

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: November 8, 2017

TO: Timothy L. Watson, Regional Director
Region 16

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Triumph Aerostructures, 530-8052
Vought Aircraft Division 530-6067-4044-5000
Cases 16-CA-197912, 16-CA-198055, 530-6050-6650
16-CA-198410, & 16-CA-198417

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) and (5) by unilaterally laying off twelve employees while the parties were engaged in first contract bargaining. The Region also seeks advice as to whether, pursuant to the Board's decision in *Total Security Management*,¹ it is appropriate to seek backpay and reinstatement for two of the Charging Parties in these cases who had received discretionary discipline without pre-implementation bargaining prior to the (b) (6), (b) (7)(C) 2017 layoffs. We conclude that, even assuming the parties were at a good-faith impasse over the layoff and implementation was not otherwise prohibited, the Employer violated Section 8(a)(5) by exercising impermissibly broad discretion under its RAS ranking system to select employees for the 2017 bond shop layoff. We further conclude that no economic exigency existed that would excuse the Employer from bargaining to impasse on the overall agreement prior to implementing its layoff, and that the Union did not clearly and unmistakably waive its right to bargain to overall impasse, under the principles of *Bottom Line Enterprises*² and *RBE Electronics of S.D.*³ Finally, we conclude that the Region should seek make-whole remedies for the two charging parties issued discretionary discipline in violation of *Total Security Management*.

¹ 364 NLRB No. 106 (Aug. 26, 2016).

² 302 NLRB 373 (1991).

³ 320 NLRB 80 (1995).

FACTS

I. Background: the Employer Establishes the Red Oak Facility

Triumph Aerostructures, Vought Aircraft Division (“Employer”) manufactures aircraft components for commercial and military aircraft programs at several facilities in Texas. From 1968 until 2013, the United Aerospace Workers Local 848 (“Union”) represented production and maintenance employees at the Employer’s (and its predecessors’) facilities in a multi-facility bargaining unit. The Charging Parties are four individuals,⁴ all of whom are former employees at the Employer’s Red Oak facility represented by the Union. Charging Parties 1,⁵ 2,⁶ and 3⁷ were all employees in the Employer’s bond shop until they were laid off on (b) (6), (b) (7)(C) 2017. Charging Party 4⁸ was employed as a sheet metal assembler until (b) (6), (b) (7) termination on (b) (6), (b) (7)(C) 2016.

In 2013, the Employer decided to close a facility located in Dallas, Texas (“Jefferson Street facility”) and open a new facility in Red Oak, Texas (“Red Oak facility”). The Employer bargained with the Union over the close of the Jefferson Street facility and the opening of the Red Oak Facility until impasse in June 2013. On August 1, 2013, prior to transferring any bargaining unit employees to the Red Oak facility, the Employer established and implemented initial terms and conditions of employment that were different from those contained in the Employer’s multi-facility collective-bargaining agreement with the Union including disciplinary policies and policies related to reductions in force. In October 2013, the Employer began transferring bargaining unit employees to the Red Oak facility.

⁴ Although the Union is not listed as a Charging Party in any of the instant cases, the Union has fully participated in the Region’s investigation and does not challenge the Charging Parties’ authority to file the instant unfair labor practice charges against the Employer on its behalf. We agree with the Region that the Employer’s challenge to the Charging Parties’ standing to file Section 8(a)(5) charges is unavailing.

⁵ Case 16-CA-179912

⁶ Case 16-CA-198417

⁷ Case 16-CA-198055

⁸ Case 16-CA-198410

On January 13, 2014, the Employer voluntarily recognized the Union as the exclusive bargaining representative of the production and maintenance employees at its Red Oak facility.⁹ Thereafter, Union sought to include the Red Oak unit employees in the extant multi-facility collective-bargaining unit, first through the contractual grievance and arbitration provisions and then through a unit clarification proceeding before the Board. The Union's efforts were ultimately unsuccessful. On May 18, 2015, the Union and the Employer began to negotiate their first collective-bargaining agreement to cover the unit employees at the Red Oak facility. To date, the parties have neither reached final agreement nor impasse on their initial collective-bargaining agreement for the Red Oak facility.

Pursuant to the Employer's disciplinary policy as established in August 2013, the Employer "endorses a policy of progressive discipline in which it attempts to provide employees with notice of deficiencies and an opportunity to improve [but] retain[s] the right to administer discipline in any manner it sees fit." Pursuant to the Employer's disciplinary procedures, it ascribes several different levels of discipline that may include:

- (a) If an employee is not meeting Company standards of behavior or performance, the employer's supervisor may take the following action:
 - i. Meet with the employee to discuss the matter;
 - ii. Inform the employee of the nature of the problem and the action necessary to correct it; and
 - iii. Prepare a memorandum for the supervisor's own records indicating that the meeting has taken place.

- (b) If there is a second occurrence, the supervisor should hold another meeting with the employee and take the following action:
 - i. Issue a written reprimand or warning;
 - ii. Warn the employee that a third incident will result in more severe disciplinary action; and
 - iii. Prepare and forward to the Human Resource Department a written report describing the first and second incidents and summarizing the action taken during the meeting with the employee. This

⁹ The Employer permanently closed the Jefferson Street facility in March 2014.

information will be included in the employee's personnel file.

- (c) If there are additional occurrences, the supervisor should take the following action, depending on the severity of the conduct:
- i. Issue a written reprimand or warning;
 - ii. Suspend the employee for up to five working days, with or without pay;
 - iii. Suspend the employee indefinitely and recommend termination; or
 - iv. Terminate the employee.

According to the Employer, it published a series of general work "guidelines" in the Employer's handbook in 2013 pertaining to employee performance standards. The Employer asserts that it has additional descriptions of specific misconduct that are not provided to its employees. The Employer does not publish its standards, work policies, or procedures.

Additionally, the Employer established a reduction-in-force ("RIF") policy for employees at its new Red Oak facility. Pursuant to the policy, the Employer assigns numerical rankings to each employee in an impacted classification by rating employees' skills and abilities; employees are then selected for layoff starting with the lowest ranked. The parties refer to this procedure as the "Rack and Stack" system ("RAS").¹⁰

In determining RAS rankings for impacted employees, the Employer utilizes eight different performance criteria: attendance, communications, integrity/organization commitment, job knowledge/skills/learning, productivity, quality, safety, and teamwork. Although the Employer provides a brief narrative description of what is being evaluated in each criterion, it does not provide concrete examples of the particular aspects of performance that each category is evaluating. The Employer has promulgated a Performance Rating Scale ranging from Exceptional to Unsatisfactory for its supervisors to use when evaluating employees pursuant to the enumerated RAS performance categories. The Employer's performance ratings each contain a brief narrative description of that rating, but do not provide any examples or objective criteria for determining each rating. According to the

¹⁰ The Employer also utilizes the RAS ranking system in conducting employees' annual performance appraisals. There is no evidence as to how the parties use RAS criteria for that purpose.

Employer, employees with active disciplines will usually receive the lowest scores depending on the criteria with which the employees' discipline is connected and the level of discipline issued.

When the Employer is considering layoffs in a particular area of its facility, it will have its first-line supervisors rate all of the impacted employees using the RAS performance criteria. After the Employer's supervisors have rated the employees, the Employer converts those narrative ratings into a numerical ranking from 1 to 5. The Employer converts the raw numerical ranking into a weighted score in each category using an undisclosed formula with a total highest possible score of 500. The Employer then ranks its employees from highest score to lowest score based on the total weighted RAS ranking. The employees with the lowest rankings will be laid off first, regardless of their seniority.

II. The (b) (6), (b) (7)(C) 2017 Bond Shop Layoff

In November 2016, one of the Employer's customers informed the Employer that it had decided to slow down production for one of its aircraft programs. According to the Employer, it anticipated that two projects for another customer eventually would produce enough work to avoid the need for layoffs in the bond shop. Between mid-February and early-March 2017, however, that second customer informed the Employer that it would reduce one of its projects by half and would not move up production on its other project. According to the Employer, this created an "urgent" need for a reduction-in-force in the bond shop.

On March 28, 2017,¹¹ the Employer sent the Union a letter informing the Union of its tentative plans to lay off twelve bond shop employees effective (b) (6), (b) (7)(C) and offered to bargain with the Union over the layoff and its impact on employees. The Employer also stated in its letter that it intended to follow the same layoff procedures in had used in the May 2015 layoffs to select employees for layoff. Finally, the letter stated that the Employer intended to make a final decision no later than April 10.

On March 30, the Union responded to the Employer's March 28 letter and requested dates for bargaining as soon as possible. Also on March 30, the Union requested information that it considered critical in preparing to bargain over the proposed bond shop layoffs, including information about seniority, attendance, any discipline that would be used in evaluating employees for layoff, a list of employees who had not been transferred from either the Marshall Street or Jefferson Street facilities, and a list of employees designated as leads for bond shop assignments. On March 31, the Employer partially responded to the Union's request for information.

¹¹ All dates hereinafter are in 2017, unless otherwise noted.

The Employer provided the Union a list of bond shop employees that included employees' seniority date and the date they were hired. The list also indicated which employees were considered lead employees in the bond shop. The Employer did not provide a list of employees that were not originally transferred from the Marshall Street or Jefferson Street facilities to the Union because the Employer claimed not to understand the request. The Employer also failed to provide any information regarding active disciplines, but instead stated that it intended to consider any and all active disciplines in determining which employees were laid off. Finally, the Employer claimed that the Union's request for attendance records was overly burdensome and requested clarification as to why the Union needed such information. The Employer also noted that the parties already had scheduled bargaining sessions for post-imposition discipline and merit wage increases, and suggested bargaining over the proposed bond shop layoffs during those bargaining sessions.

On April 5, the Employer and the Union met to bargain both the bond shop layoffs and merit wage increases. With regard to the bond shop layoffs, the Union first discussed why it believed the attendance records were necessary and agreed to provide further justification. The parties then discussed the possibility of a short-term loan-out agreement allowing bond shop employees to work in the assembly shop until the bond shop had additional work. After a brief caucus, the Employer provided a proposal under which it would loan out twenty current bond shop employees for a period of six months and would retain "sole discretion" in selecting employees. On April 6, the Employer and the Union met again to bargain over the layoffs and merit wage increase proposals. Although the parties exchanged several proposals regarding a loan-out arrangement, that evening the Employer rescinded its loan-out proposal on the grounds that it had determined a full layoff of 12 bond shop employees would be necessary.

The parties reconvened the next morning, April 7. The parties continued to discuss possible loan-out arrangements despite the Employer's having withdrawn its proposal. For the first time, the Union proposed that the layoffs should be conducted according to seniority and reiterated that loaned-out employees' compensation would not be affected. At the end of the bargaining session, the Employer stated that it still intended to lay off bond shop employees using the RAS ranking system on (b) (6), (b) (7)(C) but that it was willing to work with the Union on its latest proposal and pledged to provide a counter-proposal. Later that day, the Employer proposed a modified RAS ranking system similar to something a Union negotiator had previously proposed, albeit one that did not factor in seniority.

On April 14, the Union sent the Employer a letter rejecting the Employer's April 7 proposal. The Union also withdrew its previous proposal to use the modified RAS categories that the Employer had proposed on the grounds that the Union and the Employer were still negotiating active discretionary disciplines and the Union

opposed use of those disciplines in RAS rankings for the bond shop layoff. The Union went on to state that it was “wholeheartedly opposed to the [RAS] philosophy” and that “the two parties might not reach an agreement in a timely manner for the bond shop layoffs.” The Union counter-proposed that the Employer offer plant-wide retirement incentives and permit laid-off employees to apply for assembly positions at their current rate of pay. The Union also reiterated its agreement with an earlier Employer proposal that laid-off employees who took assembly positions would retain their seniority and would be probationary employees for ninety days after beginning work in the assembly shop. The Union went on to propose recall procedures for laid-off bond shop employees to apply for future openings in the bond shop for a period of fifteen months following the layoffs.

On April 18, the Union sent the Employer a letter requesting RAS ranking evaluations for all bond shop employees in relation to the Employer’s planned bond shop layoffs, the criteria used in determining the employees’ ranking, the names of supervisors or managers who evaluated the employees, and any information on anyone else who had input in evaluating employees.

On April 19, the parties reconvened to continue bargaining. Initially, the Employer gave the Union copies of attendance cards for bond shop employees that the Union had requested on March 30. The Employer and the Union argued over whether the Union was willing to accept anything other than a seniority-based layoff and the Union reiterated that it remained willing to bargain a modified RAS ranking system. The Employer stated that it had already decided to move forward with the bond shop layoffs pursuant to its RAS ranking system and planned to inform employees affected by the layoffs (b) (6), (b) (7)(C). Despite the Union’s request that the Employer delay the layoff by three days, the Employer insisted that it would stick to its timeline in order to be “humane” to the laid-off employees by giving them more notice. The Employer did not provide any other reason that it needed to effectuate the layoffs on (b) (6), (b) (7)(C).

After a break, the Union handed the Employer a new layoff proposal that provided: 1) employees with less than forty-eight months at the Red Oak facility bond shop would be evaluated pursuant to the Employer’s RAS ranking system excluding all active discipline; 2) laid-off employees would be able to apply to open assembly positions at their bond shop rate of pay, would retain their seniority, and would be on a ninety-day probationary period; and 3) laid-off bond shop employees would be able to apply to future vacant bond shop positions for a period of fifteen months and would return with their prior rate of pay and their seniority. The parties debated the Union’s proposal at length, but the Employer ultimately rejected the Union’s proposed modifications to the RAS system and reiterated that it would use the RAS ranking system that it had implemented in August 2013. The Employer then stated that it believed there was no way that the Union and the Employer would get close to an

agreement with regard to the layoffs and the parties could continue to discuss these issues during bargaining sessions for the full collective-bargaining agreement for subsequent layoffs. Later that day, the Employer delivered a letter to the Union formally rejecting the Union's April 14 letter/proposal. The letter went on to inform the Union that the Employer had made its final decision to move forward with the bond shop layoffs on (b) (6), (b) (7)(C)

On April 20, the Employer responded to the Union's April 18 information request and provided the Union with copies of the bond shop employees' RAS rankings, including employees' scores in each RAS category and the employees' overall weighted numerical score (from highest to lowest). This list was the Union's first indication as to which employees were to be laid off. According to the Employer's letter accompanying the rankings, each employee's first line supervisor rated their performance and those ratings were reviewed by the bond shop manager, the bond shop director, and two other Employer officials. Pursuant to the Employer's RAS rankings, the twelve employees with total scores less than 275 were selected for layoff. This included Charging Parties 1, 2, and 3. Additionally, Charging Party 3, who the Union would later learn was (b) (6), (b) (7)(C) received the second to lowest overall score in the bond shop with a score of 225.

Also on (b) (6), (b) (7)(C) the Employer held two meetings (one in the morning and one in the afternoon) to inform the twelve affected bond shop employees that they would be laid off effective (b) (6), (b) (7)(C) 2017. On (b) (6), (b) (7)(C) the Employer laid off the twelve bond shop employees it had notified the previous day.

III. The Employer's Imposition of Discretionary Discipline

Beginning in March 2014, the Employer began to send the Union letters approximately once a month proposing that the parties negotiate an interim grievance procedure and process for bargaining over discretionary discipline. Attached to each letter was a list of employees that the Employer had recently disciplined. The Union did not respond to any of these letters until November 2016.

A. Charging Party 4

Charging Party 4 worked as an assembly employee in the Employer's Bombardier program from about (b) (6), (b) (7)(C) until (b) (6), (b) (7)(C) discharge in (b) (6), (b) (7)(C) 2016.¹² Charging Party 4 had several disciplines on record prior to the events at issue. On (b) (6), (b) (7)(C) 2016, (b) (6), (b) (7)(C) received a written warning for a safety violation. On (b) (6), (b) (7)(C) 2016, (b) (6), (b) (7)(C) received a

¹² The Employer's Bombardier program is responsible for building and assembling wings for Bombardier aircraft.

final written warning and five-day suspension for workmanship issues because (b) (6), (b) (7)(C) had drilled holes on a work order that were larger than they should have been. On (b) (6), (b) (7)(C) 2016, Charging Party 4 was suspended—despite (b) (6), (b) (7)(C) previous final warning—for using an unauthorized camera and for failing to keep (b) (6), (b) (7)(C) work area clean.

On November 4, 2016, Charging Party 4 and Employee 1 were working together to install fasteners into the spar¹³ of an aircraft wing assembly. The holes had been pre-drilled by a new machine that the Employer had recently placed into service. Employee 1 was responsible for shooting the fasteners into the holes in the spar with a rivet gun while Charging Party 4 held a metal bucking bar, which is a block held on the far side of the spar and used to back up each fastener as it was installed. According to Charging Party 4, neither (b) (6), (b) (7)(C) nor Employee 1 noticed any defects in the fasteners they installed on the spar at that time.

On November 8, 2016, another employee noticed that the spar that Charging Party 4 and Employee 1 had been working on had several dents in it and brought it to the attention of Charging Party 4. Charging Party 4 inspected the spar and observed that several of the holes on the spar appeared raised as if the initial holes were too tight for the fasteners. Charging Party 4 also observed several impressions in the spar where (b) (6), (b) (7)(C) had held the bucking bar that (b) (6), (b) (7)(C) assumed were created by the amount of pressure (b) (6), (b) (7)(C) needed to push the fastener through the holes. Charging Party 4 noted the defects in the log for the spar and (b) (6), (b) (7)(C) and Employee 1 informed their supervisor. Charging Party 4's supervisor agreed that the issue appeared to be caused by the holes being too tight.

On November 9, 2016, Charging Party 4's supervisor told (b) (6), (b) (7)(C) that (b) (6), (b) (7)(C) needed (b) (6), (b) (7)(C) help with a corrective action report concerning the issues with the spar. Charging Party 4 and the supervisor again discussed the issues with the spar they observed the day before and then Charging Party 4 signed the corrective action form. The supervisor also told Charging Party 4 that (b) (6), (b) (7)(C) needed to use a wood bucking bar rather than a metal bucking bar, which, according to Charging Party 4, was the first time (b) (6), (b) (7)(C) had received such instruction.

¹³ On fixed-wing aircraft, the spar is usually one of the main structural members of the aircraft's wing that runs the length of the wing perpendicular to the aircraft's fuselage.

On (b) (6), (b) (7)(C) 2016, Charging Party 4 was suspended pending investigation.¹⁴ The Employer did not notify the Union prior to suspending (b) (6), (b) (7)(C)

On November 14, the Union sent the Employer a letter stating that the Employer had “failed to notify and bargain over Discretionary Discipline to the Employees/Members” at the Red Oak facility. The Union demanded that “all those affected be made whole” and that the Employer provide the Union an opportunity to engage in pre-imposition bargaining before it issued further discipline.¹⁵

On December 1, 2016, Charging Party 4 received a letter from the Employer stating that it had completed its investigation and that (b) (6), (b) (7)(C) was terminated effective (b) (6), (b) (7)(C) 2016 due to “workmanship and gross negligence in performing duties.” The Employer did not notify the Union about Charging Party 4’s suspension or subsequent discharge until December 4, 2016, when it sent the Union a letter announcing the most recent already-issued disciplines.

On December 12, 2016, the Employer responded to the Union’s November 14th letter by referencing its practice of providing monthly letters updating the Union of already-issued discretionary discipline. The Employer also proposed that the Union designate a representative to receive correspondence from the Employer when the Employer was considering discretionary discipline that would result in a suspension or termination. Finally, the Employer also stated that there was no legal basis for the Union’s demand to bargain prior to the imposition of any discretionary employee discipline.

On December 21, 2016, the Union responded to the Employer with a list of all employees who had been disciplined in August, September, and October 2016 and proposed bargaining over those disciplinary actions at future first-contract bargaining sessions. On January 9, 2017, the Employer accepted the Union’s offer to bargain over previously-issued disciplines as identified in the Union’s December 21 letter.

¹⁴ Employee 1 was also suspended pending investigation, but was returned to work approximately two days later. On (b) (6), (b) (7)(C) the Employer issued (b) (6), (b) (7)(C) a written warning. On that same day, the Employer provided Employee 1 with training to help (b) (6), (b) (7)(C) prevent future similar defects in the future. In an email discussing Employee 1’s corrective training, the Employer’s training instructor noted that the Employer would need to address the programming of the machine that had made the holes in the spar in the first place. The Employer’s training instructor also noted that the Employer needed “to look for best shop practice method [for employees] to use or ask questions” to aid employees in preventing future defects.

¹⁵ It is unclear whether the Union sent this letter in response to Charging Party 4’s suspension.

Between January and May 2017, the Employer and Union engaged in post-discipline bargaining on approximately four different occasions.

B. Charging Party 3

Charging Party 3 was a (b) (6), (b) (7)(C) autoclave¹⁶ operator in the Employer's bond shop. On March 8, 2017, (b) (6), (b) (7)(C) was using the autoclave to cure an aircraft spar. Approximately five to six hours into the spar cure cycle, Charging Party 3 realized (b) (6), (b) (7)(C) had chosen the wrong cure cycle for that particular spar and followed the Employer's procedure to manually force the autoclave into the cooling phase of the cycle. According to Charging Party 3, (b) (6), (b) (7)(C) believed the spar could still be re-processed using the correct cure cycle because it had not exceeded a particular temperature (270 degrees). At the end of Charging Party 3's shift, (b) (6), (b) (7)(C) told several employees from the next shift about the situation and told those employees that (b) (6), (b) (7)(C) would submit the paperwork to their supervisor so they did not get blamed. According to Charging Party 3, this was the first time (b) (6), (b) (7)(C) had set the autoclave to the wrong cure cycle in (b) (6), (b) (7)(C) career with the Employer.

On March 10, the Employer's engineer told Charging Party 3 that testing had revealed no defects in the spar and that it was one of the better parts the engineer had seen in a while.¹⁷ Later that day, Charging Party 3 asked another bond shop supervisor whether (b) (6), (b) (7)(C) would get a five-day suspension for the issue with the spar and the supervisor responded that (b) (6), (b) (7)(C) did not know, but thought that Charging Party 3 would only get a written warning. On (b) (6), (b) (7)(C) the same supervisor approached Charging Party 3 and asked (b) (6), (b) (7)(C) to go to Human Resources, where (b) (6), (b) (7)(C) met with two HR representatives. Charging Party 3 admitted (b) (6), (b) (7)(C) mistake and said it would not happen again. Charging Party 3 was then issued a five-day suspension.

The Employer did not inform the Union of Charging Party 3's suspension until the Employer's monthly letter on May 4, 2017 informing the Union of recently implemented discipline. By this time, Charging Party 3 had been laid off as part of the April bond shop layoff.

In June 2017, the parties agreed to a negotiated grievance and arbitration procedure for discretionary discipline.

¹⁶ An autoclave is a large pressure chamber that applies both heat and pressure utilized by the Employer in manufacturing components for aircraft parts.

¹⁷ Charging Party 3 later learned that the Employer's customer had refused to purchase the spar.

ACTION

We conclude that the Employer violated Section 8(a)(5) by exercising impermissibly broad discretion under its RAS ranking system to select employees for the 2017 bond shop layoff, even assuming the parties were at a good-faith impasse over the layoff. We further conclude that no economic exigency existed that would excuse the Employer from bargaining to impasse on the overall collective-bargaining agreement prior to implementing its layoff, and that the Union did not clearly and unmistakably waive its right to bargain to overall impasse, under the principles of *Bottom Line Enterprises*¹⁸ and *RBE Electronics of S.D.*¹⁹ Finally, we conclude that the Region should seek make-whole remedies for the two charging parties issued discretionary discipline in violation of *Total Security Management*.²⁰

I. The Employer Violated Section 8(a)(5) by Laying Off Twelve Bond Shop Employees.²¹

A. The Employer could not lawfully implement the RAS ranking system to select employees for layoff even in the case of a lawful impasse

Generally, a genuine impasse in bargaining “temporarily suspends the usual rules of collective bargaining,” and permits implementation of the employer’s proposal.²² The Board in *McClatchy Newspapers*, however, recognized an exception to the “implementation-on-impasse” rule for terms or proposals “that confer on an Employer broad discretionary powers that necessarily entail recurring unilateral decisions regarding changes in the employees’ rates of pay.”²³ The Board determined that such proposals are so inherently destructive of the fundamental principles of

¹⁸ 302 NLRB 373 (1991).

¹⁹ 320 NLRB 80 (1995).

²⁰ 364 NLRB No. 106 (Aug. 26, 2016).

²¹ The Region should not allege that the Employer’s implementation of the RAS ranking system for the April 2017 layoffs was unlawful under *Total Security Management* because the Board’s decision in that case states that it *only* applies to discretionary discipline and the Board has never categorized a layoff as discipline.

²² *McClatchy Newspapers, Inc.*, 321 NLRB at 1389.

²³ *Id.* at 1388.

collective bargaining that they cannot be sanctioned as part of a doctrine created to break impasse and restore active collective bargaining.²⁴ Moreover, not only would allowing implementation of such proposals be inimical to the collective bargaining process, it would also demonstrate on an ongoing basis the union's "incapacity to act as the employees' bargaining representative."²⁵ The Board has since expanded the *McClatchy* exception to the implementation-on-impasse doctrine to other mandatory subjects of bargaining, including discretion in changing medical benefits and in setting schedules that will impact wages.²⁶

When determining whether an implemented proposal grants the employer impermissibly broad discretion under the *McClatchy* exception, the Board looks to whether the discretion is limited by "definable objective procedures and criteria."²⁷ For instance, in *Royal Motor Sales*, the Board held that the employer unlawfully implemented discretionary merit wage increases that lacked clearly defined objective standards and criteria for assessing merit.²⁸ Specifically, the implemented proposal called for merit pay increases based on "experience, ability, knowledge, and performance," without specifying or defining those terms, giving the employer broadly

²⁴ *Id.* at 1390–91.

²⁵ *Id.* at 1391. *See also Royal Motor Sales*, 329 NLRB 760, 778 (1999), *enforced sub nom. Anderson Enterprises*, 2 F. App'x 1, (D.C. Cir. 2001).

²⁶ *See, e.g., Mail Contractors of America*, 347 NLRB 1158 (2006) (extending *McClatchy* exception to a proposal allowing employer to unilaterally alter the "relay points" where drivers end their shifts, which would have had a direct effect on their wages), *enforcement denied*, 514 F.3d 27 (D.C. Cir. 2008); *KSM Industries*, 336 NLRB 133, 135, 135 n.6 (2001) (extending *McClatchy* to proposal giving employer discretion in changing health plan). *See also Agrifos Fertilizer, LLC*, Case 16-CA-065274, Advice Memorandum dated April 26, 2012 (authorizing complaint for discretionary layoff provision); *Bechtel Bettis, Inc.*, Case 27-CA-19115, Advice Memorandum dated March 31, 2005 (authorizing complaint for provision granting employer discretion to reassign employees to non-unit work). *Cf. Adair Standish Corp.*, 292 NLRB 890, 890 n.1 (1989) (holding, in a decision predating *McClatchy*, that an employer could not lawfully continue to exercise its discretion in when and how it conducted layoffs after its employees' selected a bargaining representative).

²⁷ *Royal Motor Sales*, 329 NLRB at 778–79.

²⁸ *Id.*

retained discretion.²⁹ The Board further explained that this lack of objective criteria prevented any meaningful grievance arbitration. The Board also suggested that this problem is compounded when the interpretation of such terms is excluded from arbitration, because it invests the employer with unchecked judgment as to how to interpret such terms.³⁰

Assuming, *arguendo*, that the parties were at a good-faith impasse over the layoff, the Employer violated Section 8(a)(5) by exercising impermissibly broad discretion under its RAS ranking system to select employees for the April 21, 2017 bond shop layoff. The Employer's implemented RAS ranking proposal contained eight key decisional factors—attendance, communications, integrity/organization commitment, job knowledge/skills/learning, productivity, quality, safety, and teamwork—that do not constitute the type of defined, objective criteria that *McClatchy* requires.³¹ Although the Employer's RAS ranking sheet provides brief narrative descriptions of each category, these descriptions do not offer examples of particular employee conduct evaluated or how the Employer will determine the appropriate rating for that conduct. Indeed, the Employer's narrative descriptions of each performance rating under RAS ranking system also fail to describe clearly how the Employer will decide what types of work performance under each criteria would deserve a higher or lower ranking. Furthermore, the Employer adamantly rejected Union proposals that would have added additional objectivity to the Employer's selection of employees for layoff, such as seniority, and that would have limited the

²⁹ *Id.* at 781.

³⁰ *Id.* at 780–81. *See also United Grain*, Case 19-CA-100575, Advice Memorandum dated January 3, 2014 (authorizing complaint where, *inter alia*, employer omitted from arbitration all decisions made pursuant to a unilaterally implemented disciplinary system).

³¹ *Compare M & G Polymers USA, LLC*, Case 9-CA-41007, Advice Memorandum dated September 28, 2004 (unilateral layoff not unlawful under *McClatchy* where selection criteria included specific examples of the factors being considered and negotiated weights for those factors, and union had opportunity to challenge specific assessments through expedited arbitration) *with Agrifos Fertilizer*, Case 16-CA-65274, Advice Memorandum dated April 26, 2012 (unilateral layoff unlawful where selection criteria such as “skill, knowledge, ability, and job performance” lacked specificity and employer failed to provide information about how it would assess criteria).

Employer's discretion in applying the RAS rankings by making the layoffs subject to grievance and arbitration.³²

Moreover, the parties' bargaining history and past practice do not clarify the Employer's RAS rankings so as to include defined, objective procedures and criteria. During the parties' final bargaining session, the Union clearly did not understand how the Employer would apply the RAS rankings even though the Employer had used the system to conduct an earlier layoff. The Union could not explain how the Employer utilized active disciplines in determining employee RAS rankings and the Employer refused to explain it to the Union. The Employer's RAS ranking system explicitly states that it would be applied by the bond shop supervisors and managers exclusively, and the Employer rejected several Union proposals that would have granted the Union some review of the Employer's determinations. Additionally, there is no evidence that the Union was ever provided information about how the Employer would convert narrative RAS rankings to the weighted scores that the Employer would ultimately use to determine which employees would be subject to the layoff. Accordingly, because the RAS ranking system gave the Employer unfettered discretion to determine which employees would be laid off, the Employer's use of the RAS ranking system to conduct the [REDACTED] 2017 layoffs was unlawful.

B. *The Employer was not entitled to implement the layoff while the parties were negotiating an overall agreement*

In *Bottom Line Enterprises*, the Board held that an employer has a heightened obligation to refrain from making unilateral changes where no collective-bargaining agreement is in place and the parties are currently engaged in bargaining for an overall agreement.³³ In these circumstances, "an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole."³⁴ The Board articulated limited exceptions to this principle, permitting an employer to unilaterally implement only when a union continually

³² See *Royal Motor Sales*, 329 NLRB at 780 (although employer's job placement and advancement decisions would be subject to grievance-arbitration process, the proposals "contain no objective criteria that would form the basis for meaningful grievance arbitration over the [employer's] decisions").

³³ 302 NLRB 373, 374 (1991).

³⁴ *Bottom Line Enterprises*, 302 NLRB at 374.

avoids or delays bargaining or “when economic exigencies compel prompt action.”³⁵ Economic exigencies that excuse bargaining altogether must be extraordinary events due to unforeseen circumstances that have a major economic effect on the company, requiring immediate action.³⁶ Economic hardships such as a loss of significant accounts or contracts,³⁷ operation at a competitive disadvantage,³⁸ or supply shortages³⁹ do not rise to the level of economic exigency that will justify a failure to bargain prior to implementation.⁴⁰

In *RBE Electronics of S.D.*, however, the Board articulated a second, lesser economic exigency for situations which are not serious enough to forego notice and an opportunity to bargain altogether, but require the employer to provide the union with notice and opportunity to bargain to impasse on that issue, at which time the employer can unilaterally implement its final proposal.⁴¹ These lesser exigencies are limited to situations where time is of the essence and prompt action is required; to avail itself of this exception, the employer must demonstrate that the exigency was

³⁵ *Id.* See also *M & M Contractors*, 262 NLRB 1472, 1472 (1982) (for seven-month period, the union refused to give employer a date it would meet to bargain); *AAA Motor Lines, Inc.*, 215 NLRB 793, 794 (1972) (union refused to meet and bargain for two and a half months).

³⁶ *RBE Electronics*, 320 NLRB at 81 (citing *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995)).

³⁷ See, e.g., *Farina Corp.*, 310 NLRB 318, 321 (1993) (employer’s claim of insufficient work did not constitute an economic exigency sufficient to excuse bargaining; noting “business necessity is not the equivalent of compelling considerations which excuse bargaining”).

³⁸ See, e.g., *Triple A Fire Protection*, 315 NLRB 409, 414, 418 (1994) (employer did not demonstrate economic emergency by showing that its contract wage rates put it at a competitive disadvantage such that it bid on but lost numerous jobs), *enforced* 136 F.3d 727 (11th Cir. 1998).

³⁹ See, e.g. *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995) (employer’s chronic difficulty securing necessary raw materials did not constitute compelling economic exigency that would justify its unilateral layoff without opportunity to bargain).

⁴⁰ *RBE Electronics*, 320 NLRB at 82.

⁴¹ *Id.*

caused by external events, beyond the employer's control, and not reasonably foreseeable.⁴²

If the employer's obligation to refrain from making a unilateral change until the parties reach overall impasse during bargaining is not excused by any of these exigent exceptions, an employer may lawfully implement a change only if the union has waived its right to bargain to overall impasse.⁴³ A waiver of a statutorily protected right will not be lightly inferred and must be "clear and unmistakable."⁴⁴ To demonstrate a clear and unmistakable waiver where there is no contract language to be relied upon, it must be shown that the issue was "fully discussed and consciously explored" during bargaining and that the union "consciously yielded or clearly and unmistakably waived its interest in the matter."⁴⁵

Here, no exigency excused the Employer's unilaterally implemented layoffs while the parties were engaged in collective bargaining for their initial agreement at the Red Oak facility. As an initial matter, neither of the exceptions outlined in *Bottom Line Enterprises* applies to this case. The Union neither delayed nor avoided bargaining as it was consistently willing to meet with the Employer as soon as the Employer informed the Union of the planned layoffs. And, the Employer will not be able to demonstrate the stringent requirements of the *Bottom Line* economic exigency. The Employer's loss of work in November 2016 and the failure of additional work to materialize in February and early March 2017 are more akin to a loss of a significant contract than a sudden, unexpected emergency such as a natural disaster.⁴⁶

⁴² *Id.*

⁴³ See, e.g., *Lawrence Livermore National Security, LLC*, 357 NLRB 203, 206 (2011) (finding that a union did not clearly and unmistakably waive the right to negotiate to overall impasse on a contract even though the employer and union agreed to bifurcate the negotiations and first bargain about employee layoffs and their effects before discussing initial contract terms).

⁴⁴ *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 n.12 (1983); *Georgia Power Co.*, 325 NLRB 420, 420 (1998), *enforced mem.* 176 F.3d 494 (11th Cir. 1999).

⁴⁵ *Georgia Power Co.*, 325 NLRB at 420–21; *Johnson-Bateman Co.*, 295 NLRB 180, 185 (1989) (citing *Rockwell International Corp.*, 260 NLRB 1346, 1347 (1982)).

⁴⁶ See, e.g., *Port Printing AD & Specialties*, 351 NLRB 1269, 1269–70 (employer was excused from bargaining over layoffs where the plant closing was precipitated by a mandatory, city-wide evacuation due to an impending hurricane; employer was not

Likewise, the Employer cannot meet its burden of demonstrating the *RBE Electronics* lesser economic exigency that would permit implementation after impasse on the layoff issue. An immediate layoff was not necessitated by unforeseeable external events that were beyond the Employer's control. The Employer was well-aware of the potential shortfall of work in the bond shop since at least November 2016, five months prior to the (b) (6), (b) (7)(C) 2017 layoffs, when a customer informed the Employer of its decision to slow down production on a large project. The Employer concedes that it was aware of the possible need to layoff bond shop employees in November 2016, but had hope that future work would prevent the need for such layoffs. Thus, the Employer was fully aware of the potential for layoffs in the bond shop long before it initiated bargaining over layoffs. Moreover, the Employer has also failed to explain why it needed to implement the layoffs by (b) (6), (b) (7)(C) 2017 in order to avoid financial emergency. Indeed, its only articulated reason for executing the layoffs by that date was that it wished to be considerate to the laid-off employees by providing them sufficient notice.⁴⁷ Accordingly, regardless of whether the parties had reached impasse on the single issue of the bond shop layoff, the Employer's implementation of its proposal on layoffs was not excused by any of the Board's exceptions to the general rule that an employer may not unilaterally implement any changes to terms and conditions of employment without first bargaining to overall impasse on the agreement as a whole.⁴⁸

excused from bargaining over its decision to use non-unit employees to perform unit work after re-opening the facility with a reduced workforce post-hurricane).

⁴⁷ This justification is particularly puzzling considering that the Employer notified the employees one day prior to their layoffs.

⁴⁸ If the Region determines that the parties were not even at impasse on the single issue of the layoff, it may add that as an alternative argument. In that regard, we note that the Union continued to offer proposals for a compromise on layoff procedure and selection criteria up until shortly before implementation and requested that the Employer delay implementation by a few days in order to try to reach an agreement; moreover, the Employer provided the Union critical information about its selection criteria the same day that it notified the employees of their layoff and one day prior to implementation. *Cf. Raven Services Corp. v. NLRB*, 315 F.3d 499, 505 (D.C. Cir. 2003) (employer's post-impasse, unlawful refusal to provide requested information broke impasse because union could not revise its bargaining proposals and employer "was artificially perpetuating deadlock"), *enforcing* 331 NLRB 651, 658–59 (2000) (employer's post-impasse, unlawful refusal to provide requested information prevented union from revising "its proposals in order to break the alleged impasse").

The Employer also has failed to meet the high bar of demonstrating that the Union clearly and unmistakably waived its right to bargain to overall impasse on a collective-bargaining agreement before implementation of this layoff. In *Lawrence Livermore National Security*, the Board found that an agreement to bifurcate issues in contract bargaining was not enough to constitute a waiver of the union's right to negotiate to overall impasse before the employer could make changes in terms and conditions of employment.⁴⁹ In that case, although the parties had agreed to first bargain about employee layoffs and their effects before moving on to initial contract terms, the Board held that the union had not waived its right to negotiate to an overall impasse.⁵⁰ Here, by contrast, the Union did not even agree to handle negotiations in a serial fashion; rather, the parties agreed to bargain over the Employer's proposed layoff concurrent with bargaining toward an overall agreement. Thus, the Employer cannot establish that the Union clearly and unmistakably waived its right to bargain to impasse on the entire contract.

II. Charging Parties 3 and 4 Are Entitled to Backpay and Reinstatement Under *Total Security Management*

In *Total Security Management*, the Board considered whether an employer has a statutory obligation to bargain before imposing discretionary discipline on unit employees when a union has been certified or lawfully recognized but has not yet entered into a collective-bargaining agreement with the employer.⁵¹ The Board held, inter alia, that discretionary discipline is a mandatory subject of bargaining and, therefore, employers must give unions notice and an opportunity to bargain before imposing certain serious types of disciplinary actions.⁵²

Although the Board in *Total Security* elected to apply its holding only prospectively, it addressed the issue of whether reinstatement and backpay would be appropriate in future cases involving the unlawful imposition of discretionary

⁴⁹ 357 NLRB at 206.

⁵⁰ *Id.*

⁵¹ 364 NLRB No. 106, slip op. at 1.

⁵² An employer's duty to provide notice to and an opportunity to bargain with a union before imposing discipline applies only to "disciplinary actions such as suspension, demotion, and discharge [that] plainly have an inevitable and immediate impact on employees' tenure, status, or earnings." *Id.*, slip op. at 3–4.

discipline without bargaining.⁵³ The Board concluded that the standard remedy for an unlawful unilateral change should apply, including reinstatement and backpay. It noted, however, that the respondent may raise as an affirmative defense in a compliance proceeding that the discipline was “for cause,” as that term is used in Section 10(c) of the Act, and therefore that reinstatement and backpay are not warranted. Specifically, the Board held that:

We will construe Section 10(c) to preclude reinstatement and backpay if the respondent establishes, consistent with the allocation of proof described below, that the employee’s suspension or discharge was for cause. In order to do so, the respondent must show that: (1) the employee engaged in misconduct, and (2) the misconduct was the reason for the suspension or discharge. In response, the General Counsel and the charging party may contest the respondent’s showing, and may also seek to show, for example, that there are mitigating circumstances or that the respondent has not imposed similar discipline on other employees for similar misconduct. If the General Counsel and charging party make such a showing, the respondent must show that it would nevertheless have imposed the same discipline.⁵⁴

The Board emphasized that the respondent bears the burden of persuasion in this analytical framework, noting that this is consistent with the allocation of the burdens of proof in a standard compliance proceeding and with the Board’s established principle that the wrong-doer bears the burden of uncertainty created by its wrongful conduct.⁵⁵

In this case, the Employer would be able to meet its initial burden of showing that both Charging Party 3 and Charging Party 4 engaged in the alleged misconduct (poor workmanship) and that the misconduct was the reason for their suspension and discharge, respectively.⁵⁶ But the Region would then have the opportunity to show that there are mitigating circumstances and/or that the Employer has not imposed similar discipline on other employees for similar conduct.

⁵³ *Id.*, slip op. at 12–15.

⁵⁴ *Id.*, slip op. at 15.

⁵⁵ *Id.*, slip op. at 15 and n.41.

⁵⁶ We agree with the Region that the Employer’s disciplinary policy constitutes discretionary discipline within the meaning of *Total Security Management*.

With regard to Charging Party 4, the evidence demonstrates mitigating circumstances. In particular, although the Employer asserts that it provided training in early October 2016 to use wood instead of metal bucking bars, Charging Party 4 asserts that (b) (6), (b) (7)(C) never received that training and the Employer has not presented any evidence that (b) (6), (b) (7)(C) had, in fact, received that training. According to Charging Party 4, (b) (6), (b) (7)(C) first received that instruction when discussing the damaged spar on November 9, 2016 with (b) (6), (b) (7)(C) supervisor. Additionally, the Employer's documents demonstrate that the root cause of the defect—pre-drilled holes that were too small for the fasteners—was not caused by either Employee 1 or Charging Party 4, and the Employer acknowledged that it needed to adopt better procedures for its employees to ask questions when performing particular jobs. And although Charging Party 4 had received a final written warning in (b) (6), (b) (7)(C) 2016, a few months before the incident with the bucking bar, the Employer had already disregarded its progressive discipline system by again suspending (b) (6), (b) (7)(C) for a performance issue in (b) (6), (b) (7)(C) 2016. In light of this evidence, the burden would then shift back to the Employer to show that it would nevertheless have imposed the same discipline, and it has not submitted evidence that would be sufficient to meet that burden.

With regard to Charging Party 3, the Employer provided evidence of only one similar incident of an employee issued discipline for making a mistake in setting the autoclave. In that case, an employee received a five-day suspension after selecting the wrong cure cycle. However, unlike Charging Party 3, (b) (6), (b) (7)(C) personnel file indicated that (b) (6), (b) (7)(C) had a history of selecting the wrong cure cycle while operating the autoclave. In contrast, Charging Party 3 asserts that in (b) (6), (b) (7)(C) history with the Employer, (b) (6), (b) (7)(C) had never executed the wrong cure cycle before. Furthermore, Charging Party 3's personnel file does not indicate any other disciplinary or performance issues. This is significant when all of the records that the Employer submitted to the Region for Charging Party 4 and its comparator employees demonstrate that the Employer typically follows its progressive disciplinary system by issuing written warnings for performance-based misconduct prior to imposing suspensions. In addition to this evidence of disparate treatment, there is also evidence of mitigating circumstances, including that Charging Party 3 promptly took steps to correct (b) (6), (b) (7)(C) error, notified the employees on the next shift, and took full responsibility for (b) (6), (b) (7)(C) error. In light of this evidence, the burden would then shift back to the Employer to show that it would nevertheless have imposed the same discipline, and it has not submitted evidence that would be sufficient to meet that burden.

In these circumstance, the Region should seek backpay and reinstatement for Charging Parties 3 and 4.

CONCLUSION

Accordingly, the Region should issue a consolidated Section 8(a)(1) and (5) complaint, absent settlement, alleging that the Employer unlawfully implemented its April 2017 bond shop layoff.⁵⁷ The Region should also seek make-whole remedies for Charging Parties 3 and 4 as described above.

/s/
J.L.S.

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(b) (6), (b) (7)(C)

⁵⁷ Although the Region should attempt to solicit an amended charge listing the Union as a Charging Party and adding the other nine employees subject to the (b) (6), (b) (7)(C) 2017 layoff as discriminatees, the Region can seek make-whole remedies for all twelve of the employees affected by the Employer's (b) (6), (b) (7)(C) 2017 layoffs even absent an amended charge.