown dealt directly with Stoffel in violation of the Act and his related findings should be upheld, and Respondents' Exceptions 27, 31, 45, 46, and 47 should be dismissed.

Finally, Respondents' Exceptions 48 and 49 address the ALJ's conclusions of law and proposed order regarding the direct dealing allegation. As Respondents put forth no argument as to why the conclusions of law and proposed order are defective other than its exception to the finding itself, the ALJ's conclusions of law and proposed order should be upheld, and Respondents' Exhibits 48 and 49 should be dismissed.

- e. **The ALJ properly found that Respondent SMG Massena violated Section 8(a)(1) and (3) of the Act by discharging its employee David Romigh because he engaged in protected union activity. (Respondents' Exceptions 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72)**

Respondents submit a swath of exceptions relating to the ALJ's finding that Respondent SMG Massena violated Section 8(a)(1) and (3) of the Act by discharging its employee David Romigh because he engaged in protected activity. Despite Respondents' contentions, the ALJ properly evaluated the record evidence, applied the appropriate law, and concluded that Respondent SMG Massena's actions violated the Act, and his findings should be upheld.

Respondents' Exceptions 58, 59, 60, 62, 64, 65, 66, and 69 relate directly to the ALJ's evaluation of the facts under the burden-shifting framework set forth in *Wright Line*, 251 NLRB 1083 (1980). As the ALJ correctly pointed out, the framework established by the Board in *Wright Line* is inherently a causation test. *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 7 (2019), quoting *Wright Line*, supra, 251 NLRB at 1089 (“[The Board’s] task in resolving cases alleging violations which turn on motivation is to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of their employer which detrimentally affect such employees’ employment.”). (ALJD 44:11-16). To prove a discriminatory discharge under *Wright Line*, the General Counsel must demonstrate

by a preponderance of the evidence that the employee's protected conduct was a motivating factor in the employer's discharge decision. *SBM Site Services, LLC*, 367 NLRB No. 147, slip op. at 2 (2019). (ALJD 40:16-20).

Under *Wright Line*, the General Counsel must first demonstrate that an employee was engaged in protected activity. The ALJ correctly determined that the General Counsel in this case proved that Romigh was engaged in protected activity when he informed bargaining unit members that Curry was being investigated and had been required to take anger management classes. The ALJ correctly noted that here, like in *Gross Electric*, 366 NLRB No. 81 (2018), Romigh was engaged in union activity. In *Gross Electric*, the Board found that a union president was engaged in protected activity when, at a labor-management committee meeting where he served as a committee member, he questioned a company's owner about why he rejected applicants who had not worked for him before, and criticized him for employing a supervisor that bullied employees. The Board determined that the union president's conduct was protected because his statements directly related to union members' employment concerns, and therefore related directly to his role as president. Moreover, the union president only attended the meeting in connection with his role as a union official.

Here, Chase informed Romigh that Curry was being investigated and was required to take anger management classes because Romigh was the Massena steward. (Tr. 204-205, 262). The ALJ noted that issues of harassment of a coworker by a high-level supervisor would naturally relate to unit members' employment concerns. (ALJD 45:11-12). Romigh, in his capacity as a steward, related the information to unit employees. (ALJD 45:9-15; Tr. 262). The ALJ correctly found that Romigh was engaged in union activity when, as shop steward and at bargaining unit

employees' request, he told unit members about the circumstances that were causing their manager to act differently than normal.<sup>11</sup> (ALJD 44:11-20).

Next, the General Counsel must show that the employer was aware of the union activity and exhibited animus toward it. Again, the ALJ correctly found that the General Counsel in this case met this burden. (ALJD 46: 4-7). Romigh told bargaining unit members about Curry's issues in April 2018. Shortly thereafter, supervisor Sharlow told Curry that Romigh was talking about him with unit members. (ALJD 40:10-15). In May, Curry increased his own and other supervisors' monitoring of Romigh's job performance. (ALJD 46:10-14). Curry discharged Romigh the day after he finished the anger management classes that Romigh told unit members

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<sup>11</sup> As the ALJ notes, even if Romigh's conduct was not protected, Curry perceived Romigh to be engaged in union activity. This is evidenced by Curry's own written communications to Chase following Romigh's discharge, in which he wrote that he heard Romigh was telling unit employees that the union wanted to have Curry removed from his position because of the harassment allegation. As the ALJ noted, an employer violates the Act when it discharges an employee because the employee engaged in, or is believed to have engaged in, protected conduct. *Hyundai Motor Mfg. Alabama, LLC*, 366 NLRB No. 166 slip op. at 2 (2018). Respondents' Exception 68 excepts to the ALJ's failure to find that Romigh lost the protection of the Act by spreading false rumors about Curry. However, Respondents did not raise the affirmative defense that Romigh lost the protection of the Act in its Answer to the Complaint or in its Brief to the Administrative Law Judge. Instead, Respondents raise this argument for the first time in its Exceptions. "A contention raised for the first time in exceptions before the Board is ordinarily untimely raised and, thus, deemed waived." *Yorkaire, Inc.*, supra at 401. As Respondents' Exception 68 raises this issue for the first time in exceptions before the Board, it should be deemed untimely raised and thus waived, and Respondents' Exception 68 should be dismissed. Moreover, even if Respondents had timely raised the exception, Romigh's conduct did not lose the protection of the Act. Misstating the reasons behind the complaint against Curry is not the type of egregious conduct the Board has found to render an employee outside the protections of the Act. Where there is no evidence that an employee intended to cause malicious injury, "employees do not forfeit the protection of the Act when, in discussing matters of such vital concern as their conditions of work, they give currency to inaccurate (but not deliberately or maliciously false) information." *Renmuth, Inc.*, 195 NLRB 298, 304, (1972), citing *The Marlin Firearms Company*, 116 NLRB 1834, 1839-1840 (1956). Here, there is no evidence that Romigh's misstatement was deliberate or malicious. Even if Respondents' Exception 68 was timely raised, it lacks merit.

Curry was required to take. (ALJD 46:10-11; Tr. 657-658). As the ALJ noted, Curry wrote three separate letters to union president Chase informing her of, and then elaborating on, his decision to terminate Romigh. (ALJD 46:4-20). The letters offer an ever-expanding list of reasons for discharging Romigh, some of which date back to the beginning of his employment, and each letter includes discussion of the fact that Romigh talked to other employees about him. (GC Exhs. 21, 23, 25). As the ALJ noted, this “wide variety of shifting explanations” demonstrates animus.” (ALJD 46:10-11). In one letter, Curry writes that he feels that he is “on a short leash” because of Romigh’s discussions with unit employees about him. (ALJD 46:9). Moreover, after Curry became aware of Romigh’s actions, he subjected his work performance to increased scrutiny. (ALJD 46:12-13). The ALJ properly found that Respondent SMG Massena was aware of, and exhibited animus toward, Romigh’s protected activity. (ALJD 46:1-2).

Next, the burden shifted to Respondent SMG Massena to prove that it would have taken the same adverse employment action against Romigh even if he had not engaged in protected activity. (ALJD 46:22-24). Respondents’ claim that Respondent SMG Massena was justified in discharging Romigh because he was a poor employee. Respondents lay out Romigh’s many flaws, including, but not limited to, chronic lateness, falling asleep on the air, turning in incorrect time sheets, discussing personal issues on the air, and failing to appear at a scheduled live event. The ALJ properly considered the evidence of Romigh’s job performance. (ALJD 46:24-47:4). But, as the ALJ noted, this litany of issues fails to justify Romigh’s discharge in June 2018 because Respondent SMG Massena tolerated Romigh’s behavior from the commencement of his employment up until he engaged in protected activity. (ALJD 47:4-8). Moreover, Curry specifically cited Romigh’s protected activity in each of the three letters he wrote to the Union to justify his discharge. (GC Exhs. 21, 23, 25).

Respondent SMG Massena became concerned enough with Romigh's work performance to discharge him only after he engaged in protected activity. The record reflects that for most of his time working for Respondent SMG Massena, instead of disciplining Romigh, his supervisors would instead remind him to stay awake, wake him up, fix his time sheets, or talk to him as a friend about his personal issues. (Tr. 165-167, 170-171, 173, 177, 643, 647-650, 758-759, 773). Curry only determined that Romigh's actions (going back to the start of his employment with Respondent SMG Massena) warranted discharge after he learned that Romigh spoke about him to unit members. That Curry only decided to discharge Romigh after he became aware that Romigh talked to bargaining unit members about Curry shows that the decision to discharge Romigh was motivated by Romigh's protected activity. As the ALJ noted, Respondent SMG Massena did not show that it had previously discharged employees under similar circumstances or that it had never encountered a comparable situation. (ALJD 47:10-12). The ALJ correctly concluded that Respondent SMG Massena discharged David Romigh in retaliation for his protected activity in violation of Section 8(a)(1) and (3) of the Act, and Respondents' Exceptions 58, 59, 60, 62, 64, 65, 66, and 69 should be dismissed.

In Exception 61, Respondents object to the ALJ noting that employee Ashlee Tracey submitted a complaint to union president Dianne Chase about general manager Glenn Curry. But Tracey did complain to Chase, who brought the issue to Stephens, who investigated it. (Tr. 200-202, 565-566.) As a result of that investigation, Curry was required to take anger management classes. (ALJD 40:3-7; Tr. 202, 566). Respondents do not state why the ALJ was wrong to note that Tracey complained to Chase, and do not provide any evidence that Tracey did not tell Chase what happened. As the ALJ's finding was correct, Respondents' Exception 61 should be dismissed.

Respondents' Exception 63 excepts to the ALJ's statement that "it is not clear why Romigh stated sexual harassment as opposed to verbal abuse as testified to by Chase" and not clear why Romigh said "a couple' of disc jockeys were involved." Respondents argue that Romigh's statement was malicious and slanderous, but Respondents put forth no evidence to demonstrate that Romigh's statement was intentionally inaccurate rather than mistaken. Therefore, the ALJ was correct to note that it was not clear. And as the ALJ also noted, "irrespective of whether Curry's conduct was described as verbal abuse or harassment of an employee, the complaint concerned his mistreatment of a unit employee." (ALJD 40 fn. 71). Respondents' Exception 63 should be dismissed.

Respondents in Exception 67 except to the ALJ's finding that Curry "heightened his scrutiny" of Romigh after he believed Romigh to be spreading rumors about him. This finding is correct and should be upheld. It was only after Curry heard that Romigh had spread rumors about him that he instructed employees to document when Romigh arrived late to work. (ALJD 40 fn. 72; Tr. 777). This was the case even though Romigh's issues dated back to the beginning of his employment with Respondent SMG Massena. (Tr. 165). The ALJ was correct to conclude that Curry heightened his scrutiny of Romigh's work performance after hearing that Romigh was talking about him. The ALJ's finding should be upheld and Respondents' Exception 67 should be dismissed.

Respondents' Exceptions 70, 71, and 72 relate respectively to the ALJ's conclusions of law, proposed remedy, and proposed order relating to his finding that Respondent SMG Massena violated Section 8(a)(1) and (3) of the Act by discharging Romigh because he engaged in protected activity. As Respondents' Exceptions 70, 71, and 72 do not raise any issue with the

conclusions of law, proposed remedy, and proposed order in and of themselves and only stem from Respondents' earlier exceptions to the ALJ's findings, they should be dismissed.

- f. The ALJ properly found that Respondent SMG Massena violated Section 8(a)(1) and (5) of the Act by failing and refusing to meet and bargain with the Union to negotiate a successor collective-bargaining agreement. (Respondents' Exceptions 36, 37, 38, 39, 40, 41, 42, 43, 44)**

Respondents' Exceptions 36, 37, 38, 39, 40, 41, 42, 43, and 44 all relate to the ALJ's determination that Respondent SMG Massena violated Section 8(a)(1) and (5) of the Act by refusing to meet at reasonable times for the purpose of negotiating a successor CBA.

Respondents' Exceptions 36 through 41 relate to the ALJ's findings of fact. Respondents' Exceptions 42, 43, and 44 relate to the ALJ's conclusions of law, recommended order, and proposed remedy, respectively. Each Exception will be addressed below.

Respondents' Exception 37 relates to the ALJ's finding that the Union never received counterproposals to its May 2 proposals for the Massena CBA except for one proposal on wage increases. (ALJD 36 17-18). Respondents do not present any evidence to contradict the ALJ's finding, nor could they, as Respondent SMG Massena never responded to the Union's May 2 proposals for the Massena CBA. Instead, King went through the Watertown CBA and then presented the Union with a proposal for the Watertown CBA. (J. Exh. 5). Respondents' intent to bargain for a Watertown CBA and then use that agreed-upon CBA as the basis for bargaining for a Massena CBA does not mean that Watertown proposals applied to Massena. As the Union told King, the two contracts were historically separate and would need to be bargained separately. (ALJD 5:8-16; J. Exh. 6; Tr. 73). As the ALJ correctly noted, the only proposal specific to Massena that King provided to the Union was one proposal on wages that would apply to both units. (ALJD 20:5-7). Because the record evidence supports the ALJ's findings, they should be upheld, and Respondents' exception 37 should be dismissed.

Respondents' Exception 38 goes to the ALJ's finding that the parties never held a bargaining session for the Massena CBA. In spite of Respondents' contentions that the parties intended to bargain for Massena in August, and the parties intended to bargain for both Watertown and Massena in October, and that the parties communicated by phone and email in the meanwhile, Respondents present no evidence that a bargaining session for Massena ever took place. This is because no Massena-specific bargaining session ever happened. In August, the parties intended to bargain for Massena, but instead spent all three days bargaining for Watertown. (ALJD 7:7-10, 7:11-11:22; Tr. 73, 85, 90). In October, King added "Massena" to the sign-in sheet, but again, the parties bargained only over proposals for the Watertown CBA. (ALJD 16:30-18:5; J. Exh. 10; Tr. 105). No other bargaining session has been held. (Tr. 106). Therefore, the ALJ's finding that the parties never held a bargaining session for the Massena CBA should be upheld, and Respondents' Exception 38 should be dismissed.

Respondents' Exception 39 takes issue with the ALJ's finding that the parties never agreed to use the Watertown CBA as the basis for a Massena CBA. Respondents argue that the Union did in fact agree to use the Watertown CBA as the basis for a Massena CBA. While Respondents indicate examples in the record showing that the Union acknowledged that King proposed using the Watertown CBA as a basis for a Massena CBA, and that the Union agreed to discuss it, and that there was conversation about doing it, Respondents fail to demonstrate that the Union actually agreed to do so. This is because, as the Union told King in June 2018, the contracts were historically separate and merging them would in and of itself require bargaining. (ALJD 5:14-15, 6:22-24; J. Exhs. 4, 6). The fact that Respondents wanted to use the Watertown CBA as a basis for a Massena CBA, and the fact that the Union agreed to discuss doing so, does not establish that the parties agreed to do that or even got around to bargaining toward that

outcome. Therefore, the ALJ's finding that the parties never agreed to use the Watertown CBA as a basis for a Massena CBA is correct and should be upheld. Respondents' Exception 39 should be dismissed.

Respondents' Exception 40 excepts to the ALJ failing to find that the parties' conduct and the inclusion of David Romigh and Frank Laverghetta at the August 2018 and October 2018 bargaining sessions demonstrated that the parties were bargaining for both the Watertown and Massena CBAs. As an initial matter, Romigh was not present at the October 2018 bargaining session. (ALJD 17:11-12; J. Exh. 10; Tr. 106). No Massena employee was present at that session, which supports the ALJ's conclusion that the parties were only bargaining for Watertown that day. As has been explained above, Romigh was present on August 16 and 17 because the parties intended to bargain for Massena on those days, but they never actually did so. (ALJD 10:14). Further, Laverghetta, who was at both sessions, was employed by Respondent SMG Watertown, not Respondent SMG Massena. (Tr. 279). His presence would therefore support the conclusion that the parties bargained for Watertown on both occasions, which is not in dispute. Finally, the Union told Respondents repeatedly that the two contracts were separate, and the Union's actions (submitting separate proposals for each contract, specifying that it was requesting bargaining dates for both contracts, and noting that merging the contracts would require bargaining in and of itself) demonstrate clearly that they were not bargaining for both contracts at the same time. For these reasons, the ALJ's finding that including both Romigh and Laverghetta in bargaining did not mean the parties were bargaining for both CBAs at once should be upheld, and Respondents' Exception 40 should be dismissed.

Respondents' Exception 36 relates to the ALJ's finding that Respondent SMG Massena failed to meet at reasonable times and that the parties never agreed to merge the Watertown and

Massena CBAs. Respondents' exception to the ALJ's finding that the parties never agreed to merge bargaining relates specifically to the ALJ's decision to credit union representative Gabalski's testimony that the parties never agreed to merge bargaining over that of Respondents' own witness, King, that they did. The ALJ's finding is supported by the record. (ALJD 36 fn. 65; Tr. 73, 330, 340). As discussed above, the ALJ's credibility determination should be given deference. *Standard Dry Wall Products, Inc., supra* at 545. Therefore, the ALJ's finding should be upheld and Respondents' Exception 36 should be dismissed.

The foregoing paragraphs demonstrate that the ALJ's finding that Respondent SMG Massena failed to meet at reasonable times is correct and supported by the record. Respondent SMG Massena never responded to the Union's May 2, 2018 proposals regarding the Massena unit save for one proposal on wage increases that would have applied to both units. While the parties agreed to reserve a day of their August bargaining sessions to bargain over Massena, they never actually did so. (Tr. 73, 85, 90). Nor did the Union ever actually agree to use the Watertown agreement as a basis for a Massena contract. (Tr. 73). Even if it had, that does not show that the parties bargained for Massena, just that they bargained for a Watertown contract that would then be used as the starting point for bargaining for a Massena contract. Finally, having the Massena steward present, but not participating, at the Watertown negotiations in August because the parties had previously intended to bargain over Massena, does not constitute bargaining over Massena, nor does King writing in the word "Massena" at the top of the October 2018 bargaining session sign-in sheet, when the parties only bargained over the Watertown contract. The ALJ properly found that Respondent SMG Massena failed to meet and bargain at reasonable times, and properly found that the parties never agreed to merge bargaining. Those findings should be upheld, and Respondents' Exception 36 should be dismissed.

Finally, Respondents' Exception 41 addresses the ALJ's finding that King never responded to the Union about bargaining for Massena and apparently the ALJ's failure to find that the Union's actions during the August and October 2018 bargaining sessions demonstrated that it was bargaining with Respondent SMG Massena.<sup>12</sup> The record established that the parties met for in-person bargaining on August 15, 16, and 17, and again on October 22. (ALJD 7:7-9; 17:7-11). Initially they had intended to bargain for the Watertown CBA on August 15, the Massena CBA on August 16, and have the 17<sup>th</sup> as an extra day if necessary. (ALJD 7:7-9; R. Exh. 1 p. 194). However, the parties spent the entirety of their time on August 15, 16, and 17 bargaining over the Watertown CBA. (ALJD 7:11-11:22). All the proposals exchanged on those dates were for the Watertown CBA. King was aware that the parties were not bargaining for Massena because the Union had explicitly stated that even the discussion of merging them would require bargaining. (J. Exh. 6; Tr. 313-314). The October 22 session was also limited to the Watertown CBA. The parties met with the intent to move off the "impasse" declared by Respondent SMG Watertown – an impasse that did not apply to Massena. By the date of this session, King was aware that the Union had filed an unfair labor practice charge alleging a failure to meet and bargain over the Massena CBA. He insisted on writing in "Massena" at the top of the sign-in sheet. (ALJD 16:14-18). Despite this insistence, the parties did not discuss any of the Union's May 2 proposals relating to the Massena CBA. The bargaining session was limited to further bargaining of the Watertown CBA. (GC Exhs. 9, 10, 11; Tr. 105). Despite

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<sup>12</sup> On its face this Exception seems to take issue with the ALJ's finding that the Union's actions during the August and October bargaining sessions demonstrated that it was bargaining with SMG Massena. As the ALJ found the opposite, it may be assumed that Respondents meant to except to the ALJ's finding that the Union's actions at those sessions did *not* demonstrate that it was bargaining with SMG Massena, and this brief will address it as such.

intending to do so in August, the parties never actually bargained over the Massena CBA. Therefore, the ALJ's finding should be upheld, and Respondents' Exception 41 should be dismissed.<sup>13</sup> Respondents' Exceptions 42 and 43 relate to the ALJ's conclusions of law and recommended order stemming from his finding that Respondent SMG Massena violated Section 8(a)(1) and (5) of the Act by failing to meet and bargain a Massena CBA. Neither exception addresses any shortcoming specific to the conclusion of law or recommended order in and of themselves. Instead, they are solely based on Respondents' arguments that the underlying findings are in error. Because the ALJ's findings were correct, Respondents' Exceptions 42 and 43 lack merit, and should be dismissed.

Finally, Respondents' Exception 44 relates to the ALJ's remedy. Respondents' except to the remedy only to the extent that it fails to provide Respondent SMG Massena an opportunity in compliance to introduce evidence showing that the remedy is unduly burdensome, or that the laid-off employees failed to mitigate. Because that is the standard process in any compliance procedure, the ALJ's order need not specify that such opportunity be allowed. Respondents' Exception 44 should be dismissed.

**g. The ALJ properly sanctioned Respondents' attempt to rely on evidence Respondents failed to produce in response to the General Counsel's subpoena. (Respondents' Exception 19)**

Respondents except to the ALJ's decision to exclude certain of its bargaining notes from the record. As the ALJ noted, prior to the hearing the General Counsel subpoenaed all bargaining notes from Respondents from March 1, 2018 to the present (the hearing date). (ALJD 18 fn. 42).

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<sup>13</sup> Alternatively, in the event Respondents intended to except to the ALJ's finding that that the Union's actions demonstrated it was bargaining with SMG Massena, the ALJ made no such finding, and therefore Respondents' Exception 41 should be dismissed.

Respondents asserted in response to the General Counsel’s subpoena that no such responsive documents existed. At the end of the hearing, in an attempt to bolster King’s testimony, Respondents attempted to introduce as an exhibit bargaining notes purportedly taken by King at the parties’ October 22, 2018 bargaining session. Upon objection from the General Counsel and the Union, the ALJ rejected Respondents’ proposed exhibit but allowed Respondents to make an offer of proof concerning the documents. In his decision, the ALJ did not rely on the documents because the “General Counsel’s request was clear and the Respondents’ review of its case files, whether paper or electronic, should have revealed the existence of the bargaining notes.” (ALJD 18 fn. 42). The ALJ noted that “an ALJ has discretion in Board proceedings to impose a variety of sanctions for subpoena noncompliance.” *McAllister Towing & Transportation Co.*, 341 NLRB 394, 395-396 (2004). Those sanctions include precluding a party from introducing into evidence documents it had failed to produce in response to the General Counsel’s subpoena. *International Metal Co.*, 286 NLRB 1106, 1112 fn. 11 (1987). (ALJD 18 fn. 42). Moreover, although the ALJ rejected the exhibits Respondents attempted to introduce in order to bolster King’s testimony, the ALJ still credited his testimony. (ALJD 18 fn. 42).<sup>14</sup> He simply did not rely on the bargaining notes in reaching his credibility determination. The ALJ’s exclusion of Respondents’ bargaining notes resulted in no harm to Respondents while it prevented prejudice to the General Counsel

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<sup>14</sup> Respondents’ Exception 18 objects to the ALJ’s failure to find that the parties reached a tentative agreement on October 22, as Respondents’ witness King testified, even though he credits King’s testimony about the October 22 bargaining session generally. Nothing is more common than to credit some parts of a witness’s testimony but not others. *Jerry Rice Builders*, 352 NLRB 1262, 1262 fn. 2 (2008) (citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 91951). Moreover, that finding is not tied to any of the actual violations found by the ALJ, but goes to an allegation dismissed by the ALJ, over which no exception has been filed by the General Counsel or the Union. Respondents’ Exception 18 should be dismissed.

and the Charging Party. The ALJ's decision was correct and should be upheld, and Respondents' Exception 19 should be dismissed.

**h. Those Exceptions which do not comport with the Board's Rules should be disregarded. (Respondents' Exceptions 73, 74, 75, 76)**

Respondents except generally to the ALJ's conclusions of law, remedies, and order. Respondents merely restate the ALJ's findings but fail to make any argument in support of their exceptions to them. As Respondents' exceptions fail to state specifically what findings or conclusions Respondents take exception to, they are contrary to Section 102.46(b)(1) of the Board's Rules and Regulations. As Respondents' exceptions 73, 74, 75, and 76 do not comply with the Board's requirements, it is respectfully urged that the Board disregard them. *See* Section 102.46(b)(2) of the Board's Rules and Regulations; *Fuqua Homes (Ohio), Inc.*, 211 NLRB 399, 400 fn. 9 (1974).

**III. CONCLUSION**

For all the reasons set forth above, General Counsel respectfully requests that the Board deny Respondents' Exceptions to the Decision of the Administrative Law Judge in their entirety.

**DATED** at Albany, New York, this 1<sup>st</sup> day of May 2020.

Respectfully submitted,

/s/ Alicia E. Pender  
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