

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

BS&B SAFETY SYSTEMS, LLC

and

Cases 14-CA-249322  
14-CA-252717  
14-CA-252718

UNITED STEEL, PAPER AND FORESTRY, RUBBER,  
MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL  
AND SERVICE WORKERS INTERNATIONAL UNION,  
AFL-CIO

*Rebecca Proctor, Esq.*,  
for the General Counsel.

*R. Mark Solano and Kevin Litz, Esqs.*,  
for the Respondent.

*Sasha Shapiro, Esq.*,  
for the Charging Party.

DECISION

GEOFFREY CARTER, Administrative Law Judge. In this case, the General Counsel asserts that BS&B Safety Systems, LLC (Respondent) violated the National Labor Relations Act (the Act) by: improperly handling employee vacation requests; failing to provide information requested by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL-CIO (Union or Charging Party); making coercive statements to employees; and temporarily assigning an employee to a different work area for discriminatory reasons. As explained below, I have determined that Respondent violated the Act by: unilaterally deciding to grant vacation requests by labor grade instead of by seniority in the bargaining unit; requiring an employee to remove union stickers from his work area; and threatening an employee with discipline because he engaged in union and protected concerted activities. I have recommended that the remaining allegations in the consolidated complaint be dismissed.

STATEMENT OF THE CASE

This case was tried in Tulsa, Oklahoma, on March 3-4, 2020. The Union filed the following unfair labor practice charges at issue:

	<i>Case</i>	<i>Charge Filing Date</i>
	14-CA-249322	October 3, 2019 (amended on November 26, 2019)
5	14-CA-252717	December 3, 2019 (amended on January 29, 2020)
	14-CA-252718	December 3, 2019 (amended on January 29, 2020)

10 On December 12, 2019, the General Counsel issued a complaint covering Case 14-CA-249322. On February 19, 2020, the General Counsel issued a consolidated complaint covering all three Cases at issue here.

15 In the consolidated complaint, the General Counsel alleged that Respondent violated Section 8(a)(1) of the Act by: on about November 12, 2019, requiring employees to remove union stickers from their work area; and on about November 15, 2019, threatening employees with discipline because they engaged in union or other protected concerted activities. The General Counsel also alleged that Respondent violated Section 8(a)(3) and (1) of the Act by taking the following actions because employees engaged in union and protected concerted activities: since about July 5, 2019, applying vacation restrictions only to labor grade 9 employees; and on about December 17, 2019, moving employee Jesse Snelson to a different work area. Last, the General Counsel alleged that Respondent violated Section 8(a)(5) and (1) of the Act by: in about July 2019, changing its vacation scheduling practices by granting employee vacation requests based on labor grade instead of by seniority without first notifying the Union and affording an opportunity to bargain, and without first bargaining with the Union to an overall good-faith impasse for a successor collective-bargaining agreement; since about July 19, 2019, failing and refusing to provide information to the Union in response to a July 12, 2019 information request; and since about August 16, 2019, failing and refusing to provide information to the Union in response to a July 31, 2019 information request. Respondent filed a timely answer denying the alleged violations in the consolidated complaint.

30 On the entire record,<sup>1</sup> including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Charging Party and Respondent, I make the following

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<sup>1</sup> The transcripts and exhibits in this case generally are accurate. However, I hereby make the following corrections to the trial transcript: p. 8, l. 1: “discriminatees” should be “designees”; p. 21, l. 23: “B.S&S’s” should be “BS&B’s”; p. 24, l. 15: “sated” should be “stated”; p. 71, l. 2: “I’m sure” should be “I’m not sure”; p. 72, l. 11: “funs” should be “runs”; p. 82, ll. 20-21: “Counsel” should be “General Counsel” and “document” should be “document issue”; p. 85, l. 15: “knew a newly-calculated” should be “need a copy of the”; p. 90, l. 12: “2019” should be “2018”; p. 122, l. 19: “stared” should be “started”; p. 124, l. 19: “petty” should be “pretty”; p. 131, l. 1: “ant” should be “want” and “I” should be “in”; p. 136, l. 24: “no” should be “not”; p. 145, l. 9: “force a” should be “enforce the”; p. 153, l. 18: “I” should be “in”; p. 163, l. 3: “rea” should be “area”; p. 175, l. 4: “mans” should be “means”; p. 179, l. 2: “ere” should be “were”; p. 197, l. 11: “stent” should be “stint”; p. 208, l. 7: “sked” should be “asked”; p. 216, l. 10: “sked” should be “asked”; p. 222, l. 22: “sked” should be “asked”; p. 263, l. 7: “he” should be “the”; p. 272, l. 25: “database” should be “basis”; p. 328, l. 7: “effect” should be “affect”; p. 336, l. 1: “building” should be “build”; p. 341, l. 16: “alliance” should be “reliance”; p. 342, l. 25: “a” should be “at”; and p. 348, ll. 2, 5: “Strew” should be “Stroup”.

FINDINGS OF FACT<sup>2</sup>

## I. JURISDICTION

5 Respondent, a Delaware limited liability company with an office and place of business in  
 Tulsa, Oklahoma, engages in the manufacture and nonretail sale of pressure relief devices. In the  
 12 months preceding October 31, 2019, Respondent sold and shipped goods valued in excess of  
 \$50,000 from its Tulsa, Oklahoma facility directly to points outside the State of Oklahoma. In  
 10 the same time period, Respondent also purchased and received goods at its Tulsa, Oklahoma  
 facility that were valued in excess of \$50,000 and came directly from points outside the State of  
 Oklahoma. Respondent admits, and I find, that Respondent is an employer engaged in  
 commerce within the meaning of Section 2(2), (6) and (7) of the Act. Respondent also admits,  
 and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act,  
 15 and that Local 4992 (Local Union) has been a servicing agent for the Union and is also a labor  
 organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

*A. Background*

## 1. The production and maintenance employee bargaining unit

20 Since at least August 1, 1978, Respondent has recognized the Union as the exclusive  
 collective-bargaining representative of employees in the following appropriate bargaining unit:

25 All production and maintenance employees of Respondent's Tulsa, Oklahoma plant,  
 excluding all office and clerical employees, stockroom clerical employees, inspectors,  
 technical employees other than lab techs, watchmen, guards and supervisors as defined  
 by the Act [the production and maintenance unit].

30 (GC Exh. 1(cc), (ff) (par. 7(a)–(b), (e)).)<sup>3</sup>

The production and maintenance unit includes approximately 28–30 employees in the  
 following job classifications:

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I also note that on April 28, 2020, I granted the General Counsel's unopposed motion to add  
 Respondent's March 2, 2020 answer to the record as General Counsel Exhibit 1(ff), and to replace  
 General Counsel Exhibit 6 with a fully redacted version of the same document. I recommend that the  
 Board take appropriate steps to ensure that the previous version of General Counsel Exhibit 6 is removed  
 from the paper and electronic files for this case.

<sup>2</sup> Although I have included several citations in this decision to highlight particular testimony or  
 exhibits in the evidentiary record, I emphasize that my findings and conclusions are not based solely on  
 those specific citations, but rather are based on my review and consideration of the entire record for this  
 case.

<sup>3</sup> Respondent also has recognized the Union as the exclusive collective-bargaining representative of a  
 bargaining unit composed of inspectors (the inspectors' unit). (GC Exh. 1(cc), (ff) (par. 7(c)–(e).) The  
 parties agree, however, that the complaint allegations in this case only relate to the production and  
 maintenance unit. (GC Posttrial Br. at 4; R. Posttrial Br. at 1.)

	<u>Job classification</u>	<u>Labor Grade</u>	<u>Positions (approx.)</u>
5	tool and die maker specialist	14	2
	maintenance specialist	12	2
	welder	11	2
	disk fabricator and assembler	9	20-24
	general shop helper	4	Unspecified
10	janitor/truck driver	2	Unspecified

(GC Exhs. 2 (Article 23, Section 2; Appendix B), 6; Tr. 32-33, 114, 146-147, 305, 361.)

15 While most (all but 4-5 out of 20-24) labor grade 9 employees work as fabricators who build disks and other products, the disk fabricator labor grade 9 job description covers a broad range of potential assignments, as indicated in the following job summary:

20 Fabrication, Work-in-Process Testing (i.e., Bubble Leak, Break Test, etc.) and assembly of rupture disks, assemblies' products and explosion vents. Other duties include stockroom duties, punch press, Teflon forming, temperature testing, tagging, marking, oxygen cleaning and shipping.

25 (GC Exh. 21; see also Tr. 145-146, 183-184, 186, 218, 231, 295, 307.) The broad range of potential labor grade 9 duties stems in part from a decision during collective bargaining to combine employees in labor grades 5-9 into a single labor grade 9. (Tr. 175, 231-232, 238-239, 294-295.)

30 In practice, most fabricators work in one of 10-15 separate areas dedicated to a single function, such as making a particular type of disk or operating a specific set of machinery. If the fabricator in a particular work area is out on vacation or other short-term leave, that fabricator's work generally will be waiting for them to resume when they return to the facility. Respondent does not have a consistent practice of cross-training fabricators to work in other areas, but does do cross-training assignments on an ad-hoc basis. There is also some history of Respondent: assigning employees in labor grade 9 (or higher) to the shipping area as needed; assigning  
35 fabricators to work in other areas on a temporary basis (e.g., when the fabricator normally assigned to the area is not available or needs assistance with a large or premium order); and assigning a fabricator to a new area to replace another fabricator who is retiring or otherwise ending their employment. (Tr. 114-115, 146, 151, 154-155, 176-179, 186-187, 202, 214-216, 220, 232-233, 249-250, 302, 308-309; see also Tr. 115-116 (explaining that having a single  
40 fabricator work on a product makes it easier to trace products).)

## 2. Collective-bargaining history

45 Respondent and the Union have executed a series of successive collective-bargaining agreements for the production and maintenance unit, the most recent of which was effective from August 7, 2014, through August 6, 2017, and extended by agreement through October 31, 2017. Since about August 2017, the Union and Respondent have been negotiating over the terms of

another successive collective-bargaining agreement. The Union and Respondent reached a tentative agreement in November 2019, but the bargaining unit voted against ratifying the proposed agreement, and thus negotiations resumed and bargaining unit employees continue to work under the terms of the expired collective-bargaining agreement. There is no evidence that either party has declared impasse in the ongoing contract negotiations. (GC Exhs. 1(cc) (par. 7), 1(ff) (par. 7), 2; Tr. 40–41, 99.)

## *B. Employee Vacation Rules and Practices*

### 1. Collective-bargaining agreement vacation language

The expired collective-bargaining agreement for the production and maintenance unit states as follows concerning how Respondent and bargaining unit members may schedule vacations:

The Company may schedule vacations according to its work requirements for any employee or group of employees and the vacation of any employee during a slack period of work. In granting vacations, the Company will grant vacations by shift and will give preference to the senior employee on each shift, except in those instances where the request is received within the thirty (30) calendar day period preceding the vacation, in which case, preference will be given to the employee’s request as they are received. Notwithstanding the foregoing, from February 14 through February 28 of each year, the Company will allow employees, by seniority, to select one week of available vacation (that is, a week not previously selected/scheduled by an employee with more seniority), for that calendar year from which they cannot be bumped. Once so scheduled, this one week of pre-scheduled vacation can only be cancelled by the employee completely (not partially) and then the regular, established vacation policy will apply.

(GC Exh. 2 (Article 10, Section 6); see also Tr. 105, 141, 221–222, 233–235, 250, 282–283, 296.)

### 2. Vacation practices

Consistent with the expired collective-bargaining agreement, Respondent has an established practice of granting employee requests for vacation time in order of seniority, such that more senior employees have priority over less senior ones. To illustrate, if an employee submits a request on April 1 to take vacation time on September 10–12, that employee may be bumped from those vacation days by another employee with more seniority. The potential for bumping ends, however, once less than 30 days remain before the vacation days in question – instead, vacation requests in that time period are handled on a first-come-first-served basis. (Tr. 106, 141–142, 175–176, 223, 234–235, 244, 251–252, 261–263, 282–283, 296, 298–299, 309, 366; see also Tr. 255–256 (providing an example of seniority bumping that could have occurred between two bargaining unit employees in different labor grades, but for the senior employee voluntarily opting to select a different vacation week).)

Vacation requests submitted between February 14 and 28 each year (known as the “lock-in” period) are handled slightly differently. Lock-in vacation requests must be for an entire

available week and are awarded based on seniority. Once the lock-in period ends, employees cannot be bumped from the vacation week that they reserved as part of the lock-in process. (GC Exh. 2 (Article 10, Section 6); Tr. 143-145, 235-237, 239-240.)

5 Respondent also has maintained an established practice of only allowing a maximum of three labor grade 9 employees to be on vacation at the same time.<sup>4</sup> If a labor grade 9 employee is denied vacation based on this restriction, then the established practice is that no other less senior employee in the bargaining unit may take vacation, regardless of whether the less senior employee works in a different labor grade. Any employees who have excess vacation time at the end of the year receive a payout from Respondent for the value of their excess vacation time. (Tr. 49, 141-142, 176, 237-238, 304-305, 311; see also Tr. 175-176, 302-304 (noting that seniority operates on a plant-wide basis, such that everyone in the bargaining unit is on the same seniority list, and also noting that employees in higher labor grades may perform work customarily handled by labor grade 9 employees).)

### 15 *C. Weekly Scheduling Practices*

To prepare the weekly schedule for each fabricator, Respondent's production scheduler uses a database (Tulsa Manufacturing System (TMS)) to print out a preliminary schedule showing the past due orders and a selection of backlogged orders for the fabricator's area of the shop floor. Using the preliminary schedule and also considering any premium/emergency orders, supervisors talk to the fabricator to assess what orders the fabricator can complete for the week. Respondent posts a final schedule for each fabricator on Friday, with past due orders shown at the top of the schedule and other orders shown on the bottom. Past due orders that are not expected to be completed during the week are generally not listed on the schedule, though the fabricator may still do some work on those orders if time permits. (Tr. 61-62, 64-65, 67-68, 73-75, 77, 126-127, 137, 147-149, 324-326, 329-330, 332-336, 350-351; see also Tr. 130 (noting that fabricators generally do not see the entire list of orders that are backlogged for their work area); Tr. 135, 343-344 (explaining that a "past due" order is an order that is past the due date for shipment, while a "backlog" is an open order at the facility).)

For many years, fabricators worked orders based on the due date, and thus generally prioritized past due orders (while also accounting for premium/emergency orders). In about mid-2017, however, Respondent began using a "schedule attainment" system that, on a weekly basis, directs fabricators to work on a designated set of orders that tend to be prioritized based on dollar value, with premium orders having top priority (though due dates also remain relevant). Past due orders therefore appear on the weekly schedule but are not necessarily given first priority for completion. Any orders on the weekly schedule that are not completed will roll over to the following week. Respondent evaluates its supervisors in part on how successful the fabricators are with completing orders under the schedule attainment system. (Tr. 61, 68, 126-129, 131, 135, 137-138, 148-150, 178, 327-331, 335-336, 350-351; see also GC Exhs. 8, 10 (information request responses that discuss the role of due dates in weekly scheduling).)

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<sup>4</sup> Respondent also has restrictions for labor grades 11 (welders), 12 (maintenance) and 14 (tool and die), insofar as Respondent generally permits only one of the two employees in each of those labor grades to be on vacation on a given day. (Tr. 361; see also Tr. 305.)

*D. The 2018 Vacation Dispute*

1. Respondent sets new limit on labor grade 9 vacation time

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In about February 2018, Respondent set a new limit of permitting only one labor grade 9 employee to be on vacation at any given time. Respondent maintained that this new limit on vacation time was necessary to address an increase in the number of orders that were past due and/or backlogged. The Union served an information request on Respondent to obtain more information about Respondent's workload, and also filed a grievance over the issue. Respondent provided some information in response to the Union's information request, but denied the grievance because Respondent found that the vacation restrictions did not violate the contract. Since the dispute continued, the Union filed unfair labor practice charges to challenge the vacation restrictions. (Tr. 90, 97-98, 117-126, 136, 141, 263-264, 342-344, 349-350; GC Exhs. 11-14 (grievance, information request and responses); see also Tr. 138, 154-155, 257-258, 351-352 (noting that the vacation restriction applied to all labor grade 9 employees even though some of those employees did not have backlogs or past due orders in their particular work areas, and even though orders could be past due for reasons outside of the fabricator's control).)

2. October 2018 – Respondent and the Union settle the 2018 vacation dispute

On September 17, 2018, the General Counsel issued a complaint in Cases 14-CA-214750, 14-CA-224095 and 14-CA-225941, alleging (among other things) that Respondent violated Section 8(a)(5) and (1) of the Act by, on about February 15, 2018, changing its vacation scheduling practices by limiting the number of employees who can take vacation at any given time. (GC Exh. 3 (pp. 9-17).)

In October 2018, the parties executed a settlement agreement to resolve the complaint allegations in Cases 14-CA-214750, 14-CA-224095 and 14-CA-225941. The settlement agreement included a non-admission clause indicating that, notwithstanding the settlement agreement, Respondent did not admit that it violated the Act. (GC Exh 3 (pp. 22-26) (settlement agreement and notice); Tr. 90-91, 142, 344.)

An addendum to the settlement agreement states as follows concerning the vacation dispute:

Respondent agrees to return to its prior practice of allowing three Labor Grade 9 Fabricators to simultaneously utilize vacation time on any given day and of allowing three Labor Grade 9 Fabricators to "lock in" vacation for any given work week during the February "lock in" period. Should backlogs and past-dues require a reduction in the number of Labor Grade 9 Fabricators allowed to utilize vacation time on any given day Respondent will provide [the Union] thirty-day notice of the reduction, accompanied by documentation of the backlogs and past-dues. Such reductions may not last more than sixty days without additional timely notice and documentation of past-dues/backlogs being provided to [the Union]. Respondent agrees that even if such notice is provided, it will not cancel or in any other way impact locked in vacation time.

Respondent agrees to work with [the Union] to identify any bargaining unit employees who between February 2018 and the present requested vacation time, were denied vacation due to one other Labor Grade 9 Fabricator being on vacation, and who received attendance points or attendance-related discipline due to the denial. Once such employees are identified, Respondent agrees to rescind any attendance points and/or attendance discipline resulting from the denial.

(GC Exh. 3 (p. 27); see also Tr. 91-92, 104, 142-143, 264-265, 344-345, 352.)

3. December 2018 – the parties clarify the 2018 settlement regarding vacation time

On about December 18, 2018, the Union and Respondent signed an agreement that clarified the terms of their October 2018 settlement concerning vacation time. The clarification states as follows:

Under the Settlement Addendum, Vacation Paragraph, the Respondent has agreed to provide [the Union] with thirty-day notice of a reduction in the number of Labor Grade 9 Fabricators allowed to utilize vacation time on any given day because of backlogs and past-dues; and, that said notice will be accompanied by documentation of the backlogs and past-dues.

To clarify these matters, the Respondent and [the Union] agree to the following:

- (1) The “documentation of the backlogs and past-dues” to be provided to [the Union] shall be copies of all schedules and SQDIP reports<sup>5</sup> used by the Respondent to determine the backlogs and past-dues at the time of notice to [the Union] is given;
- (2) The above notice and documentation of the backlogs and past-dues shall be provided by the Respondent by email to the USW Staff Representative Chad Vincent . . . and USW Local 4992 President Michael Stroup . . . or their successors at their relevant email addresses, at the time period set forth in the Settlement Addendum;
- (3) The notice and documentation of the backlogs and past-dues will be provided to Mr. Vincent and Mr. Stroup at the same time; and
- (4) This agreement is effective on the date of execution and will apply to all future notices provided by Respondent after the date of execution.

(GC Exh. 3 (p. 29); see also Tr. 94-95, 104, 264-265, 345-350, 352, 364-365; R. Exh. 1 (example of documentation that Respondent provided to the Union to support a vacation restriction).)

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<sup>5</sup> An SQDIP report is a report that addresses safety, quality, delivery, inventory and productivity at the facility. (Tr. 347.)

Local Union president Michael Stroup took the lead for the Union on monitoring Respondent's compliance with the terms of the fall 2018 settlement agreement and settlement clarification. Citing past due orders and backlogs, Respondent continued to restrict vacation for labor grade 9 employees to one person at a time, but generally complied with the obligation (from the settlement agreement and clarification) to provide 30-day notice and documentation demonstrating the backlogs and past due orders. In about January and February 2019, Stroup complained to managers that Respondent's schedule attainment system was diverting attention away from addressing backlogs and past due orders. Respondent, however, discharged Stroup in April 2019.<sup>6</sup> (Tr. 44-45, 49-50, 96-97, 113, 131-132, 145, 151, 245.)

*E. June 2019 – Respondent Denies Campanella Steele's Vacation Request and Grants the Same Vacation Day to an Employee with Less Seniority*

On April 5, 2019, fabricator Campanella Steele submitted a request to take a vacation day on July 5, 2019. Employee I.B., a tool and die specialist (labor grade 14), also submitted a request to take vacation on July 5, but submitted the request on June 6. At the time, fabricator Brenda Skinner was already scheduled to take vacation on July 5 as part of her lock-in vacation week. Steele had more seniority than I.B., as Steele was the second most senior employee in the bargaining unit (number 2 out of 28), while I.B. had the least seniority in the unit (number 28 out of 28). As shown on Respondent's personnel records, Steele had an "active" union membership status while I.B. had a "non-active" union membership status (i.e., Steele was a dues-paying union member while I.B. was not). (GC Exhs. 6, 22-23; Tr. 223-224, 249, 252-255, 274-279, 283, 297-298.)

On June 26, Respondent, through production manager Alan Roberts, denied Steele's request for vacation on July 5, but granted I.B.'s vacation request for that day (Skinner's previously locked-in vacation for July 5 remained in place). At trial, Roberts maintained that it was appropriate to deny Steele's vacation request because Respondent, due to a high number of past due and/or backlogged orders, was only permitting one labor grade 9 employee to take vacation on any particular day (for July 5, Skinner was the labor grade 9 employee permitted to take vacation). Roberts also noted that I.B., as a labor grade 14 employee, was not subject to the limit that Respondent placed on labor grade 9 employee vacation time. Roberts conceded, however, that the collective-bargaining agreement required Respondent to grant vacation requests by shift and seniority, and that nothing in the 2018 settlement agreement and clarification modified the vacation rules in the collective-bargaining agreement. (GC Exhs. 22-23; Tr. 223-224, 252-254, 278-281, 360-361, 363-366; see also Tr. 245-246.)

On June 26, 2019, the Union filed a grievance about vacation time. The grievance, which was signed by 17 employees in the bargaining unit, stated as follows:

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<sup>6</sup> On October 21, 2019, the administrative law judge in Case 14-CA-239530 issued a decision finding that Respondent violated Section 8(a)(3), (4) and (1) of the Act when it discharged Stroup. (GC Exh. 5.) The administrative law judge's decision in Case 14-CA-239530 is (as of the date of my decision in this case) currently pending before the Board on appeal.

[Grievance information]: Numerous employees have question[s], concerns, comments pertaining to company's administration of vacation time. Settlement requested applies to the entire bargaining unit.

5 Nature of Grievance: Senior employees denied vacation on days granted to junior employees. [Shelley Brazille] has discussed her instance with Mr. Roberts. Contract provides that other than language for "lock-in" and "30 day window," vacation is granted to senior employee.

10 Settlement requested in Grievance: Meeting with all employees, HR, and management to clarify multiple vacation issues. Company to schedule vacations per contract.

Agreement Violation: Article 10, and any other applicable contract language.

15 (GC Exh. 16; see also Tr. 152-153, 296-297, 300-301.) Steele also approached Hart to discuss the decision to deny his (Steele's) request for vacation on July 5 while permitting a less senior employee in the unit to take vacation. Hart promised to talk to Roberts about the issue, but later told Steele that he and Steele could not discuss it because of the pending grievance. Respondent did not otherwise meet with employees to discuss their concerns about vacation time. (Tr. 155-  
20 156, 256-257.)

On July 2, 2019, Respondent notified the Union that it was denying the June 26 grievance. Respondent stated as follows concerning its decision:

25 The Company approves and schedules vacation requests in compliance with the Collective Bargaining Agreement and the settlement reached in the ULP case concerning vacation policy. Upon review the Company finds no violation of the CBA. Grievance respectfully denied.

30 (GC Exh. 16; see also Tr. 155.)

#### *F. July 2019 – Union Requests Information from Respondent*

##### 1. July 12, 2019 information request and response

35 In about mid-June 2019, Vince Clark began serving as the Union's staff representative for the bargaining unit. Based on conversations with Stroup, former staff representative Chad Vincent and current bargaining unit members, Clark learned that vacation restrictions were still a problem and that bargaining unit members were concerned that Respondent was scheduling work  
40 assignments in a manner that perpetuated a high number of past due orders. Specifically, bargaining unit members expressed the concern that instead of scheduling work based on the due dates of the orders, Respondent was now scheduling work assignments to give priority to expensive orders (and thereby postponing work on past due orders). (Tr. 29-31, 33-35, 45-49, 55-56, 98-102.)

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To look further into whether a change in scheduling or production practices was causing an increase in backlogs and past due orders and the resulting restrictions on vacation time, on July 12, 2019, Clark sent the following information request to Respondent:

5 The Union is requesting the following information due to the Vacation Restriction:

1. When did the company modify the production process
2. When did employees start being given a production schedule instead of working orders by the due date
- 10 3. Backlogs and past dues for 3 years prior to the change
4. Backlogs and past dues since the change
5. Whose decision was it to make the change [to] the production process
6. Any and all information relative to how the decision was made for the change to production process
- 15 7. The reason for the change to production process

Please provide the information by **7/19/19**. Please respond to questions in the numerical order in which they were requested, to limit confusion. If any part of this request is denied or if any material is unavailable, please state so in writing and provide the remaining items by the above date, which the union will accept without prejudice to its position that it is entitled to all documents and information sought in this request. This letter is submitted without prejudice to the union's right to file subsequent requests in regard to similar information.

25 Vince Clark  
USW Staff Representative

(GC Exh. 7 (emphasis in original); see also Tr. 33-35, 45, 108-111.)

30 On July 19, 2019, Respondent sent a letter to the Union to reply to the Union's July 12, 2019 information request. Respondent stated as follows:

Vince:

35 The Company is in receipt of your Request for Information ("RFI") dated July 12, 2019.

Your inquiries are centered around three areas:

- 40 (1) Information regarding backlogs and past dues and
- (2) Modification in production processes and
- (3) Production Schedules.

I believe it will be helpful if, prior to responding to your specific requests, I provide you with some background.

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### **Backlogs and Past Dues**

As to any inquiries regarding “back logs and past dues,” this issue dates back to last year’s ULP (Case 14–CA–214750) and thus predates your involvement with this local and this issue.

The production of these items (back logs and past dues) has already been debated, discussed between the Company and the Union and, under the oversight of the NLRB, ultimately resolved in December 2018.

The result of that process was and is the attached “Clarification of Settlement Addendum.” As you can see, “documentation of the backlogs and past dues” to be provided to the Union, as agreed by the Company and the Union, was and is copies of “all schedules and SQDIP reports used by the Respondent [BS&B] to determine the backlogs and past-dues at the time notice to the Charging Party [USW] is given.”

Since that time, the Company has been in compliance with the terms of this Settlement addendum, providing the schedules and the SQDIP reports to the USW as directed. The Company fully intends to continue to abide by the settlement and provide the information described in that document “documentation of the backlogs and past dues”) which was negotiated and agreed to between the Company and the Union.

### **Modification in Production Processes**

The inquiries regarding “modification in production processes” are more problematic.

First, the inquiry is incredibly unclear since the Company has been making and undergoing modifications to the production process on a regular basis since it started manufacturing pressure relief devices many decades ago. In recent years, this has been in part outlined and demonstrated by the Company’s “continuous improvement” initiative.

In addition, there is an entire unit of the Company (CEP or “Custom Engineered Products”) which causes regular changes in the production process as “custom” products are engineered and the manufacturing process modified accordingly to respond to particular customer needs.

Perhaps most importantly, matters such as the decisions to modify the production process (and the related when and how) lie within the core of ongoing business decisions which in turn rest solely and strictly within the discretion of management.

Further support for this proposition can be found in the management rights section of the most recent CBA between the parties or, in the alternative, the actual past practice of unilateral activity regarding this issue.

**Production Schedules**

Employees have been given schedules for a number of years in varying formats but, in the end, all such schedules are ultimately driven by customer due dates and requirements.

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Whereas, previously, the employees were given an area report (orders listed by customer request dates) for the last five years or so, they have been provided weekly schedules (again, driven by customer due dates, with emergency and premium orders being given priority, as well as direction from the sales group).

10

With the above information as background, here are the Company responses to the items in the USW's RFI:

15

[(1), (5)–(7) The requests are overly broad, unclear and, to the extent that they refer to decisions that the Company can make unilaterally, no responses are required.]

20

(2) Production schedules and orders by due date, of one type or another, have been provided to the employees for years. For at least the last five years, employees have been provided with weekly schedules (driven by customer due dates).

(3) This request is unclear as the Company does not know what the "change" is. In addition, as set forth above, information regarding backlogs and past dues are already provided to the Union per the settlement agreement.

25

(4) This request is unclear as the Company does not know what the "change" is. In addition, as set forth above, information regarding backlogs and past dues are already provided to the Union per the settlement agreement.

30

Vince, I am more than happy to discuss the Union's legitimate needs for information but I would need some guidance from you as to what information you are really needing since the RFI as stated provides little guidance.

Regards,

Dr. Charles C. Hart [Director of Human Resources & EHS]

35

(GC Exh. 8 (emphasis in original); see also Tr. 36, 42–44, 53–54.)

## 2. July 31, 2019 follow up information request and response

40

On July 31, 2019, the Union sent another information request to Respondent to follow up on and clarify the Union's July 12, 2019 request. The Union stated as follows in its July 31 request:

Dr. Hart:

45

I have received and reviewed your response to the information request. Your timely response is recognized and appreciated, however, the response does not satisfy the information request. I am informed and cognizant of the issues surrounding vacation

5 limitations that were the subject of an unfair labor practice and settlement agreement last year. However, as I read the settlement, part of it relates to the information BS&B is required to provide on a regular basis to justify ongoing vacation limitations. It does not limit permanent or ongoing information request[s] that the Union has a right to under the NLRA.

10 Based on my conversations with bargaining unit members, it appears the issue with backlogs and past dues is a relatively recent one, with many saying there were no significant backlogs or past dues until there was a change in the production/scheduling process that moved away from processing orders by due date. The vacation limitations have been in place for over a year now, limiting employees' ability to utilize and enjoy their bargained vacation time. The Union is now requesting information related to the causes of the backlogs and past dues. Please note: this information request is *not* aimed at whether there is a backlog, but instead is aimed at determining why there is a backlog, which is a completely different issue than what is discussed by the settlement agreement. This information is directly relevant to terms and conditions of employment, as the backlogs and past dues are [Respondent's] stated reason for limiting vacation time. Clarification of each information request follows:

20 **In clarification of requests #1 and 2:** Please provide the date the Company stopped having employees process/manufacture orders based on the due date and/or changed to a production schedule considering factors other than due date and describe the specific change implemented on each date.

25 **In clarification of request #3:** Please provide the backlogs and past dues, by month, for the three years prior to the change(s) identified in requests 1 and 2.

30 **In clarification of request #4:** Please provide the backlogs and past dues, by month, from the date of the change(s) identified in response to requests 1 and 2.

**In clarification of request #5:** Please provide the names of the management members who made the decision to make the change(s) identified in response to requests 1 and 2.

35 **In clarification of request #6:** Please provide all documents, correspondence, and any and all other materials used or relied upon in making the decision to implement the change(s) identified in response to requests 1 and 2.

40 **In clarification of request #7:** Please provide the Company's reasons/rationale for making the change(s) identified in response to request[s] 1 and 2.

45 **New request #8:** Please provide detailed information of any and all steps the Company has taken to reduce backlogs and past dues from **January 2018 to the present**. If the Company has taken no steps to reduce backlogs and past dues, please indicate why no action has been taken to reduce backlogs and past dues.

Dr. Hart, I believe we can both agree that employees are more efficient and productive when they receive sufficient down time and are able to utilize their time off. I am

hopeful that we can work cooperatively and collectively to find solutions to reduce backlogs and past dues so employees are again able to schedule and use their vacation time.

5 Vince Clark

(GC Exh. 9; see also Tr. 36-37, 54-55, 102-103.)

10 On August 16, 2019, Respondent answered the Union's July 31 information request, stating as follows:

Vince:

15 I have received and reviewed your letter of July 31, 2019. As a preliminary matter, I agree that the settlement relates to the information that BS&B is required to provide on a regular basis to justify its need to limit the number of LG 9s that can take vacation at the same time.

20 However, in addition, the settlement also defined (and limited) the documentation that the Company had to provide to the Union in support of that decision. The Company has precisely abided by the guidelines set forth in the settlement and the addendum regarding this issue and now the Union seems to want to proceed as though the settlement (arrived at in August 2018 and further refined in December 2018 with the participation of the NLRB) never occurred.

25 In addition, the entire RFI and the related questions are based on a false premise (that the Company "moved away from processing orders by due date"). The Company has always set (and continues to set) production schedules by due date and customer priorities. The due dates may have been set forth in different formats and media over the decades  
30 (ranging from an outside computer service decades ago, to File Pro to the Tulsa Manufacturing System to basic MS Excel spread sheets) but due dates have always been part of the manufacturing schedule process.

35 Thus, requests #1 and #2 are based on an invalid premise (in that the Company has not "stopped having employees process/manufacture orders based on the due date") and thus, in turn, requests #3, #4, #5, #6 and #7 (all of which are based on the "changes identified in response to requests 1 and 2) are equally based on the same invalid premise. In short, there is no documentation of changes that did not occur.

40 Regarding new Request #8, the Company is always searching for ways and methods to improve production and make all of us more efficient through its "Continuous Improvement" initiative. I have enclosed a list that covers many of those efforts over the last five years.

45 Regards,  
Dr. Charles C. Hart [Director of Human Resources & EHS]

(GC Exh. 10 (including an attached list of “Continuous Improvement Projects”); see also Tr. 37–39, 53, 57–58, 81–82; Tr. 38 (noting that the Union requested in an email that Respondent reply to the July 31 information request by August 16, 2019).)

5 After reviewing Respondent’s August 16 letter, the Union determined that Respondent’s communications did not satisfy the information requests. Accordingly, the Union decided to file an unfair labor practices charge. There is no evidence that Respondent provided any additional information in response to the Union’s July 12 and 31 information requests. (Tr. 38–40.)

10 *G. August 2019 – Disputes About Vacation Time Continue*

In late July 2019, fabricators Deborah Miller and Matthew McAfee separately requested vacation time for August 30 and September 3, 2019 (around Labor Day weekend). Miller and McAfee are numbers 7 and 13 (respectively) on the bargaining unit seniority list and are each active union members. Roberts denied Miller’s and McAfee’s vacation requests on August 5. (GC Exhs. 6, 23; Tr. 242, 244–245; see also Tr. 274–277.)

20 On about August 26, 2019, maintenance employee J.S. (labor grade 12) requested vacation time for August 30. J.S. is number 25 on the bargaining unit seniority list and is a non-active union member. (GC Exhs. 6, 23; Tr. 245, 361.)

On August 27, 2019, J.S. sent the following email to Hart and Misha Spalding concerning vacation time:

25 Can someone explain to me why I can’t take vacation time when the rules do not apply to me in regards to [one] LG9 off at a time policy is in [e]ffect?

(GC Exh. 26.) Hart, who is not generally involved in approving vacation for bargaining unit employees, forwarded J.S.’s email to Roberts and Amend with the instruction to “please address with [J.S.]” Later, on August 27, Roberts approved J.S.’s request to take vacation on August 30. (GC Exhs. 23, 26; Tr. 337; see also Tr. 244–245.)

35 On August 28, 2019, the Union filed another grievance to object to how Respondent was handling vacation requests. The grievance stated as follows:

[Grievance information]: There is a long standing practice of those outside [labor grade 9 (LG9)] being denied if a senior LG9 has been denied for the day. LG 10/12/14 can work down (LG9 duties).

40 Nature of Grievance: Junior employee granted vacation despite multiple senior members having their vacation request denied. It is the Union’s understanding that Alan Roberts did not approve this vacation as would normally happen. Instead, Junior employee was directed to Dr. Hart to obtain/negotiate his approval.

45 Settlement requested in Grievance: Issue vacation days per the contract. Seniority must be observed.

Agreement violation: Article 10 and any other applicable contract language.

(GC Exh. 17; see also Tr. 156–157, 245.)

5 On September 4, 2019, Respondent notified the Union that it was denying the August 29, 2019 grievance. Respondent stated as follows concerning its decision:

10 The Company approves and schedules vacation requests in compliance with the Collective Bargaining Agreement and the settlement reached in the ULP case concerning vacation policy. Upon review the Company finds no violation of the CBA. Grievance respectfully denied.

(GC Exh. 17; see also Tr. 157, 360.)<sup>7</sup>

15 *H. Jesse Snelson – Interactions with Respondent*

1. Background

Jesse Snelson began working for Respondent in September 2014, and currently works as a disk fabricator. Snelson has an active union membership. (GC Exh. 6; Tr. 201.)

20

In about August 2019, Snelson applied for a vacation day to be present for his children's first day of school. Respondent denied Snelson's request, and in response, Snelson took the day off anyway (by either taking a sick day or accepting "points" on his attendance record). After that incident, Snelson spoke to fabricator Kyle Gibson (who worked nearby on the shop floor and took points on his attendance record for missing the same work day as Snelson) about his aggravation with being denied vacation time. (Tr. 191–195, 203–204; see also Tr. 205 (noting that, based on his workload, Snelson did not believe Respondent's vacation restrictions were necessary).)

25

30

In the week after missing the work day in August, and periodically throughout fall 2019, Snelson continued to express his frustration to Gibson about not being able to take vacation time. Snelson, however, began timing his remarks to coincide with the daily 9 a.m. meeting that managers held about 20 feet away from his work area, and typically used a sarcastic and loud voice to make comments like "It would be nice to get to use our vacation" or "It would be nice to have a day off." (Tr. 194–199, 204–205; see also Tr. 205 (noting that Snelson believed the managers could hear his comments because he could hear what the managers were saying in their meeting).)

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2. November 12, 2019 – Respondent takes issue with union stickers in Snelson's work area

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<sup>7</sup> Since the disputes about vacation time and seniority arose after the collective-bargaining agreement expired, the Union was not obligated to continue pursuing the June 26 and August 28 grievances under the grievance procedure in the expired agreement. See *KOIN-TV*, 369 NLRB No. 61, slip op. at 2 fn. 5, 8 (2020) (citing *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 (1991)) (explaining that grievance/arbitration procedures do not survive the expiration of a collective-bargaining agreement and thus do not apply to disputed unilateral changes that took place after the agreement expired); see also GC Exh. 2 (expired collective-bargaining agreement, which includes a grievance procedure in Article 14).

In October and November 2019, around the time that the bargaining unit was preparing to vote on whether to ratify a proposed collective-bargaining agreement, Snelson had two “Fair Contract Now” stickers that were attached to a pair of sunglasses on his work area desk. Snelson also had a sign hanging on the end of his desk that stated “That wasn’t free,” although Snelson testified that the sign was not union related. (Tr. 206; see also GC Exh. 5 (p. 4) (noting that, starting in January 2018, bargaining unit employees placed stickers on personal belongings as part of their union activities).)

On about November 12, 2019, Snelson observed Roberts walk down the aisle and look at the stickers and signs in Snelson’s work area. Shortly thereafter, Roberts asked union representative Matt McAfee to come to Roberts’ office, where Roberts told McAfee that Snelson needed to remove the “Fair Contract Now” stickers and “That wasn’t free” sign from his work area. (Roberts admitted that Respondent did not know what the “That wasn’t free” sign meant, but still wanted the sign removed because Respondent deemed it to be inappropriate.) When McAfee pointed out that other employees had other stickers on their cups and personal items, Roberts responded that Snelson needed to remove his stickers because they were in a prominent location and Respondent was hosting an important visitor in the afternoon. Roberts asked McAfee to talk to Snelson about the issue because he did not want to make the issue a disciplinary matter.<sup>8</sup> McAfee subsequently left the meeting and, citing Roberts’ instruction, asked Snelson to remove the stickers and sign. Snelson complied with the instruction. McAfee then contacted Roberts and asserted that Snelson was being “singled out,” but added that Snelson removed the stickers and sign. There is no evidence that Respondent maintained an established work rule prohibiting stickers and signs in employee work areas, though at trial Roberts indicated that he relied on an unfair labor practice decision that employees could post union materials in the employee breakroom or on the union bulletin board.<sup>9</sup> (Tr. 159, 162–164, 206–208, 216, 266–267; see also GC Exh. 24.)

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<sup>8</sup> McAfee testified that Roberts was more explicit with his warning, as Roberts’ (according to McAfee) stated that Snelson’s stickers and sign were going to “lead to discipline” if Snelson did not remove them. (Tr. 162–163, 184–185.) Although McAfee’s testimony on this point was credible, I have credited Roberts’ equally credible account that he said he “did not wish to make this a disciplinary matter” (see Tr. 266; GC Exh. 24) because the General Counsel bears the burden of proof.

<sup>9</sup> I infer that Roberts was referring to the October 2018 settlement agreement in Cases 14–CA–214750, 14–CA–224095 and 14–CA–225941, which (among other things) resolved complaint allegations that Respondent unlawfully removed union communications and materials from the employee break room and told employees that it had done so. (GC Exh. 3, pp. 12, 22–28; see also Tr. 267.) The settlement agreement included a notice posting in which Respondent stated, in pertinent part:

You may have union information and materials in the break room, and WE WILL NOT stop you from doing so or remove those materials.

WE WILL NOT tell employees that we have ordered the removal of Union information and materials from the break room.

(GC Exh. 3, p. 24 (emphasis in original); see also *id.*, p. 28 (settlement addendum in which Respondent and the Union agreed to “return to the status quo regarding any personal items and/or written materials placed in the employee break room”).)

Later on November 12, Robert emailed Hart, Amend and Respondent's attorney about the "[s]ignage in Jesse Snelson's Area," stating as follows:

5 I met with Matt McAfee at 12:45 pm today to discuss the issue with the posting of the large sign stating "These wasn't free" and the "Fair Contract Now" cards attached to Jesse's glasses.

10 I told him I did not wish to make this a disciplinary matter and reviewed with him the outcome of the ULP decision of where postings by Union members can be displayed (Union bulletin board and the shop breakroom). He agreed and stated he would talk with Jesse. Approximately 10 minutes later he informed me that he had taken care of the issue.

15 (GC Exh. 24; see also Tr. 265-266.) Respondent did not discipline Snelson for having the stickers and sign in his work area. (Tr. 164, 185, 216-217.)

### 3. November 15, 2019 – Snelson's disciplinary meeting

20 On November 15, 2019, supervisor Ian Slattery emailed human resources manager Misha Spalding to set up a meeting to discuss an issue on November 14 regarding Snelson "not doing his job." Spalding indicated that Hart should also participate in the discussion because Slattery's concerns were union related since a labor grade 9 employee was involved. Slattery subsequently met with Hart, Spalding, Amend and Roberts, and then prepared a disciplinary report stating that Snelson would receive a verbal warning for "substandard performance" and "policy/procedure violation" for failing to verify that gaskets were in stock and available to complete a premium order. Slattery had never disciplined an employee before, and had never disciplined a fabricator for failing to check inventory. Respondent did not meet with Snelson to get his side of the story before deciding to move forward with the verbal warning. (GC Exhs. 20, 25; Tr. 268, 314, 317-318, 320-323, 362.)

30 Next, Respondent called Snelson in for a meeting, with McAfee present as Snelson's union representative, and Roberts, Slattery and Spalding present for management. Early in the meeting, Slattery presented a copy of the disciplinary report to Snelson and indicated that the discipline related to the issue that Snelson had with not having gaskets to complete the premium order. Snelson responded that it was not his responsibility as the fabricator to check the inventory for gaskets because the purchasing department handles that task and indicated that the appropriate gaskets were on hand. Snelson added that it was not possible for him to check the inventory for gaskets because he did not have access to the computer inventory system or to the stockroom (unlike managers or purchasing department staff, who have access to those resources). McAfee further noted that the gaskets for the order were made incorrectly by the vendor who provided them. (Tr. 164-166, 209-211, 217, 268-270, 317, 335, 357-358; GC Exh. 20; see also GC Exh. 21 (disk fabricator job description does not state that fabricators should check parts inventory); Tr. 169-170, 269-270, 315.)<sup>10</sup>

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<sup>10</sup> I do not credit Slattery's testimony that fabricators are supposed to check to see if parts needed for their work are available in inventory. (See Tr. 315.) Slattery's testimony on that point is contradicted by Respondent's job description for fabricators, as well as by Roberts' and McAfee's testimony that the

Based on the facts that Snelson and McAfee presented at the meeting, Roberts decided that Snelson had not done anything wrong and suggested that the discipline be withdrawn. Slattery agreed, and thus Respondent did not formally issue the verbal warning to Snelson. (Tr. 172, 185, 212, 217, 316, 318, 358, 363.)

4. December 2019 – Respondent assigns Snelson to the shipping area for cross training

As stated in the job description for labor grade 9 disk fabricators, disk fabricator job duties may include working in shipping. The shipping department is in a separate area from the shop floor and an access card is required to enter the shipping department. Accordingly, a fabricator working in the shipping department would not be able to talk with other fabricators on the shop floor without physically leaving the shipping department. (GC Exh. 21; Tr. 173, 186, 212–213, 218, 249.)

In about late November 2019, the work in McAfee’s area was slow, so Respondent assigned (or “flexed”) him to do cross training in other areas, including the shipping department. During his time in shipping, McAfee noticed that at times the shipping department had a high number of shipments, and at other times the shipping department was slow such that Respondent sent him back to his customary work area or to a different assignment. (Tr. 151, 172–173, 178–179, 186–187, 359; see also Tr. 295, 301–302 (noting that the workload in the shipping department was light in late 2019 and in the early part of 2020.)

In about early December 2019, Respondent (through Slattery) assigned Snelson to the shipping department for cross training, where he worked for approximately one-and-a-half weeks before returning to his usual work area. Snelson had an average workload in his area when he was reassigned to shipping, which Respondent covered with another employee. Snelson, meanwhile, found that work in the shipping department was extremely slow. (Tr. 197, 212–214, 358–359.)

*I. December 2019 – Additional Labor Grade 9 Employees Denied Vacation Time*

1. Late November 2019 – Respondent announces that it will permit two labor grade 9 employees to take vacation on the same day

In late November, Respondent announced that, effective December 26, 2019, “the number of LG 9 employees approved for vacation time off for any work day will be limited to two (2)” due to the number of backlogs and past due orders. Since Respondent, in preceding months, had allowed only one labor grade employee to be on vacation at a time, Respondent’s November announcement increased opportunities for labor grade 9 employees to take vacation (though the limit remained below the three-person limit that historically applied). (R. Exh. 1; Tr. 49, 151, 205, 221, 258, 298; see also Findings of Fact (FOF), Section II(B)(2).)

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purchasing department is generally responsible for establishing whether necessary parts are in stock. (See Tr. 169–170, 269–270; GC Exh. 21.)

2. Respondent denies Brenda Skinner's and Shelley Brazille's vacation requests

On February 17, 2019, fabricator Brenda Skinner submitted a request to take vacation on December 23, 26, 27 and 30, 2019. Skinner's vacation request was not a lock-in request, and thus remained pending until December 2, 2019, when Roberts denied Skinner's request for each of the four days. Skinner is number 3 on the bargaining unit seniority list, has an active union membership status, and has previously served on the Union's grievance committee and negotiating committee. Skinner also signed the June 2019 grievance that the Union filed to assert that Respondent was not following seniority when granting vacation requests. (GC Exhs. 6, 16, 23; Tr. 219-220, 223-224; see also Tr. 274-277.)

On November 26, 2019, shipping department (labor grade 9) employee Shelley Brazille submitted a request to take vacation on January 2-3, 2020. When Roberts (on about December 5, 2019) told Brazille that he was denying her request because the vacation days were already filled, Brazille questioned how that could be true when she submitted her request shortly after Respondent announced that two labor grade 9 employees could take vacation on the same day. Roberts responded that employees G.W. and Herb Sarty were granted the vacation days. Brazille is number 5 on the bargaining unit seniority list, has an active union membership status, and signed the June 2019 grievance that the Union filed to assert that Respondent was not following seniority when granting vacation requests. (GC Exhs. 6, 16, 23; Tr. 298-300.)

3. Respondent approves vacation for other bargaining unit employees on the same days  
Respondent denied for Skinner and/or Brazille

Respondent approved vacation time for 7 bargaining unit employees who requested some of the same December 2019/January 2020 vacation days as Skinner and Brazille. As part of its rationale, Respondent maintained that it was permissible to grant vacation to less senior employees in the bargaining unit if those employees were not labor grade 9 employees (and thus not subject to the 2-person limit on labor grade 9 employees taking vacation on the same day). Respondent approved the following vacation requests:<sup>11</sup>

Name	Seniority and Union Membership Status	Job (Labor Grade)	Vacation Days Sought (date request submitted)	Date Approved
D.B.	24 Active	[Job and labor grade not specified]	January 3, 2020 (Dec. 17)	December 18
I.B.	28 Non-active	Tool & Die (14)	December 27 (Dec. 5)	December 27
J.H.	4	[Job and labor grade not specified]	December 26 (Aug. 23) <sup>12</sup>	December 11

<sup>11</sup> All dates in the table below are in 2019 unless noted otherwise.

<sup>12</sup> Respondent's records show that J.H.'s August 23 requests for vacation on December 23 and 26 were canceled, and subsequently resubmitted on December 10. (GC Exh. 23.) The evidentiary record does not provide an explanation for what caused the cancellations and resubmissions.

Name	Seniority and Union Membership Status	Job (Labor Grade)	Vacation Days Sought (date request submitted)	Date Approved
	Active		December 27 (Aug. 23)	December 11
			December 30 (Aug. 23)	December 2
			Jan. 2, 2020 (Aug. 23)	December 5
			January 3, 2020 (Aug. 23)	December 5
Herb Sarty <sup>13</sup>	8 Active	Fabricator (9)	December 23 (Feb. 11) <sup>14</sup>	March 1
			December 26 (Feb. 11)	March 1
			December 27 (Feb. 11)	March 1
			December 30 (Feb. 11)	March 1
			January 2, 2020 (Feb. 11)	March 1
S.S.	18 Non-active	Maintenance (12)	December 26 (Dec. 2)	December 2
			December 27 (Dec. 2)	December 2
			December 30 <sup>15</sup>	March 1

<sup>13</sup> I have used Sarty's name here (instead of initials) because he testified as a witness during trial.

<sup>14</sup> Sarty explained, without rebuttal, that he initially requested the listed vacation dates as a lock-in request, but was informed by Roberts that he could not lock in those dates because the lock-in limit had been reached. Sarty accordingly decided to maintain his vacation request as a regular request in case some vacation slots opened up on those days. (Tr. 309-310.)

Based on Sarty's un rebutted testimony, I find that the entries on GC Exhibit 23 are erroneous to the extent that the entries show that Sarty reserved vacation on December 23, 26, 27, 30, 2019, and January 2, 2020, as lock-in dates. (See GC Exh. 23.)

<sup>15</sup> Respondent's records indicate that Respondent approved S.S. to take vacation on December 30, 2019, January 2-3, 2020, and January 6-7, 2020 as a lock-in week of vacation. Respondent, however,

Name	Seniority and Union Membership Status	Job (Labor Grade)	Vacation Days Sought (date request submitted)	Date Approved
			(Feb. 28)	
			January 2, 2020 (Feb. 28)	March 1
			January 3, 2020 (Feb. 28)	March 1
J.S.	25 Non-active	Maintenance (12)	December 23 (Dec. 30) <sup>16</sup>	December 30
G.W.	1 Active	Fabricator (9)	December 23 (Jan. 24 lock-in)	March 1
			December 26 (Jan. 24 lock-in)	March 1
			December 27 (Jan. 24 lock-in)	March 1
			December 30 (Jan. 24 lock-in)	March 1
			Jan. 2, 2020 (Jan. 24 lock-in)	March 1
			Jan. 3, 2020 (Jan. 24 – regular request)	December 5
R.W.	10 Non-active	[Job and labor grade not specified]	December 23 (Nov. 14)	December 2
			December 30 Nov. 14)	December 2

(GC Exhs. 6, 23; Tr. 226, 228–229, 307, 360–361; see also Tr. 274–277.)

should not have permitted S.S. to lock in for December 30, 2019, and January 2, 2020, because Skinner and Sarty also requested those vacation dates before/during the lock-in period and had more seniority than S.S. (See GC Exh. 23; Tr. 299–300; see also FOF, Section II(B)(1) (explaining that an employee may only lock in a vacation week that has not been previously selected or scheduled by another employee with more seniority).)

<sup>16</sup> The evidentiary record does not explain why Respondent's records show December 30, 2019, as the date that J.S. submitted his request for vacation on December 23, 2019. (See GC Exh. 23.)

## DISCUSSION AND ANALYSIS

*A. Credibility Findings*

5 A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. Credibility findings need not be all-or-nothing propositions — indeed,  
 10 nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014) (noting that an administrative law judge may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the  
 15 party's agent). To the extent that credibility issues arose in this case, I have stated my credibility findings in the Findings of Fact above.

*B. Did Respondent Violate Section 8(a)(5) and (1) of the Act by Unilaterally Changing its Vacation Scheduling Practices?*

## 1. Complaint allegations

20 The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by, in about July 2019, changing its vacation scheduling practices by granting employee vacation requests based on labor grade instead of by seniority, without first affording the Union an opportunity to bargain about the decision or its effects, and without first bargaining with the Union to an overall good-faith impasse for a successor collective-bargaining agreement.

## 2. Applicable legal standard

30 Under the unilateral change doctrine, an employer's duty to bargain under the Act includes the obligation to refrain from changing its employees' terms and conditions of employment without first bargaining to impasse with the employees' collective-bargaining representative concerning the contemplated changes.<sup>17</sup> The Act prohibits employers from taking  
 35 unilateral action regarding mandatory subjects of bargaining such as rates of pay, wages, hours of employment and other conditions of employment. An employer's regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even if those practices are not required by a collective-bargaining agreement. The party asserting the existence of a past practice bears the burden of proof on the issue, and must show  
 40 that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis. *Raytheon Network*

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<sup>17</sup> Separate and apart from the unilateral change doctrine, an employer also has a "duty to engage in bargaining regarding any and all mandatory bargaining subjects *upon the union's request to bargain*," unless an exception to that duty applies. *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 11-12, 16-17, 20 (emphasis in original).

*Centric Systems*, 365 NLRB No. 161, slip op. at 5, 8, 16, 20 (2017); *Howard Industries, Inc.*, 365 NLRB No. 4, slip op. at 3-4 (2016).

5 If an employer makes a unilateral change to a term and condition of employment, it may still assert certain defenses. For example, the employer may assert that the change: did not alter the status quo (e.g., because the change in question was part of a regular and consistent past pattern); did not involve a mandatory subject of bargaining; was not material, substantial and significant; or did not vary in kind or degree from what has been customary in the past. *MV Transportation, Inc.*, 368 NLRB No. 66, slip op. at 11 (2019); *Raytheon Network Centric*  
10 *Systems*, 365 NLRB No. 161, slip op. at 5, 8, 16, 20. The Board has also held that an employer may assert that contractual language privileged it to make the disputed change without further bargaining (the “contract coverage” standard), but has explained that the contract coverage standard does not apply to unilateral changes made after the collective-bargaining agreement expires unless the agreement contains language explicitly providing that the relevant provision survives contract expiration. See *KOIN-TV*, 369 NLRB No. 61, slip op. at 2-4 (2020); see also *MV Transportation, Inc.*, 368 NLRB No. 66, slip op. at 11-12 (describing the contract coverage standard).

### 20 3. Analysis

The evidentiary record shows that Respondent has an established past practice of following seniority when deciding whether to grant bargaining unit employee requests for vacation time. As part of that practice, if a senior employee is denied vacation time (for example, due to a limit on the number of labor grade 9 employees who make take vacation on  
25 the same day and shift), then Respondent has denied vacation time to any less senior employee in the bargaining unit, regardless of the employees’ labor grades. (FOF, Section II(B).)

30 In fall 2018, the Union and Respondent signed a settlement agreement that permitted Respondent to further restrict the number of labor grade 9 employees who could take vacation on the same day and shift, provided that Respondent gave the Union 30-days’ notice of the restriction along with documentation of backlogged and past due orders. The settlement agreement did not, however, address or change the seniority rules for vacation time requested through the regular process or through the lock-in process.<sup>18</sup> (FOF, Section II(D)(2)-(3); see also

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<sup>18</sup> The fall 2018 settlement agreement states, in pertinent part:

Respondent agrees to return to its prior practice of allowing three Labor Grade 9 Fabricators to simultaneously utilize vacation time on any given day and of allowing three Labor Grade 9 Fabricators to “lock in” vacation for any given work week during the February “lock in” period. Should backlogs and past-dues require a reduction in the number of Labor Grade 9 Fabricators allowed to utilize vacation time on any given day Respondent will provide [the Union] thirty-day notice of the reduction, accompanied by documentation of the backlogs and past-dues. Such reductions may not last more than sixty days without additional timely notice and documentation of past-dues/backlogs being provided to [the Union]. Respondent agrees that even if such notice is provided, it will not cancel or in any other way impact locked in vacation time.

(FOF, Section II(D)(2).)

FOF, Section II(B)(2) (noting that before the settlement, Respondent's established practice was to permit a maximum of three labor grade 9 employees to take vacation on the same day and shift.)

- 5 In 2019, Respondent made various decisions about vacation time that did not follow seniority practices. Those decisions include:

<b>Vacation Date Requested</b>	<b>Request Denied (seniority rank)</b>	<b>Request Granted (seniority rank)</b>
July 5, 2019	Campanella Steele (2)	I.B. (28)
August 30, 2019	Deborah Miller (7) Matthew McAfee (13)	J.S. (25)
December 23, 2019	Brenda Skinner (3)	Herb Sarty (8) R.W. (10) J.S. (25)
December 26, 2019	Brenda Skinner (3)	J.H. (4) Herb Sarty (8) S.S. (18)
December 27, 2019	Brenda Skinner (3)	I.B. (28) J.H. (4) Herb Sarty (8) S.S. (18)
December 30, 2019	Brenda Skinner (3)	J.H. (4) Herb Sarty (8) R.W. (10) S.S. (18)
January 2, 2020	Shelley Brazille (5)	Herb Sarty (8) S.S. (18)
January 3, 2020	Shelley Brazille (5)	D.B. (24)

- 10 Respondent maintains that these vacation decisions were permissible because the less senior employees who received the disputed vacation time were not labor grade 9 employees, and thus were not subject to the restrictions that Respondent set (under the settlement agreement) on the number of labor grade 9 employees who could be on vacation on the same day. (FOF, Sections II(E), (G), (I) (indicating that the senior employee requested the vacation time before the less senior employee and/or before the 30-day first-come-first-served period for vacation requests).)

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- Based on the evidentiary record, I find that the General Counsel demonstrated that Respondent, beginning in about July 2019, unilaterally changed its established practice of granting vacation requests by seniority in the bargaining unit as a whole. Vacation time is a mandatory subject of bargaining, and Respondent unilaterally changed its vacation practices by (on multiple occasions) denying vacation requests to senior employees in the bargaining unit while granting vacation requests that less senior bargaining unit employees submitted for the same day. There is no dispute that Respondent changed its practices without first affording the Union an opportunity to bargain about the decision or its effects, and without first bargaining with the Union to an overall good-faith impasse for a successor collective-bargaining agreement.

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Notably, Respondent does not dispute any of those facts. Instead, Respondent maintains that the fall 2018 settlement agreement and clarification permit Respondent to consider vacation requests by labor grade, which can produce the result of a senior labor grade 9 employee having their vacation request denied (due to the applicable restriction on the number of labor grade 9 employees who may take vacation on the same day) while a less senior employee in a different labor grade has their vacation request approved. (R. Posttrial Br. at 6–8.)

I am not persuaded by Respondent’s argument. First, the evidentiary record shows that Respondent failed to follow seniority rules when handling competing vacation requests by employees *within* labor grade 9. Indeed, Respondent granted vacation to Herb Sarty (labor grade 9; seniority rank 8) on December 23, 26, 27 and 30, 2019, and January 2–3, 2020, but denied Brenda Skinner’s (labor grade 9; seniority rank 3) and Shelley Brazille’s (labor grade 9; seniority rank 5) requests to take vacation on those same dates.

Second, I do not find that the fall 2018 settlement agreement and clarification permit Respondent, contrary to its established past practice of granting vacation requests by seniority in the bargaining unit as a whole, to grant vacation requests by labor grade. The fall 2018 settlement and clarification only establish that Respondent, after providing the Union with 30-days’ notice and documentation of backlogs and past due orders, may restrict the number of labor grade 9 employees who may take vacation on the same day. Nothing in the settlement and clarification changed the seniority rules that apply to vacation time or authorized Respondent to begin handling vacation requests by labor grade.

Since Respondent’s proffered defense fails, and no other defenses apply,<sup>19</sup> I find that Respondent violated Section 8(a)(5) and (1) of the Act by, since about July 2019, unilaterally changing its vacation scheduling practices by granting employee vacation requests based on labor grade instead of by seniority, without first affording the Union an opportunity to bargain about the decision or its effects, and without first bargaining with the Union to an overall good-faith impasse for a successor collective-bargaining agreement.

*C. Did Respondent Violate the Section 8(a)(3) and (1) of the Act by Applying its Vacation Rules and Practices in a Discriminatory Manner?*

1. Complaint allegations

In the consolidated complaint, the General Counsel alleged that Respondent violated Section 8(a)(3) and (1) of the Act by applying vacation restrictions only to labor grade 9 employees because they formed, joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in those activities.

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<sup>19</sup> The contract coverage standard does not apply to this dispute because the collective-bargaining agreement has expired and the vacation provisions in that agreement do not contain any language explicitly providing that those provisions survive contract expiration. See *KOIN-TV*, 369 NLRB No. 61, slip op. at 2–3; FOF, Section II(B)(1).

## 2. Applicable legal standard

The legal standard for evaluating whether an adverse employment action violates Section 8(a)(3) of the Act is generally set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982). To sustain a finding of discrimination, the General Counsel must make an initial showing that the employee's union or other protected activity was a motivating factor in the employer's decision. The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and animus on the part of the employer. *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 2-3 (2019). Proof of discriminatory motivation (animus) can be based on direct evidence or can be inferred from circumstantial evidence based on the record as a whole. Circumstantial evidence of discriminatory motivation may include evidence of: suspicious timing; false or shifting reasons provided for the adverse employment action; failure to conduct a meaningful investigation of alleged employee misconduct; departures from past practices; tolerance of behavior for which the employee was allegedly fired; and/or disparate treatment of the employee. See *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 4, 8 (2019); *Medic One, Inc.*, 331 NLRB 464, 475 (2000). The evidence must be sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee. *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 8.

If the General Counsel makes the required initial showing, then the burden shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union or protected activity. In order to meet that burden, the employer need not prove that the disciplined employee committed the misconduct alleged. Instead, the employer only needs to show that it had a reasonable belief that the employee committed the alleged offense, and that it acted on that belief when it took the disciplinary action against the employee. *National Hot Rod Assn.*, 368 NLRB No. 26, slip op. at 4 (2019); see also *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010) (explaining that where the General Counsel makes a strong initial showing of discriminatory motivation, the respondent's rebuttal burden is substantial), enfd. 646 F.3d 929 (D.C. Cir. 2011). The General Counsel may offer proof that the employer's reasons for the personnel decision were false or pretextual. When the employer's stated reasons for its decision are found to be pretextual – that is, either false or not in fact relied upon – discriminatory motive may be inferred but such an inference is not compelled. *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 3 (noting that the Board may infer from the pretextual nature of an employer's proffered justification that the employer acted out of union animus where the surrounding facts tend to reinforce that inference). A respondent's defense does not fail simply because not all the evidence supports its defense or because some evidence tends to refute it. Ultimately, the General Counsel retains the burden of proving discrimination. *Farm Fresh Co., Target One, LLC*, 361 NLRB at 861.

## 3. Analysis

Although the complaint allegation uses broad language, the General Counsel's theory (as explained in its posttrial brief) is that Respondent violated Section 8(a)(3) and (1) of the Act by denying the vacation requests of more senior employees with active union memberships while

granting vacation requests of less senior employees with non-active union memberships. (See GC Posttrial Br. at 28–31.)

5 With that clarification in mind, I note that the evidentiary record shows that Respondent  
 10 has an established practice of limiting the number of labor grade 9 employees who may take  
 vacation on the same day and shift. Historically, Respondent has maintained a limit of three  
 labor grade 9 employees on vacation at once. In early 2018, however, Respondent further  
 restricted labor grade 9 vacation, citing the need to address backlogged and past due orders. The  
 Union challenged that decision, and in fall 2018, the Union and Respondent signed a settlement  
 agreement that permitted Respondent (after providing notice and documentation to the Union) to  
 further limit labor grade 9 employee vacation time as a strategy for catching up on backlogged or  
 past due orders. Relying on the settlement, Respondent limited labor grade 9 vacation to one  
 employee at a time until late November 2019, when Respondent increased the limit to two  
 employees.<sup>20</sup> (FOF, Section II(B)(2), (D)(2)–(3), I(1).)

15 On various occasions in 2019, Respondent denied vacation requests by senior bargaining  
 unit employees while granting vacation requests for the same day to less senior bargaining unit  
 employees. Of the seven less senior employees who benefited from these decisions, four  
 (employees I.B., S.S., J.S., R.W.) had non-active union memberships while three (employees  
 20 D.B., J.H. and Herb Sarty) had active union memberships. Respondent maintains that these  
 vacation decisions resulted from restrictions that it (under the fall 2018 settlement agreement)  
 placed on vacation by labor grade 9 employees. Specifically, Respondent maintains that if all  
 labor grade 9 vacation slots are taken, Respondent may still permit bargaining unit employees in  
 other labor grades to take vacation because those employees are not subject to the labor grade 9  
 25 vacation restriction in effect at the time. (FOF, Sections II(E), (G), (I); see also Discussion and  
 Analysis, Section B(2), supra.)

30 I find that the General Counsel failed to make an initial showing that the senior  
 employees' union or other protected activities were a motivating factor in Respondent's  
 decisions to deny their vacation requests while granting similar requests submitted by less senior  
 employees. The General Counsel demonstrated that the senior employees who were denied  
 vacation time had active union memberships, and also demonstrated that Respondent knew of  
 their membership status based on the employment records that Respondent maintains about the  
 bargaining unit. The General Counsel fell short, however, of demonstrating that Respondent  
 35 acted with animus. As an initial matter, some of the bargaining unit members who benefitted  
 from Respondent's vacation decisions had active union memberships (e.g., D.B., J.H. and Herb  
 Sarty). That fact undercuts the General Counsel's argument that Respondent was using its  
 vacation practices to target active union members for the benefit of non-active union members.  
 In addition, while there is no dispute that the Union and Respondent generally had a number of

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<sup>20</sup> Notwithstanding the vacation restrictions, Respondent has continued to have backlogs and past due orders. The evidentiary record raises questions about whether the vacation restrictions are sufficiently precise, as the restrictions apply to all labor grade 9 employees, regardless of the number of backlogs or past due orders in each individual employee's work area. In addition, the evidentiary record raises questions about whether Respondent, through its weekly scheduling practices, gives sufficient priority to reducing backlogs and past due orders (and thereby reducing/eliminating the need for vacation restrictions), as opposed to prioritizing work on premium or more expensive orders under the schedule attainment system. (FOF, Section II(C), (D)(1).)

disagreements in 2019, the General Counsel did not present meaningful evidence that Respondent harbored animus towards any specific senior employees (e.g., Brazille, McAfee, Miller, Steele or Skinner) for whom it denied vacation. As a result, the General Counsel did not establish that a causal relationship exists between the senior employees' protected activities and Respondent's adverse actions (denial of vacation requests despite seniority) against those employees.

I also note that I am not persuaded by the General Counsel's argument that the vacation restrictions Respondent placed on labor grade 9 vacations are a pretext for discrimination. In support of that contention, the General Counsel asserts the vacation restrictions are not effective in reducing backlogs and past due orders because: Respondent does not prioritize those orders on its weekly schedules; the vacation restrictions apply to all labor grade 9 employees instead of only to employees working in areas that have a high number of backlogs and past dues; and Respondent generally does not have other employees cover the work of individual fabricators who are on vacation (thereby letting any past dues in that work area sit idle until the fabricator returns to work). (See GC Posttrial Br. at 30-31.) Even if those criticisms of Respondent's vacation restrictions are accurate, they fall short of showing that Respondent's vacation restrictions are a pretext for discrimination. Indeed, the evidentiary record supports various nondiscriminatory reasons for why the vacation restrictions are inefficient in the ways that the General Counsel has identified, including but not limited to, Respondent: prioritizing work on expensive and/or premium orders instead of past dues to increase profit; restricting all labor grade 9 vacation because the fall 2018 settlement agreement explicitly permits such action after providing notice and documentation to the Union (and does not discuss or authorize restricting the vacation of an individual employee with past dues in his or her work area); and requiring a single fabricator complete his or her own work because that practice makes it easier to keep track of work quality and product safety. (See FOF, Sections II(A)(1), (C), (D)(2)-(3), F(1).)

In sum, I find that the General Counsel failed to prove that Respondent violated Section 8(a)(3) and (1) of the Act by discriminating against senior/active bargaining unit members by denying their vacation requests while granting similar requests of less senior employees with non-active union memberships. Accordingly, I recommend that the complaint allegation asserting that violation be dismissed.

*D. Did Respondent Violate Section 8(a)(5) and (1) of the Act by Failing and Refusing to Provide Information to the Union in Response to Two July 2019 Information Requests?*

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by, since about July 19, 2019, failing and refusing to provide the Union with information that the Union requested on July 12, 2019.

The General Counsel also alleges that Respondent violated Section 8(a)(5) and (1) of the Act by, since about August 16, 2019, failing and refusing to provide the Union with information that the Union requested on July 31, 2019.

## 2. Applicable legal standard

An employer is obligated under the Act to supply information requested by the union that is potentially relevant and would be of use to the union in fulfilling its responsibilities as the employees' bargaining representative. Generally, information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative. By contrast, information concerning extra-unit employees is not presumptively relevant, and thus relevance must be shown. The burden to show relevance, however, is not exceptionally heavy, as the Board uses a broad, discovery type standard in determining relevance in information requests. *E.I. Du Pont de Nemours & Co.*, 366 NLRB No. 178, slip op. at 4 (2018); *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011).

## 3. Analysis

The evidentiary record shows that in early July 2019, bargaining unit members were increasingly becoming concerned about whether Respondent's restrictions on vacation for labor grade 9 employees were necessary or justified. To explore that issue, the Union sent its July 12, 2019 information request to Respondent, and generally sought information about when and why Respondent changed its production process and scheduling practices. (FOF, Section II(F)(1).)

When Respondent wrote back to the Union on July 19, Respondent did not refuse to provide the Union with information. Instead, Respondent: described the fall 2018 settlement and how it addressed backlogs, past dues and vacation restrictions; asserted that the Union's requests for information about Respondent's production process were unclear because Respondent frequently makes production changes, and because production process decisions are within management's discretion; and explained that while the format for production schedules has varied, Respondent has always created schedules based on due dates and customer requirements. Respondent concluded its letter by stating that it needed more guidance from the Union about the information the Union was looking for. (FOF, Section II(F)(1).)

In its July 31 information request, the Union mostly focused on clarifying its July 12 information request, though the Union did add one new request for information about what efforts Respondent has taken to reduce backlogs and past dues. In its clarifying remarks, the Union explained its belief (based on communications with bargaining unit members) that backlogs and past dues were not an issue until Respondent moved away from processing orders by due date. The Union accordingly clarified its July 12 information request by asking when Respondent stopped processing orders by due date and changed to considering other scheduling factors, and by asking for documentation of backlogs and past dues before and after that change, and documentation for how and why Respondent changed its scheduling practices. (FOF, Section II(F)(2).)

In its August 16 response to the Union's July 31 clarification letter, Respondent provided documents in response to the Union's (new) request for information about Respondent's efforts to reduce backlogs and past dues. As for the remainder of the Union's request, Respondent maintained that: (1) the fall 2018 settlement agreement and clarification defined and limited the information that Respondent needed to provide about backlogs and past dues (in general and to

justify vacation restrictions); and (2) no responsive documents existed because each of the Union's clarified information requests relied on the false premise that Respondent moved away from processing orders by their due dates, when in actuality Respondent continued to make production schedules based on due dates and customer priorities. After receiving Respondent's August 16 letter, the Union did not communicate further with Respondent about obtaining information related to its July 12 and 31 information requests. (FOF, Section II(F)(1).)

As a preliminary matter, I agree with the General Counsel that each of the Union's information requests sought information that is relevant to the Union's role as the bargaining unit's collective-bargaining representative. The persisting backlogs and past dues were an ongoing issue for the bargaining unit because (among other reasons) the backlogs and past dues were the basis for Respondent's restrictions on labor grade 9 employee vacation time. Because of that connection, the Union had an interest in evaluating why backlogs and past dues continued to be an issue at Respondent's facility.

With that stated, I do not find that Respondent violated Section 8(a)(5) and (1) of the Act with its response to the July 12 information request. Respondent's July 19 reply to the Union's July 12 information request was reasonable, as Respondent did not refuse to provide information to the Union, but rather provided some general information about backlogs and past dues and asked the Union to clarify the type of information that the Union was looking for. That initial exchange was permissible, particularly given the broad nature of the Union's requests about whether Respondent changed its production process.

Respondent's August 16 reply to the Union's July 31 information request was somewhat more problematic, but in the end, I also find that Respondent did not violate the Act with its reply to that request. In its August 16 letter, Respondent asserted that the fall 2018 settlement defined and limited the documents that Respondent needed to provide to the Union about backlogs and past dues. The fall 2018 settlement, however, does not include any language that supports Respondent's position; to the contrary, the settlement (and settlement clarification) require Respondent to provide documentation to the Union if Respondent plans to impose a vacation restriction on labor grade 9 employees, and does not place any limits on the Union's right to request information generally.<sup>21</sup>

If Respondent had stopped there (with a refusal to provide documents because the fall 2018 settlement and settlement clarification precluded the Union from requesting additional information about backlogs and past dues), then the General Counsel likely would have a strong case. Respondent, however, also stated that it did not have any responsive documents to provide in response to requests 1-7 (Respondent provided documents in response to request 8) because requests 1-7 relied on the false premise that Respondent moved away from processing orders by due date. That aspect of Respondent's reply should have prompted the Union to follow up with another revised information request (such as a direct request for documentation of backlogs and

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<sup>21</sup> In connection with this point, I note that I reject Respondent's argument that the Union, by signing the fall 2018 settlement and clarification, clearly and unmistakably waived its right to submit information requests for documents about backlogs and past dues. (See R. Posttrial Br. at 8-11.) There is no language in the fall 2018 settlement and clarification that could be construed as the Union waiving the right to submit information requests related to backlogs and past dues, much less language that would qualify as a clear and unmistakable waiver of that right.



## 2. Applicable legal standard

Section 8(a)(1) of the Act makes it unlawful for an employer (via statements, conduct, or adverse employment action such as discipline or discharge) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the conduct or statements have a reasonable tendency to interfere with, restrain or coerce union or protected activities. *Farm Fresh Company, Target One, LLC*, 361 NLRB at 860 (noting that the employer's subjective motive for its action is irrelevant); *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000).

## 3. Analysis – directive to remove union stickers

In about October/November 2019, Snelson had two “Fair Contract Now” stickers that were attached to a pair of sunglasses on his work area desk. On November 12, shortly after walking by Snelson's work area and looking at the stickers (and a “That wasn't free” sign that was not union related), Roberts told union representative McAfee that Snelson needed to remove the stickers and sign because Respondent was expecting an important visitor later in the day and Snelson's items were in a prominent location. Roberts asked McAfee to talk to Snelson about the issue because he (Roberts) did not want the issue to become a disciplinary matter. McAfee subsequently asked Snelson to remove the stickers and sign based on Roberts' instruction, and Snelson complied even though other employees had various stickers and signs in their work areas and there is no evidence that Respondent maintained an established work rule prohibiting such stickers and signs. (FOF, Section II(H)(2).)

I find that Respondent ran afoul of Section 8(a)(1) of the Act when, using McAfee as its messenger, it required Snelson to remove the “Fair Contract Now” stickers from his work area. Roberts' directive had a reasonable tendency to interfere, restrain or coerce both McAfee's and Snelson's union or protected activities. It matters not that Roberts' used McAfee as an intermediary or that Roberts said he did not want the issue to become a disciplinary matter. Even with those circumstances (and perhaps even more so with Roberts' hint of potential discipline), Roberts' message remained the same – that Snelson's union activities were not welcome or permitted in the workplace. That message violated Section 8(a)(1) of the Act. Cf. *USF Red Star, Inc.*, 339 NLRB 389, 391 (2003) (noting that the Board has long held that a ban on wearing union insignia violates the Act unless it is justified by special circumstances).

The result remains the same even if, as Respondent suggests, we consider the facts under the Board's precedent for work rules. (See R. Posttrial Br. at 11–14.) As a preliminary matter, I note that Respondent was not relying on an established work rule when it directed Snelson to remove his union stickers. Indeed, at trial, Roberts (incorrectly) asserted that the fall 2018 settlement permitted him to direct Snelson to remove the union materials from his work area when, in fact, the settlement merely states that employees may post union materials in the employee break room and on the union bulletin board, and that Respondent will not stop employees from doing so. In addition, Roberts' directive cannot be described as facially neutral, given the evidence that Roberts specifically took issue with the union stickers and sign that Snelson had in his work area, and was not relying on a more general rule or policy when he did so. (FOF, Section II(H)(2).)

Even if we put those issues aside, there is no evidence of any legitimate justification that Respondent relied on to require Snelson to remove the “Fair Contract Now” stickers beyond a general reference (provided in McAfee’s testimony) to Respondent having an important visitor coming to the facility and Snelson’s stickers being in a prominent location. Respondent did not go any further to describe the nature of its interest in prohibiting Snelson’s stickers, and in the absence of that evidence did not show that its interest outweighed the adverse impact that Roberts’ directive had on Snelson’s (and McAfee’s) Section 7 rights. Accordingly, Respondent’s legitimate justification defense falls short, and Respondent violated the Act when it (using McAfee as its messenger) required Snelson to remove the union stickers from his work area. See *Wal-Mart Stores, Inc.*, 368 NLRB No. 146, slip op. at 2–4 (2020) (finding a facially neutral work rule restricting the size of graphics and logos was valid as applied to the selling floor because the employer’s evidence of a legitimate justification for the rule outweighed the rule’s adverse impact on employees’ section 7 rights, but finding that the work rule was not lawful in areas away from the selling floor).

#### 4. Analysis – threat of discipline

On November 15, 2019, a group of Respondent’s managers (Slattery, Hart, Spalding, Amend and Roberts) met to discuss Snelson’s job performance. Based on that meeting, Slattery prepared a disciplinary report stating that Snelson would receive a verbal warning for “substandard performance” and “policy/procedure violation” for (on November 14) failing to verify that gaskets were in stock and available to complete a premium order. (FOF, Section II(H)(3).)

Later on November 15, Respondent met with Snelson and McAfee (who was present as Snelson’s union representative). Slattery showed Snelson a copy of the disciplinary report and indicated that the discipline related to Snelson not having gaskets necessary to complete a premium order. Snelson responded that it was not his responsibility as the fabricator to check the inventory for gaskets, and added that he could not have checked the inventory for gaskets because he did not have access to the computer inventory system or to the stockroom. McAfee further noted that the gaskets for the order were made incorrectly by the vendor who provided them. After hearing Snelson’s and McAfee’s remarks, Respondent determined that Snelson had done nothing wrong and decided not to formally issue the written warning. (FOF, Section II(H)(3).)

I find that Respondent violated Section 8(a)(1) of the Act when it summoned Snelson to a meeting and threatened him with discipline. Respondent took this action a mere 3 days after unlawfully requiring Snelson to remove the union stickers from his work area. Further, Respondent presented Snelson with a verbal warning that it prepared without getting Snelson’s side of the story, and that faulted Snelson for not completing a work task (checking gasket inventory) that Respondent knew or should have known was not part of Snelson’s job duties. Although Respondent ultimately decided not to formally issue the written warning, the disciplinary threat was still unlawful under these circumstances because it in essence was another

warning shot that had a reasonable tendency to interfere with, restrain or coerce Snelson's union or protected activities.<sup>24</sup>

5                   F. *Did Respondent Violate Section 8(a)(3) and (1) of the Act by, on about December 17, 2019, moving Jesse Snelson to a different work area?*

1. Complaint allegations

10                   The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act by, on about December 17, 2019, moving Snelson to a different work area.

2. Applicable legal standard

15                   The legal standard for evaluating whether an adverse employment action violates Section 8(a)(3) of the Act is generally set forth in *Wright Line*, 251 NLRB 1083. See Discussion and Analysis, Section C(2), supra (describing the legal standard under *Wright Line*).

3. Analysis

20                   The evidentiary record shows that in the summer and fall of 2019, Snelson grew frustrated with Respondent's ongoing restrictions on labor grade 9 vacation. Periodically, Snelson expressed his frustration by making comments (such as "it would be nice to get to use our vacation") in a loud voice while managers conducted their morning meeting about 20 feet away from Snelson's work area. No managers responded to Snelson's remarks, though Snelson  
25                   believed that the managers could hear him because he could hear their meeting. (FOF, Section II(H)(1).)

30                   In mid-November 2019, Respondent unlawfully had McAfee tell Snelson to remove two union stickers from Snelson's work area (along with a "That wasn't free" sign that was not union related). A few days later, Respondent unlawfully threatened Snelson with discipline for conduct (not verifying that gaskets were in inventory) that Respondent knew or should have known was not an infraction. (See Discussion and Analysis, Section E(3)-(4), supra.)

35                   In about late November 2019, the work in McAfee's area was slow, so Respondent assigned him to do cross training in other areas, including the shipping department (a work area listed in the job description for labor grade 9 disk fabricators). Since, the shipping department is in a separate area from the shop floor and has restricted access, a fabricator working in the shipping department cannot talk with fabricators on the shop floor without physically leaving the shipping department. During his time in shipping, McAfee noticed that the workflow was

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<sup>24</sup> In connection with this finding, I note that I have considered the fact that Roberts was behind the directive to have Snelson remove his union stickers, but then was the one who recommended against disciplining Snelson for the gasket inventory issue. Even though Roberts sided with Snelson towards the end of the disciplinary meeting, I find that a reasonable employee still would have left the meeting with the concern that they were threatened with discipline and faced additional scrutiny in the workplace because of their union activities. Accordingly, Respondent violated the Act when it threatened to discipline Snelson.

inconsistent, with sometimes being very busy, and other times being slow enough that Respondent sent him to work in another area. (FOF, Section II(H)(4).)

5 In about early December 2019, Respondent assigned Snelson to the shipping department for cross training, where he worked for approximately one-and-a-half weeks before returning to his usual work area. Snelson had an average workload in his usual work area at the time of the assignment, which Respondent covered with another employee. Snelson found that work in the shipping department was extremely slow during his cross training assignment. (FOF, Section II(H)(4).)

10 I find that the General Counsel failed to meet its burden of proving that Respondent violated Section 8(a)(3) and (1) of the Act when it reassigned Snelson to the shipping department for a one-and-a-half week period of cross training. The General Counsel presented sufficient evidence to make an initial showing of discrimination (based on the evidence that Snelson engaged in union and protected concerted activities, Respondent's knowledge of those activities, and the animus against Snelson as demonstrated by Respondent's unlawful statements/conduct towards Snelson in November 2019). Respondent, however, presented sufficient evidence to prove that it would have sent Snelson to the shipping department for cross training even in the absence of Snelson's union or protected activities. Respondent assigned fabricators for cross training on an ongoing (albeit sporadic) basis, and cross training in the shipping department is consistent with that practice, particularly given that shipping duties are explicitly listed in the fabricator job description.

25 The General Counsel maintains that the timing of Snelson's cross training assignment is suspicious and that the cross training assignment was actually a pretext for removing Snelson from the shop floor. (See GC Posttrial Br. at 31-33.) While I agree that the evidentiary record supports a "suspicious timing" argument given that Snelson's cross training assignment occurred only a few weeks after the Respondent's unlawful remarks/conduct in November 2019, the General Counsel still fell short of proving that Respondent discriminated against Snelson by making the cross training assignment. As noted above, Respondent did (sporadically) assign fabricators for cross training, including McAfee, who did a cross training assignment in the shipping department in late November 2019. It is plausible, therefore, that Snelson was simply the next in line for similar cross training. Further, the evidentiary record does not support the General Counsel's argument that Snelson's workload and the workload in the shipping department prove that Snelson's cross training assignment was pretextual. Although Snelson had work to do in his usual area and work in the shipping department was slow at the time of Snelson's cross training assignment, it does not follow that it was an inappropriate time for Respondent to send Snelson for cross training. To the contrary, a relatively slow period in the shipping department might be a good time for cross training, and perhaps more important, the General Counsel did not demonstrate (e.g., with evidence of disparate treatment) that the managerial decision to send Snelson for cross training was discriminatory. Since the General Counsel fell short of proving that Respondent discriminated against Snelson by sending him to the shipping department for a brief period of cross training, I recommend that the complaint allegation concerning that assignment be dismissed.

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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2. The Union and Local Union are labor organizations within the meaning of Section 2(5) of the Act.

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3. By, since about July 2019, unilaterally changing its vacation scheduling practices by granting employee vacation requests based on labor grade instead of by seniority, without first affording the Union an opportunity to bargain about the decision or its effects, and without first bargaining with the Union to an overall good-faith impasse for a successor collective-bargaining agreement, Respondent violated Section 8(a)(5) and (1) of the Act.

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4. By, on about November 12, 2019, requiring employees to remove Union stickers from their work area, Respondent violated Section 8(a)(1) of the Act.

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5. By, on about November 15, 2019, threatening employees with discipline because they engaged in union or other protected, concerted activities, Respondent violated Section 8(a)(1) of the Act.

6. The unfair labor practices stated in conclusions of law 3-5, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

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## REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

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Having found that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its vacation scheduling practices by granting employee vacation requests based on labor grade instead of by seniority, I shall order Respondent to make bargaining unit employees whole for any losses attributable to those unilateral decisions as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6<sup>th</sup> Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), minus tax withholdings required by Federal law and the law of the State of Oklahoma.

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In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), Respondent shall compensate all bargaining unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 14 a report allocating backpay to the appropriate calendar year(s). The Regional Director will then assume responsibility for transmitting the report to the Social Security Administration at the appropriate time and in the appropriate manner.

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The General Counsel has requested, as a special remedy, that I require Respondent to have a responsible management official read the notice aloud to employees at a meeting or meetings convened for that purpose. In support of its request, the General Counsel maintains that a notice reading remedy is appropriate not only for the violations found in this case, but also for the unlawful discharge of Michael Stroup as found in Case 14-CA-239530. (GC Posttrial Br. at 41-42; see also GC Exh. 5 (administrative law judge decision in Case 14-CA-239530).) The Board has required such a remedy where an employer's misconduct has been sufficiently serious and widespread that reading of the notice will be necessary to enable employees to exercise their Section 7 rights free of coercion. This remedial action is intended to ensure that employees will fully perceive that the respondent and its managers are bound by the requirements of the Act. *Farm Fresh Co., Target One, LLC*, 361 NLRB at 868.

I do not find that a notice reading remedy is warranted in this case. While the violations at issue here are serious, the violations are also limited in nature as I have recommended that multiple complaint allegations be dismissed. I also note that the administrative law judge in Case 14-CA-239530 did not grant the Union's request for a notice reading, and further note that Respondent's appeal of the judge's decision is still pending before the Board. Under those circumstances, I find that the Board's traditional remedies (including notice posting) are sufficient to address Respondent's violations of the Act, and I deny the General Counsel's request for a notice reading remedy.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>25</sup>

#### ORDER

Respondent, BS&B Safety Systems, L.L.C., a Delaware limited liability company with a place of business in Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing its vacation scheduling practices by granting employee vacation requests based on labor grade instead of by seniority.

(b) Requiring employees to remove union stickers from their work area.

(c) Threatening employees with discipline because they engaged in union or other protected, concerted activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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<sup>25</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its unlawful, unilateral decision, made in about July 2019, to change its vacation scheduling practices by granting employee vacation requests based on labor grade instead of by seniority, and make bargaining unit employees whole for any losses attributable to that unilateral decision, in the manner set forth in the remedy section of this decision.

(b) Compensate bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s).

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Tulsa, Oklahoma, copies of the attached notice marked "Appendix."<sup>26</sup> Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facilities involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since July 1, 2019.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C., June 1, 2020




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Geoffrey Carter  
Administrative Law Judge

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<sup>26</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

**APPENDIX**

**NOTICE TO EMPLOYEES**

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

**FEDERAL LAW GIVES YOU THE RIGHT TO**

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally change our vacation scheduling practices by granting employee vacation requests based on labor grade instead of by seniority.

WE WILL NOT require employees to remove union stickers from their work area.

WE WILL NOT threaten employees with discipline because they engage in union or other protected, concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind our unlawful, unilateral decision, made in about July 2019, to change our vacation scheduling practices by granting employee vacation requests based on labor grade instead of by seniority, and WE WILL make bargaining unit employees whole for any losses attributable to that unilateral decision.

WE WILL compensate bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s).

BS&B SAFETY SYSTEMS, LLC

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

1222 Spruce Street, Room 8.302, St. Louis, MO 63103-2829  
(314) 539-7770, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/14-CA-249322](http://www.nlr.gov/case/14-CA-249322) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE  
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE  
ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR  
COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S  
COMPLIANCE OFFICER, (314) 449-7493.