

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

STEPHENS MEDIA GROUP, LLC,	:	NLRB Case Nos. 03-CA-226225;
	:	03-CA-227946; 03-CA-227924
Respondent,	:	
	:	
--and--	:	
	:	
NABET-CWA, AFL-CIO,	:	
	:	
Charging Party.	:	

NABET-CWA'S ANSWERING BRIEF

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I. INTRODUCTION

The Decision of Administrative Law Judge ("ALJ") Charles Muhl, dated January 24, 2020, is amply supported by the record evidence, fully consistent with established National Labor Relations Board ("Board") law, and should be upheld in its entirety.¹

The ALJ concluded Respondent Stephens Media Group - Watertown ("SMG-Watertown") violated subsections 8(a)(1) and (5) of the National Labor Relations Act ("Act"), 29 U.S.C. §158(a)(1) and (5) by its:

1. Premature declaration of impasse on August 22, 2018;
2. Unilateral changes to terms and conditions of employment;
3. Interrogating employees about their Union activities; and
4. By-passing the Union and engaging in direct dealing.

(JD-04-20, pp. 47-48). The ALJ further concluded that Respondent Stephens Media Group - Massena ("SMG - Massena) violated §§ 8(a)(1), (3) and (5) of the Act by:

1. Terminating the employment of Union Steward David Romigh; and
2. Refusing to meet at reasonable times with the Union for the purpose of negotiating a successor collective bargaining agreement.

(JD-04-20, pp. 47-48). ALJ Muhl's careful analysis of the voluminous record evidence, and his thoughtful, thorough review and application of extant Board law demonstrate his Decision need not be disturbed and must be affirmed in its entirety by the Board.

¹ Hereinafter referred to as JD-04-20.

As a preliminary matter, the Exceptions and Brief filed by Respondents do not comply with the Board's Rules. The Exceptions contain no cites whatsoever to the record evidence, nor do they concisely state the grounds upon which they are made. Respondents also filed exceptions to the ALJ's failure to find that Charging Party bargained in bad faith, even though the Union's conduct was not raised in the Complaint or Respondents' Answer. And Respondents raised an affirmative defense for the first time in the Exceptions, a defense Charging Party and the ALJ had no opportunity to address.²

Respondents' failure to support its Exceptions with precise cites to the record evidence is not ameliorated by its Brief. Respondents did not once mention the exceptions to the ALJ's factual findings and, as a result, did not precisely cite to the record in its Brief to support the factual challenges. Accordingly, Charging Party National Association of Broadcast Employees and Technician - Communications Workers of America ("NABET-CWA") urges the Board to reject Respondents' exceptions in their entirety, and affirm ALJ Muhl's Decision.

NABET-CWA joins in the arguments raised by Counsel for the General Counsel in her answering brief.

² Respondents in Exception 32 and in the Brief at pages 25-26 argue for the first time Charging Party waived its right to bargain over the unilateral changes, which Respondent implemented the day after it unlawfully declared impasse, and without notice to the Union. This issue was not raised in Respondents' Answer, nor was the issue mentioned by Respondents during the four-day trial or in Respondents' post-hearing brief.

II. RESPONDENTS' EXCEPTIONS SHOULD BE REJECTED FOR FAILURE TO COMPLY WITH BOARD RULES

Respondents' Exceptions to ALJ Muhl's Decision must be rejected for failure to comply with the Board's Rules and Regulations. The Rules require that each exception:

- (c) Provide precise citations to the portions of the record relied upon; and
- (d) Concisely state the grounds for the exception.

NLRB Rules §102.46(a)(1)(i)(c) and (d). This Respondents did not do.

Respondents filed seventy-six (76) Exceptions: not one contained a cite to the record evidence. Respondents simply cited to the page and line in the ALJ's Decision to which the Exception was made. Respondent did not state the grounds for the Exceptions.

Exceptions which fail to comply with the Rules may be disregarded by the Board. NLRB Rules §102.46(b)(2). In *Special Touch Home Care Services, Inc.*, 349 NLRB 759 (2007), the Board accepted the Respondent's exceptions, notwithstanding the impermissible inclusion of argument, but rejected Respondent's supporting brief as a sanction for noncompliance with the Rules. Similarly, in *Metta Electric*, 338 NLRB 1059 (2003), the Board explained that it would be justified in disregarding the Respondent's exceptions and supporting brief for noncompliance, but in the interest of judicial economy it would consider the discernible arguments "that cite the record and the law." *Id.* at 1059.

Respondents' Brief in this matter does not make up for the deficiencies in the Exceptions. Forty-five (45) of Respondents' Exceptions are challenges to ALJ Muhl's

factual findings.³ Two (2) Exceptions challenge the ALJ's credibility findings.⁴ One (1) Exception challenges the ALJ's failure to admit a document (Attorney King's bargaining notes) Respondents' attorneys withheld during the Region's investigation and failed to produce in response to Counsel for the General Counsel's subpoena *duces tecum*.⁵

Respondents did not cite to a single piece of record evidence in support of these exceptions in its Exceptions document. More troubling, it made no mention whatsoever of these exceptions in the supporting Brief. Respondents began the Brief with a ten (10) page section entitled "Factual Overview Relevant to Bargaining and Impasse." (Brief, pp. 1-10). Respondents did not refer to a single exception in the factual overview. Respondents did not state in the Brief, not even once, that the ALJ's factual conclusions were erroneous or without support in the record.⁶ Respondents did not specify what, if any, record evidence refuted the ALJ's findings of fact. Respondents' broad overview of the facts in the Brief is not in compliance with the Board's requirement for precise citations to the record evidence.

Significantly, Respondents excepted to the ALJ's refusal to admit a document as a sanction for subpoena noncompliance under *McAllister Towing & Transportation Co.*, 341 NLRB 394 (2004). (Exception 19; JD-04-20, *fn.* 42). There was no cite to the record evidence in the Exceptions document, nor was the issue of the rejected exhibit discussed

³ Please see Exceptions 1, 2, 3, 4, 5, 8, 9, 10, 11, 13, 15, 16, 17, 18, 23, 25, 26, 27, 28, 29, 30, 31, 36, 37, 38, 39, 40, 41, 45, 46, 47, 50, 51, 52, 54, 59, 60, 61, 63, 64, 65, 66, 67, 68, and 69.

⁴ Please see Exceptions 51 and 52.

⁵ Please see Exception 19.

⁶ The same is true for the section of the Brief devoted to the facts on the termination of David Romigh, found at pages 36-38 of the Brief.

in the Brief.⁷ The same is true for Respondents' Exceptions to the ALJ's credibility determinations. Respondent did not precisely cite to any record evidence in Exceptions 51 and 52. Respondents did not discuss the credibility determinations in the Brief.⁸

The crux of this case is whether Respondents' declaration of impasse on August 22, 2018, after two and one-half days of bargaining, was unlawful. It is a fact-intensive inquiry. It is not enough for Respondents to simply state the ALJ erred in almost all of his factual findings. The Rules obligate Respondents to provide precise cites to the record evidence in support of the Exceptions. Respondents failed to do so in the Exceptions document, and in the supporting Brief. Accordingly, Charging Party asks the Board to disregard Respondents' Exceptions to the ALJ's factual findings for noncompliance with its Rules.

⁷ Respondent, in its response to the Subpoena *Duces Tecum* served upon it, claimed it had no bargaining notes at all for the 2018 negotiations. (Tr. 508; 788). King testified that he made notes but may have thrown them away, after receipt of a request for information from Region Three during the investigation of the Charges. (Tr. 507). Respondent recalled King to the stand on the final day of the hearing, and he offered newly-discovered notes (Rejected Ex. 3, 3(a), 3(b), and 3(c). King blamed his secretary for the missing notes, which, he testified, she found the night before, and were challenged by Counsel for the General Counsel and the Union. (Tr. 801-02).

⁸ Respondents filed a "general exception" to the ALJ's conclusions of law (Exception 73), a "general exception" to the ALJ's remedial order (Exception 74), and a "general exception" to the ALJ's Order (Exception 75). In Exception 76, Respondents take exception to "any of the ALJ's findings, conclusions, or remedies" not mentioned in the Exceptions document. These Exceptions do not comply with §102.46(a) of the Board's Rules and should be rejected.

III. RESPONDENT'S WAIVER DEFENSE MUST BE REJECTED AS IT WAS NOT RAISED IN ITS ANSWER TO THE COMPLAINT OR RAISED DURING THE TRIAL OR IN THE POST-HEARING BRIEF

Respondent SMG-Watertown in the Answer to the Consolidated Complaint did not raise any defense to the §8(a)(5) allegations, other than to admit or deny the facts. (GC Ex. 1(k)). At no time during the four-day trial before ALJ Muhl did Respondent argue that Charging Party waived its statutory right to bargain over the proposed changes to the seniority and layoff provisions in the parties' collective bargaining agreement ("CBA"). As a practical matter it could not argue waiver, as this would have defeated its main argument to the ALJ: that the parties bargained to impasse over the seniority and layoff provisions. (Brief, pp. 10-26).

In the Exceptions, at Exception 32, Respondent SMG-Watertown for the first time raised the waiver defense and challenged the ALJ's failure to find that NABET-CWA waived its right to bargain. It argued waiver on pages 25-26 in the Brief supporting the Exception. Waiver is an affirmative defense. *Allied Signal*, 330 NLRB 1216 (2000); *Lincoln Child Center*, 307 NLRB 288 (1992).

Defenses raised for the first time in Exceptions to an ALJ's decision are untimely and must be rejected. *Ava's Pizzeria*, 368 NLRB No. 45 fn. 3 (2019), citing *Delta Sandblasting Co.*, 367 NLRB No. 17 (2018); *Master Mechanical Insulation*, 320 NLRB 1134 (1996). The failure to advance a legal theory in a brief to the ALJ precludes its consideration for the first time on exceptions to the Board. *United States Service Industries, Inc.*, 315 NLRB 285 (1994), citing *Wind-Chester Roofing Products*, 302 NLRB No. 17 (2018); *Operating Engineers Local 520 (Mautz & Oren)*, 298 NLRB 768 fn. 3 (1990);

Yorkaire, Inc., 297 NLRB 401 (1989). NABET-CWA asks the Board to reject Exception 32, and to disregard pages 25-26 of the supporting Brief.

In addition to its failure to timely raise the defense, the defense of waiver is not available to Respondent here as the parties were engaged in negotiations for a successor CBA when Charging Party allegedly waived its right to bargain. Waiver is not an available defense when the parties are engaged in negotiations for a successor CBA. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991)(where the parties are engaged in negotiations for a CBA, the employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain to the union); *Allied Signal* (union did not waive its right to bargain during negotiations for a successor CBA).

Respondent SMG-Watertown's reliance on *Taft Coal Sales & Associates*, 360 NLRB 96 (2014) is misplaced. In *Taft*, the employer advised the Union it would implement layoffs two days before it advised the employees and refused to provide the Union with a list of the affected employees prior to the layoffs. 369 NLRB at 100. The Board agreed with the ALJ that Respondent presented the Union with a *fait accompli*, which precluded meaningful bargaining. *Id.* The employer in *Taft* denied the Union the ability to bargain meaningfully, as is the case here. As the ALJ found, Respondent SMG-Watertown did not provide notice of the layoffs to NABET-CWA. (JD-04-20, p. 15; Tr. 26-27, 29, 30-31, 45-48, 107-109). The Union learned of the layoffs from the bargaining unit employees. (JD-04-20, p. 15). Simply, the waiver defense is not available to Respondent SMG-Watertown in this matter.

IV. THE ALJ'S FINDINGS OF FACT ARE AMPLY SUPPORTED IN THE RECORD AND NEED NOT BE DISTURBED

ALJ Muhl's finding of facts are comprehensive. (JD-04-20, pp. 4-20). The ALJ's recitation of the facts demonstrates a careful analysis of the witness testimony and the volumes of documentary evidence. ALJ Muhl's Decision is replete with citations to the record. Respondents in the Brief did not explain why the ALJ's findings of fact are erroneous.

A. The Parties' Bargaining Relationship

ALJ Muhl acknowledged NABET-CWA is the exclusive representative of Broadcast Technicians, Engineers, Staff Announcers, and Announcer-Operators employed by SMG-Watertown at Radio Stations WTNY-AM, WCIZ-FM-93.3, WNER-FM and WFRY-FM (hereinafter "Watertown Unit"). (JD-04-20, pp. 2, 4; Joint Ex. 1, p. 3).⁹ NABET-CWA also represents all Announcer-Operators and Technician-Announcers employed by Respondent SMG-Massena at radio station WMSA in Massena, NY (hereinafter "Massena Unit"). (ID-04-20, pp. 2, 4; Joint Ex. 2, p. 3). NABET-CWA Local 24 services the Watertown and Massena Units. (Tr. 54). Dianne Chase is the President of Local 24 and worked for Respondent SMG-Watertown for 20 years prior to her layoff on August 23, 2018. (JD-04-20, p. 7; Tr. 192).

The ALJ properly found the 2018 negotiations were unlike all previous contract negotiations between the parties. In 2012 and 2015, the parties bargained separately for

⁹ Joint Ex. __ denotes reference to the Joint Exhibits; GC Ex. __ denotes reference to the General Counsel's exhibits; CP Ex. __ denotes reference to the Charging Party's exhibits; R. Ex. __ denotes reference to Respondent's exhibits; Rejected Ex. __ denotes reference to Rejected Exhibits; and TR. __ denotes reference to the official transcript.

the Watertown and Massena bargaining units, and Respondent was represented at the bargaining table by supervisors and managers. (JD-04-20, p. 4). Respondents for the first time in 2018 had an Oklahoma attorney, Michael King, represent it at the bargaining table. (JD-04-20, p. 4).¹⁰

B. The Expired Watertown CBA

The Watertown CBA expired April 30, 2018. (Joint Ex. 1, p. 12). The Watertown CBA contained a union security provision at Article II(e) - (f). (Joint Ex. 1, p. 2). The CBA also required the payment of overtime to unit employees who worked more than eight (8) hours per day, and a minimum of three (3) hours of pay if an employee was scheduled to work but worked less than three (3) hours. (Joint Ex. 1, pp. 6-7).

Article V of the expired CBA prohibited layoffs for the first year of the CBA. (Joint Ex. 1, p. 5). The expired CBA also banned the layoff of any full-time bargaining unit employee unless all part-time unit employees were laid off first, required the retention of at least one full-time bargaining unit member at each radio station, and required Respondent to meet with the Union and “negotiate terms...to prevent the layoff of Employees having more than three (3) years of service. (Joint Ex. 1, pp. 5-6).¹¹ The Watertown CBA also afforded recall rights to all laid-off bargaining unit member for a six-month period. (Joint Ex. 1, p. 6).

¹⁰ King, whose law firm filed the Answer to the Consolidated Complaint, denied that he was acting as a §2(13) agent of Respondent. (Answer, ¶5(b)). At the hearing, King testified that he had complete authority to bargain in Respondent's behalf. (Tr. 301).

¹¹ The CBA for the Massena bargaining unit contained its seniority and layoff provisions in Article VI. (Jt. Ex. 2, pp.9-10). Key differences between the layoff provisions in the Massena CBA are the absence of a ban on layoffs for the first year of the CBA, and no distinction between full and part-time employees vis-à-vis layoffs. *Id.*

C. The 2018 Negotiations

NABET-CWA by letter dated February 26, 2018 advised Respondents of its intent to reopen the Watertown and Massena CBAs and engage in negotiations for successor contracts. (CP Ex. 1, 2). Respondent's General Manager, Glen Curry, acknowledged he received the notices from the Union. (Tr. 33-34). Attached to the letters sent to Respondent were the forms filed with the Federal Mediation and Conciliation Service. (CP Ex. 1 and 2). King, the negotiator for Respondent, did not know if Respondent complied with the Act's §8(d) notice requirement, and admitted he was unaware of §8(d)'s notice requirements. (Tr. 431).

NABET-CWA sent its bargaining proposals to Respondent on May 2, 2018. (JD-04-20, p. 4; Joint Ex. 3). Respondents' attorney responded by email on June 7, 2018, with a red-line agreement for the Watertown CBA only. (JD-04-20, p. 4; Joint Ex. 5).

Respondent SMG-Watertown's initial and subsequent bargaining proposals given to NABET-CWA sought dramatic changes in fundamental terms and conditions of employment, including the elimination of union security, elimination of daily overtime and minimum call times, and the elimination of seniority as a factor controlling layoffs. (Joint Ex. 5; Joint Ex. 12; Joint Ex. 15). ALJ Muhl listed the changes sought by Respondent SMG-Watertown on pages 5-6 in his Decision. (JD-04-20, pp. 5-6). Respondent SMG-Watertown described the same sweeping proposals in its Brief at pages 2-3. Respondents' attorney admitted SMG-Watertown "assumed" the elimination of union security was provocative to the Union. (Tr. 439).

The parties agreed to meet in Watertown, NY on August 15-17, 2018, to begin negotiations for the Watertown and Massena CBAs. (JD-04-20, p. 7). The ALJ's detailed description of the record evidence on the three bargaining dates is found on pages 7-11 of his Decision.

Attorney King and Respondents' Business Manager Penny Woolf comprised Respondent's bargaining team. (JD-04-20, p. 7; Tr. 61; Joint Ex. 10). King admitted it was the first time he had bargained with the Union on behalf of his client. (JD-04-20, p. 4; Tr. 215). NABET-CWA Staff Representative Ronald Gabalski led the Union's bargaining team, which included Local 24 President Dianne Chase, and Stewards Allen Walts, David Romigh, and Ashlee Tracey. (JD-04-20, p. 7; Tr. 61).

King testified that the August 15, 2018 bargaining session began with each party making an opening statement. King testified that he told the Union bargaining committee that Respondent had plans to modernize, but that "I didn't expect that there would be any job loss." (Tr. 328). ALJ Muhl, in fn. 14 in his Decision, described his decision to credit King's specific answers over his generalized testimony in the ALJ's credibility determination. (JD-04-20, p. 8, *fn.* 14). Respondents did not explain why the ALJ's credibility determination should be disturbed in its Brief.

Consistent with the record evidence, the ALJ found the parties discussed a number of significant issues on August 15, the first day of bargaining, including Respondent SMG-Watertown's bargaining proposals, union security, and Respondent SMG-Watertown's new proposal on health care. (JD-04-20, pp. 7-8; Tr. 61-64). The ALJ found the Union bargaining team gave Respondent SMG-Watertown its counter

proposals (Joint Ex. 7) across the table in the afternoon of August 15. (JD-04-20, p. 9; Tr. 67). The ALJ credited King's testimony that the parties bargained all day, and parties were able to reach multiple tentative agreements on August 16, the second day of bargaining, including an agreement on Respondent SMG-Watertown's health care proposal. (Tr. 70; Tr. 347-349; 470-471). The parties did not discuss the Massena CBA on August 15 or 16. (Tr. 73).

Notwithstanding the parties' progress during the first two days of bargaining, at the end of the second day there were eight (8) open issues, including union security, wages, the recognition clause, and seniority. (JD-04-20, p. 11; Tr. 84; Joint Ex. 16). On Friday, August 17, the parties discussed wages, a significant issue. (JD-04-20, p. 11; Tr. 353). At the end of the day, the Union advised Respondent SMG-Watertown it would have a comprehensive proposal at the next bargaining session. (JD-04-20, p. 11; Tr. 88). Attorney King asked to see the proposal before he decided whether Respondent SMG-Watertown would schedule another session. (Tr. 88). NABET-CWA sent King its comprehensive proposal on Monday, August 20. (JD-04-20, p. 12; Tr. 90; Joint Ex. 19).

Respondent SMG-Watertown's attorney admitted he did not contact the Union about its proposals to Respondent. (JD-04-20, p. 12; Tr. 410). King sent a letter dated August 22 to the Union (Joint Ex. 20), in which he (King) declared the parties were at impasse. (JD-04-20, p. 12; Tr. 93; Joint Ex. 20, p. 2). Significantly, King listed a number of open issues in his impasse letter, including Respondent SMG's desire to eliminate union security, modify the recognition clause, and several economic concessions. (JD-

04-20, p. 13). Respondent SMG-Watertown did not declare impasse on a single issue. (JD-04-20, *fn.* 51).

The Union did not agree with King that the parties were at impasse, and advised him so by email dated August 23, 2018. (JD-04-20, p. 13; Joint Ex. 21).

King admitted that no member of the NABET-CWA bargaining committee ever stated that the Union was not willing to bargain over Article V, the Watertown CBA's layoff and seniority provisions. (Tr. 407). The ALJ properly found the Union continued to express its desire to reach an agreement, and never rejected the layoff proposal "out of hand." (JD-04-20, p.24). Likewise, King testified that no Union bargaining committee member stated that the Union would not agree to change Article V. (Tr. 407). The ALJ found King did not advise the Union that the impasse was declared over Article V, and he listed all open items, even those not discussed, in his letter declaring impasse. (JD-04-20, p. 14 and 24; Tr. 482).

D. The August 23, 2018 Layoffs and Transfer of Unit Work

There is no dispute that Respondent laid-off Local 24 President Chase, Michael Stoffel, and Frank Laverghetta, and eliminated the shifts and reduced working hours for Brian Best, Holly Gaskin, and Jeffrey Shannon. (JD-04-20, pp. 14-15; Tr. 25; GC Ex. 3(a), (b) & (c); Tr. 28-31; 45; 108; 217-218; 274;). Respondent did not provide the Union with any notice prior to the layoffs, elimination of shifts, and the reduction in hours. (JD-04-20, p. 15; Tr. 27; 29 -30). The layoffs violated the seniority and layoff provisions of the Watertown CBA.

Two days after Respondent laid off full-time bargaining unit member Stoffel it hired him into a newly-created position in which he continued to perform bargaining unit work. (JD-04-20, p. 15; Tr. 121). Indeed, Respondent SMG-Watertown published a press release concerning Stoffel's new position, which confirmed Stoffel would continue to perform bargaining unit work. (Tr. 124; CP Ex. 3). Respondent SMG-Watertown did not notify the Union of its decision to recall Stoffel and remove him from the unit. (JD-04-20, p. 15; Tr. 121).

Respondent SMG-Watertown laid off unit member and transferred his 2:00 – 6:00 p.m. afternoon drive show to a non-unit person. ((JD-04-20, p. 14; Tr. 288). Respondent SMG-Watertown admitted it hired a voice tracker from Cincinnati to cover Laverghetta's shift, and she is not in the bargaining unit. (JD-04-20, p. 14; Tr. 536).

E. Respondent's Direct Dealing With Bargaining Unit Employees

Respondent SMG-Watertown engaged in one-on-one negotiations with unit employee Shannon, and excluded the Union. (JD-04-20, p. 15; Tr. 122). Respondent's General Manager Curry and a supervisor spoke directly to Shannon about expanding his part-time bargaining unit work, while full-time employees were laid off. (JD-04-20, p. 15; Tr. 28).¹²

Respondent SMG-Watertown engaged in one-on-one negotiations with Stoffel, as noted above, regarding his return to work. (JD-04-20, p. 15; Tr. 27; 121). Curry called Stoffel directly, and discussed his wages and terms and conditions of employment. (JD-04-20, p. 15; Tr. 27). Respondent in its opening statement declared "there's no need to

¹² Emails between Shannon and Curry regarding the expansion of his work are in evidence as GC Ex. 4.

consult with the union if whether or not it's okay to expand somebody's work at the Company, particularly since it is bargaining unit work." (Tr. 20).

F. Respondent's Interrogation of Bargaining Unit Employees

On August 16, the second day of bargaining, Respondents' General Manager Curry told bargaining unit employee Laverghetta that negotiations were not going well, and if the Union called a strike, he (Laverghetta) would still have to work. (JD-04-20, p. 11; Tr. 281). The General Manager asked Laverghetta "If I would be someone that would cross the picket line to keep working." (JD-04-20, p. 11; Tr. 282). Curry posed his questions when the two were alone in the studio. (JD-04-20, p. 11; Tr. 282).

On August 17, Curry again raised the strike issue. Laverghetta testified Curry stated "he told Mr. Stephens that there were two people that he knew of what would cross the picket line - cross the picket line and work." (JD-04-20, p. 11; Tr. 283). Curry told Laverghetta "I would be one of those people." (JD-04-20, p. 11; Tr. 283).

G. The Termination of David Romigh

The ALJ's factual finding concerning the §8(a)(3) termination allegation are found on pages 38-43. (JD-04-20, pp. 38-44). The findings are grounded in the record. David Romigh worked as the on-air personality during the morning-drive hours for SMG's AM radio station in Massena. (JD-04-20, p. 38; Tr. 249). The ALJ found Romigh was a talented on-air performer and was never disciplined by SMG prior to his termination in June 2018. (JD-04-20, p. 38)¹³ Romigh was the union steward in Massena.

¹³ See Tr. 165-67, 170-71, 176-77 (Mr. Truax's testimony concerning Mr. Romigh's workplace issues); Tr. 253-56 (Mr. Romigh's uncredited testimony addressing the same); Tr. 617-18 (Mr. Curry's testimony

In April 2018, in his capacity as shop steward, Romigh relayed accurate information to bargaining unit members in Massena — reported to him by Local 24 President Chase — concerning Respondents' General Manager Curry. (Jd-04-20, p. 40). Romigh informed his fellow bargaining unit members that Curry had been investigated by Respondents for harassment of on-air employees in Watertown, and was directed to complete an anger management class by the Respondents' owner.¹⁴ (JD-04-20, p. 40).

The ALJ found, based on the record evidence, that upon learning about Romigh's comments from a supervisor, Curry instructed Respondent SMG-Massena's employees to monitor Romigh more closely and to compile evidence against him. (JD-04-20, p. 41 and *fn.* 81; Tr. 770-71). Curry ultimately terminated Mr. Romigh's employment on June 8, 2018, one day after completing the anger management class that Mr. Romigh had informed bargaining unit members about. (JD-04-20, p. 41-42; Tr. 657-58; GC Ex. 32).

The ALJ found, and Respondent SMG-Massena did not dispute, that Curry sent three letters to the Union regarding his reasons for terminating Romigh. (JD-04-20, pp. 42-43).¹⁵ Curry offered shifting explanations for his decision, and relied upon alleged incidents that occurred in prior years, but he repeated one message in all three letters:

concerning the presentation — or lack thereof — of discipline to Mr. Romigh); Tr. 724-26, 730-31, 733-35, and 740-42 (Mr. Sharlow's testimony concerning the same).

¹⁴ See Tr. 262 (Mr. Romigh's testimony concerning the communication with bargaining unit members that led to his termination); Tr. 657-58 (Mr. Curry's testimony on cross-examination concerning Mr. Romigh's conduct); GC Ex. 32 (Mr. Curry's certificate of completion for the anger management course).

¹⁵ Todd Truax, Romigh's supervisor, admitted and there is no dispute that prior to his June 8, 2018 termination, Respondent SMG-Massena never issued any written disciplinary notices to Romigh. (Tr. 165; 169; 170; 176; 198; 253). Truax testified Respondents' owner, David Stephens, told him that Curry would "have to take anger management classes because of all this."

Curry terminated Romigh for "spreading rumors about the General Manager. (JD-04-20, pp. 42-43; GC Ex. 21, 23, 25). The final letter, dated June 29, 2018, stated:

I consider myself a reasonable man, but I was constantly given reasons to terminate Dave, to which I would say to myself, I'll give him another chance. Then, starting this past March, I was told by Jason Sharlow, that Dave Romigh was telling another union member that the NABET union was looking to remove me as Market Manager because of an issue in Watertown. I never said anything and I remained neutral and calm. This was an approach I learned directly from an "Anger Management" course after an issue I was responsible for after an issue I created with a union employee in Watertown.

(JD-04-20, P. 43; GC Ex. 25). Curry continued "his rumor about me spread throughout the building and made me feel I was on a short leash." (JD-04-20, p. 46); GC Ex. 25).

H. Respondent SMG-Massena's Failure to Meet and Bargain

The ALJ found, and Respondent SMG-Massena did not dispute, that NABET-CWA has represented the bargaining unit employees in Massena for decades, as a separate unit from the Watertown radio stations. (JD-04-20, p. 4). Respondent SMG-Massena insisted the parties merge the separate units and negotiate a single CBA to cover the stations in Watertown and Massena. (JD-04-20, p. 5). Respondent acknowledged NABET-CWA flagged this proposal as a permissive subject of bargaining, and never agreed to merge the units. (JD-04-20, p. 5; Joint Ex. 4). Respondent SMG-Massena did not reply to the proposals NABET-CWA offered in 2018. (JD-04-20, p. 5). The ALJ found King did not respond to the Union's request for bargaining dates for the Massena CBA. (JD-04-20, p. 17).

V. THE ALJ'S LEGAL ANALYSIS IS BASED ON BOARD LAW AND MUST BE AFFIRMED

A. The ALJ Properly Concluded that Respondent SMG-Watertown Unlawfully Declared Impasse

ALJ Muhl's legal analysis on Respondent SMG-Watertown's unlawful declaration of impasse can be found on pages 21-24 of his Decision. (JD-04-20, pp. 21-24). In its Exceptions, Respondent SMG-Watertown stated the ALJ misapplied *Taft Broadcasting Co.*, 163 NLRB 475 (1967) and *CalMat Co.*, 331 NLRB 1084 (2004). (Exception No. 21). In its Brief, Respondent SMG-Watertown argued that *CalMat*, rather than *Taft Broadcasting* controlled, and claimed the single-issue impasse analysis was appropriate. (Brief at 13). ALJ Muhl carefully considered both cases and found that under either test, SMG-Watertown unlawfully declared impasse on August 22, 2018. (JD-04-20, pp. 21, 24 and *fn.* 51).

The Board in *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enfd sub nom AFTRA v. NLRB*, 395 F.2d 622 (DC Cir. 1968) defined impasse as the exhaustion of good faith negotiations which preclude the making of an agreement. Whether a lawful impasse exists requires an examination of the bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue(s) as to which there is no accord, and the contemporaneous understanding of the parties." *Taft Broadcasting*, 163 NLRB at 478. The party asserting impasse has the burden of proving its existence. *Serramonte Oldsmobile, Inc.*, 318 NLRB 80, 97 (1995). ALJ Muhl concluded SMG-Watertown did not sustain its burden and its declaration of impasse on August 22, 2018 was unlawful. (JD-04-20, pp. 21-22).

1. The Bargaining History Does Not Demonstrate That The Parties Were At A Lawful Impasse

The 2018 negotiations were unusual, and the ALJ properly concluded they were "markedly different from prior contract negotiations." (JD-04-20, p. 21). This was the first time Respondent retained an attorney to represent it at the bargaining table. NABET-CWA Staff Representative Gabalski had not previously bargained with Respondent. Respondent did not present any evidence of the parties' bargaining history to suggest that after just three (3) days of bargaining, a lawful impasse existed. (JD-04-20, p. 21).

2. The Length of Negotiations

ALJ Muhl found, and there was no dispute, that the parties met face-to-face for just three (3) days before King advised his client the parties were at impasse. (JD-04-20, p. 22). In those three days Respondent SMG-Watertown and the Union reached tentative agreements on multiple issues, including Respondent's health care proposal on premium costs. (JD-04-21, p. 11). Respondent in its Brief did not address this factor.

3. NABET-CWA Acted in Good Faith at the Table

The ALJ found that NABET-CWA bargained in good faith with Respondent SMG-Watertown. (JD-04-20, p. 22). The ALJ found, consistent with attorney King's testimony, that during the three (3) days of bargaining with NABET-CWA, the Union's bargaining team were professional, and the parties reached a number of TAs, which King listed on the stand. (JD-04-20, p. 22). The record contains numerous documents exchanged between the parties during this time. (JD-04-20, p. 22).

4. Seniority Was An Important Issue, But It Was Not the Only Issue Cited By Respondent In Its August 22 Letter Declaring Impasse

The ALJ concluded that Respondent SMG-Watertown's proposals to dramatically alter the seniority and layoff provisions in the CBA was significant. (JD-04-20, p. 24). There's no dispute Respondent and the Union considered management's proposal to eliminate seniority as a factor for layoffs to be a very important issue. It was critical to management which, unbeknownst to the Union, was waiting to lay off the Local 24 President and eliminate the shifts of several bargaining unit members.

The ALJ also concluded, in accord with attorney King's testimony, that in Respondent's August 22, 2018 letter to the Union declaring impasse, King did not identify Article V as the reason for the unlawful declaration. (JD-04-20, *fn.* 51). King admitted, when faced with his letter, that he listed every open item, including items the parties had yet to discuss, as a basis for his

5. NABET-CWA Did Not Agree the Parties Were at Impasse

The ALJ noted NABET-CWA's immediate response to King's August 22, 2018 letter, which advised Respondent the parties were "miles away from impasse." (JD-04-20, p. 13). The Union filed unfair labor practice charges over the unlawful impasse and Respondent's unlawful change in the terms and conditions of employment during bargaining on August 24, 2018. (JD-04-20, p. 15).

Respondent SMG-Watertown failed to sustain its burden to prove the existence of a lawful impasse to ALJ Muhl. Its Exceptions and Brief point to no reason why the ALJ's Decision should be disturbed.

B. The ALJ's Conclusion that Respondent SMG-Watertown Violated §§8(a)(1) and (5) By Unilaterally Changing Mandatory Terms and Condition of Employment Is Sound

The ALJ properly concluded SMG-Watertown violated §8(a)(1) and (5) of the Act by unilaterally altering terms and conditions of employment the day after it unlawfully declared impasse. (JD-04-20, pp. 25-29). An employer's unilateral change in terms and conditions of employment that are the subject of ongoing negotiations is the equivalent of a refusal to bargain and violates §8(a)(5) of the Act. *NLRB v. Katz*, 369 U.S. 736 (1962). It is well-settled that when parties are engaged in contract negotiations, an employer must refrain from unilateral changes in terms and conditions of employment until a new contract is reached, or a lawful impasse exists. *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995), *citing Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). The ALJ discussed these well-established principles in his thoughtful Decision. (JD-04-20, p. 25).

Respondent SMG-Watertown took exception to the ALJ's reliance upon *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). (Exception No. 6, pages 20-21 of the Brief). This Exception lacks merit. To be sure, Respondent SMG-Watertown characterized its decision to modernize, in its post-hearing brief to the ALJ, as a managerial decision outside the scope of mandatory subjects. It repeats the same argument now before the Board. The problem is Respondent's decision to modernize was simply the replacement of old equipment with newer equipment, so Respondent

could employ fewer workers and still have its radio broadcasts on the air. (JD-04-20, p. 26). Indeed, Respondent's attorney told the bargaining committee, on the first day of bargaining, that the modernization would result in more money for bargaining unit employees, with no loss of employment.

Surely, Respondent understood that seniority and layoffs were mandatory subjects of bargaining. It proposed to eliminate seniority as the controlling factor in layoffs during the 2018 negotiation. After three days of bargaining, Respondent SMG-Watertown unlawfully declared impasse, and the very next day, it implemented its proposals. It eliminated the contractual requirement to lay off part-time employees before full-time employees were laid off. It eliminated the notice provisions to the Union. And it eliminated seniority as the controlling factor in layoffs. Respondent SMG-Watertown cited no support for the notion that the order of layoffs is not a mandatory subject of bargaining.

There was no lawful impasse on August 22, the date of Respondent SMG-Watertown's impasse letter to the Union. There was no lawful impasse on August 23, when Respondent ignored the clear and unequivocal language in the parties CBA, and laid off full-time employees while retaining part-time employees, and by laying off employees with the most seniority in the bargaining unit. Respondent SMG-Watertown clearly violated §8(a)(5) of the Act by the layoffs, elimination of regular shifts, and the reduction in working hours of bargaining unit employees. ALJ Muhl's conclusions are based on Board law, and need not be disturbed.

There is no question that Respondent SMG-Watertown transferred bargaining unit work to non-unit employees and non-employees at the same time it laid off and reduced the hours of bargaining unit employees, and ALJ Muhl's conclusion on this topic are well-grounded in Board law. (JD-04-20, p. 27). Respondent admitted that a voice tracker from Cincinnati took over the work performed by laid off unit employee Laverghetta. Respondent admitted that it recalled unit employee Stoffel to a non-unit position, while requiring him to continue his staff announcer work, which is bargaining unit work. Indeed, Respondent issued a press release to assure the public that they would continue to enjoy Stoffel's show: his performance of bargaining unit work was uninterrupted.

The ALJ's application of *Torrington Industries*, 307 NLRB 809 (1992), and *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964) on this issue was correct. There was no dispute the contractor Respondent SMG-Watertown hired replaced bargaining unit employee Laverghetta. The contractor, like Laverghetta, was a disc jockey, using basic broadcasting equipment. This unilateral transfer of bargaining unit work while the parties were engaged in negotiations for a successor CBA likewise violated §8(a)(5) of the Act as alleged in the Consolidated Complaint.

C. The ALJ Properly Concluded Respondent SMG-Massena Refused to Meet at Reasonable Times to Negotiate A Successor CBA

Respondent SMG-Massena in its Brief supporting the Exceptions admitted the Union stated the proposal to merge the Watertown and Massena bargaining units was a permissive subject of bargaining. There is no evidence the Union ever agreed to merge

the two historic units.¹⁶ Respondent in its Brief stated the Union never expressly opposed the merger. (Brief, p. 26). Respondent insisted the Watertown CBA would serve as the baseline for the union-represented employees. (JD-04-20, p. 35).

The ALJ found, and there is no dispute, that despite the Union's request for bargaining dates for the Massena bargaining unit, SMG-Massena did not agree to meet. (JD-04-20, pp. 35-36). The ALJ found, and there is no dispute, that Respondent SMG-Massena never responded to the Union's bargaining proposals for the Massena CBA, nor did it provide the Union with any of its own proposals. (Jd-04-20, pp. 35-36).

The ALJ properly concluded Respondent SMG-Massena failed to meet and bargain with the Union over terms and conditions of employment for the Massena bargaining unit, as required by §8(d).

D. The ALJ Properly Concluded Respondent SMG-Massena Violated §§8(a)(1) and (3) of the Act When It Terminated David Romigh

The ALJ's conclusion that Respondent SMG-Watertown violated §8(a)(3) of the Act when it terminated Local 24 steward and bargaining unit employee David Romigh is based on the record and grounded in Board law. It need not be disturbed.

1. ALJ Muhl correctly concluded that Mr. Romigh's discussions with his Watertown coworkers concerning Mr. Curry's workplace conduct and disposition were concerted, protected or union activity.

Neither the facts nor the law support SMG-Massena's characterization of Romigh's discussion with fellow bargaining unit members about the harassment allegation against General Manager Curry as "individual gripes," rather than concerted,

¹⁶ Massena, NY is about a two-hour drive from Watertown, NY.

protected or union activity under Section 7 of the Act. *See* 29 U.S.C. §157 (protecting, in relevant part, the right of employees “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”). ALJ Muhl correctly concluded Romigh's comments to his fellow Union members were protected. (JD-04-20, p. 45). General Manager Curry supervised employees in both Watertown and Massena, and the harassment complaint had originated from a similarly-situated SMG employee in Watertown. There can be little question that the temperament of a supervisor bears directly on employees’ terms and conditions of employment. *See, e.g., Hoytuck Corp.*, 295 NLRB 904 fn. 3 (1987) (attempting to cause the removal of a supervisor is protected where doing so would have impacted working conditions); *Gross Electric*, 366 NLRB No. 81 (2018) (protecting a union president’s questioning of company owner regarding a bullying supervisor). Thus, ALJ Muhl's ruling that Curry's harassment of bargaining unit employees is concerted, protected activity under §7 of the Act. (JD-04-20, p. 45).

At bottom, Respondent-SMG’s argument that Romigh’s communication in April 2018 with fellow bargaining unit members concerning Curry’s disposition at work was unprotected finds no support in either the facts or the law. (Brief at 39). The Board, therefore, should reject Respondent-SMG’s argument that Romigh communicating this information was unprotected.

2. Romigh did not lose the protection of the Act when he communicated with his Watertown coworkers about Curry's workplace conduct and demeanor.

Respondent-SMG Massena accused Romigh of defaming Curry and engaging in conduct that, even if concerted and protected or inherently union in nature, nonetheless warranted termination. (Brief at 44). Respondent SMG-Massena argues that such a result is necessary “as a matter of public policy to protect the private rights of SMG managers/supervisors [sic] . . . and the totality of the circumstances of Romigh’s poor job performance, insubordination, and falsification of time cards demonstrates Romigh was lawfully discharged for a valid business reason.” *Id.*

SMG provides little support for the assertion that public policy compels the Board to rule in its favor, and with good reason. Although SMG cites *Greif Packaging, LLC*, 2016 NLRB Lexis 497, for the proposition that “even if [a] discharge [is] motivated by union or protected, concerted activity, insubordination and verbal assault on a supervisor” renders a termination lawful. (Brief at 44). Indeed, Respondent SMG-Massena analogizes Romigh informing bargaining members about Curry’s harassing of other bargaining unit members to “a moment of animal exuberance . . . so violent” as to wrench the statements outside the realm of NLRA protection. *See Lutheran Soc. Serv. of Minn., Inc.*, 250 NLRB 35, 43 (1980). (Brief at 44).

Plainly, there is a wide gulf between the facts as found by ALJ Muhl and Respondent SMG-Massena’s characterization of the facts. Far from verbally assaulting or doing violence to Curry, or exhibiting “animal exuberance,” Romigh, in his capacity as shop steward, relayed accurate information – which had been relayed to him by

Local President Chase, an individual with intimate knowledge of the underlying events in Watertown – to fellow bargaining unit members in Massena concerning Curry’s temperament and conduct toward other members of the union.¹⁷ As a matter of fact, after all, there was an allegation of harassment against Mr. Curry, and he was required to attend an anger management course as a result. (JD-04-20, p. 46; Tr. 657-58; GC Ex. 32). Accordingly, the Board should reject Respondent SMG-Massena’s hyperbolic and unserious claims and decline to disturb Judge Muhl’s well-reasoned finding that Mr. Romigh’s communication was concerted and protected or union activity.

3. Judge Muhl correctly applied *Wright Line* to find that Respondent SMG-Massena’s termination of Romigh’s employment was motivated by anti-union animus in violation of §8(a)(3) of the Act.

Wright Line provides the legal analytical framework where an employer has advanced a “mixed motive” for disciplining an employee – in other words, where an employer has put forward one or more permissible justifications for discipline and one or more unlawful justifications. 251 NLRB 1083, 1084 (1980), *enf d.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983). The *Wright Line* framework applies to Respondent SMG-Massena’s termination of Romigh as Respondent based the termination, first, on Romigh’s concerted, protected activity and, second, on his workplace performance issues. The ALJ appropriately applied *Wright Line* to the record evidence. (JD-04-20, pp. 44-45).

¹⁷ Tr. 262 (Mr. Romigh’s testimony that he considered it to be his duty as shop steward to relay the information he had received from Ms. Chase); *see also* Tr. 199-200, 202-03, 206 (Ms. Chase’s testimony regarding the workplace discussion of Mr. Curry’s conduct and disposition at work and its relationship to SMG’s reliance upon Mr. Romigh’s “spreading rumors about management”).

ALJ Muhl found the General Counsel demonstrated that anti-union animus was a motivating factor in Respondent's decision to terminate Romigh. (JD-04-20, p. 46). The ALJ found Respondent SMG-Massena failed to demonstrate that it would have reached the same decision absent the protected conduct."¹⁸ (JD-04-20, p. 47).

Here, the GC established a *prima facie* case of discrimination under *Wright Line*, carrying its initial burden with ease. As discussed above, Romigh was engaged in concerted, protected or union activity, given that he was discussing Mr. Curry's influence on the workplace with other bargaining unit members. *See, e.g.,* GC Ex. 23; *see also* Tr. 199-200, 202-03, 206 (Chase's testimony concerning the workplace discussion of Curry's conduct); Tr. 262. Second, Respondent SMG-Massena was undisputedly aware of Romigh's concerted, protected activity, as it was repeatedly referenced as a justification for terminating his employment. *See, e.g.,* GC Ex. 21 & 23; *see also* Tr. 205-10 (Chase's testimony concerning GC Ex. 23, 24, & 25). Finally, there is ample circumstantial evidence that Respondent harbored anti-union animus, as the timing and content of termination-related correspondence indicates Respondent was willing to tolerate Romigh's alleged misconduct until he began to discuss SMG management with other bargaining unit members. *See* GC Ex. 21 & 23; *see also* Tr. 199-200, 202-03, 206.

The sole remaining issue under *Wright Line*, therefore, is whether Respondent SMG-Massena established by a preponderance of the evidence that it would have

¹⁸ *Wright Line*, 251 NLRB at 1087; 1089; *see Tschiggfrie Properties*, 368 NLRB No. 120 (Nov. 22, 2019) (clarifying that *Wright Line* is a causation test); *Hyundai Motor Mfg. Co. Alabama*, 366 NLRB No. 166, slip op. at 2 (2018) (discharging an employee based on belief of engagement in concerted, protected activity violates NLRA regardless of whether the employee in fact engaged in the activity).

terminated Romigh absent his engagement in concerted, protected activity.¹⁹ All of the evidence and testimony relevant to establishing Respondent's anti-union animus also establishes that SMG is unable to make out its affirmative defense under *Wright Line*. See *Laro Maintenance*, 56 F.3d at 230; see also *Auto Nation*, 360 NLRB at 1301 (an employer's affirmative defense fails if "the evidence establishes that the reasons given for the [employer's] action are pretextual – that is, either false or not in fact relied upon").

First, Respondent terminated Romigh close in time to his engagement in concerted, protected activity – importantly, purportedly for conduct it had largely condoned or ignored for the previous twenty-six months. This is suspicious and suggests the belatedly-proffered reasons for Romigh's dismissal were not true factors in SMG's decision. See, e.g., *Hall v. NLRB*, 941 F.2d 684, 688 (8th Cir. 1991) ("The timing of an adverse employment decision is given great weight in" evaluations of an employer's motive) (citing *TLC Lines. v. NLRB*, 717 F.2d 461, 464 (8th Cir. 1983)). Respondent took great pains to establish that Romigh was a flawed employee for the duration of his tenure with the company, citing even off-the-clock, offsite conversations and social media account activity as supporting its decision to terminate his employment. See GC Ex. 23 (adding several statements from Respondent SMG-Massena employees and photographs of parts of the company parking lot); Tr. 183-84; Tr. 618-23 (Curry's

¹⁹ See *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1352 (3d Cir. 1969) (the Act does not allow substitution of "good" reasons for "real" reasons when the true purpose of discipline is to punish an employee for engaging in concerted, protected activities), cert. denied 397 U.S. 935 (1970); see also *Roure Bertrand Dupont*, 271 NLRB 443 (1984) (underscoring that the employer's burden is to demonstrate by a preponderance of the evidence that it would have terminated the employee absent the protected conduct, not merely to assert any legitimate reason).

testimony concerning the *post hoc* preparation of evidence of Romigh's misconduct); Tr. 770-71 (Sharlow's testimony concerning the same).

Respondent's attempts to demonstrate that Mr. Romigh was an imperfect employee are better understood as efforts to reverse-engineer a plausible justification for terminating his employment. Indeed, what the full chronology reflects is that Respondent SMG-Massena was willing to tolerate alleged misconduct from Romigh, such as falling asleep "dozens" of times, (Tr. 646-47); disrespecting commercial benefactors and tarnishing goodwill among members of the community, (Tr. 638-42); and playing fast and loose with timesheets (Tr. 643_ — that is, until Romigh began discussing management at work with fellow bargaining unit members. *See Hall*, 941 F.2d at 688-89 (suspicious timing where employer laid off employee "after it learned [the employee] had contacted the union and scheduled an organizational meeting"). ALJ Muhl's statement that "Curry did not take issue with Romigh's poor job performance until after learning of his protected conduct" is correct. JD-04-20, p. 46).

Second, Respondent SMG-Massena's shifting justifications for terminating Romigh further suggest a *post hoc* rationalization rather than a genuine explanation. *See Hall*, 941 F.2d at 688 ("[I]mplausible explanations and false or shifting reasons support a finding of illegal motivation.") (citing *York Prods. v. NLRB*, 881 F.2d 542, 545 (8th Cir. 1989) and *McGraw-Edison Co. v. NLRB*, 419 F.2d 67, 75 (8th Cir. 1969)); *Lucky Cab*, 360 NLRB at 274 (supplying "new reasons" for discharge of employees as proceedings unfold is persuasive evidence of animus and pretext). (JD-04-20, p. 46).

Third, Respondent's failure to present Romigh with its justifications for terminating his employment – or *any* formal or informal disciplinary documents of any kind during the course of his twenty-six months of employment – strongly suggested that its proffered explanation was pretextual.²⁰

As in *Rockline Industries*, *Rood Trucking*, and *Lucky Cab*, where the Board found in each case that the employer failed to carry its *Wright Line* burden, Respondent SMG-Massena never provided Romigh an opportunity to address or dispute its allegations. Romigh was never presented with documents indicating he discussed these allegations with management or understood their implications. This failure, in conjunction with other evidence, renders it likely that the misconduct which Respondent alleged Romigh engaged in was not the genuine basis for his dismissal, and instead the true motivation for his dismissal was his concerted, protected activity, in violation of §8(a)(3).

Accordingly, Respondent SMG-Massena failed to establish its *Wright Line* defense by a preponderance of the evidence. The ALJ's conclusion that Respondent violated §8(a)(3) by terminating Romigh must be affirmed.

²⁰ See *Lucky Cab*, 360 NLRB at 274 (citing *Rood Trucking*, 342 NLRB 895, 900 (2004), for the proposition that “denying discharged employees the opportunity to explain their alleged misconduct is evidence of pretext”). At most, SMG management had informal discussions with Mr. Romigh. See Tr. 165-68, 169-77, 182 (Mr. Truax's testimony that neither he nor any other SMG manager ever formally disciplined Mr. Romigh for his alleged misconduct, nor was Mr. Romigh ever provided written notice of alleged discipline); Tr. 207 (stating that, to Ms. Chase's knowledge, Mr. Truax never disciplined Mr. Romigh during his tenure with SMG); Tr. 612-23 (neither Mr. Curry's signature nor Mr. Romigh's were on various disciplinary documents concerning the alleged misconduct); Tr. 636-47 (Mr. Curry describing SMG's efforts to “counsel” Mr. Romigh, which did not include presentation of formal discipline); Tr. 754-55 (Mr. Sharlow's testimony that “discipline was left to Glenn [Curry]”); see also *NLRB v. Rockline Industries*, 412 F.3d 962, 968-69 (8th Cir. 2005) (persuasive evidence of pretext where employer failed to give suspended employee opportunity to respond to charges of misconduct); and *Rood Trucking*, 342 NLRB at 900 (same).

E. The ALJ Properly Concluded Respondent SMG-Watertown Engaged In Unlawful Direct Dealing and Unlawfully Interrogated Bargaining Unit Employees About Their Engagement In Union Activities

The ALJ found Respondent SMG-Watertown violated §8(a)(5) when it engaged in unlawful direct dealing with bargaining unit member Stoffel. (JD-04-20, p. 30-31).

An employer violates §8(a)(5) of the Act when it bypasses a union and deals directly with its employees. *Tecnocap LLC*, 2019 NLRB LEXIS 522 (06-CA-216449, September 16, 2019)(asking employees if they desired to work during the lockout constituted direct dealing); *El Paso Electric Co.*, 355 NLRB 544, 545 (2010). Direct dealing occurs when an employer 1) communicates directly with its employees; 2) for the purpose of changing wages, hours, or terms and conditions of employment. 355 NLRB at 545. The ALJ applied this law in his Decision. (JD-04-20, p. 30).

Respondent here freely admitted that it engaged in conversations with Stoffel for the purpose of changing his work hours, compensation, schedules, and terms and conditions of employment. Indeed, counsel for Respondent in his opening statement proclaimed it was not unlawful for management to bypass the Union to negotiate such terms with bargaining unit employees. Respondent violated §8(a)(1) of the Act by engaging in direct dealing with Stoffel. ALJ Muhl's decision need not be disturbed.

The ALJ also concluded Respondent SMG-Watertown violated §8(a)(1) when Curry interrogated bargaining unit member Laverghetta on August 16 and 17, 2018. (JD-04-20, p. 36). The ALJ noted the Board consider a "non-exhaustive list of factors" including the history of employer hostility; the nature of the information sought by the

interrogator; the status of the interrogator in the employer's hierarchy; the place and method of interrogation; and the truthfulness of the reply. *Westwood Healthcare Center*, 330 NLRB 935 (2000). (JD-04-20, p. 37).

In this matter, as the ALJ found, Curry interrogated Laverghetta not once but twice, asking him whether Laverghetta would cross the expected picket line, and work for Respondent during a strike. Curry told Laverghetta that he (Curry) told Stephens he knew Laverghetta would cross the picket line for Respondent.

There is no dispute that as General Manager, Curry held the highest position at the Watertown facility. Curry sought Laverghetta to disclose critical information – whether the employee would cross a picket line for Respondent. Laverghetta testified the conversations occurred in the work place, and there were no other employees in the area. Laverghetta also testified that he did not respond to the questions, demonstrating he was intimidated by the General Manager's probe.

Respondent violated §8(a)(1) of the Act when it interrogated Laverghetta and asked whether he would cross a picket line for Respondent.

IV. Conclusion

For the reasons set forth herein, Charging Party asks the Board to reject Respondents' Exceptions, and affirm ALJ Muhl's Decision in its entirety, and adopt his Order.

Respectfully,



Dated: May 1, 2020

Judiann Chartier
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Certification

I hereby certify that on this day I filed Charging Party's Answering Brief to Respondents' Exceptions using the Agency's electronic filing system.

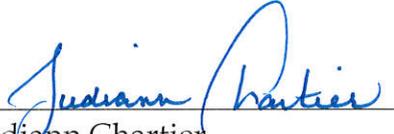
I further certify that I served a copy of this Answering Brief upon Counsel for the General Counsel and Respondent's Counsel by electronic mail on this day:

Alicia Pender Alicia.Pender@nlrb.gov

Renee Williams renee@awilaw.com

Steve Andrews Steve@awi.law.com

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