Bemis Company, Inc. *and* Graphic Communications Conference of the International Brotherhood of Teamsters, Local 727-S.

Bemis Company, Inc. *and* Philip A. McMeins. Cases 18–CA–202617, 18–CA–205446, 18–CA–205920, 18–CA–205927, 18–CA–207874, 18–CA–209515, 18–CA–210170, 18–CA–210936, and 18–CA–211086

August 7, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On July 1, 2019, Administrative Law Judge Charles J. Muhl issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party Union filed answering briefs to the Respondent's exceptions, and the Respondent filed a reply brief. The General Counsel and Charging Parties filed cross-exceptions and supporting briefs, the Respondent filed an answering brief to the General Counsel's and Charging Party McMeins' cross-exceptions, and the Charging Party Union filed a reply brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions[3] only to the extent consistent with this Decision and Order.[4]

1. The Discipline and Discharge of Linda Hesler

The Respondent is a multinational corporation that manufactures plastic shrink bags for wrapping meat and cheese products, including at the Centerville, Iowa facility at issue in this case. Linda Hesler was a vocal, open union supporter who had been employed by the Respondent for 23 years until she was discharged on July 21, 2017. We adopt the judge's finding, under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), that the Respondent violated Section 8(a)(3) and (1) by discharging Hesler. After the judge issued his decision in this case, however, the Board clarified the animus element of the General Counsel's

[1] The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In the absence of exceptions, we adopt the judge's findings that the Respondent violated Sec. 8(a)(1) by maintaining its nonsolicitation and no-distribution policies, by enforcing its nonsolicitation policy to prohibit employees from posting prounion materials on their lockers, by writing in employee Elizabeth Nichols' performance appraisal that she was bothering employees with her union activity, and by engaging in surveillance of her union activity, and Sec. 8(a)(3) and (1) by downgrading Nichols' performance appraisal because of her union activity. Also, in the absence of exceptions, we adopt the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(3) and (1) by refusing to recall Nichols from her layoff.

[3] We adopt the judge's finding that the Respondent's maintenance of its off-duty access rule is unlawful under the first prong of *Tri-County Medical Center*, 222 NLRB 1089 (1976). Although we recognize that this case does not turn on the third prong of *Tri-County*, we would be willing to reconsider the third prong of *Tri-County* in a future appropriate case.

We also adopt the judge's findings that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally altering employees' schedules from 8-hour shifts to 12-hour shifts beginning on December 31, 2017, and by relatedly altering the schedules of employees who were restricted to 8 hours of work per day. Although the General Counsel alleged in the complaint that the schedules were altered on November 15, 2017, in fact the change was only announced on that date, and the announcement was not alleged as a separate violation. We further adopt the judge's findings that the Respondent violated Sec. 8(a)(5) and (1) by dealing directly with unit employees when it solicited them to sign severance agreements regarding their layoffs; by unilaterally laying off unit employees Coty Gearin, Tyler Lewis, Kent Morlan, Chet Varner, Jeff McClurg, Elizabeth Nichols, Brian Shives, and other unnamed employees; by unilaterally eliminating the general laborer and ink controller unit positions; by failing and refusing to provide the Union with relevant information it requested on August 8, 2017; by engaging in surface bargaining during first-contract negotiations; and by refusing to meet with the Union at reasonable times for bargaining.

We clarify that the Respondent's violations of Secs. 8(a)(3) and (5) derivatively violated Sec. 8(a)(1) as alleged in the consolidated complaint but not expressly stated by the judge in his conclusions of law. *Altura Communication Solutions, LLC*, 369 NLRB No. 85, slip op. at 51 fn. 49 (2020) (an employer's violation of Sec. 8(a)(5) is also a derivative violation of Sec. 8(a)(1)); *Napleton 1050, Inc. d/b/a Napleton Cadillac of Libertyville*, 367 NLRB No. 6, slip op. at 14 (2018) (conduct found to be a violation of Sec. 8(a)(3) would also discourage employees from exercising their Sec. 7 rights and be a derivative violation of Sec. 8(a)(1)).

Further, we agree with the judge that the Respondent's refusal to include certain mandatory subjects of bargaining in the contract did not independently violate the Act as the Charging Party Union contends; the additional violation was not pleaded in the complaint and, further, finding the violation would not affect the remedy. We also find it unnecessary to pass on whether Morlan's layoff additionally violated Sec. 8(a)(3) because the additional finding would not materially affect the reinstatement and make-whole remedy for Morlan. See *The Strand Theatre of Shreveport Corp.*, 346 NLRB 523, 523 fn. 2 (2006), enfd. 493 F.3d 515 (5th Cir. 2007).

Finally, we adopt the judge's dismissals of allegations that the Respondent violated Sec. 8(a)(1) by maintaining a policy banning "false" statements and by discharging Supervisor Philip McMeins and violated Sec. 8(a)(5) and (1) by changing its seniority preference policies for bidding on shifts and jobs.

[4] We shall modify the judge's conclusions of law, remedy, and recommended Order to conform to our findings, to the Board's standard remedial language, and in accordance with our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). We shall also substitute a new notice to conform to the Order as modified.

initial burden of establishing that an alleged discriminatee's discharge was unlawfully motivated. *Tschiggfrie Properties, Ltd.,* 368 NLRB No. 120, slip op. at 5–8 (2019). As the Board there explained, the General Counsel "does not *invariably"* establish the animus element merely by showing *"any* evidence of the employer's animus or hostility toward union or other protected activity." Id., slip op. at 7 (emphasis in original). "Instead, 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." Id., slip op. at 8. Here, we find that a "causal relationship" between Hesler's protected activity and the Respondent's discharge of Hesler has clearly been established by the judge's findings of specific animus towards her union activity and the Respondent's contemporaneous unfair labor practices.

Contrary to the judge, however, we additionally find that Hesler engaged in protected concerted activity when she raised issues about working conditions during an April 2016 captive-audience meeting, at which the Respondent discussed the organizing campaign with employees, and two round-table meetings, held in December 2016 and June 2017, at which the Respondent discussed particular working conditions with employees. At these meetings, Hesler raised many concerns. She objected to the Respondent's policies regarding reimbursement for safety shoes and scheduling of employee vacations; she asserted that new hires were being treated poorly in the extrusion department; she complained that different departments were unfairly held to different production standards; and she requested a different day off for employees for the July 4th holiday and funding for a community safety day. These concerns related to the work force generally, as well as to issues directly affecting the working conditions of multiple employees in attendance at these meetings, and Hesler's statements were made in response to issues raised for the first time by management at the meetings. In these circumstances, we infer that by speaking up about working conditions, Hesler sought to induce or prepare for group action and was engaged in protected concerted activity. See *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 7 (2019) (although statements made in meetings or in presence of other employees are not automatically concerted, the "totality of the circumstances" may support "a reasonable inference that . . . the employee was seeking to initiate, induce or prepare for group action"), clarifying *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985); *Meyers Industries*, 281 NLRB 882 (1986) *(Meyers II)*, affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).[5]

2. The Respondent's Social Media Rule

For the reasons stated below, we reverse the judge's finding that the Respondent's maintenance of a social media rule violated Section 8(a)(1).

The Respondent maintains an employee handbook for the Centerville facility with a subsection titled "Social Media," which states:

> Employees are expected to be respectful and professional when using social media tools. With the rise of websites like Facebook, MySpace, and LinkedIn, the way in which employees can communicate internally and externally continues to evolve. We expect our employees to exercise judgment in their communications relating to Bemis so as to effectively safeguard the reputation and interests of Bemis.
>
> Employees should:
>
> - Communicate in a respectful and professional manner;
> - Avoid disclosing proprietary information; and
>
> Each employee is responsible for respecting the rights of their co-workers and conducting themselves in a manner that does not harass, disrupt, or interfere with another person's work performance or in a manner that does not create an intimidating, offensive, or hostile work environment.

Applying *The Boeing Co.*, 365 NLRB No. 154 (2017), the judge found that the first paragraph of the rule is unlawful.[6] He found that, because the rule applies to private social media activity and instructs employees to avoid communications on social media that would harm the Respondent's reputation, it would restrain employees' discussions about their working conditions. He further concluded that the rule's impact on Section 7 activity outweighed the Respondent's interest in protecting its brand and the brands of its customers.[7]

[5] Accord *Caval Tool Division, Chromalloy Gas Turbine Corp.*, 331 NLRB 858, 863 (2000), enfd. 262 F.3d 184 (2d Cir. 2001); *Whittaker Corp.*, 289 NLRB 933, 934 (1988); but see *Bud's Woodfire Oven, LLC d/b/a Ava's Pizzeria*, 368 NLRB No. 45, slip op. at 6 (2019) (employee's accusation made at an employee team meeting that a supervisor did not do anything in the restaurant was not concerted where there was no evidence that other employees shared his concerns).

[6] The first paragraph was the only section of the rule alleged to be unlawful in the complaint.

[7] Under *Boeing*, the Board first determines whether a challenged rule or policy, reasonably interpreted, would potentially interfere with the

We disagree and reverse. The Board has repeatedly held that, in analyzing the lawfulness of a work rule, it must refrain from reading particular phrases in isolation. *Interstate Management Co., LLC*, 369 NLRB No. 84, slip op. at 4 fn. 10 (2020); *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 4–5 (2019). We find that an objectively reasonable employee would understand that the first paragraph of the rule sets out a general expectation that is more fully defined by the explanatory language that follows. Read in its entirety, the rule makes clear that, to safeguard the reputation and interests of the company, employees referring to the company on social media must be respectful and professional, must not disclose proprietary information, must respect their coworkers, and must not harass, disrupt, or interfere with another person's work or create an intimidating, offensive, or hostile work environment. Employees would reasonably understand that adhering to those specific expectations would support the general expectations described in the rule's first paragraph without infringing on their Section 7–protected rights to discuss, criticize, or complain about working conditions with coworkers or the public when using social media.

The judge's decision finding to the contrary focused on two mistaken conclusions. First, the judge erroneously found that the rule would interfere with employees' private communications. The rule's stated purpose, however, is to protect the reputation of the company. Accordingly, the rule clearly concerns communications that could affect the *public's* view of the company, such as those posted on social media, rather than private conversations among employees. Second, the judge reasoned that the first and third sentences of the rule could have been drafted more narrowly. Putting aside the fact that, as discussed above, the meaning of the first and third sentences is sufficiently clear when those sentences are read in the context of the entire rule, the Board has made clear that it will not find rules unlawful simply because they could have been written more narrowly. See *LA Specialty Produce Co.*, above, slip op. at 1–2; *Boeing*, above, slip op. at 11–14.

Accordingly, we reverse the judge and dismiss the allegation that the Respondent's social media rule is unlawful.[8]

AMENDED CONCLUSIONS OF LAW

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

2. The Union is a Section 2(5) labor organization and the designated exclusive collective-bargaining representative of the following appropriate unit of the Respondent's employees:

> All full-time and regular part-time production employees working in extrusion, press and pre-press, and finishing departments; and all full-time and regular part-time employees working in maintenance, quality assurance, distribution, and shipping and receiving departments; excluding office clerical, sales, engineers, temporary employees, and supervisors and guards as defined in the Act, as amended.

3. The Respondent violated Section 8(a)(1) by maintaining its nonsolicitation, no-distribution, and off-duty access to company property rules.

4. The Respondent violated Section 8(a)(1) on March 27, 2017, by banning employees from posting material on their lockers, pursuant to its unlawful nonsolicitation rule and in response to employees' union activities.

5. The Respondent violated Section 8(a)(1) on April 9, 2017, by writing in Elizabeth Nichols' performance appraisal that her lower rating in "Work Relationships" was due to her union activity.

6. The Respondent violated Section 8(a)(1) on June 23, 2017, by instructing its supervisor to engage in surveillance of Elizabeth Nichols' union activity.

7. The Respondent violated Section 8(a)(3) and (1) on April 9, 2017, by downgrading Elizabeth Nichols' performance appraisal due to her union activity.

8. The Respondent violated Section 8(a)(3) and (1) on July 28, 2017, by discharging Linda Hesler due to her union activity.

9. The Respondent violated Section 8(a)(5) and (1) on June 26, 2017, by unilaterally laying off Jeff McClurg, Elizabeth Nichols, Brian Shives and other unnamed employees on a temporary basis.[9]

10. The Respondent violated Section 8(a)(5) and (1) on July 7, 2017, by unilaterally and permanently laying off Coty Gearin, Tyler Lewis, Kent Morlan, and Chet Varner.

---

exercise of rights under Sec. 7 of the Act. If not, the rule or policy is lawful. If so, the Board determines whether an employer violates Sec. 8(a)(1) of the Act by maintaining the rule or policy by balancing "the nature and extent of the potential impact on NLRA rights" against "legitimate justifications associated with the rule," viewing the rule or policy from the employees' perspective. Id., slip op. at 3.

[8] Because we find that the rule would not interfere with the exercise of employees' Sec. 7 rights, we need not address the Respondent's justification for the rule, and we designate it a Category 1(a) rule under *Boeing*. *LA Specialty Produce Co.*, above, slip op. at 2; *Boeing Co.*, above, slip op. at 3.

[9] Identities of any additional employees unilaterally laid off on June 26, 2017, as alleged in the complaint and found by the judge, may be determined at the compliance stage of this proceeding.

11. The Respondent violated Section 8(a)(5) and (1) on July 7, 2017, by unilaterally eliminating the bargaining-unit job classifications of ink controller and maintenance laborer.

12. The Respondent violated Section 8(a)(5) and (1) on July 7, 2017, by bypassing the Union and dealing directly with bargaining-unit employees by unilaterally providing them severance agreements in connection with their permanent layoffs.

13. The Respondent has violated Section 8(a)(5) and (1) since August 9, 2017, by refusing to furnish the Union with relevant information the Union requested.

14. Respondent violated Section 8(a)(5) and (1) on December 31, 2017, by unilaterally changing employees' work schedules from 8-hour to 12-hour shifts, and by relatedly altering the schedules of employees who were restricted to 8 hours of work per day.

15. The Respondent violated Section 8(a)(5) and (1) by refusing to meet with the Union at reasonable times for bargaining for an initial collective-bargaining agreement.

16. The Respondent violated Section 8(a)(5) and (1) by engaging in surface bargaining and failing to bargain in good faith with the Union for an initial collective-bargaining agreement.

17. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, we amend the judge's remedy in the following respects.

We shall delete the requirement that the Respondent remove from its files any reference to the unlawful layoff of Kent Morlan.

We shall order the Respondent to reinstate and make whole the employees who formerly held the positions of ink controller and maintenance laborer, consistent with the unlawfully permanently laid-off employees as described in the judge's recommended remedy, and to reimburse them and the temporarily laid-off employees Jeff McClurg, Elizabeth Nichols, Brian Shives, and any other employees unilaterally laid off at that time for any search-for-work and interim employment expenses to be determined at the compliance stage of this proceeding, consistent with the Board's decision in *King Soopers, Inc.,* 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017).

In addition to the remedies imposed by the judge for the Respondent's unlawful surface bargaining and refusal to meet at reasonable times, we shall order the Respondent to reimburse the Union for its bargaining expenses. As the Board explained in *Frontier Hotel & Casino,* 318 NLRB 857 (1995), enfd. in relevant part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997):

> In cases of unusually aggravated misconduct … where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their "effects cannot be eliminated by the application of traditional remedies," *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 614 (1969), citing *NLRB v. Logan Packing Co.,* 386 F.2d 562, 570 (4th Cir. 1967), an order requiring the respondent to reimburse the charging party for negotiation expenses is warranted both to make the charging party whole for the resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table.… [T]his approach reflects the direct causal relationship between the respondent's actions in bargaining and the charging party's losses.

318 NLRB at 859.[10]

We agree with the General Counsel that the extraordinary remedy of ordering reimbursement of the Union's bargaining expenses is warranted under the circumstances of this case. Although we adopt the judge's recommended remedies, including a 12-month extension of the certification year in accordance with *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962), a minimum bargaining schedule, and written progress reports, we find that these remedies will not make the Union whole for the substantial financial expenses incurred as a result of the Respondent's bad faith in negotiations.[11] As the judge describes in detail, and as we have found, the Respondent prevented meaningful

[10] See also *Regency Service Carts, Inc.*, 345 NLRB 671 (2005).

[11] The Respondent has not excepted to the judge's recommended affirmative bargaining order or other extraordinary remedies, which we adopt. Indeed, although in its answering brief to the cross-exceptions of the General Counsel and Charging Party McMeins the Respondent opposes an order requiring it to reimburse the Union's bargaining expenses, it also states:

> [E]ven if the Board affirms the ALJD's conclusion that Bemis engaged in surface bargaining and refused to meet at reasonable times, the ALJD's remedy (issuance of cease-and-desist and affirmative bargaining orders, requirement that the certification year should be extended by one year, and instituting a minimum bargaining schedule) should remain unchanged.

The Respondent expressly agrees that an affirmative bargaining order is warranted. It is therefore unnecessary to further justify the imposition of this order consistent with *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727, 738 (D.C. Cir. 2000).

progress toward a contract throughout the 18-month period during which the parties were meeting to negotiate.

Significantly, the Respondent failed and refused to meet at reasonable times with the Union, despite persistent requests by the Union to meet more frequently and for longer periods due to the unproductive negotiating sessions, requests that the Respondent regularly rejected even well after the need for a more aggressive bargaining schedule was obvious. The Respondent also flatly refused to include provisions on numerous mandatory bargaining subjects in the contract, citing its desire for a "minimalist" contract and insisting instead on referencing, but not incorporating, existing handbook policies affecting mandatory terms and conditions of employment, which it would have the unfettered ability to change without bargaining. Moreover, the Respondent made only insignificant editorial changes to its proposals which it touted as new proposals, wasted time in bargaining sessions with lengthy discussions of non-bargaining-related or minor matters, and refused to discuss economic matters until after the expiration of the Union's initial certification year. In fact, the Respondent did not submit a full economic proposal until more than 5 months after expiration of the initial certification year (and in the same month that a decertification petition was filed). The Respondent also made numerous unilateral changes to terms and conditions of employment that were mandatory subjects of bargaining and bypassed the Union to deal directly with unit employees during the period it was ostensibly negotiating with the Union for a first contract.

As for the financial impact on the Union, the Union's chief negotiator Philip Roberts was stationed at the Union's international office near Nashville, Tennessee, about 600 miles from Centerville, Iowa where negotiations took place. Roberts and members of the Union bargaining committee met with the Respondent on a total of 42 days and made 21 trips to Centerville. The Union shouldered significant expenses that included Roberts' multiple flights to Des Moines, the bargaining team's nearly 2-hour drives from Des Moines to Centerville, and lodging expenses. At a time when the newly certified Union was particularly susceptible to conduct that would undermine employee support, the drain on the Union's resources would have hampered its ability to fulfill its representational duties to unit employees during and beyond the critical certification year. In these circumstances, reimbursement of bargaining expenses is warranted to make the Union whole for the resources that were wasted because of the Respondent's conduct, to restore the Union's economic strength, and to ensure a return to the status quo ante at the bargaining table. See, e.g., *Richfield Hospitality*, 369 NLRB No. 111, slip op. at 2–3, 5 (2020) (awarding negotiating expenses where the employer engaged in surface bargaining and recidivist unlawful conduct, including implementing additional unlawful unilateral wage decreases, despite "a serious unremedied unfair labor practice that affect[ed] the negotiations"); *Hospital of Barstow, Inc. d/b/a Barstow Community Hospital*, 361 NLRB 352, 355–356 (2014) (awarding negotiating expenses where the employer's bad-faith bargaining "caused the Union to waste its resources in futile bargaining" and occurred during the critical postelection period when the newly certified union would be susceptible to unfair labor practices that would undermine employee support), adopted and incorporated by reference in 364 NLRB No. 52 (2016), enfd. 897 F.3d 280 (D.C. Cir. 2018); *Fallbrook Hospital Corp. d/b/a Fallbrook Hospital*, 360 NLRB 644, 645–646 (2014) (awarding negotiation expenses where the employer "deliberately acted to prevent any meaningful progress during bargaining sessions," and noting that such expenses may include reasonable salaries, travel expenses, and per diems), enfd. 785 F.3d 729 (D.C. Cir. 2015).

Accordingly, in addition to the remedies recommended by the judge, we shall order the Respondent to reimburse the Union for the bargaining expenses the Union incurred during the period of time from November 2, 2016, through the date of the complaint, April 26, 2018, upon submission by the Union of a verified statement of costs and expenses.

ORDER

The Respondent, Bemis Company, Inc., Centerville, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a nonsolicitation rule prohibiting employees from soliciting during nonworking time in nonworking or working areas.

(b) Maintaining a no-distribution rule prohibiting employees from distributing or posting union literature during nonworking time in nonworking areas without supervisory approval.

(c) Maintaining an off-duty access to company property rule restricting employees from access to nonworking areas outside the plant without supervisory approval.

(d) Enforcing its nonsolicitation policy in response to employees' union activity by banning employee postings on their lockers.

(e) Telling employees their performance appraisals will be downgraded because of their union or protected concerted activities.

(f) Placing employees under surveillance while they engage in union or other protected concerted activities.

(g) Downgrading employees' performance appraisals because of their union or other protected concerted activities.

(h) Discharging or otherwise discriminating against employees because they support the Union or any other labor organization or engage in protected concerted activities.

(i) Unilaterally changing the terms and conditions of employment of its unit employees by laying off unit employees, eliminating bargaining-unit positions, and changing unit employees' work schedules.

(j) Bypassing the Union and dealing directly with employees regarding their terms and conditions of employment.

(k) Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the exclusive collective-bargaining representative of the Respondent's unit employees.

(l) Failing and refusing to meet with the Union at reasonable times for bargaining.

(m) Failing and refusing to bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(n) 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.

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

(a) Rescind the nonsolicitation, no-distribution, and off-duty access to company property rules, or revise them to remove any language that prohibits or reasonably would be read to prohibit conduct protected by Section 7 of the Act.

(b) Furnish employees with inserts for the current employee handbook that (1) advise that the unlawful nonsolicitation, no-distribution, and off-duty access to company property rules have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or publish and distribute to employees a revised employee handbook that (1) does not contain the unlawful provisions, or (2) provides lawfully worded provisions.

(c) Rescind the ban on employee postings on their lockers and advise employees in writing that this has been done.

(d) Within 14 days from the date of this Order, rescind the "work performance" rating and narrative in Elizabeth Nichols' April 9, 2017 performance appraisal and remove from its files any references to them, and within 3 days thereafter, notify Elizabeth Nichols in writing that this has been done and that these unlawful acts will not be used against her in any way.

(e) Within 14 days from the date of this Order, offer Linda Hesler full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights or privileges previously enjoyed.

(f) Make Linda Hesler whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(g) Compensate Linda Hesler for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(h) Compensate Linda Hesler for her reasonable search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings.

(i) Within 14 days from the date of this Order, remove from its files any references to the unlawful discharge of Linda Hesler, and within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

(j) Rescind the changes in the terms and conditions of employment of its unit employees that were unilaterally implemented on June 26, July 7, and December 31, 2017.

(k) Within 14 days from the date of this Order, offer Coty Gearin, Tyler Lewis, Kent Morlan, Chet Varner, and the employees who previously held the positions of ink controller and maintenance laborer full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

(l) Make Coty Gearin, Tyler Lewis, Kent Morlan, Chet Varner, Jeff McClurg, Elizabeth Nichols, Brian Shives, the employees who previously held the positions of ink controller and maintenance laborer, and any other employee unlawfully laid off on June 26, 2017, whole for any loss of earnings or other benefits suffered as a result of their unlawful layoffs or the elimination of their jobs, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(m) Compensate Coty Gearin, Tyler Lewis, Kent Morlan, Chet Varner, Jeff McClurg, Elizabeth Nichols, Brian Shives, the employees who previously held the positions of ink controller and maintenance laborer, and any other employee unlawfully laid off on June 26, 2017, for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report

allocating the backpay award to the appropriate calendar years for each employee.

(n) Compensate Coty Gearin, Tyler Lewis, Kent Morlan, Chet Varner, Jeff McClurg, Elizabeth Nichols, Brian Shives, the employees who previously held the positions of ink controller and maintenance laborer, and any other employee unlawfully laid off on June 26, 2017, for their reasonable search-for-work and interim-employment expenses regardless of whether those expenses exceed their interim earnings.

(o) Make whole any unit employees, including those who were restricted to 8 hours of work per day, who were adversely affected by changes to their work schedules unlawfully implemented on December 31, 2017, for any loss of earnings or other benefits suffered as a result of the unlawful changes, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(p) Compensate unit employees who lost earnings as a result of the unlawful changes in work schedules for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

(q) Furnish to the Union in a timely manner the information requested by the Union on August 8, 2017, insofar as such information has not already been furnished.

(r) On request, bargain with the Union in good faith and at reasonable times as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. Such bargaining sessions shall be held for a minimum of 4 days per month, for at least 6 hours per bargaining session, or, in the alternative, on another schedule to which the Union agrees. The Respondent shall submit written bargaining progress reports every 30 days to the compliance officer for Region 18, serving copies thereof on the Union. The appropriate unit is:

> All full-time and regular part-time production employees working in extrusion, press and pre-press, and finishing departments; and all full-time and regular part-time employees working in maintenance, quality assurance, distribution, and shipping and receiving departments; excluding office clerical, sales, engineers, temporary employees, and supervisors and guards as defined in the Act, as amended.

(s) Compensate the Union for all bargaining expenses it incurred during the period beginning November 1, 2016, through April 26, 2018, when the Respondent engaged in unlawful surface bargaining. Upon receipt of a verified statement of costs and expenses from the Union, the Respondent promptly shall submit a reimbursement payment, in the amount of those costs and expenses, to the compliance officer for Region 18 of the National Labor Relations Board, who will document receipt and forward the payment to the Union.

(t) 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.

(u) Post at its Centerville, Iowa facility copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the 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, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 1, 2016.

[12] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. 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."

(v) 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 Regional Director attesting to the steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the certification of the Union issued by the Board on May 13, 2016, is extended for a period of 1 year commencing from the date on which the Respondent begins to bargain in good faith with the Union, and that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 7, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) 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 maintain a nonsolicitation rule prohibiting you from solicitation during nonworking time in nonworking or working areas.

WE WILL NOT maintain a no-distribution rule prohibiting you from distributing or posting union literature during nonworking time in nonworking areas without supervisory approval.

WE WILL NOT maintain an off-duty access to company property rule restricting your access to nonworking areas outside the plant without supervisory approval.

WE WILL NOT ban postings on your lockers pursuant to an unlawful nonsolicitation rule or because you post union literature on your lockers.

WE WILL NOT tell you that your performance appraisal will be downgraded because of your union or other protected concerted activities.

WE WILL NOT place you under surveillance while you engage in union or other protected concerted activities.

WE WILL NOT downgrade your performance appraisal because of your union or other protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against you for supporting the Union or any other labor organization or for engaging in protected concerted activities.

WE WILL NOT unilaterally change the terms and conditions of your employment by laying you off, eliminating bargaining unit job positions, or changing your work schedules.

WE WILL NOT bypass the Union and deal directly with you regarding your terms and conditions of employment.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT fail and refuse to meet with the Union at reasonable times for bargaining.

WE WILL NOT fail and refuse to bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind or revise the unlawful nonsolicitation, no-distribution, and off-duty access to company property rules described above.

WE WILL furnish you with inserts for the current employee handbook that (1) advise that the unlawful nonsolicitation, no-distribution, and off-duty access to company property rules have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or publish and distribute to employees a revised employee handbook that (1) does not contain the unlawful provisions, or (2) provides lawfully worded provisions.

WE WILL rescind our ban on postings on employees' lockers and WE WILL advise you in writing that we have done so and that the ban will no longer be enforced.

WE WILL, within 14 days from the date of the Board's Order, rescind the "work performance" rating and narrative in Elizabeth Nichols' April 9, 2017 performance appraisal and remove from our files all references to them and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that these unlawful acts will not be used against her in any way.

WE WILL, within 14 days from the date of the Board's order, offer Linda Hesler full reinstatement to her former job or, if her job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges she previously enjoyed.

WE WILL make Linda Hesler whole for any loss of earnings and other benefits resulting from her unlawful discharge, less any net interim earnings, plus interest, and WE WILL also make her whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Linda Hesler for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all references to the unlawful discharge of Linda Hesler and WE WILL, within 3 days thereafter, notify her that this has been done and that the discharge will not be used against her in any way.

WE WILL rescind the changes in the terms and conditions of employment for our unit employees that were unilaterally implemented on June 26, July 7, and December 31, 2017.

WE WILL, within 14 days from the date of the Board's order, offer Coty Gearin, Tyler Lewis, Kent Morlan, Chet Varner, and the employees who previously held the positions of ink controller and maintenance laborer full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Coty Gearin, Tyler Lewis, Kent Morlan, Chet Varner, Jeff McClurg, Elizabeth Nichols, Brian Shives, the employees who previously held the positions of ink controller and maintenance laborer, and any other employee unlawfully laid off on June 26, 2017, whole for any loss of earnings or other benefits resulting from their unlawful layoffs or the elimination of their jobs, less any net interim earnings, plus interest, and WE WILL also make them whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Coty Gearin, Tyler Lewis, Kent Morlan, Chet Varner, Jeff McClurg, Elizabeth Nichols, Brian Shives, the employees who previously held the positions of ink controller and maintenance laborer, and any other employee unlawfully laid off on June 26, 2017, for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 18, 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 years for each employee.

WE WILL make our unit employees whole for any loss of earnings and other benefits suffered as a result of our unlawful changes to employee work schedules.

WE WILL compensate our unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards as a result of any losses that resulted from our unlawful schedule changes, and WE WILL file with the Regional Director for Region 18, 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 years for each employee.

WE WILL furnish to the Union in a timely manner the information requested by the Union on August 8, 2017.

WE WILL, on request, bargain with the Union in good faith and at reasonable times as the exclusive collective-bargaining representative of our employees in the following appropriate unit concerning terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement. The initial year of certification of the Union has been extended for an additional 12 months from the date we comply with the Board's Order. The appropriate unit is:

> All full-time and regular part-time production employees working in extrusion, press and pre-press, and finishing departments; and all full-time and regular part-time employees working in maintenance, quality assurance, distribution, and shipping and receiving departments; excluding office clerical, sales, engineers, temporary employees, and supervisors and guards as defined in the Act, as amended.

WE WILL, on request, hold bargaining sessions for a minimum of 4 days per month, at least 6 hours per day, or, in the alternative, on another schedule to which the Union agrees, and WE WILL submit a written bargaining progress report every 30 days to the compliance officer for Region 18, with a copy served on the Union.

WE WILL compensate the Union for all bargaining expenses it incurred from November 1, 2016, through April 26, 2018, when we failed to bargain in good faith.

BEMIS COMPANY, INC.

The Board's decision can be found at www.nlrb.gov/case/07-CA-202617 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.

Joseph Bornong, Esq. and *David Stolzberg, Esq.,* for the General Counsel.
Kevin J. Kinney, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.), of Milwaukee, Wisconsin, for the Respondent.
Philip Roberts, of White House, Tennessee, for Charging Party Graphic Communications Conference of the International Brotherhood of Teamsters, Local 727-S.
Philip A. McMeins, pro se.

DECISION

CHARLES J. MUHL, Administrative Law Judge. Section 8(d) of the National Labor Relations Act defines the duty to bargain collectively as the mutual obligation of an employer and a union to:

> [m]eet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.

The tension in this language is obvious. On the one hand, the statute imposes a duty to bargain in good faith. That duty presupposes a sincere purpose by parties to find a basis to reach agreement on a contract. A party cannot merely go through the motions during bargaining. On the other hand, the statute permits a party to refuse to make concessions, even though compromise typically is an essential component to reaching an agreement. Because of this tension, the Board looks to the totality of a party's conduct, both at and away from the bargaining table, to determine if bad-faith bargaining has occurred. Given that standard, the line between unlawful "surface bargaining" and lawful "hard bargaining" long has been a difficult one to draw.

The evaluation becomes even more challenging and sensitive when, as in this case, the claim is that bargaining for a first contract has not been in good faith. In May 2016, the Board certified Teamsters Local 727-S as the exclusive collective-bargaining representative of certain employees working at a manufacturing facility of Respondent Bemis Company, Inc., in Centerville, Iowa. The Union won the election by a relatively narrow margin, 112 to 95. For 20 months thereafter, the Respondent and the Union met 44 times, yet did not reach overall agreement on an initial contract. They did not even come close, managing just eight tentative agreements, almost all on minor subjects involving minimal language. They did not reach any economic agreements, with the Respondent not even submitting its first economic proposal until the end of the 24th day of negotiations, 11 months in. The General Counsel's complaint alleges the failure to reach an agreement occurred, because the Respondent engaged in surface bargaining in violation of Section 8(a)(5). The complaint also claims the Respondent refused to meet at reasonable times with the Union, in violation of Section 8(d) and 8(a)(5). Finally, the complaint contains a plethora of additional allegations against the Respondent involving violations of Section 8(a)(1), (3), and (5), all occurring as negotiations were ongoing.

The record evidence establishes that the Respondent was used to doing things its own way at the Centerville facility and wanted to continue doing things its own way, even after the Union became the employees' bargaining representative. On multiple occasions, the Respondent unlawfully disregarded its newfound obligation to bargain with the Union over terms and conditions of employment. It unilaterally laid off employees and engaged in direct dealing by offering separation agreements to some of them. The Respondent also unilaterally eliminated bargaining unit positions and imposed a dramatic work schedule change from 8 hours a day, 5 days per week to 12 hours a day, 3 days one week and 4 days the next. The unilateral changes sent a message to employees that their choice to be represented by a union was futile. In addition, the Respondent was well aware of the close election vote and took numerous, unlawful actions to further erode employee support for the Union. It discharged a strong union supporter due to her union activity; permanently laid off another employee because it wanted to retain an anti-union employee; and downgraded a third employee's performance appraisal due to her union activity. The Respondent also ordered a supervisor to engage in surveillance of an employee's union activity and banned employee locker postings after a union newsletter was posted.

In negotiations, the Respondent met repeatedly with the Union, exchanged many proposals, and, for the most part, explained its positions. However, despite the lack of productivity in bargaining, the Respondent steadfastly refused, or ignored, the Union's calls for more negotiation dates. It typically offered no explanation but, when it did, relied upon the busy negotiator excuse. The bargaining date history and correspondence between the parties establishes that the Respondent believed meeting once a month for two days of bargaining was sufficient, irrespective of the slow progress and overall length of the negotiations. At the table, the Respondent sought to exclude multiple mandatory subjects of bargaining from the contract and retain them as employee handbook policies it could change without the Union's agreement. The subjects included discipline and job promotions/transfers, two of the most critical ones to bargaining unit employees. In doing so, the Respondent refused to memorialize any agreements reached with the Union on the policies. It also gave mixed signals to the Union about the effects of keeping the policies outside the contract, resulting in no clarity as to what agreeing to the provisions would mean. Moreover, and consistent with how it was handling its bargaining obligations at the plant, the Respondent made multiple proposals to retain

unilateral control over mandatory subjects of bargaining and sought a broad management-rights clause which never changed throughout negotiations. If agreed to, these proposals would have put the Union in a worse position than if no contract was reached. The Respondent offered no meaningful concessions in return. It engaged in other dilatory tactics, including delaying its submission of an economic proposal and submitting numerous counterproposals which contained minor language changes of no substance. The Respondent also sought to limit the Union's ability to communicate with employees at the plant.

Given this totality of conduct, I conclude the Respondent had a cast of mind against reaching an agreement and engaged in surface bargaining.

STATEMENT OF THE CASE

On July 18, 2017, the Graphics Communication Conference of the International Brotherhood of Teamsters, Local 727-S (the Union), initiated this case by filing the original unfair labor practice charge against Bemis Company, Inc. (the Respondent). Region 18 of the National Labor Relations Board (the Board) docketed the charge as Case 18–CA–202617. Thereafter, the Union filed these new or amended charges against the Respondent:

DATE	CASE NUMBER	CHARGE
July 28, 2017	18–CA–202617	First amended charge
August 31, 2017	18–CA–205446	Original charge
September 11, 2017	18–CA–205920	Original charge
	18–CA–205927	Original charge
October 12, 2017	18–CA–207874	Original charge
November 20, 2017	18–CA–210170	Original charge
November 29, 2017	18–CA–202617	Second amended charge
	18–CA–205446	First amended charge
November 30, 2017	18–CA–210936	Original charge
December 6, 2017	18–CA–211086	Original charge
December 22, 2017	18–CA–205920	First amended charge
January 23, 2018	18–CA–207874	First amended charge
March 12, 2018	18–CA–205446	Second amended charge
March 23, 2018	18–CA–210170	First amended charge

On November 8, 2017, Charging Party Philip A. McMeins filed an original unfair labor practice charge against the Respondent, which Region 18 docketed as Case 18–CA–209515.

On March 29, 2018, the General Counsel, through the Regional Director of Region 18, issued an order consolidating all of the above-listed cases, except Case 18–CA–210170, and a consolidated complaint against the Respondent. On April 12, 2018, the Respondent filed a timely answer. On April 26, 2018, the General Counsel issued an order consolidating Case 18–CA–210170 with the other cases and an amended consolidated complaint against the Respondent. The complaint alleges numerous violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). On May 10, 2018, the Respondent filed a timely answer to the amended consolidated complaint, denying the substantive allegations and asserting multiple affirmative defenses. From August 14 to 17 and August 20 to 24, 2018, in Centerville, Iowa, I conducted a trial in these cases. On October 26 and November 16, 2018, the General Counsel and the Respondent filed initial and response briefs with me. On the entire record and after considering those briefs, I make the following findings of fact and conclusions of law.[1]

JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent is engaged in the manufacture and nonretail sale of flexible and rigid packaging used for food, consumer products, health care, and other industries from a facility located in Centerville, Iowa. During the calendar year ending December 31, 2017, a representative period, and in the course of conducting its business operations, the Respondent purchased and received

[1] To aid review and given the breadth of the General Counsel's complaint, I have broken down this decision into sections with related allegations. Each section contains findings of fact and legal analysis. To the extent possible, I have presented the facts in chronological order. Although I have included citations to the record, my findings and conclusions are not based solely on that evidence, but upon my review and consideration of the entire record. I have placed most of those citations in footnotes at the end of paragraphs to minimize the disruption to the reader. In assessing credibility, I have considered the witnesses' demeanors, the context of their testimony, the quality of their recollections, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). To the extent any testimony contradicts my factual findings, I have not credited that testimony. Where needed, I discuss specific credibility resolutions in my findings of fact.

goods valued in excess of $50,000 directly from suppliers located outside the State of Iowa. Accordingly, and at all material times, I find, as the Respondent admits, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is subject to the Board's jurisdiction. I also find, as the Respondent admits, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

ALLEGED UNFAIR LABOR PRACTICES

I. BACKGROUND FINDINGS OF FACT

The Respondent manufactures food and medical device packaging at facilities throughout the world. In the United States, the company has 35 to 40 facilities, about one-third of which are unionized. The Respondent acquired the Centerville, Iowa plant in the fall of 2000. The plant is part of Bemis North America, the headquarters of which is located in Neenah, Wisconsin. In Centerville, the Respondent manufactures plastic shrink bags for wrapping meat and cheese products. The departments include extrusion, press, and finishing. The manufacturing process begins in extrusion, where operators melt resin pellets, blow them up into a continuous bubble of film, and collapse the film into a tube of plastic. Press department employees then print product labels on to the plastic film. Finally, the printed film goes to finishing, where bag machine operators run machines which manufacture bags. Those operators also inspect bags for defects. From October 19, 2014, to October 19, 2017, John Augustiniak was the Centerville plant manager. Augustiniak was responsible for the bottom-line operation and financial results of the entire facility. Each department also has a manager who oversees the department, as well as shift supervisors responsible for the front-line operation of each shift. From the time it acquired the plant until May 2016, the facility operated in the manner local management felt was appropriate for the circumstances, without any oversight from corporate headquarters. If management felt a policy or practice needed to be modified, it changed the policy or practice on its own. The only requirement from corporate was that the plant meet expectations for business results.[2]

On April 12, 2016, the Union filed a petition seeking a Board-conducted election to represent certain of the Respondent's production and maintenance employees. Between that filing date and the vote on May 6, 2016, Augustiniak conversed daily with his managers to identify whether specific employees were or were not union supporters and to determine how the vote might go. Augustiniak also instructed his managers and supervisors to collect union literature and bring it to him. On two occasions just a week prior to the election, Augustiniak sent emails to his superiors at corporate headquarters detailing his views of the union sympathies of different employees. He also reported that no union literature was found. The email recipients included two supervisors of Augustiniak, two corporate attorneys, and two corporate human resources directors. One of the corporate attorneys was John Haberman, the Respondent's associate general counsel for litigation and labor/employment. One of the human resource directors was Angela Daniels. Someone within the corporate group previously told Augustiniak to make such reports to them, including providing his opinion of how specific employees would vote.[3]

On May 6, 2016, the Board conducted the election, which the Union won by a count of 112 to 95. On May 13, 2016, the Board certified the Union as the exclusive collective-bargaining representative of production employees working in the extrusion, press, and finishing departments, as well as employees working in the maintenance, quality assurance, distribution, and shipping and receiving departments.

About 8 weeks after the election on June 27, 2016, Daniels emailed Michael Mihalakis, the extrusion department manager, and asked him to give her anything he had seen or heard since the election. She also asked for "lists" he had on any of his supervisors. Mihalakis sent her two lists containing comments about extrusion supervisor Ed Grenko and finishing supervisor Mark Allgood. Mihalakis stated both supervisors were upset with the Respondent's management. He reported that Grenko specifically said he was not going to tell the company anything more about employees' union activity. Augustiniak also received these emails.[4]

On August 23, 2016, the Respondent and the Union began negotiations for an initial collective-bargaining agreement.

II. THE RESPONDENT'S MARCH 2017 LOCKER POSTING BAN AND APRIL 2017 EVALUATION OF ELIZABETH NICHOLS

FINDINGS OF FACT

On November 7, 2016, the Respondent hired Elizabeth Nichols as a treator operator in the extrusion department. Matt Bray, the human resources manager at Centerville from July 2016 to June 2017, interviewed Nichols for the job. Bray told her there was a union at the plant and asked if she had any problem with it. Nichols responded she did not. She added that she had worked in both union and nonunion facilities and just wanted a job. In January 2017, Nichols began attending union meetings.[5] On January 19, her supervisor, Kreg Bauer, gave Nichols a 60-day performance review. The Respondent's evaluation form contained seven potential ratings: Exceeds I, II, and III; Meets I, II, III; and Needs Improvement. Exceeds III was the highest potential rating. In "Work Relationships," Nichols received a rating of Exceeds I. Bauer told Nichols to keep up the good work. On February 1, Nichols moved into an extrusion operator trainee position. During that same month, Nichols spoke with Augustiniak one-on-one for the first time and inquired about contract negotiations. Augustiniak responded they were trying to get a contract and Nichols told him that was awesome. She added that she had worked in union facilities before and, from what she observed, the plant would benefit, because employees and managers would know the rules and everyone would be happier. As she said this, Augustiniak clenched his jaw, started wringing his hands, and began rocking back and forth from heel to toe. However, he did not say anything back to Nichols.[6]

[2] Tr. 2144.

[3] GC Exh. 150, pp. 1–2; Tr. 2085–2099.

[4] GC Exh. 150, pp. 3–5; Tr. 2099–2101.

[5] All dates hereinafter are in 2017, unless otherwise specified.

[6] Tr. 123–129, 139–147; GC Exh. 107. Nichols testimony concerning her conversation with Augustiniak is uncontroverted. Augustiniak testified, but not about this conversation.

Also, in February, Nichols began posting union newsletters and fliers on the face of her locker at the plant. The newsletters provided updates on contract negotiations, while the fliers contained information on upcoming union meetings. Nichols' locker was one of over 100 maintained by the Respondent for female employees in a combined locker room and bathroom. Both unit employees and front-line supervisors, including Jennifer Schoonover and Sarah Traxler, used the bathroom, from which portions of the locker room can be observed. Prior to March 27, employees posted a variety of things on their lockers for approximately 30 years. They included family pictures, comics, stickers with sayings on them, and holiday decorations. At any one time, roughly 50 percent of the lockers had postings on them.[7]

In early March, someone wrote "This is bullshit" on a union newsletter Nichols had posted on her locker. Another employee sent a photograph of it to Nichols, who was off work. When Nichols returned, the union newsletter had been removed from her locker. Nichols went to see Bray, the human resources manager. She showed him the photo and told him she wanted to file a complaint. Nichols said that she did not appreciate someone putting swear words on her personal documents. A few days later, Nichols visited Bray again. He told her he had not done an investigation.[8]

On March 27, the Respondent posted a memorandum from Augustiniak and Bray entitled "Non-Solicitation Policy" on the company's bulletin board. The memorandum stated:

> In order to ensure fairness and consistency when it comes to soliciting employees while at work and to avoid disruption of business operations, I want to remind you of Bemis' Non –Solicitation policy, which has been and will continue to be enforced as we become aware of violations.
>
> As defined in our policy, *solicitation shall include: canvassing, soliciting, or seeking to obtain membership in or support for any organization, requesting contributions, and posting or distributing handbills, pamphlets, petitions and the like of any kind ("material') on Company time, in Company work areas or using Company resources.* [Emphasis in the original.]
>
> Please ensure all postings, pictures and personal belongings displayed on the outside of the lockers are removed by the end of the week. Any remaining items on the outside of the lockers will be removed and disposed.

The Respondent's nonsolicitation rule, maintained in an employee handbook, states:

> At Bemis Company, we understand that our employees and outside organizations have a wide range of affiliations and causes for which they often want to share their interest and enthusiasm with others. In order to insure fairness and consistency when it comes to soliciting our employees while at work, and avoid disruption of business operations or disturbance of employees, visitors, and customers, the following Non-Solicitation policy will apply.
>
> For purposes of this policy, "solicitation" (or "soliciting") shall include: canvassing, soliciting, or seeking to obtain membership in or support for any organization, requesting contributions, and posting or distributing handbills, pamphlets, petitions, and the like of any kind ("materials") on Company time, in Company work areas or using Company resources (including without limitation bulletin boards, computers, mail, e-mail and telecommunication systems, photocopiers and telephone lists and databases).
>
> "Commercial solicitation," means peddling or otherwise selling, purchasing or offering goods and services for sale or purchase, distributing advertising materials, circulars or product samples, or engaging in any other conduct relating to any outside business interests or for profit or personal economic benefit on Company time, in Company work areas or using Company resources.
>
> Solicitation and commercial solicitation performed by verbal, written, or electronic means are covered by this policy and are prohibited. Failure to comply with this policy could lead to disciplinary action, up to and including termination.

The Respondent maintains this rule, so employees focus on work and are not distracted by solicitations.[9]

Shortly before April 9, extrusion supervisor Jonathan Page observed Nichols outside of the extrusion area speaking to a new employee, Jimmy McGaughey, who was training to be a treator operator. At that point, Page was Nichols' front-line supervisor. The third time that Page observed Nichols and McGaughey conversing, he approached the two to find out what they were discussing. Page was concerned, because an extruder operator like Nichols would only need to speak to a treator operator like McGaughey that frequently if a quality issue existed. Page asked Nichols, tongue-in-cheek, if she wanted to go back to being a treator operator. She said no, she was just headed to the break room. After she departed, Page asked McGaughey what was going on. McGaughey responded that he just wanted to be left alone, come to work, do his job, and go home. When Page pressed him for more specifics, McGaughey said that he was getting pressure to be a part of the Union and go to union events, even though he had said he was neither prounion nor antiunion.[10]

On April 9, Nichols received a second performance appraisal, this time from Page. Her rating in "Working Relationships" dropped from the prior Exceeds I to a Meets I. In the text for that category, Page wrote: "I appreciate your desire to make improvements for employees; respect others' rights to be involved in the union as they desire."[11]

When the two met regarding this appraisal, Nichols asked Page about his comment. Page told her he observed Nichols pushing the Union onto McGaughey. Page said he appreciated the fact she was looking after her fellow employees and wanted to improve their work environment, but she also needed to respect other people and the fact they had the right to say no. Page explained that it was no different than selling popcorn for a Boy

[7] Tr. 107–111, 113–114, 160–164, 226–233, 744–746.
[8] Tr. 164–165, 746–747.
[9] GC Exhs. 16 (p. 23), 20; Tr. 1916–1917.
[10] Tr. 1885–1887.
[11] GC Exh. 108.

Scout troop: if someone said they did not want popcorn, stop trying to sell it to them. Nichols denied pressuring McGaughey. She told Page that she moves on when someone tells her they are not interested in the Union and does not force anything on anyone. However, Nichols added, she did not want anybody to miss an opportunity to go to a union meeting and at least make an educated decision. Page told her again that he appreciated her trying to help other employees, but that she needed to judge when to let something go.[12]

Finally, at some unidentified point in April, Nichols became a steward. Thereafter, she frequently spoke with other employees about the Union. Bauer or Schoonover were present for some of these discussions. Employees also came to her to report problems and she would take them to management or a higher-level union representative. When she became active in the Union, Nichols began wearing union t-shirts to work every day. The shirts included ones she made with information on when and where upcoming union meetings would occur and who would be there. Augustiniak observed her wearing the shirts. Nichols also put union fliers out on the lunchroom table. The fliers contained the schedule for and what was happening in negotiations, as well as any other information the Union needed to get to employees. Bauer saw her do so and Schoonover was present when Nichols put the documents out. In May, June, and July, Nichols attended contract negotiations. Nichols voluntarily left the Respondent's employ in September 2017.[13]

Legal Analysis

A. Does the Respondent's Maintenance of its Nonsolicitation Rule Violate Section 8(a)(1)? (Complaint Paragraph 7)

The General Counsel's complaint alleges the Respondent's maintenance of its nonsolicitation rule violates Section 8(a)(1). It also alleges the Respondent violated Section 8(a)(1), (3), and (5) by enforcing its nonsolicitation rule, when it announced to employees on March 27 that, going forward, nothing was allowed to be taped or posted on their lockers.

The Board long has recognized the principle that "[w]orking time is for work," and thus has permitted employers to adopt and enforce rules prohibiting solicitation during "working time," absent evidence that the rule was adopted for a discriminatory purpose. *Conagra Foods, Inc.*, 361 NLRB 944, 945 (2014), citing to *Peyton Packing Co.*, 49 NLRB 828, 843 (1943), enfd. 142 F.2d. 1009 (5th Cir. 1944), cert. denied 323 U.S. 730 (1944). However, solicitation cannot be banned during nonworking times in nonworking areas, nor can bans be extended to working areas during nonworking time. *UPS Supply Chain Solutions, Inc.*, 357 NLRB 1295, 1296 (2011). In addition, rules prohibiting the distribution of union literature during nonworking times in nonworking areas are presumptively unlawful. See, e.g., *Titanium Metals Corp.,* 340 NLRB 766, 774–775 (2003); *Chromalloy Gas Turbine Corp.*, 331 NLRB 858, 858–859 (2000). "Interference with employee circulation of protected material in nonworking areas during off-duty periods is presumptively a violation of the Act unless the employer can affirmatively demonstrate the restriction is necessary to protect its proper interest." *Waste Mgmt. of Arizona, Inc.*, 345 NLRB 1339, 1346 (2005), quoting *Champion International Corp.*, 303 NLRB 102, 105 (1991). The Board's recent decision in *Boeing Co.*, 365 NLRB No. 154 (2017), in which it revised the standard for evaluating the legality of employer rules, did not alter these standards. See *UPMC Presbyterian Hospital*, 366 NLRB No. 142, slip op. at 1 fn. 5 ("we note that the Board in *Boeing* did not disturb longstanding precedent governing employer restrictions on solicitation and distribution, which already strikes a balance between employee rights and employer interests.")

The Respondent's nonsolicitation policy bans solicitation and distribution "on Company time, in Company work areas, or using Company resources." (Emphasis added.) The broad definition of solicitation encompasses union activity, because it includes "canvassing, soliciting, or seeking to obtain membership in or support for any organization, requesting contributions, and posting or distributing handbills, pamphlets, petitions, and the like of any kind." Given the rule's use of the disjunctive, the Respondent has banned union solicitation in work areas during nonwork time. Moreover, banning solicitation or distribution on "company time" is overbroad and presumptively invalid, as it could reasonably be construed as prohibiting such conduct during break times or periods when employees are not actually working. *Laidlaw Transit, Inc.*, 315 NLRB 79, 82 (1994). The Respondent's stated justification for the rule—allowing employees to focus on work—does not apply to the ban on activity which occurs during nonwork time. Accordingly, the Respondent's maintenance of the nonsolicitation rule violates Section 8(a)(1).[14]

B. Did the Respondent's Enforcement of its Nonsolicitation Rule to Ban Locker Postings Violate Section 8(a)(1), (3), and (5)? (Complaint Paragraph 5(a))

The next question to resolve is whether the Respondent's

[12] Tr. 152–158, 1887–1889. I found both Nichols and Page to be credible witnesses based upon their reliable demeanors. In their testimony concerning this conversation, their accounts of the statements made were the same in parts and each individual also remembered specific statements the other did not. However, the testimony did not contain substantive conflicts about what was said. I also credit Page's testimony that he approached McCaughey and Nichols out of concern over a potential quality issue.

[13] Tr. 129–135, 147–151.

[14] However, I do not find the rule's prohibition on "commercial solicitation" to be unlawful, because its definition, when reasonably interpreted, does not encompass Sec. 7 activity. *Boeing Co.*, supra, slip op. at 16; *Children's Center for Behavioral Development*, 347 NLRB 35, 37 (2006). "Commercial solicitation" includes "engaging in any other conduct . . . for . . . personal economic benefit." The General Counsel argues this phrase reasonably could be interpreted to encompass solicitation of a wage increase for all employees or support of a union in general. I do not agree. Standing alone, the phrase "personal economic benefit" suggests solicitation for an individual, not group, goal. It also has no reasonable connection to union activity. Those conclusions become even stronger when examining the remaining language of the rule. The banned activities are "peddling or otherwise selling, purchasing or offering goods and services for sale or purchase" and "distributing advertising materials, circulars or product samples." With that context, a reasonable interpretation of the ban is that employees are prohibited from soliciting for their own personal commercial business.

enforcement of its nonsolicitation policy to prohibit employees from posting materials on their lockers was unlawful. In *Sprint/United Mgmt. Co.*, 326 NLRB 397, 397–399 (1998), the Board found an employer's enforcement of a rule which prohibited the distribution of union materials in employee lockers violated Section 8(a)(1). The employer provided individual lockers to employees to store their personal belongings. The lockers were in a nonworking area of the employer's facility and had mail slots on their doors. For at least two years, employees had deposited personal notes, private invitations, chain letters, and Christmas cards in other employees' lockers. However, when an employee placed union literature in the lockers during nonwork time, the employer announced a rule that the lockers were provided for employees' use in connection with their work and the employer did not permit their use for other purposes. The employer also removed and confiscated all of the union literature in the lockers. The Board found the rule unlawful, because it restricted distribution during nonwork time in nonwork areas. It also found the confiscation of the union literature unlawful, because the employer offered no justification for doing so other than its unlawful rule.

The Respondent's conduct in this case is strikingly similar. After Nichols' union newsletter posting on her locker was defaced, the Respondent banned all employee postings on lockers. To justify the ban, the Respondent relied upon its unlawful nonsolicitation rule, which bans distribution in nonwork areas on nonwork time.[15] Thus, on this basis alone, the ban on locker postings violated Section 8(a)(1). In addition, the Respondent enforced its nonsolicitation policy, in response to Nichols' protected posting of the union newsletter on her locker. Prior to then, the Respondent allowed employees to post many different things on their lockers for three decades. The record contains no evidence the Respondent ever previously enforced its nonsolicitation policy to remove locker postings. Thus, the change from no enforcement to a wholesale ban on locker postings, which was motivated by Nichols' protected activity, also violated Section 8(a)(1).[16] *Freemont Medical Center*, 357 NLRB 1899, 1902–1904 (2011); *Lincoln Center for the Performing Arts, Inc.*, 340 NLRB 1100, 1100 fn. 2, 1110 (2003).

C. Did the Respondent's Evaluation of Nichols Violate Section 8(a)(1) and (3)? (Complaint Paragraphs 5(b) and 8(a))

The General Counsel's complaint alleges the Respondent threatened Nichols in violation of Section 8(a)(1), based upon Page's written comments in her April 9 performance evaluation. The complaint also alleges Page downgraded Nichols' evaluation due to her union and protected concerted activity, in violation of Section 8(a)(3).

An employer violates 8(a)(3) by giving an employee a less favorable performance appraisal, because the employee engaged in protected conduct; it also violates Section 8(a)(1) by telling the employee the less favorable appraisal was due to their protected conduct. *Wayne J. Griffin Electric, Inc.*, 335 NLRB 1362, 1386–1387 (2001) (supervisor unlawfully gave two employees a "0" rating in "loyalty" on appraisals, because of "badmouthing" the employer by discussing "labor issues" and unlawfully informed another employee that his lower "loyalty" rating on appraisal was due to him being more loyal to the union than the employer); *Beverly Enterprises*, 310 NLRB 222, 222 fn. 2 and 240 (1993) (employer violated Section 8(a)(3) and (1) when, in downgraded performance appraisal, employer wrote the employee "has the potential to become a good employee if outside influences are curbed," then told the employee "outside influences" referred to her union activity).

Here, Nichols' discussion with McGaughey about being a part of the Union and attending Union events was protected. *Ryder Transportation Services*, 341 NLRB 761 (2004), citing to *Bank of St. Louis*, 191 NLRB 669, 673 (1971), enfd. 456 F.2d 1234 (8th Cir. 1972). That McGaughey was annoyed by the conversation is irrelevant. The Act allows employees to engage in persistent union solicitation, even when it annoys or disturbs the employee being solicited. Ibid. In response, Page downgraded Nichols' rating for "Work Relationships" from "Exceeds I" to "Meets I" and wrote in the evaluation that it was due to Nichols' failure to "respect others' rights to be involved in the union as they desire." Page's statement objectively communicated to Nichols that her rating was downgraded due to her protected activity. It also communicated that, going forward, she needed to restrict her attempts to persuade employees to support the Union.

As to the Section 8(a)(1) violation, the Respondent argues the record evidence does not establish that Page's statement in Nichols' appraisal impacted her or any other employees' activities on behalf of the Union. However, the required analysis is whether Page's statement objectively, not subjectively, interfered with employees' exercise of Section 7 rights. *Aliante Casino and Hotel*, 364 NLRB No. 80, slip op. at 1 fn. 4 (2016), citing to *Miller Electric Pump & Plumbing*, 334 NLRB 824, 824 (2001). The impact of the statement on Nichols is immaterial. Regarding the 8(a)(3) violation, the Respondent contends no adverse action occurred, because the evaluation had no bearing on Nichols' terms and conditions of employment. However, at the time of Nichols'

[15] In its brief, the Respondent argues its locker posting ban was lawful, pursuant to a different rule in its employee handbook which also banned postings. The argument misses the mark, because the Respondent itself stated in its March 27 memorandum to employees that it was banning locker postings pursuant to the nonsolicitation rule. Thus, the legality of that rule (which contains a posting ban), not a different posting ban, is the relevant question.

[16] However, I find no merit to the General Counsel's allegations that the Respondent's locker posting ban also independently violated Section 8(a)(3) and (5). An 8(a)(3) violation requires "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Similarly, an 8(a)(5) unilateral change violation requires a modification to a term and condition of employment. In line with these requirements, the cases relied upon by the General Counsel to establish these violations involve stricter enforcement of a policy dealing with a term and condition of employment. See *Shamrock Foods Co.*, 366 NLRB No. 107 (2018) (break schedules); *Sommer Awning Co., Inc.*, 332 NLRB 1318, 1325 (discharge for falsifying employment applications). But the General Counsel concedes the Board has never found employee postings on their lockers to be a term and condition of employment. Absent such a holding, I decline to find the Respondent's conduct also violated Section 8(a)(3) and (5).

appraisal, the Respondent's "job postings" policy in its employee handbook noted that, to be considered for a job transfer, change between departments, or rehire, an employee must have had "acceptable" or "satisfactory" performance appraisals.[17] Thus, Nichols' downgraded appraisal could have impacted her ability to move to another job or resume employment with the Respondent, plainly terms and conditions of employment.

Accordingly, Page's statement in Nichols' appraisal violates Section 8(a)(1) and his downgrading of Nichols' appraisal violates Section 8(a)(3).[18]

III. THE RESPONDENT'S DISCHARGES OF LINDA HESLER AND PHILIP MCMEINS IN JULY 2017

FINDINGS OF FACT

Linda Hesler worked for the Respondent for 23 years, having started at the Centerville plant on April 10, 1994. At all material times, her job classification was "BM3," or advanced bag machine operator, in the finishing department. Her job duties were to run machines making plastic bags, inspect those bags for defects, and perform simple maintenance on the machines.

A. Hesler's Involvement with the Union

In March 2016, Hesler became aware of the Union's organizing campaign at the facility. Shortly thereafter, she signed an authorization card and began attending union meetings. From the April 12, 2016 petition filing date until the May 6, 2016 election, the Respondent held captive audience meetings with employees. Augustiniak and several corporate officials attended. During the meetings, Hesler frequently spoke up about employees' working conditions, including issues she and her coworkers had with the safety shoe allowance and the advanced notice required to take vacation. She once asked a corporate official what the future of the plant would be without a union, to which the official responded, "You'll have to trust us." Hesler responded "I'm sorry, but I trust in God, and that's about it."[19]

On April 29, 2016, Hesler received her annual performance appraisal from finishing department manager Justin Tucker and Hesler's supervisor Schoonover. Citing several issues with bag inspection, Schoonover gave Hesler a "needs improvement" rating in the "quality" criterion. When Tucker and Schoonover met with Hesler to discuss the appraisal, they told her that three "corrective actions" contributed to the quality rating.[20] Hesler conceded she was responsible for two of the three quality issues. As to the third, she told them that a trainee ran her machine while she was on break when a bag defect occurred. In past years, Hesler had similar problems, but never received a "needs improvement" in quality on her appraisal. In each of her three prior annual appraisals, Hesler received an "exceeds" rating in quality.[21]

Just days before the election, Augustiniak spoke with Hesler and reminded her to vote. He said he was pretty sure he knew how she would vote and Hesler knew where he stood.[22]

Following the Union's election win, Hesler became a steward in July 2016. Thereafter, employees brought complaints to her and she passed them along to either a higher-level union representative or to a department manager. One example of this occurred in September 2016, when Hesler met with Tucker and Bray about an employee's complaint that management told her she had a hygiene problem. Hesler argued the issue was with Schoonover, who had made a similar complaint about a different employee a year earlier. Hesler also sold Union hats and t-shirts to her coworkers.[23]

B. The Respondent's Discipline of Hesler in November 2016

On November 15, 2016, the Respondent issued both a corrective action and a verbal warning to Hesler. The corrective action form cited multiple occasions that month where Hesler either took breaks that were too long or did not accurately log the breaks on her machine. On the form, Hesler checked the box stating, "I agree with the Employer's Statement" and wrote: "I honestly forget to put in break and forget to take out of break. I'm working on this but it will take time to get into habit." (The Respondent implemented a new break logging system earlier in 2016 and Hesler began using the new method a month or two earlier.) The verbal warning stated that, on November 12, 2016, Hesler left her machine eight minutes prior to the end of her shift. It also stated that, on multiple occasions on November 15, management observed Hesler having extended conversations with other employees away from her assigned work area, leaving her machine running unattended. The employer narrative added:

> A secondary issue of concern, it has been reported by another employee that Linda made comments today that are unsubstantiated and untruthful "gossip" regarding supervision and the behavior of another employee that is none of Linda's concern or business. As has been discussed multiple times, this type of "drama" behavior has no business in the workplace and will not be tolerated in the future. Future violations will result in further disciplinary action, up to and including termination of employment.

Hesler again checked the box on the form indicating she agreed with the Respondent's statement, but did not include any narrative. The "gossip" and "drama" referred to in the warning was a conversation Hesler and two other employees previously had on a break. One of the employees said that Schoonover was a real ball buster and had written up a coworker, Fred, for not following a safety protocol. When a different employee asked who turned

---

[17] GC Exh. 16, pp. 46–47, 52.

[18] Because Page downgraded Nichols' rating in "work relationships" solely due to her conversation with McGaughey, I find it unnecessary to evaluate the Section 8(a)(3) allegation under *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See, e.g., *Tito Contractors, Inc.*, 366 NLRB No. 47, slip op. at 5–6 (2018); *Neff-Perkins Co.*, 315 NLRB 1229, 1229 fn. 2 (1994). That Page's motive for downgrading the rating was Nichols' union activity is undisputed.

[19] Tr. 644, 649–654.

[20] Corrective actions are not discipline or a step in the Respondent's progressive discipline policy, but are used by supervisors to correct employee behavior. (Tr. 2080; GC Exh. 16, p. 24.)

[21] Tr. 655–663; GC Exh. 101.

[22] Tr. 654–655.

[23] Tr. 644–648, 665–669.

Fred in, Hesler told the group that Fred thought it was an employee named Nina.[24]

When Hesler met with Tucker and Schoonover to discuss this discipline, she denied taking breaks that were too long. She said she forgot to log back in on the machine after she got back from break. Hesler admitted that she left work early on November 12. Regarding her conversations with other employees away from her machine, Hesler said she was taking her machine waste to the warehouse and, when she walked back, coworker Becky Cooprider stopped her and asked her how to troubleshoot a problem with Cooprider's machine. Tucker responded that he saw Hesler multiple times away from her machine talking to people and Hesler denied it. Finally, Hesler asked about the "drama" behavior comment. Tucker described Hesler's conversation with her coworkers and noted Nina would flip out if she discovered Hesler had identified her as the employee who turned Fred in. Hesler replied that she would tell Nina what Hesler had said and that should squash any drama. Tucker told her to make sure she did so.[25]

After the disciplinary meeting, on that very same day, Hesler had trouble with another order. Her machine was jamming up, resulting in some of the bags having missing print on their backsides. Hesler tried to troubleshoot the problem and did not pull all of the defective bags out of the order. The next day, November 16, the Respondent issued Hesler a written warning. The form stated that Hesler violated the quality accountability policy when she packaged two cartons containing 1,575 defective bags that had to be scrapped. Again, Hesler checked the "I agree with Employer's Statement" box and wrote: "I was fighting with the machine and was not able to really look at print which is how this happened." When she again met with her superiors, Tucker told Hesler troubleshooting was not her priority, inspecting bags was. He said they could not have that defect and she needed to spend more time watching her bags. Hesler told the two that she disagreed with the comment in the text stating she had a "blatant disregard for quality." Tucker told her he called it like he saw it. In Hesler's April 2015 appraisal, her supervisor wrote that she needed to increase her production "by using you(r) troubleshooting skills and getting the machine running as soon and long as possible."[26]

C. The Respondent's Discipline of Hesler in January 2017

In December 2016, Hesler attended a meeting with eight to ten employees. Augustiniak and his supervisor, director of manufacturing Todd Appel, were present for management. Hesler raised the topic of bullying in the finishing department. She said that the Respondent had large turnover in that area and attributed it to new employees not being treated well. She stated that supervisors were hard on them and they were made to feel unwanted. She said the area needed to be more welcoming to the new employees.[27]

Near the end of December 2016, between Christmas and New Year's days, Hesler attended a union meeting at a local hotel with five to six other employees. The union representatives present were: Phillip Roberts, an international representative; Andre Johnson, who is an employee at the Respondent's Des Moines, Iowa plant and also serves as the local union's president; and Donna Zaputil, an employee at the Respondent's Centerville plant and the local's vice president. The group discussed how the Respondent was adjusting employees' schedules to cover overtime, because of certain workers having restricted, eight-hour work schedules due to medical conditions. Greg Stull, one of the employees whose schedule was going to change to cover overtime, was part of this discussion. Hesler suggested to Stull that he get a doctor's note like another employee, Laura Lowe, did. She told Stull he then could work 7 a.m. to 3 p.m. and it would not be an issue. Lowe was one of the employees restricted to an eight-hour schedule as a result of a medical issue.[28]

The next day, Stull spoke to Lowe in the Respondent's parking lot. He told her that Hesler divulged in the union meeting the night before that Lowe was on a restricted 40-hour-per-week schedule. Lowe then reported this to both Tucker and Bray. Tucker called Hesler into his office and told her she had "started a real shit storm" by saying something about Lowe's restricted schedule. Hesler responded that Tucker previously told her and other employees about Lowe's schedule and she did not think it was a big secret. Tucker said not to worry about it, that it was not a big deal and he was sick of "FMLA people" anyway. Bray later told Lowe there was nothing he could do about the situation. Thereafter, Lowe overheard employees in the break room multiple times discussing how the 40-hour-a-week people did not have to work overtime. Connie Dunham was one of the employees. Eventually, Lowe told Augustiniak she was being harassed by Hesler, Cooprider, and Dunham. She said the three employees were talking about how they had to work overtime, because of Lowe's hours' restriction. Lowe also told him the harassment started when Hesler divulged Lowe's schedule at the union meeting.[29]

On January 5, the Respondent issued Hesler a final warning in a meeting attended by Augustiniak, Bray, Tucker, Schoonover, and Zaputil. Augustiniak read the text of the warning to Hesler, which stated:

> Linda is being issued a final warning for her continued and repeated behaviors in violation of the Company's Code of Conduct including bullying, intimidating and harassing other employees resulting in a hostile and offensive work environment within the Finishing department. The prohibition of such behaviors has been discussed via Code of Conduct training as well as during Finishing Department meetings. Linda's behaviors have been detrimental to overall departmental morale and have contributed to excessive turnover (Including among new hires), increased training times and diminished production. Any future deviations from the Bemis Core Values or BNA policies, including bullying, intimidation, harassment, retaliation, failure to provide assistance when needed or similar infractions will result in immediate termination.

Augustiniak told Hesler her behaviors were mean and needed to

[24] GC Exh. 102, pp. 1–2; Tr. 682.
[25] Tr. 669–683; GC Exh. 102, pp. 1–2.
[26] Tr. 684–686, 689; GC Exhs. 101 (p. 3), 102 (p. 3).
[27] Tr. 694–697.
[28] Tr. 697–699.
[29] Tr. 39–52, 698–700, 1482–1485.

end. He said they had complaints from new employees about her at several meetings. He added that recent employees left the company because of her behaviors. Hesler asked Augustiniak how she was supposed to change her behavior, if she did not know what she had done wrong. Augustiniak responded that she was to stay at her machine and stop the whispering, the staring, the glaring, and talking about others. He told her to intently focus on her behaviors and again to stop making side conversations indirectly towards people. He said any retaliation by Hesler would not be tolerated and she was not to do her own investigation. Augustiniak concluded by telling Hesler not to go into the break room and have peripheral conversations about others. Hesler refused to sign the final warning. In addition to disciplining Hesler, the Respondent also issued nearly identical final warnings for harassment to Cooprider and Dunham.[30]

D. The Respondent's Hiring and Subsequent Employment of Philip McMeins

In April, the Respondent hired Philip McMeins as finishing department manager, replacing Tucker. On May 1, McMeins began his employment. McMeins' job duties as finishing manager were to oversee production in that department. At that time, three finishing supervisors reported to him: Allgood, Schoonover, and Traxler. Shortly after McMeins started, Augustiniak and Bray provided him with an overview of the department and his three supervisors. Augustiniak told him his biggest challenge was going to be Schoonover. Within his first week of employment, McMeins had a walk around with Schoonover where he met each employee on the day shift. After meeting Hesler, Schoonover told him that Hesler was the most challenging person on the shift, that she had an attitude issue and required a lot of attention.[31]

Early on in McMeins' employment still in May, Chris Rutt replaced Bray as human resources manager in Centerville. McMeins, who was not familiar with unionized work environments, met with Augustiniak and Rutt and asked for some background on the Union. Augustiniak told him that it was a very close vote and he was aware of a decertification effort that was going on in the plant at that time. After the meeting, Rutt told McMeins that decertification was not something management should be involved in or mention to anyone.[32]

After he began his employment, McMeins also started attending the Respondent's daily management meeting. At the start of each meeting, all managers and supervisors were present, but eventually supervisors were excused, leaving just the managers. The purpose of the meeting was to discuss the plant's production by department in the prior 24 hours. During these meetings, McMeins deferred to his finishing supervisors to address any issues that arose. He also spent much of the meetings on his cell phone. In addition to plant production, Augustiniak told his managers and supervisors about any scheduled collective-bargaining negotiations with the Union. Once the supervisors left the meetings, Augustiniak provided more detailed information about the negotiations, including written proposals. The group also reviewed union fliers collected in the plant and then discarded them. Finally, Augustiniak asked the managers each day to report any union discussions they heard on the floor. This included what the Union said to employees about the negotiations, compared to what the Respondent was telling them. In one of these meetings, Augustiniak told the managers that the Respondent was going to present a proposal to the Union that would result in lower wages for unit employees, so they would see the negative value of being in the Union. In a different meeting, Augustiniak informed the managers that decertification was in progress.[33]

In mid-May 2017, McMeins introduced himself to Dunham and the two spoke. Dunham told him about how she previously had been accused of harassing other employees. She asked him if he would do investigations of employees based on assumptions or if he actually was going to approach the employees for their sides of the story. McMeins told her he wanted the facts of a situation before he proceeded. McMeins then spoke to Augustiniak and Rutt about the conversation. Augustiniak told McMeins that he had employees, including Hesler and Dunham, who were harassing new hires. McMeins asked him if he got the employees' sides of the story, because one of them had approached him and did not feel that Augustiniak did. Augustiniak responded that he did not need their side of the story, because he already had enough information from their investigation to issue discipline.[34]

In mid to late May 2017, Augustiniak questioned McMeins and Allgood regarding why a new employee, Tyler, was being trained by another employee named Mae. Allgood told Augustiniak that the two employees who normally trained were out, so he assigned Mae to Tyler. Augustiniak responded that he did not want new employees training with Mae and Allgood needed to pick someone else. Augustiniak told him Mae was a strong

---

[30] Tr. 700–704, 1065–1068, 1083–1087; GC Exhs. 102 (p. 4), 104, 113–114. Prior to this discipline, Cooprider and Dunham wore union t-shirts to work once or twice a week. (Tr. 1062–1063, 1082–1083.)

[31] Tr. 449–452, 454–455, 461–462, 465–466; GC Exh. 109. Although Augustiniak and two other supervisors testified that McMeins' job interviews raised some red flags about him, I do not credit this conclusory testimony, which appeared exaggerated. Tr. 1928–1931, 1947–1949, 2033–2036.

[32] Tr. 489–490. At the hearing, Augustiniak conceded that he had conversations with an employee, Wayne Devour, about decertification. Devour later filed a decertification petition with the Board on October 31. (Tr. 2102–2103; GC Exh. 31.)

[33] I credit McMeins' testimony concerning what Augustiniak did and said in these daily meetings, including the comment about the Respondent's wage proposal. (Tr. 478–489, 491.) Overall, I found McMeins to be a credible witness with a trustworthy, frank demeanor. However, I credit the testimony of Augustiniak and multiple supervisors, over McMeins' denial, that McMeins often was on his cell phone during these meetings. (Tr. 1858, 1933, 1951, 2042.) I do not credit Augustiniak's testimony that he discussed with McMeins his lack of participation and his cell phone use in the meetings. The testimony was nonspecific and speculative. (Tr. 2043–2044.) Finally, although I find that McMeins deferred to his supervisors to discuss production issues, I reject the Respondent's suggestion that this practice was problematic. Augustiniak testified that he typically wanted the front-line supervisors to address issues, since they saw what was going on day-to-day, and that managers like McMeins were there for support for bigger issues that needed to be discussed. (Tr. 2041.)

[34] Tr. 473–477.

union supporter and he did not want her to talk new employees into supporting the Union. Thereafter, Allgood assigned a new trainer to Tyler. The next day, McMeins asked Schoonover who trained for her on the first shift. After identifying the employees, Schoonover told McMeins that Hesler, Dunham, and an employee named Virginia Exline were not allowed to train.[35]

At a June 15 meeting attended by 30 to 35 employees, Augustiniak said the finishing department had serious issues. Hesler replied that extrusion was allowed a certain number of errors (resin spots per million), but finishing was not. She added that the finishing operators had to pull bags with those errors out, which slowed them down. Augustiniak said the Respondent was trying to fix that issue, but also that "you finishing area people just have way too many issues to go into now." Hesler then asked about moving the July 4th holiday from Tuesday to Monday. Augustiniak said he would look into it. When the discussion turned to the Respondent's funding of the employees' activity association, Hesler said that the association had not had any activities for years. She also asked if the Respondent or the association was responsible for funding safety days, where employees and their families could meet with police officers and firefighters. Augustiniak responded it was not his job to entertain Hesler.[36]

At some point prior to the 3rd week of June 2017, Schoonover met with Lowe, who then was working as a support operator in finishing. Schoonover told Lowe to keep track of how often Hesler went to the bathroom and report the number back to Schoonover. She said she wanted that information, because she did not like Hesler, wanted her out of there, and was looking for a way to get Hesler fired. Lowe reported back to Schoonover on Hesler's bathroom breaks about six or seven times. Schoonover also used Lowe to track how often Hesler was away from her machine visiting other employees, as well as Hesler's work quality.[37]

On June 23 during the daily management meeting, Augustiniak discussed with the group how certain extrusion department employees were being transferred to the finishing department to conduct bag testing. Nichols was one of the employees coming over to finishing, set to work the third shift from 11 p.m. to 7 a.m. Augustiniak asked McMeins to work that shift too, on the first night after Nichols was transferred. The regular shift supervisor was going to be absent that night, meaning the shift otherwise would have no supervision. Mihalakis, the extrusion manager, told McMeins that Nichols was the extrusion department's "Union billboard" and was going to be a problem. He added that, when Nichols introduced herself to people, she would say "hello my union brother" or "hello my union sister." Augustiniak told McMeins that he should observe Nichols and make sure she did not visit other employees outside of her work area and try to persuade them into supporting the Union or engaging in union activities. Augustiniak also asked McMeins to report to him the next morning if Nichols left her work area during the shift. McMeins agreed to work that night shift and did so. He watched Nichols as she worked and spoke to her at one point. He did not observe anything unusual. McMeins reported to Augustiniak the next morning that nothing happened.[38]

E. The Respondent's June 30 Final Warning to Hesler

Also, on June 23, Schoonover sent Augustiniak and McMeins an email with a proposed final warning for Hesler. Schoonover listed a variety of alleged problems. First, she stated that 43 defective bags, hole punch scrap, and thin trim waste had been discovered in a carton run by Hesler on June 9. Second, Schoonover stated that a customer complaint recently had been received regarding a bag order with missing print, for which Hesler likewise was responsible. Third, Schoonover stated that, during her shift on June 21, another employee reported that Hesler went to the bathroom 16 times. Fourth, Schoonover stated generally that Hesler had been walking away from her machine and visiting other operators. Fifth, Schoonover wrote that Hesler's crew bag per hour rate was 2,728. Schoonover stated that Hesler needed to do a better job of staying at her machine and inspecting her bags. Finally, Schoonover noted that Hesler repeatedly logged off her machine early.

Shortly thereafter, McMeins met with Augustiniak and Rutt about the proposed discipline of Hesler. McMeins told the two he did not think the discipline was warranted. McMeins stated he had investigated when other employees were logging off their machines and found that over 80 percent of the staff in his department did the same thing as Hesler. He said it was a department-wide problem requiring training, not discipline. McMeins also stated the excessive bathroom breaks comment was subjective. McMeins told them he spoke to Hesler's machine partner, Rod, who told McMeins that her bathroom breaks were not an issue and were not outside the norm in the department. Rutt agreed with McMeins that discipline was not warranted on the bathroom issue. Augustiniak asked McMeins why he was protecting Hesler. McMeins responded that he was not protecting anyone; he was just looking at the facts of the situation. Augustiniak then told McMeins "protecting Linda Hesler could jeopardize your standing at Centerville." Augustiniak stated that he wanted to move forward with the discipline. He said he was more focused on Hesler walking away from her machine and her history of poor performance. He told McMeins that, once an employee gets into the corrective action system, it was hard for them to get out of it. Augustiniak told McMeins he did not

[35] Tr. 455–459, 463–465.

[36] Tr. 709–713.

[37] Tr. 52–58, 71–73. Lowe's testimony in this regard is uncontroverted, as Schoonover did not testify at the hearing. The timing of these reports is unclear from her testimony, but occurred when Lowe worked as a support operator beginning in March. I find the reports must have occurred before June 23 because, as will be discussed, Schoonover recommended disciplining Hesler, in part for taking excessive bathroom breaks and visiting with other employees, on June 23.

[38] I credit McMeins' uncontroverted testimony concerning the meeting discussion. (Tr. 536–544, 581–583.) Although they testified, neither Augustiniak nor Mihalakis addressed this conversation. In addition, although Augustiniak stated he told McMeins at some point that he wanted McMeins to work other shifts and get to know the employees on them, nothing in the meeting conversation about Nichols suggests Augustiniak was asking McMeins to work the night shift just to get to know her. Finally, I note a transcript error at p. 540, ln 21, where the pronoun should be "she," not "he."

believe Hesler would be working for the company within the year.[39]

During the same meeting, Augustiniak mentioned that Hesler had been disrespectful to an employee named Fred and he wanted McMeins and Rutt to investigate it. After the meeting, the two went to speak to Fred. He told them he and Hesler discussed how overtime was no longer available and Fred said to her that he had farm work and was not interested in it anyway. Fred told them, following his discussion with Hesler, Schoonover repeatedly asked Fred if Hesler had been disrespectful to him. Fred told Schoonover he did not see it that way. When McMeins and Rutt finished their conversation with Fred, McMeins told Rutt he thought Schoonover was targeting Hesler. Rutt responded that he believed what McMeins said was true, but additional investigation would have to be conducted for him to come to that conclusion. The two went back to Augustiniak and reported what Fred said.[40]

On June 28, the Respondent's corporate team came in from Wisconsin to visit the Centerville plant. The visitors include Appel, the vice president of manufacturing, and Fred Stephan, the president of Bemis North America. A town hall meeting with the corporate representatives and a limited number of employees was scheduled for that day. About a week prior to the town hall, Augustiniak asked his department managers for lists of a few names of employees who they thought should attend the meeting. In a subsequent management meeting, Augustiniak and Rutt discussed the names on the lists. Augustiniak based his decision on who should attend based upon his view of employees' union sentiments. Augustiniak sought to insure the town hall had an equal number of pro and antiunion employees in attendance. Augustiniak had similar discussions about employee attendees for prior town hall meetings held after the Union's election win.[41]

Following the corporate representatives' arrival on June 28, they met with the entire Centerville senior management team, prior to the town hall. The meeting attendees reviewed a PowerPoint presentation concerning the plant's finances and the trends in the different departments. As to the finishing department led by McMeins, a corporate official commented that the department looked like it was heading in the right direction, efficiencies were improving, and scrap was decreasing. A different corporate official stated that, when she was out on the floor in the finishing area, it seemed like the overall attitude in the department was better than the last time she was there, and she was starting to see sustained improvement. Stephan said it appeared to be a good decision that they brought McMeins onboard, to which Appel responded by patting McMeins on the back.[42]

On June 30, McMeins and Schoonover issued Hesler the final warning which Schoonover recommended. The warning contained all of the issues previously identified by Schoonover, except the one regarding Hesler logging out early. When the three met to discuss the warning, Hesler disclosed that her bathroom visits were due to a medical condition. McMeins told her to get a doctor's note and it would not be an issue. Regarding the bag defects, Hesler said that she asked another employee to go through and check the bags. Schoonover responded that was not what the other employee told her. She added that Hesler needed to watch her bags and her quality more, as well as stop wandering away from her machine and talking to people. McMeins told Hesler the concerning thing in the discipline was the quality defects and walking away from her machine. Hesler responded that other people did that too, including people who went into Schoonover's office to talk, and nothing was done about it. A few hours after the meeting, McMeins spoke to Hesler at her machine. McMeins told her he was not happy with the discipline and felt she was being singled out. Hesler said she understood certain parts of the document and asked him if he agreed with the entire thing. McMeins responded he did not agree with the discipline beginning to end, but when the individual in authority decided to go forward with the discipline, he had to stand by it and this was one of those cases.[43]

Subsequent to the discipline being issued, Hesler obtained a doctor's note, dated July 3, confirming that her frequent bathroom trips were due to medical reasons. She gave the note to Rutt and the Respondent crossed off the comment in the warning about the bathroom issue. On that same date, Hesler posted on the Union's Facebook page that "[i]t's a sad day when you have to get a note from your doctor to use the restroom." Her coworker, Mark Stogdill, commented in response to Hesler's post that "[e]veryone in the plant should get one!" During a managers' meeting held by the Respondent thereafter which McMeins attended, a manager asked if anyone had seen Hesler's Facebook post regarding her bathroom discipline. He noted it was on the Union's Facebook page. Augustiniak responded that he had seen it and the facts as Hesler was portraying them were not accurate. During this same time period, Lowe was speaking with other employees about how a new medication she was taking was causing her to go to the bathroom six to seven times each work day. Hesler commented that Lowe would have to get a doctor's note like Hesler did. Lowe asked Schoonover if that was the case and Schoonover told her not to worry about it.[44]

F. The Respondent Terminates McMeins and Hesler

Prior to the July 4th holiday, McMeins went on a business trip with finishing supervisor Sarah Traxler to a different Bemis plant in Pauls Valley, Oklahoma. The two travelled by car together for several hours to get there, which McMeins and Traxler both found uncomfortable. During the ride, conversation was minimal and McMeins often spent time on his cell phone. After

[39] Tr. 511–521, 1250–1251.

[40] Tr. 522–526.

[41] Tr. 495–500.

[42] Tr. 491–495.

[43] Tr. 527–531, 714–721; GC Exh. 102, p. 5. I credit Hesler's testimony that it was not atypical for her or other employees to converse with coworkers away from their machines. (Tr. 676–678.) Lowe and employee Tammy Clark corroborated that testimony, saying they often left their running machines to talk to coworkers and no supervisor ever told them not to do so. (Tr. 56, 71–73, 2276.) Moreover, Rutt conceded that the Respondent did not prohibit employees from leaving their machines when they were working, except for "common sense." (Tr. 1249.) The first time the Respondent cited this as a problem to Hesler was in the verbal warning it gave her on November 15, 2016. In her performance appraisals the four prior years, the text repeatedly mentioned the need for Hesler to increase productivity, but none of them stated she should stop walking away from her machine. (GC Exh. 15.)

[44] Tr. 58–62, 559–562; GC Exhs. 105, 106.

arriving at the hotel where they were staying, the hotel clerk asked McMeins if it was okay if he and Traxler had rooms on separate floors. McMeins responded "Oh fantastic. That's great," which embarrassed Traxler. That night, McMeins did not invite Traxler to go to dinner with him. During the subsequent plant tour, the Oklahoma plant manager, Luis Bogran, invited Traxler to a meeting, but McMeins told her not to go. When Bogran and McMeins later had dinner, Bogran asked him how contract negotiations were going. McMeins said he was not heavily involved in it, but asked Bogran for advice since McMeins had never worked at a union facility before. Bogran told him to follow the union contract to a T, whether it benefitted him or not. After returning to Centerville, McMeins told Augustiniak about Bogran's comment. Augustiniak responded that McMeins had a lot to learn and Bogran's suggestion was "not the direction that he was interested in taking." Traxler likewise reported what occurred in Oklahoma to Augustiniak, Rutt, and Schoonover.[45]

On July 12, Hesler was running "Machine 75," one of the most complex machines to operate in the finishing department. Only two advance bag machine operators, including Hesler, could run it. For this order, Hesler was required to inspect 100 percent of the bags being manufactured. Tammy Clark was working as a support operator during Hesler's shift and was right across from Machine 75. Clark observed Hesler speaking to the operator next to her with her back to the machine while it was running. When Hesler returned to the machine, she put the lid on a full carton of bags without inspecting the bags and sent the carton down the line to the shipping department. Because Machine 75 had been on 100-percent bag inspection for several days, Clark decided to look into Hesler's carton and inspect the bags. She found 186 bags with creases on them, most of them large ones. Clark took the defective bags to Schoonover, who then went to McMeins' office with a sample of them and told him they were from Hesler. Schoonover said she obviously wanted to discipline Hesler for the defective bags. McMeins told her he would have to investigate it and discuss it with the management team, before giving Schoonover direction on how she was to proceed. McMeins met with Rutt and discussed the situation. They agreed to bring potential discipline to Augustiniak for approval, but not identify Hesler as the employee involved.[46]

On July 13 when Hesler reported to work, she observed another employee going through cartons from the prior day and pulling out bags. The employee said to Hesler that Schoonover told her to pull out any bags with creases on them. Nine cartons were near the employee who was inspecting Hesler's bags, but only one of the nine was Hesler's responsibility. Two other employees, Kay Glosser and Carla Egbert, ran the remaining bags for the same 100-percent inspection order. At the daily management meeting that same day, Augustiniak said there was a quality issue in the finishing area that he was aware of and McMeins and Rutt needed to investigate it immediately. Augustiniak made the comment, even though McMeins and Rutt had not yet advised him of the situation. Thus, McMeins concluded Schoonover had told Augustiniak what happened.[47]

McMeins began an investigation. He went to the shop floor and saw six or seven cartons from the lot that Hesler ran. He attempted to obtain documentation showing how much defective product had been manufactured during the time Hesler was operating the machine. However, the Respondent did not have anything showing the "defect rate," or percentage of bags out of the total that were defective. Instead, Traxler gave him a sticky note saying that carton 5 contained 160 plus bad bags. McMeins considered manually computing a defect rate, but was unable to do so because all of the defective bags had not yet been pulled out of the cartons.[48]

McMeins met with Augustiniak and Rutt to convey that he could not determine the defect rate. Augustiniak told him he was not interested in the defect rate, because Hesler had a history of walking away from her machine and having a bad attitude. He added that she was a bad apple in the department. McMeins responded that he needed some guidance on what an appropriate, quantitative defect rate was, not necessarily for Hesler's situation but going forward. Augustiniak's face became red. He crossed his arms and again told McMeins he was protecting Hesler. McMeins stated he could not make a conclusive decision on whether discipline was warranted until he knew all the facts, including the total amount of defective product. Augustiniak said he wanted to proceed with Hesler's discharge. He asked McMeins if McMeins agreed with the decision. McMeins responded that he was not in a position to do so with the facts he had at that time. Augustiniak told him that Hesler had a history of walking away from the machine and, based on the investigation Rutt had done speaking with other employees, Hesler had walked away from her machine this time as well. McMeins told him he was not aware of any investigation Rutt had done. Augustiniak then asked him if he would agree with the termination, if Rutt's investigation showed Hesler walked away from her machine and she had a history of poor performance. McMeins said yes.[49]

On July 20, Rutt met with Zaputil, the local union's vice president, and told her the Respondent was going to move forward with Hesler's discharge, because of her trend of bad behavior. Zaputil told Rutt the Union wanted to bargain over it. She also said that Hesler was a good employee, was one of only two people who could operate Machine 75 and had trained new employees for years. Zaputil asked Rutt if she could see the packet for the order on which Hesler produced defective bags. She also asked to go back to the bag reworking area, where defective product is removed from cartons before shipping. The packet and the rework area visit would have allowed Zaputil to determine if other operators ran the machine on the same order as

[45] Tr. 506–510, 583–588, 1859–1866.
[46] Tr. 544–547, 731, 2271–2275.
[47] Tr. 547–549, 732–736.
[48] Tr. 549–553.
[49] Where it conflicts with Augustiniak's account, I credit McMeins' testimony about the discussion in this meeting. (Tr. 553–559.) Overall, I found Augustiniak to be an unreliable witness. His responses often were limited, vague, and conclusory. Those characteristics were present in his testimony concerning this meeting. (Tr. 2060–2062.) Rutt testified, but not about this meeting. Rutt also had very limited recall of the material events in this case.

Hesler, as well as if they were written up for running their own defective product. Rutt refused both requests. Zaputil asked Rutt to look in the computer to see if any other finishing department employees had been written up in June or July. Rutt did so and Zaputil observed that Hesler was the only employee who had been written up in that timeframe. In the same meeting, Rutt informed Zaputil that a supervisor saw employee Cory Lewis with a cell phone in the plant and wanted Lewis discharged. Zaputil asked Rutt why the supervisor had waited two days to report Lewis' alleged policy violation. Rutt told her to discuss it with the supervisor.[50]

On July 21, the very next day, Augustiniak informed McMeins that his employment was terminated. Augustiniak said it was due to his lack of communication to the team and his leadership style. McMeins asked for specific examples. Augustiniak responded they would be in a document Rutt would provide to him. Augustiniak also told McMeins that he was getting in the way of employee communication directly with Augustiniak. McMeins said that he needed to know about issues on the floor in order to address them. In a letter dated the same day, Rutt wrote to McMeins that "[i]mmediately, we are notifying you of your termination of employment with Bemis Centerville." Rutt did not provide any explanation for the decision. After he was discharged, McMeins sent an email to Appel, the corporate official who recently had visited Centerville and commended McMeins' performance. He expressed surprise at his discharge and the lack of clarity regarding the reasons for it. McMeins also acknowledged regret for not having followed advice Bray had given him when he started, when Bray told McMeins to meet with Augustiniak every week to insure their thoughts were aligned.[51]

On July 24, Rutt advised the two local union representatives, Johnson and Zaputil, that the Respondent intended to terminate Hesler for performance issues. Rutt met with Zaputil in Centerville, while Johnson participated by phone from Des Moines. Rutt told them that Hesler did not catch a problem while running her machine and had prior performance issues. At the representatives' request, Rutt reviewed Hesler's entire disciplinary record. They included a corrective action that was over a year old, which the representatives contended should have dropped off pursuant to the Respondent's progressive discipline policy in its employee handbook. They also included the January 5 final warning for bullying and gossiping, as well as the June 30 final warning with the comment about Hesler taking excessive bathroom breaks. But Rutt stated he did not agree with the discipline for harassment and gossiping, or with her being disciplined for excessive bathroom breaks. Johnson asked Rutt how he could proceed with Hesler's termination, if he did not agree with all of the discipline. Rutt responded that Hesler had a trend of bad behavior. Johnson told Rutt that Hesler was working on the hardest machine in the plant and was not being put in a position to succeed. He asked Rutt why the Respondent would put her on that machine, if it actually thought she was such a problem employee. Johnson also said Hesler's work life was causing her stress and leading to mistakes on the job. He asked if the Respondent had tried to help Hesler with the stress. Johnson also inquired as to whether other operators who ran the same machine and manufactured bad product were disciplined. Rutt told him other employees were counseled, but through corrective actions, not discipline, because they did not have any prior offenses. In the same meeting, Johnson and Zaputil again raised the issue of Lewis' discharge for violating the Respondent's cell-phone policy. The union representatives repeated their concern that the discipline was issued a full two days after the alleged incident.[52]

On July 27, the Respondent informed Hesler she was suspended pending termination, because the Union wanted to bargain over it.[53]

On July 28, Rutt, Johnson, and Zaputil met again concerning Hesler. Rutt stated the Respondent was going through with Hesler's discharge because of a trend of bad behavior, including walking away from her machine. Johnson proposed to Rutt that Hesler be put on a last-chance agreement or some lesser form of discipline. Rutt told him no. The group also discussed the discipline Hesler received for taking excessive breaks. Johnson told Rutt the logging in and out procedure was a new policy and Hesler was not the only employee to have trouble remembering to log in after breaks. Johnson then asked Rutt for a copy of Hesler's punch ins and outs from breaks. Finally, Johnson and Zaputil told Rutt that Augustiniak and Schoonover were targeting union supporters and noted Schoonover was responsible for 90 percent of Hesler's write-ups. Rutt responded that he did not believe it. Rutt said it was a serious allegation and he would have to move that up to an investigation with his superiors. Nonetheless, Rutt told him he was going to continue with Hesler's termination. Rutt subsequently told Dees about Johnson's accusation, but never got back to the Union with a further response.[54]

That same day, Hesler went back to the facility with Zaputil. The two met with Rutt, who gave her a letter stating she was being discharged for job performance. The Respondent's final write-up[55] upon which the discharge was based stated:

---

[50] Tr. 261–267; GC Exh. 12, p. 5. In August 2016, Bray and Zaputil began meeting on a regular basis, in order for Bray to provided Zaputil with discipline the Respondent intended to issue to employees. These meetings arose out of an agreement between the Respondent and the Union in contract negotiations. When Rutt took over, the meetings became more consistent and occurred weekly. Zaputil often asked Rutt for proof to justify discipline and, once the proof was provided, the representatives would discuss the validity of the discipline. (Tr. 382–394.)

[51] Tr. 563–569, GC Exh. 112; R. Exh. 2. I do not credit Augustiniak's testimony concerning his reasons for discharging McMeins, which included alleged issues with communication and a lack of engagement in his job duties. (Tr. 2046–2051.) The testimony contained a surprising lack of specificity and was not corroborated by any contemporaneous documentation showing McMeins' alleged performance problems or communication from Augustiniak about the problems. He provided no clarity as to why he made the decision at that time or what process and discussions he had with other managers to arrive at it. The record evidence does suggest that Augustiniak and McMeins disagreed concerning whether front-line supervisors could bring problems to Augustiniak without first speaking to McMeins. (Tr. 2044–2047.) However, and as discussed more fully below, I conclude that Augustiniak did not discharge McMeins because of this issue.

[52] Tr. 268–272, 410–413, 1255–1256, 1602–1603, 1615–1618.

[53] Tr. 739–740.

[54] Tr. 272–282, 413–414, 1618–1620; GC Exh. 12, p. 7.

[55] GC Exh. 12, p. 6.

> Linda was scheduled to run machine #75 on 7/12/17, Order #2611998, The [assistant foreman] was running the shift and knew the film was full of crease misprint. The AF saw Linda walk away and talk to her neighbor. She left the machine running, while she was off talking. The AF tagged the cartons that had been ran for inspection. While Inspecting the cartons Linda ran, carton # 4 contained over 180 bad bags for creases and crease misprint. Linda was just issued a final warning for quality on 6/30/17. This quality issue puts Linda at termination of employment.

The write up also sets forth the following prior warnings relied upon for discharging her:

Date of warning	Step	Stated Reason (from prior disciplinary form)
11/15/16	Corrective Action[56]	Violation of break times
11/15/16	Verbal	Leaving shift early, allowing machine to run unattended while conversing with other EEs outside of her assigned work area, and gossiping regarding supervision and the behavior of another employee.
11/16/16	Written	Defective product, 1,575 bags packaged and staged to be sent to customer with a highly visible defect
6/30/17	Final Warning	Defective product (43 bags); customer complaint from Grande Cheese for missing print; walking away from her machine to visit other operators; bag rate per hour of 2,728 and need to remain at her machine and inspecting her bags.
7/21/17	Discharge	Defective product (180 bags); observed by another EE away from her machine.

G. The Respondent's Progressive Discipline Process and Discipline History

The Respondent's employee handbook details a progressive discipline system with four steps.[57] They are: (1) verbal warning (in writing); (2) written warning with a suspension of up to 5 days depending on the offense; (3) final warning with a suspension of up to 10 days depending on the offense; and (4) discharge. The policy states that, after an employee goes 12 months without an offense, the employee's record shall be considered clean. The policy also states the Respondent "generally" will use progressive discipline for discipline, but "reserves the right to repeat or bypass any disciplinary step."

The Respondent's rate of issuing discipline to employees other than Hesler significantly increased following the Union's election win. In the 16-month period from January 1, 2015, to May 6, 2016, the Respondent issued 12 verbal warnings, two written warnings, and one final warning. It did not discharge any employees. Most issues were handled with corrective actions, 175 total. In the 15-month period from May 7, 2016, through Hesler's discharge on July 28, 2017, the Respondent issued 51 verbal warnings, 20 written warnings, nine final warnings, and discharged four employees. It only issued 91 corrective actions in the same time period.[58]

The four other discharged employees were Ben Cullers, Cory Lewis, Russell Roadenizer, and Dustin Williams. Cullers received a verbal warning on September 21, 2016; a written warning on October 7, 2016; and was discharged on October 19, 2016. The Respondent did not issue him a final warning. Cory Lewis received a verbal warning on September 7, 2016; another verbal warning on October 16, 2016; a written warning on January 25, 2017; a final warning on July 7, 2017; and was discharged on July 12, 2017. Roadenizer received a verbal warning on June 2, 2017; a written warning on June 20, 2017; a final warning on July 19, 2017; and was discharged on July 21, 2017. Williams received two written warnings on March 14, 2017; a final warning on April 11, 2017; and was discharged on June 19, 2017. Thus, the Respondent followed the four progressive discipline steps in only one of the four discharges. It also repeated a step for Cory Lewis.[59]

During this same timeframe, the Respondent repeated steps and declined to discharge certain employees who were eligible under its policy. Press department employee Puteh Siregar received: a verbal warning on September 3, 2015; a final warning on March 25, 2016; a written warning on June 9, 2016; and another final warning on July 28, 2016. In 2016, finishing department employee Greg Stull received: a written warning on June 27; a verbal warning on November 1; a final warning on November 21; but then received a last chance agreement, as Johnson requested for Hesler, on December 14.[60]

---

[56] Although corrective actions are not discipline, the Respondent was inconsistent in its treatment of corrective actions at Centerville prior to Hesler's discharge, including by including her corrective action as part of its justification for her termination. (Tr. 1155–1156, 2079–2080.)

[57] GC Exh. 16, p. 24.

[58] GC Exh 15; Tr. 1842. These numbers are derived from a table the Respondent submitted during the General Counsel's investigation of the underlying charges in this case. The table shows all discipline and discharges issued during the stated timeframes, with short explanations for why they were issued. Neither party elicited any testimony about the document, so the available information is limited.

[59] GC Exh. 15, pp. 4, 9–11. As to Williams, the Respondent's table does not show that it issued him a verbal warning, the first step in progressive discipline, in the year prior to discharging him.

[60] GC Exh. 15, pp. 3, 7. The discipline table contains numerous additional entries where the Respondent issued corrective actions to

H. The Union's Information Request Regarding Hesler

In an August 8 email, Johnson sent Rutt a "request to bargain and for information."[61] Johnson stated he wanted to bargain over the last four terminations, which included Hesler and Lewis. As to her discharge, Johnson requested: a list of all operators who worked on the order for which the Respondent terminated Hesler; a list of all work orders containing defects and the action taken; and records of all employees logging in and out at the start and end of shifts, as well as for breaks, for the past year. With respect to Lewis' termination, Johnson asked for all write-ups for violations of the cell-phone policy for the past year.

On August 9, Rutt responded to Johnson's bargaining request. Rutt stated that the Respondent was confused by the request, because the company already has "met with and bargained with the union to impasse" involving the individuals whose discipline was discretionary. Rutt cited to the Board's decision in *Total Security Management Illinois 1*, 364 NLRB No. 106 (2016). Rutt went on to describe the parties' meetings concerning the last four terminated employees. For Hesler, Rutt stated the Respondent met with the Union three times before moving forward with Hesler's discharge. Rutt also stated: "The Company informed the union that two other employees had received corrective action for similar issues explaining CA's were provided based on neither of those employees having any disciplinary actions within the past 12 months." Rutt concluded the letter by stating he was gathering the requested information and would forward it to Johnson by the end of the next week.

On August 10, Johnson responded via letter.[62] He told Rutt the Union did not believe the Respondent met its *Total Security* bargaining obligations. Johnson stated that, although the Respondent provided notice to the Union prior to terminating the employees, the Union requested information for three out of the four employees. Johnson did not identify the employees to whom he was referring. Johnson went on to say the Respondent had responded to some, but not all, of the requests, again without identifying the specific requests to which he was referring. Johnson also denied the parties had ever bargained, let alone reached impasse, on any of the discharges. Johnson then asserted the Respondent had a continuing obligation to bargain over the discharges, even after imposing them. Johnson requested dates for bargaining, after the date that the Respondent provided the information requested by the Union.

Rutt responded via an undated letter. He asserted that Johnson's description of the Respondent's failure to bargain or respond to information requests did not match what Rutt remembered. He also stated he could not respond to the information requests, because Johnson's description of them was too vague. Rutt asked Johnson to provide specifics regarding the date the requests were made, the method of the request, and what information was requested. As to bargaining, Rutt asked if the Union was contending the Respondent did not meet with it to discuss the terminations. If not, Rutt asked for an explanation as to what additional information the Union asked to discuss which the Respondent had not addressed. Johnson did not respond to this letter.

On September 5 and 20, Rutt provided Johnson with a partial response to the Union's August 8 information request. However, the Respondent never furnished the Union with a list of all operators who worked on the order for which it terminated Hesler; a list of all work orders containing defects and the action taken; or all write-ups for violations of the cell-phone policy for the past year. The Respondent did provide records of employees logging in and out at the start and end of shifts, as well as for breaks. But the information provided was not for all departments and did not cover the full year the Union requested.[63]

Finally, on October 20, Rutt advised Cooprider and Dunham that their January 2017 disciplines for harassing other employees were being rescinded, because they were not justified. Rutt did this the day after Augustiniak's employment with the Respondent ended and shortly before Rutt himself left the Respondent's employ.[64]

LEGAL ANALYSIS

A. Did the Respondent Engage in Unlawful Surveillance of Nichols? (Complaint Paragraph 6(b))

The General Counsel's complaint alleges the Respondent engaged in unlawful surveillance of employees' union and protected concerted activity, when Augustiniak instructed McMeins in June 2017 to work the overnight shift and observe the activities of a suspected union supporter (Nichols).

Instructing a supervisor to engage in surveillance of employees' protected activity violates Section 8(a)(1). *Teksid Aluminum Foundry, Inc.*, 311 NLRB 711, 711 fn. 2 (1993) (instructing supervisors to keep their "eyes and ears open" because employer would not allow a union was unlawful). During the June 23 supervisory meeting, Augustiniak told McMeins to work the night shift and make sure Nichols, the "union billboard," did not visit other employees outside of her work area and discuss the Union with them. He also instructed McMeins to report back to him the next morning, if she did so. No question exists that Augustiniak's instructions to McMeins were unlawful. The Respondent argues that McMeins was assigned to the night shift, solely because another supervisor was absent. But McMeins' uncontroverted testimony establishes that the other supervisor's absence was not the sole, nor even the most important, reason that Augustiniak asked him to work the shift. Augustiniak was concerned about having no shift supervision on Nichols' first night, so he asked McMeins to fill in and monitor her union activities. The Respondent also argues no unlawful surveillance occurred, because Nichols was an open union supporter. I find no merit to the argument. The cases where the Board has found an employer's observation of employees' open union activity lawful involved a specific, not hypothetical, activity. The Respondent does not have carte blanche to monitor all of Nichols' union activities, just because she is an open union supporter. In any

employees subsequent to their being issued prior discipline, instead of the next step in the discipline process.

[61] GC Exh. 407. All of the communication between Johnson and Rutt as described in this section is contained in this exhibit.

[62] This letter appears to have been written by an attorney on Johnson's behalf.

[63] GC Exhs. 408–409; Tr. 1628–1629.

[64] Tr. 1068–1074, 1095–1096; GC Exh. 120.

event, an employer may not do something "out of the ordinary" to observe open union activity, because it gives employees the impression the employer is engaging in surveillance of protected conduct. *Sprain Brook Manor Nursing Home*, 351 NLRB 1190, 1191 (2007). Augustiniak did something out of the ordinary when he instructed McMeins to work the night shift, which McMeins had never done. Thus, Augustiniak's instruction to McMeins to engage in surveillance of Nichols' protected activities violates Section 8(a)(1).

B. Did the Respondent's Discharge of Hesler Violate Section 8(a)(3)? (Complaint Paragraphs 8(d) and 9)

The General Counsel's complaint alleges the Respondent violated Section 8(a)(3) by discharging Hesler, due to her union and protected concerted activity.

In determining whether an employee's discharge is unlawful, the Board applies the mixed motive analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must demonstrate by a preponderance of the evidence that the employee's protected conduct was a motivating factor behind the employer's adverse action. The General Counsel satisfies the initial burden by showing (1) the employee's protected activity; (2) the employer's knowledge of that activity; and (3) the employer's animus. *Alternative Energy Applications Inc.*, 361 NLRB 1203, 1205 (2014). A discriminatory motive may be established by: (1) statements and actions showing an employer's general and specific animus; (2) the presence of other unfair labor practices; (3) the disparate treatment of the discriminates; (4) departure from past practice; and (5) evidence that an employer's proffered explanation for the adverse action is a pretext, including advancing a false reason. *National Dance Institute–New Mexico, Inc.*, 364 NLRB No. 35, slip op. at 10 (2016).

To begin, the record evidence establishes, and the Respondent does not contest, that Hesler was an active union supporter and engaged in union activity. Before the election in May 2016, Hesler voiced her support for the Union in a captive audience meeting and directly to Augustiniak. After the Union was certified, Hesler served as a steward from July 2016 until her termination. In that role, employees brought their workplace complaints to her and, in turn, she discussed them with management. The Respondent was aware of all of this activity. Therefore, the General Counsel has established the first two elements of the initial *Wright Line* burden.[65]

The evidence likewise establishes the Respondent's animus. This discussion must begin with Augustiniak. From the moment he learned of the Union's petition filing in April 2016, Augustiniak engrossed himself in the task of determining which employees supported the Union and the content of discussions they were having about the Union. Even after the Union won the election, Augustiniak continued his efforts. In his daily supervisory meetings, Augustiniak asked his managers for details on discussions about the Union on the shop floor, including specifically about negotiations. They reviewed union fliers as well. At one point, Augustiniak told them the Respondent would present a proposal to the Union that would result in a wage decrease for employees, to show them the "negative value" of having chosen to be represented by the Union. He also advised them that a decertification effort was in progress and conversed with the employee who ultimately filed a decertification petition. He engaged in unlawful surveillance of Nichols' union activity, by ordering McMeins to work off shift and observe Nichols to insure she did not leave her workstation to discuss the Union with other employees. He also was keeping tabs on the Union's Facebook page. Finally, when McMeins told Augustiniak of the recommendation he got from the Oklahoma Bemis plant manager to follow the union contract whether it benefitted him or not, Augustiniak responded that it was "not the direction he was interested in taking."

The evidence also establishes the Respondent's specific animus towards Hesler's protected conduct. At the June 2017 meeting to discuss the potential discipline of Hesler, McMeins told Augustiniak he did not think discipline was warranted and explained the specific reasons why he came to that conclusion. Augustiniak responded by asking him why he was protecting Hesler, to which McMeins answered he was just looking at facts. Augustiniak then told him "protecting Linda Hesler could

[65] The General Counsel, in conclusory fashion without any citation to case law, argues that Hesler engaged in protected concerted activity, by raising complaints about working conditions with management in various meetings the Respondent had with employees. At a meeting in April 2016, Hesler objected to the Respondent's reimbursement for safety shoes and its scheduling of employee vacations. In December 2016, Hesler told supervisors at a meeting that new hires were being treated poorly in the extrusion department. At a June 15 meeting, Hesler complained that the Respondent was holding the finishing department to higher production standards than the extrusion department. She also requested a different day off for all employees for the July 4th holiday and asked if the Respondent would fund an upcoming community safety day. No employees joined in Hesler's complaints when she made them at the meetings. Furthermore, Hesler's limited testimony about each of these meetings fails to establish she was bringing a group complaint to management or was attempting to induce group action. Thus, although her complaints in the two meetings concerned terms and conditions of employment, her conduct was not concerted. *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 7 (2019).

The General Counsel also contends Hesler engaged in protected concerted activity by discussing complaints about working conditions with her coworkers. In November 2016, Hesler and other employees discussed Schoonover being a "ballbuster" and issuing discipline to a coworker. In late December 2016, Hesler and other employees discussed having to work overtime, due to other employees' restricted work schedules. Hesler told one employee he should get a doctor's note, if he wanted a restricted schedule. Again, these discussions were protected, but not concerted. On neither occasion did employees discuss bringing their complaints to upper management or taking any other form of group action addressing their complaints. Subsequently, they never did so.

Finally, I also reject the General Counsel's contention that Hesler's July 3 post to the Union's Facebook page constituted union activity. Hesler wrote "It's a sad day when you have to get a note from your doctor to use the restroom." The mere act of posting a comment on a union's Facebook page, as opposed to a personal page, does not transform the text from personal gripe to protected union activity.

jeopardize (your) standing at Centerville." Thus, Augustiniak threatened McMeins with discharge for defending Hesler. Given the extensive hostility Augustiniak displayed towards the Union prior to then, the reasonable inference is that Augustiniak made the threat, because McMeins was protecting a strong union supporter. The statement otherwise would be illogical. The purpose of the meeting was to discuss whether Hesler should be disciplined. The fact that McMeins did not agree with Augustiniak on that question, standing alone, would not warrant threatening him with job loss. Then at the July 2017 meeting to discuss Hesler's possible discharge, Augustiniak again rejected McMeins' calls to determine an objective measure, the defect rate, to evaluate Hesler's job performance, instead telling him that Hesler had a "bad attitude." In this context and given his overall union animus, Augustiniak's use of this phrase was a veiled reference to Hesler's union activity. *Climatrol, Inc.*, 329 NLRB 946, 946 fn. 4 (1999) and cases cited therein. Augustiniak's continual resistance to evaluating Hesler's job performance using objective measures suggests her job performance deficiencies were not the reason for her discharge. At the time he was doing so, Augustiniak already was aware of an ongoing decertification effort and the Union's certification year had expired. Augustiniak was looking to seize upon a seemingly valid reason to discharge Hesler for her union support.

In addition, both Augustiniak and Schoonover took repeated steps to ensure Hesler and other union supporters did not convince other employees, in particular new hires, to support the Union. Prior to the election, it was common practice for employees to leave their running machines and converse with coworkers, without any repercussions from the Respondent. From January 1, 2015, to the May 6, 2016 election date, no employee was disciplined for doing so. However, things changed once the Union came in. Hesler's November 15, 2016 verbal warning[66] and her June 30, 2017 final warning both were based, in part, on Hesler's visits to and discussions with other employees. On the surface, requiring operators to remain at their running machines to minimize bag defects is a perfectly reasonable job expectation. But keeping union supporters at their machines so they could not drum up additional support for the Union is an entirely different matter. Augustiniak instructed McMeins to engage in surveillance of Nichols, so he could prevent her from leaving her area and talking to other employees about supporting the Union. If that was his reason for keeping Nichols at her machine, it is proper to infer that Augustiniak also wanted Hesler at her machine for the same reason. Moreover, in May 2017, Augustiniak gave McMeins and Allgood a specific instruction that Hesler's coworker, Mae, could not train new employees, because she was a strong union supporter. As of that month, Hesler too no longer could train employees, even though she had 20+ years of experience, was in the advanced machine operator position, was one of only two operators who could run the difficult Machine 75, and previously had trained employees. Again, the reasonable inference is that, like Mae, Hesler was not allowed to do so, because she was a strong union supporter. Augustiniak's actions suggest he was being mindful of the "very close vote" in the election.

The striking increase in the Respondent's issuance of discipline following the Union's election win further supports a finding of animus. *Hedaya Brothers, Inc.*, 277 NLRB 942, 945–946 (1985). In roughly comparable time periods, the Respondent went from 12 to 51 verbal warnings; two to 20 written warnings; one to nine final warnings; and zero to four discharges. The number of nondisciplinary corrective actions it issued declined from 175 to 91.

Citing to *Tschiggfrie Props., Ltd. v. NLRB*, 896 F.3d 880, 886 (8th Cir. 2018), the Respondent argues that the General Counsel, to meet the initial *Wright Line* burden, must establish a nexus between the Respondent's animus and Hesler's discharge. The Respondent specifically contends that Rutt was the decision maker for Hesler's discharge and had no animus towards her protected conduct. The argument fails for both factual and legal reasons. Factually, Augustiniak was the plant manager, the highest-level position at the plant, while Rutt was a human resources manager. At the meeting where Augustiniak and McMeins discussed Hesler's issue with Machine 75, Augustiniak, not Rutt, told McMeins he wanted to proceed with Hesler's discharge. The Respondent does not cite to any record evidence, because none exists, supporting the notion that Rutt made the decision to terminate Hesler on his own or that he had such authority in his position. Legally, the Respondent misstates Board law. Proving that an employee's protected activity was a motivating factor in the employer's action does *not* require the General Counsel to make some additional showing of particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional, undefined "nexus" between the employee's protected activity and the adverse action. See, e.g., *East End Bus Lines, Inc.*, 366 NLRB No. 180, slip op. at 1 fn. 7 (2018); *Libertyville Toyota*, 360 NLRB 1298, 1301 fn. 10 (2014), enfd. 801 F.3d 767 (7th Cir. 2015). Even if it did, the record evidence demonstrates the Respondent's specific animus towards Hesler's protected activity, as described above, and would establish such a nexus. In any event, the Eighth Circuit's decision in *Tschiggfrie Props.* is not binding precedent on the Board. *Western Cab Co*., 365 NLRB No. 78, slip op. at 1 fn. 4 (2017).

Finally, I find Augustiniak's testimony concerning how and why the Respondent discharged Hesler to be totally unreliable and indicative of pretext. Augustiniak attempted to cast his role as one of approving Schoonover's decision, brought to him by

[66] The Respondent argues it is improper for me to consider its disciplines of Hesler outside the 10(b) period, including the November 2016 verbal warning, as evidence of animus. The Union filed its original charge alleging the company had been "discriminating against and terminating" Hesler due to her protected conduct on September 11, 2017. (GC Exh. 1(q).) Thus, the November 2016 verbal warning occurred more than six months before the filing of the charge. Nonetheless, it is well established that events occurring outside the 10(b) period can be used as background evidence of an employer's animus. *CSC Holdings, LLC*, 365 NLRB No. 68, slip op. at 4 (2017). Moreover, conduct that exhibits animus but that is not independently alleged or found to violate the Act nevertheless may be used to shed light on the motive of other conduct that is alleged to be unlawful. *Brinks, Inc.*, 360 NLRB 1206, 1206 fn. 3 (2014). Accordingly, it is proper for me to rely upon the November 2016 warning as evidence of animus.

Rutt, to discharge Hesler. But McMeins' credited testimony shows Augustiniak was not a passive observer in the decision-making process. Moreover, Augustiniak did not even testify as to why Hesler was discharged. He also did not describe what he, Rutt, and McMeins said to one another when discussing Hesler's discharge. Instead, when asked point blank during his direct examination what Rutt told him, ostensibly in seeking his approval, about Hesler's termination, Augustiniak only response was:

> I think our conversations were that this is in line with what we have been doing, you know, followed the process. The process was approved as—as it was followed. It was progressive discipline process throughout the – the stages of that process. Everything was followed, documented.

He also gave a nonsensical and nonspecific answer as to why McMeins, as the department manager, could not overrule Schoonover's recommendation to discharge Hesler, then contradicted himself later by saying a supervisor's recommended discipline could not proceed without department manager approval. Augustiniak could not explain with clarity what criteria the Respondent even used to determine when discipline was warranted for defective bags. He first denied that McMeins spoke to him about the need for a defect rate, then said he could not recall if McMeins had asked him about it. To say Augustiniak's testimony in this regard was unconvincing is a significant understatement.[67]

For all these reasons, I conclude the General Counsel also has met the burden of showing the Respondent's animus.

Because the General Counsel has met his initial *Wright Line* burden, the burden shifts to the Respondent to prove that it would have discharged Hesler, even in the absence of her protected activity. See, e.g., *Mesker Door,* 357 NLRB 591, 592 (2011); *Donaldson Bros. Ready Mix, Inc.,* 341 NLRB 958, 961 (2004). The Respondent cannot meet its burden merely by showing that it had a legitimate reason for discharging Hesler; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.,* 357 NLRB 1084, 1086 (2011); *Roure Bertrand Dupont, Inc.,* 271 NLRB 443, 443 (1984). If the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon–the Respondent fails by definition to show that it would have taken the same action for those reasons, and its *Wright Line* defense necessarily fails. *Libertyville Toyota*, supra at 1301; *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

I have concluded that the Respondent's reasons for discharging Hesler were a pretext, because her job performance issues were seized upon by Augustiniak to discharge her and rid the Respondent of a strong union supporter. Thus, the Respondent defense fails. However, even if pretext was not established, the outcome would be the same. The Respondent argues it would have discharged Hesler irrespective of her protected activity, because of repeated issues with production quality.[68] I agree that the record evidence establishes Hesler had multiple quality issues prior to her discharge. She produced 1,575 defective bags on November 16, 2016; 43 defective bags on June 30, 2017; and 180 defective bags on July 21, 2017. By and large, Hesler admitted to being responsible for the defective bags. Moreover, before discharging Hesler, the Respondent followed its established progressive discipline policy, issuing her a verbal warning, written warning and final warning within a 1-year period before terminating her. Considering this evidence, the Respondent had a legitimate business reason for discharging Hesler.

Nonetheless, that alone does not render Hesler's discharge lawful. The Respondent did not produce sufficient evidence, indeed any evidence, that it previously discharged employees pursuant to its progressive discipline policy in the same manner it discharged Hesler. The Respondent's own summary of its disciplinary actions for 2015–2017, entered into evidence by the General Counsel, shows that, prior to Hesler's discharge, it did not strictly adhere to the progressive discipline steps numerous times, either repeating steps or not discharging employees who were eligible under the policy. The Respondent did not explain the criteria it used, if any, for determining when it would issue a corrective action to an employee instead of actual discipline; when it would repeat or skip a step-in progressive discipline for an employee; and why it ultimately discharged the four other employees it did in addition to Hesler. In the absence of all this information, it is impossible to determine if the Respondent would have discharged Hesler, even absent her union activity. Moreover, two other operators, Egbert and Glosser, ran Machine 75 on the same order leading to the Respondent's discharge of Hesler. Both also produced defective bags. But the Respondent did not discharge, or even discipline, the two employees. Although Rutt contemporaneously claimed to the union representatives that the two received corrective actions because of a lack of prior discipline, the Respondent's summary does not show any corrective actions issued to the two employees in 2017. In addition, Egbert received a verbal warning on July 26, 2016, less than a year prior to the July 12, 2017 defective bag issue. Thus, the next step in the progressive discipline policy for her was written warning, not corrective action.

As to its shifting burden, the Respondent argues that the General Counsel did not demonstrate any employee on the same or similar disciplinary track as Hesler was not terminated. Of course, the burden at this juncture is on the Respondent to show the inverse, that it previously discharged employees in the same manner it terminated Hesler. In any event, the limited evidence in the record establishes that the Respondent did not always discharge similarly-situated employees. The Respondent also stipulated to the fact that it disciplined some employees for quality issues resulting in customer complaints, but not others. To explain this, the Respondent claims that any inconsistencies in its discipline of employees for quality issues were due to it only disciplining employees when the root cause of the issue was known. The Respondent cites to one paragraph of Augustiniak's testimony, as well as confusing and unclear testimony from Hesler about a different alleged quality issue for which the Respondent did not discipline her. I find that testimony insufficient to

[67] Tr. 2060–2062, 2076–2080, 2084, 2107–2108.

[68] Although the Respondent contends it discharged Hesler solely due to "quality" issues, its November 15, 2016 verbal warning to her contains no such issues. Rather, it states Hesler was disciplined for leaving her shift early, leaving her machine to converse with other employees, and gossiping about her supervisor and another employee.

establish the Respondent had a practice of not disciplining employees, if it did not know the root cause of a quality issue.[69]

I conclude the Respondent's discharge of Hesler violates Section 8(a)(3).[70]

C. Did the Respondent Refuse to Furnish Relevant Information to the Union? (Complaint Paragraph 17)

The General Counsel's complaint alleges that the Respondent violated Section 8(a)(5), by refusing to furnish the Union with relevant information requested on August 8.

In his written request, Johnson asked the Respondent to provide the following items: (1) a list of all operators who worked on the order resulting in Hesler's discharge; (2) a list of work orders with defects and the action taken; (3) records of all employees logging in and out at the start and end of shifts, as well as for breaks, for one year; and (4) all write ups for violations of the Respondent's cell-phone policy for one year. The first three items related to Hesler's discharge, while the fourth related to Lewis' discharge. The Respondent never provided items (1), (2), and (4). Regarding item (3), the Respondent provided a partial response, but not the logs for all departments or for the entire time period requested.

An employer has a statutory obligation to provide to a union that represents its employees, on request, information that is relevant and necessary to the union's performance of its duties as the exclusive collective-bargaining representative. *Endo Painting Service*, 360 NLRB 485, 485 (2014), citing to *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967) and *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956). Information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as the bargaining representative. *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011). All of the Union's requests sought information on the Respondent's treatment of other employees who engaged in the conduct resulting in the discharges of Hesler and Lewis. The requested information would enable the Union to evaluate possible disparate treatment of Hesler and Lewis. Requests for prior discipline of employees are presumptively relevant. *Grand Rapids Press*, 331 NLRB 296, 299 (2000). In addition, information that would allow the Union to investigate possible disparate treatment is relevant. *Postal Service*, 307 NLRB 1105, 1109–1110 (1992). Thus, the Respondent was obligated to furnish the requested information to the Union.[71]

The Respondent argues that Rutt asked the Union for clarification of its information request, but Johnson never responded. However, the Respondent's confusion related to the Union's claim that the company had not fully responded to information requests allegedly made prior to, not after, the discharges of the four employees. In Johnson's August 10 letter to Rutt, he stated "…the Union requested information in at least three out of the four cases. In some instances, Bemis replied to the Union in response to its information request and in some instances it did not. Bemis then terminated all four employees." Rutt responded by asking for the specifics of those information requests.[72] None of this dialogue had anything to do with the Union's August 8 written requests for information. No ambiguity exists in those requests and Rutt never asked for any clarification of them. Indeed, Rutt's initial response to the August 8 requests was "I will be gathering the requested information and forward to you by the end of next week." Rutt's confusion was over the Union's subsequent contention that the Respondent discharged Hesler, Lewis, and two other employees, before responding to information requests made prior to the discharges. But that confusion did not eradicate Rutt's obligation to provide the information requested by Johnson in writing on August 8.

The Respondent's refusal to provide all of the information requested by the Union violates Section 8(a)(5).

D. Did the Respondent's Discharge of McMeins Violate Section 8(a)(1)? (Complaint Paragraphs 6(c) and 6(d))

The General Counsel's complaint alleges that the Respondent discharged McMeins for refusing to commit unfair labor practices, in violation of Section 8(a)(1). Specifically, the General Counsel contends that McMeins was terminated because he refused to support the pretextual discipline and discharge of Hesler.

Although supervisors generally are excluded from coverage under the Act, an employer's discharge of a supervisor for refusing to commit an unfair labor practice is unlawful. *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402 (1982). The impact of such a discharge on employees' Section 7 rights, coupled with the need to ensure that even statutorily excluded individuals may not be coerced into violating the law, compels that supervisors be protected despite the general statutory exclusion. Id. at 404.

McMeins spoke with Augustiniak prior to the Respondent disciplining Hesler on June 30 and discharging her on July 28. At the first meeting, McMeins said he did not think the proposed discipline of Hesler was warranted. He specifically objected to reliance on Hesler taking excessive bathroom breaks and not logging in and out of her machine properly. When Augustiniak asked him why he was protecting Hesler, McMeins denied it and said he was just looking at the facts. During the discussion, neither Augustiniak nor McMeins mentioned Hesler's union activity. At the end of the meeting, Augustiniak overruled McMeins

[69] Tr. 981–982, 2080, 2319.

[70] Having found that the Respondent's discharge of Hesler violates Section 8(a)(3), and given the associated make-whole remedy, it is unnecessary, and I therefore decline, to reach the General Counsel's allegation that the Respondent violated Sec. 8(a)(5) by failing to bargain with the Union over Hesler's discharge. (Complaint paragraphs 14(e) and 15.) *Napleton Cadillac of Libertyville*, 367 NLRB No. 6, slip op. at 1 fn. 2 (2018).

[71] My conclusion would remain the same, irrespective of whether the Respondent had a continuing obligation to bargain over the discharges after implementation, pursuant to *Total Security Management Illinois 1*, 364 NLRB No. 106 (2016). As the employees' bargaining representative, the Union has a continuing interest in knowing whether the Respondent engaged in disparate treatment. Moreover, at the time of Hesler's discharge, the Union and the Respondent still were negotiating a discipline provision for their initial contract and disparate treatment information was relevant to the Union's bargaining function in that regard because, as discussed below, the Respondent did not want to include a just cause requirement for discipline in the contract.

[72] GC Exh. 407, pp. 5, 7, 9; Tr. 1683–1684.

and decided Hesler should be given the final warning. Following the meeting, McMeins told Rutt he though Schoonover was targeting Hesler, but did not explain why he thought she was doing so. Nonetheless, McMeins issued the discipline to Hesler that same day. He told Hesler he felt she was being singled out, but again did not say why. McMeins also said he did not agree with the entire discipline but had to stand by it, implying his superior Augustiniak made the decision to issue it. At the July 13 meeting to discuss Hesler's proposed termination, McMeins initially told Augustiniak he could not determine the defect rate for her work on the July 12 order and thus could not conclude that discipline was warranted. Augustiniak disagreed that determining the defect rate was necessary, again accused McMeins of protecting Hesler, and said he wanted to proceed with Hesler's discharge. When he asked McMeins if he could agree to that decision, McMeins initially said no. Then Augustiniak asked whether McMeins could agree to it, if Hesler had a history of poor performance and walked away from her machine. McMeins said yes. Again, neither Augustiniak nor McMeins discussed Hesler's union activity. Eight days following the second discussion, the Respondent discharged McMeins, allegedly for his lack of communication and leadership style. At that point, the Respondent had not yet discharged Hesler.

In evaluating the application of *Parker-Robb* to these circumstances, the Board's decision in *Pontiac Osteopathic Hospital*, 284 NLRB 442 (1987), is instructive. In that case, two employees engaged in protected concerted activity, when they wrote a fake newsletter with satirical articles complaining about the employer's relationship with its employees and criticizing a supervisor. The nursing director showed a copy of the newsletter to a supervisor of one of the employees, who recognized the employee's handwriting. The nursing director decided to discharge the employee. The employee's supervisor was present when the nursing director informed the employee she was being discharged. After the discharge, the supervisor told the nursing director that she did not think the incident warranted discipline. The nursing director responded that the supervisor had to support all administrative decisions. Subsequently, the employer's executive director told the supervisor not to openly disagree with administrative decisions. The supervisor responded to him that, while she disagreed with the decision to discharge the employee, she had not done so openly. Nonetheless, the employer fired the supervisor. Although it found the employee's discharge violated Section 8(a)(1), the Board held that the supervisor's discharge was not unlawful. The Board drew a distinction between the discharge of a supervisor for refusing to commit an unfair labor practice and for failure to support management action amounting to an unfair labor practice. The Board explained:

> When an employer asks a supervisor to commit an unfair labor practice, the supervisor is forced to choose between violating the law or disobeying the employer's request–a choice that could lead to discipline or discharge. Consequently, in such situations, an employer is able to pressure a supervisor into violating the law on its behalf. On the other hand, when a supervisor, acting on his or her own initiative, chooses to express disapproval of a management policy, the supervisor is not coerced at all (i.e., he or she has not been forced to choose between violating the law or risking the consequences of the employer's wrath). Admittedly, the discharge in either situation may have a secondary effect on the employees' exercise of their Section 7 rights, but there is no need to protect the supervisor from coercion when the supervisor is acting on his or her own initiative.

The facts in *Pontiac Osteopathic Hospital* are strikingly similar to this case. McMeins disagreed with Augustiniak's conclusions that Hesler should be disciplined and discharged. On his own initiative, McMeins told Augustiniak he did not think the June 30 discipline of Hesler was warranted. He said his position was based on the "facts." Despite not thinking the discipline was warranted, McMeins still issued it to Hesler. When discussing Hesler's potential discharge, McMeins, again on his own initiative, told Augustiniak he could not determine if discipline was warranted, without an objective measure of Hesler's performance. Nonetheless, McMeins eventually agreed that Hesler's discharge would be appropriate, if it was determined that she had a history of poor performance and again walked away from her machine. Moreover, McMeins did not refuse to commit an unfair labor practice. McMeins never said, either contemporaneously or at the hearing, that he disagreed with the discipline and discharge, because he thought Augustiniak was really basing them on Hesler's union activity. Cf. *Ampersand Publishing*, 357 NLRB 452, 496–497 (2011) (supervisor's discharge was unlawful, where supervisor refused to issue a reprimand because he felt it was retaliation for the employee's support of the union); *Greenwich Air Services*, 323 NLRB 1162, 1162 (1997) (discharge of supervisor violated the Act, where supervisor refused to participate in an employee's termination, after being told it was being done because the employer had proof the employee was actively involved in a union); *Trus Joist MacMillian*, 341 NLRB 369, 389–390 (2004) (where supervisor refused to give employee a failing rating on an appraisal and said the refusal was due to his belief the proposed rating was motivated by a desire to retaliate against the employee for his union activity, subsequent discharge of the supervisor was unlawful).

McMeins deserved a better fate here. He defended an employee he supervised from what he viewed as unwarranted discipline and called for her to be evaluated based upon objective factors. But the record evidence does not establish that he thought Augustiniak's treatment of Hesler was motivated by Hesler's union activity. Thus, his conduct falls into the category of failure to support management action amounting to an unfair labor practice.[73] The *Parker-Robb* exception does not apply and the Respondent's discharge of McMeins was lawful.[74]

[73] The General Counsel's reliance on *FlorStar Sales, Inc.* is misplaced, as no exceptions were filed in that case to the administrative law judge's unfair labor practice findings. 325 NLRB 1210, 1210 fn. 2 (1998). Thus, the decision is not binding precedent. Even if it was, the employer there instructed a manager to persuade employees against the union and he would be held responsible if he did not. The employer later discharged the supervisor for not being tough enough as a manager. The Respondent here gave no such instructions to McMeins.

[74] Were it necessary, I would conclude that Augustiniak's stated reason for discharging McMeins was a pretext and McMeins was discharged because he repeatedly refused to support Augustiniak's desire to discipline and discharge Hesler. The sequence of events from June 30 to

IV. THE RESPONDENT'S LAYOFFS AND JOB ELIMINATIONS IN JUNE AND JULY 2017

FINDINGS OF FACT

A. The Temporary Layoffs, Voluntary and Involuntary

In the first 5 months of 2017, the Respondent's sales volume was down 15 to 20 percent from its budgeted number. Corporate gave Augustiniak an edict to bring costs down which, coupled with the poor sales, required a workforce reduction. The Respondent decided to lay off employees both in manufacturing operations and in "indirect" positions not involved directly in the manufacturing process. Both bargaining unit and supervisory employees were affected.[75]

On June 15, Rutt told Johnson and Zaputil that the Respondent's business was running soft, so the Respondent was going to seek volunteers for layoffs and move other employees around. That same day, the Respondent began soliciting employees for voluntary layoffs. It also posted a memorandum from Augustiniak and Rutt announcing that it had offered the extrusion department employees voluntary layoffs in 2-week increments. The memo stated the voluntary layoffs were due to "decreased customer volume" in extrusion. The memo also said that the layoffs would be based on (plant) seniority, highest to lowest. The initial 2-week period ran from June 26 to July 10. Zaputil ended up being one of the employees who took a voluntary layoff. When she signed up for it, Zaputil received a "Voluntary Layoff Information Sheet" from the Respondent. In the frequently-asked-questions section of that document, one of the questions was "How will Mandatory layoff be determined?" The answer stated: "If we do not receive enough employees to sign up for Voluntary lay off, we will *require* individuals to be off." (Emphasis in the original.) The answer further stated mandatory layoffs would be based on seniority, while accounting for the Respondent's need to maintain enough operators to run its machines and meet customer demands.[76]

On June 28, Stephan, the Respondent's president, and Rutt determined that twelve more employees had to be laid off, including seven extruder operators and five treater operators. At some point thereafter, Rutt told Zaputil and gave her the names of five treater operators at the bottom of the seniority list. The Respondent then solicited volunteers for the additional layoffs, but only two treator operators volunteered. On July 7, the last workday in the first 2-week voluntary layoff period, Rutt spoke to Johnson and Zaputil. Rutt told the two that the Respondent now would implement involuntary layoffs of the remaining three treator operators at the bottom of the seniority list: Elizabeth Nichols, Jeff McClurg, and Brian Shives. Rutt said it would be for a short period of time, possibly 2 weeks. That same day, the Respondent notified Nichols and McClurg of their layoffs.[77]

Soon after it implemented these temporary layoffs, the Respondent had an uptick in business. As a result, on July 24, Rutt advised Johnson and Zaputil that the Respondent was recalling McClurg and Shives from their layoffs, but not Nichols. Because Nichols was an extrusion operator trainee at the time of the layoffs (although counted as one of the treater operator layoffs), Rutt said Nichols was not qualified to be recalled to that job classification. Johnson and Zaputil argued that Nichols should have been brought back as a treater operator. Rutt said he would look into it.[78]

On August 3, Rutt advised Johnson that the Respondent was bringing Nichols back and she should have been recalled after the initial 2-week involuntary layoff. Rutt stated that the Respondent wanted to reimburse Nichols for her missed time and shift differential for the 2 weeks she should not have remained on layoff. Johnson agreed to the proposal. At the time, the Union was unaware that Nichols had not been recalled. After Nichols returned, she met with Rutt, who told her he made a mistake by failing to recall her with the other two employees. Nichols asked Rutt about obtaining overtime pay for the same period. Ultimately, the Respondent paid her 2 days of overtime in addition to her regular pay.[79]

B. The Permanent Layoffs of Four Employees and Elimination of Two Job Classifications

On July 7, Rutt also advised Johnson and Zaputil that the Respondent was eliminating certain jobs and four employees would

July 21 makes clear that Augustiniak's discharges of McMeins and Hesler were linked. He discharged McMeins just 1 week after the meeting where he opposed Hesler's discharge and the day after Rutt informed the Union that the Respondent intended to discharge Hesler. Augustiniak himself told McMeins in the meeting to discuss Hesler's June 30 discipline that "protecting Linda Hesler could jeopardize your standing at Centerville," because of Hesler's union support. Augustiniak held true to his word shortly thereafter.

[75] Tr. 2066–2069.

[76] Tr. 239–247, 1589–1594; GC Exhs. 10, 11, 501. Where conflicts exist, I credit Johnson's testimony regarding the conversation with Rutt on June 15. Compared to Zaputil's testimony about the discussion, Johnson's recall was more detailed and his demeanor when testifying more assured.

[77] Tr. 167–171, 1233–1243, 1596–1599. In making the finding that Rutt first notified the Union of involuntary layoffs and the three employees who were being laid off on July 7, I credit Johnson's uncontroverted testimony. (Tr. 1596–1597.) The record evidence is far from clear as to the sequence of events regarding the involuntary layoffs. Rutt could not recall his discussions with Johnson and Zaputil about the layoffs, without the aid of having his memory refreshed by his prior affidavit. (Tr. 1233–1243.) The limited testimony Rutt did provide did not establish the date between June 28 and July 7 when he told Zaputil about the number of employees who were to be laid off and the names of the five treater operators. Rutt's testimony and bargaining notes suggest he discussed the "mandatory layoff" with Zaputil on July 5, but do not provide further details. Zaputil only could recall discussing voluntary layoffs with Rutt. (Tr. 247.)

[78] Tr. 357–362, 1244–1247, 1602–1604. The testimony likewise is confusing as to why the Respondent treated Nichols as a treater operator for purposes of the layoff, but then as an extrusion operator for her recall. It also is unclear as to the argument the Union was making as to why she should have been recalled. However, no question exists that the Union felt Nichols should have returned at the same time as the other two treater operators.

[79] Tr. 171–174, 1607; GC Exh. 406. At their meeting on this date, the Respondent agreed to the Union's proposal to extend the 2-week voluntary layoffs in extrusion to 4 weeks. They also agreed involuntary layoffs would occur, if not enough employees volunteered. This agreement occurred after the Respondent laid off McClurg, Nichols, and Shives. (Tr. 416–418; R. Exh. 1, p. 23953.)

be permanently laid off. Those employees were Coty Gearin, Tyler Lewis, Kent Morlan, and Chet Varner. Morlan was an ink controller and Lewis a maintenance laborer. Morlan had been employed at the plant since 1980 and performed the job duties of ink controller since 1990. The union representatives asked Rutt about moving the employees somewhere else in the plant, rather than laying them off. Rutt responded that there was a hiring freeze and they were not going to move anyone. Johnson asked that the permanent layoffs be done by seniority, not job classification. Rutt responded that the job eliminations were a corporate decision and the Respondent was going in a different direction. Johnson then asked Rutt to negotiate on how the job eliminations would play out. Rutt responded that he would discuss it with the people being let go. When Johnson again asked Rutt how the eliminations would be done, Rutt said he would get back to Johnson. This was the Respondent's first notification to the Union of the job eliminations.[80]

On that same July 7 date, the Respondent implemented the permanent layoffs of the four employees and eliminated the job classifications of ink controller and maintenance laborer. Morlan was advised he was being let go in a meeting with Augustiniak and Rutt. Augustiniak told Morlan that business was bad and the Respondent was not getting any orders. He said the Respondent had to make cutbacks and get rid of some positions, and Morlan's was one of them. During the meeting, Rutt gave Morlan a "Separation, Release and Waiver Agreement" (the "separation agreement") for Morlan's consideration. The separation agreement offered Morlan the opportunity to be covered by the Respondent's "Supplemental Unemployment Benefit Plan" (the "SUB plan"), governed by the federal Employee Retirement Income Security Act (ERISA). The SUB plan provides payments to involuntarily terminated employees to bridge the gap between their unemployment compensation and weekly base pay. The separation agreement specifically called for Morlan to receive 2 weeks of severance pay from the Respondent, then 8 weeks of payments from the SUB plan. In exchange, Morlan had to waive any and all claims arising out of his employment with the Respondent, including his permanent layoff. The other three employees who were permanently laid off with Morlan also received the proposed separation agreement. Employees in Centerville were covered by the SUB plan for an unspecified time period before the union election.[81]

On July 10, the Respondent issued a memorandum from Augustiniak and Rutt to all employees entitled "Cost Reduction Actions" announcing the layoffs. The memorandum stated the reductions will "reduce labor expenses" to "align our cost structure with the current volume." On that same date, Gearin, Lewis, and Varner signed separation agreements. Morlan never did.[82]

Approximately 1 month after the Respondent laid off Morlan, Rutt called him and offered him a job as an expediter in the finishing area. Morlan accepted the job, went in for one day, and then rescinded his acceptance.[83]

Morlan's job function as the ink controller was "formulating new ink colors." When new customers requested colors for their bags, Morlan created an ink formula to match each color. Morlan used a digital color matching system, called "X-Rite," to develop the ink formulas. Morlan manually measured out batches of ink in different proportions in a small cup. Each time he added a color, Morlan logged the addition to the formula. After each addition, Morlan utilized an instrument which allowed X-rite to compare his manual sample to the requested color and determine if they matched. When the process was completed, he wrote down the entire ink formula and retained it in a three-ring binder. Morlan's coworker, Shawn Bradshaw, was an ink maker/ink blender in the ink room at the same time. Bradshaw also started working at the plant in 1980, but after Morlan did. Bradshaw's job function was to "blend ink to proper colors." He prepared ink for the daily production schedule, so that it would be ready for use by the press helper. To do so, Bradshaw would pick a job and determine what colors were needed on it. He went to Morlan's office and pulled the ink formulas. Bradshaw then manually made the needed colors, by dispensing different inks into a 5-gallon bucket with a mixer on it. Bradshaw also utilized the X-Rite system to insure a color match, before putting the completed gallons on a shelf for press helpers to pick up. Morlan and Bradshaw worked in two different areas, adjacent to one another.[84]

About a year prior to Morlan's permanent layoff, the Respondent bought a new system for ink dispensing called "Nova Flow." This system permitted ink formulas to be electronically stored and colors to be automatically made and dispensed via attached ink drums. When the new system arrived, the Respondent was not taking advantage of all the features the machine offered. Instead, the system was just being used as a pump to dispense ink. Even though all of the Respondent's 2,000 ink formulas had been entered into the system, the formulas did not include solvent as an ingredient, a necessary step to finalizing a color for print. Thus, the Respondent had Morlan redo the ink formulas in the system to account for the inclusion of a solvent. Once Morlan did so, Bradshaw utilized Nova Flow for his day-to-day ink making. Instead of getting Morlan's paper ink formula and manually making the ink, Bradshaw could call up the formula on Nova Flow and automatically dispense it into the gallons. Nova Flow also had an ink inventory tracking system. Prior to the machine's arrival, Morlan was responsible for tracking inventory and reordering ink when needed. Morlan no longer performed that work, once he finished upgrading Nova Flow with the proper ink formulas.[85]

As for the union sentiments of the two employees, Morlan tried to stay neutral. However, he perceived Bradshaw to be one of the most antiunion people in the plant. Morlan heard Bradshaw make comments and "sounds of disgust" in the break room when Bradshaw observed an employee wearing a prounion shirt. Prior to the union election, Bradshaw purchased hats with his

[80] Tr. 256–258, 370–372, 1240–1243, 1596–1599; GC Exh. 12, p. 3.
[81] Tr. 799–802, 1902–1909; GC Exhs. 35–38; R. Exh. 9.
[82] GC Exh. 13.
[83] Tr. 803–805.
[84] Tr. 795–799, 822–828.
[85] Tr. 795–799, 808–813, 822–828, 831–857; R. Exhs. 3, 15. With respect to the job duties of Morlan and Bradshaw, I credit Morlan's uncontradicted testimony. Neither Cozart, Morlan's manager, nor any other supervisor of Morlan testified. Bradshaw also did not testify.

own money saying "vote no," gave the hats to other employees, and wore his own "vote no" hat for 3 weeks prior to the election. He acted as the Respondent's observer at the election, wearing his "vote no" hat. In the fall of 2017 after Morlan's layoff, Bradshaw passed out fliers in the lunch room, allegedly detailing the wages and benefits Des Moines employees lost because of the Union. It also included his criticisms of the Union's conduct in negotiations and a call for employees to sign a petition to get rid of the Union.[86]

LEGAL ANALYSIS

A. Did the Respondent's Permanent Layoffs Violate Section 8(a)(5)? (Complaint Paragraphs 14(a), 14(c) and 14(d))

The General Counsel's complaint alleges the Respondent violated Section 8(a)(5) by: permanently laying off Gearin, Lewis, Morlan, and Varner on July 7, 2017; eliminating the ink controller and maintenance laborer job classifications; and bypassing the Union and dealing directly with the four employees by soliciting them to sign severance agreements in connection with their layoffs.[87]

The law is well settled that an employer violates Section 8(a)(5) when it unilaterally changes represented employees' wages, hours, and other terms and conditions of employment without providing their bargaining representative with prior notice and a meaningful opportunity to bargain over the changes. *Lincoln Lutheran of Racine*, 362 NLRB 1655, 1656 (2015), citing to *NLRB v. Katz*, 369 U.S. 736, 742–743 (1962). Where, as here, parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter. It encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole. *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995); *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991).

On July 7, Rutt notified Johnson and Zaputil that the Respondent was permanently laying off Gearin, Tyler Lewis, Morlan, and Varner. Johnson asked Rutt to negotiate over how the layoffs would be done, to which Rutt responded that he would discuss the matter with the people being let go. The Respondent laid off all four employees the same day. The decision to lay off unit employees is a change in terms and conditions of employment and a mandatory subject of bargaining. *Mercedes-Benz of Orlando*, 358 NLRB 1729, 1750 (2012), reaffd. 361 NLRB 1238 (2014); *Tri-Tech Services*, 340 NLRB 894, 894–895 (2003). Thus, absent extraordinary situations involving "compelling economic circumstances," an employer must provide notice to and bargain with the union representing its employees concerning both the layoff decision and the effects of that decision. *Pan American Grain Co.*, 351 NLRB 1412 (2007); *Lapeer Foundry & Machine, Inc.*, 289 NLRB 952, 954 (1988) (citations omitted). The Respondent did neither. Its notice to the Union of the layoffs was inadequate, because it occurred on the same day as the layoffs and provided no meaningful opportunity to bargain. See, e.g., *Tramont Mfg., LLC*, 365 NLRB No. 59, slip op. at 6–7 (2017); *Toma Metals, Inc.*, 342 NLRB 787, 787 fn. 4 (2004). Even had it been sufficient, the Respondent did not provide the Union with the opportunity to bargain, because Rutt outright refused to negotiate over the layoffs when Johnson requested he do so.

The Respondent argues that it had no bargaining obligation concerning the permanent layoffs, because they were part of an established past practice. In *Raytheon Network Centric Systems*, 365 NLRB No. 161, slip op. at 16 (2017), the Board held that an employer's past practice, irrespective of how it was developed, constitutes a term and condition of employment that permits the employer to take actions unilaterally, where the actions do not materially vary in kind or degree from what had been customary in the past. The burden of proof is on the party asserting the existence of a past practice. *Caterpillar, Inc*, 355 NLRB 521, 522 (2010), quoting *Sunoco, Inc.*, 349 NLRB 240, 244 (2007). To meet this burden, the party must show the prior action was similar in kind and degree and occurred with such regularity and frequency that employees could reasonably expect the practice to continue or recur on a regular and consistent basis. Ibid.; see also *Consolidated Communication Holding, Inc.*, 366 NLRB No. 152, slip op. at 4 (2018). The Respondent has fallen well short of establishing it had a past practice of permanently laying off employees. The only record evidence the Respondent relies upon is one page of testimony given by press operator Bryan Newman, a witness called by the General Counsel.[88] Newman stated that he moved into his press helper job in 2013, because the plant manager determined he no longer needed Newman's services in the department in which he was working. The plant manager gave Newman the option of going to another department or "out the door." This bare testimony of one employee does not establish a past practice. It does not even involve the permanent layoff of an employee. The Respondent offered no evidence of any prior, permanent layoffs.

Accordingly, the Respondent's permanent layoffs of Gearin, Tyler Lewis, Morlan, and Varner violated Section 8(a)(5).

As to the Respondent's elimination of the bargaining unit positions of ink controller and maintenance laborer, the General Counsel pursues a unilateral change theory to establish this violation. Following a union's certification and before an initial contract is reached, an employer must provide the union with notice and the opportunity to bargain over the elimination of a unit job classification. See, e.g., *FiveCap, Inc.*, 332 NLRB 943, 943 fn. 2, 950–951, 955 (2000); *Plymouth Locomotive Works*, 261 NLRB 595, 602–603 (1982). No dispute exists that the Respondent eliminated the ink controller and maintenance laborer positions. Aside from the non-meritorious *Raytheon* argument described above, the Respondent offers no defense to this complaint allegation.[89] As a result, I also conclude the Respondent

[86] Tr. 249–253, 805–808; GC Exh. 502.

[87] The complaint does not allege the Respondent eliminated the job classifications occupied by Gearin and Varner, because employees remained in their job classifications following the layoffs.

[88] Tr. 770.

[89] In its brief, the Respondent states its decision to eliminate the positions was lawful, because it "goes to the heart of managerial control of an operation." The Respondent did not elaborate. If the Respondent

violated Section 8(a)(5) by unilaterally eliminating the two positions, without providing the Union with notice and an opportunity to bargain.

Finally, regarding the direct dealing allegation, the General Counsel contends the Respondent unlawfully solicited the four employees to sign the severance agreements in connection with their permanent layoffs. An employer engages in direct dealing when: (1) the employer communicates directly with union-represented employees; (2) the discussion was to establish or change wages, hours, and terms and conditions of employment or to undercut the union's role in bargaining; and (3) the communication was made to the exclusion of the union. *El Paso Electric Co.*, 355 NLRB 544, 545 (2010) (citations omitted.

The record evidence establishes, and the Respondent does not contest, the first and third elements. As to the first, the Respondent offered the severance agreement to the four employees directly, resulting in three of the employees signing it. As to the third, the Union was not a part of the discussions between the Respondent and the employees concerning the severance agreement. In fact, Rutt told Johnson he would address the layoffs with the employees themselves, rather than bargain with the Union. He did not even advise Johnson and Zaputil that the Respondent was going to offer the severance agreements to the employees.

The Respondent's asserted defense goes to the second criterion. It contends that offering SUB plan benefits to separated employees was an established past practice. Thus, the Respondent contends, by offering the benefits to the four permanently laid off employees, the Respondent did not establish or change their terms and conditions of employment. Again, I find the record evidence insufficient to establish a past practice of offering SUB plan benefits, given Dees' limited and nonspecific testimony on the topic. Dees testified that the SUB plan is offered to employees who are involuntarily terminated, "typically" due to a plant closure or downsizing. She also stated the plan was in effect at the Centerville facility prior to the union election in May 2016, but did not specify for how long. From the Respondent's 2016 tax filing with the Internal Revenue Service, it appears the effective date of the plan was April 1, 2013. However, Dees did not confirm that, for the Centerville plant or otherwise. Dees also did not describe the total number of separated employees to whom the Respondent has offered these benefits since the plan's inception or the circumstances of the employees' departures.[90]

Even if the Respondent had a past practice of offering the SUB plan benefits, the complaint alleges the Respondent engaged in direct dealing by offering the separation agreement, not the SUB plan benefits. The record evidence similarly falls short of establishing a past practice in that regard. Dees testified only that, if an employee wanted the supplemental unemployment benefits after being terminated, the employee was required to "sign the separation agreement and waiver form that they're presented at the time of their termination." She did not state whether the Respondent has used the same separation agreement in the past, including whether it always included severance pay and continuation of benefits for 2 weeks prior to the SUB plan going into effect. On this record evidence, the Respondent has not established that its offering of the severance agreement to the four permanently laid off employees in July 2017 was similar in kind and degree and occurred with such regularity and frequency as to constitute a past practice. Absent that showing, the Respondent's offer of the severance agreement to the four employees was an attempt to establish terms and conditions of employment. Accordingly, all the criteria to demonstrate direct dealing have been established and the Respondent's offer violates Section 8(a)(5).

B. Did the Respondent's Temporary Layoffs Violate Section 8(a)(5)? (Complaint Paragraph 14(b)

The General Counsel's complaint also alleges the Respondent violated Section 8(a)(5) by temporarily laying off McClurg, Nichols, and Shives, and "others unknown to the General Counsel at this time" on June 26, 2017. As a preliminary matter, it is unclear from the allegation and the General Counsel's brief which layoffs the government is alleging were unlawful. The June 26 alleged date corresponds to the start of the first 2-week voluntary layoff of employees. But the Respondent implemented the temporary, involuntary layoffs of McClurg, Nichols, and Shives on July 7. The General Counsel's brief suggests that both the voluntary and involuntary layoffs are at issue. I will presume that to be the case.

As noted above, the layoff of unit employees is a mandatory subject of bargaining. Moreover, where, as here, a company effectuates a layoff due to a decline in business, the issues of whether those layoffs should be affected, whom to include in such layoffs, and what if any benefits should be given to laid off employees also are mandatory subjects of bargaining. *Ross Fence, Inc.*, 359 NLRB 225, 229 (2012), reaffd. 361 NLRB 1198 (2014), citing to *Dickerson-Chapman, Inc*., 313 NLRB 907, 942 (1994). An employer also is required to bargain over the effects of the layoffs, which mandates that the employer provide a union with notice of the layoffs before they occur. *Geiger Ready-Mix Co. of Kansas City*, 315 NLRB 1021, 1021 fn. 8 (1994), enfd. 87 F.3d 1363 (D.C. Cir. 1996). The recall of employees from a layoff likewise is a mandatory subject of bargaining. *Wilmington Fabricators, Inc.*, 332 NLRB 57, 65 (2000).

I conclude the Respondent failed to provide the Union with

intended to invoke *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), I find that decision inapplicable to this case. In *First National Maintenance*, the Supreme Court held that certain managerial decisions amounting to a change in the scope and direction of a business were core entrepreneurial decisions, which would require an employer to bargain only if the benefit for labor-management relations outweighed the burden placed on the conduct of the business. But here, the Respondent implemented the layoffs and job classification eliminations for economic reasons, meaning they were a mandatory subject of bargaining. The only possible application of *First National Maintenance* would be to Morlan's layoff, because the Respondent contends, in defense to the General Counsel's allegation that his layoff also violated Sec. 8(a)(3), that the ink controller position was eliminated as a result of a technological change. As discussed in detail below, I find that the introduction of the Nova Flow system did not render Morlan's job obsolete. Even if it had, the ability to automatically create ink from electronically stored formulas, rather than doing it manually, is not a change in the scope and direction of the Respondent's business. *Mi Pueblo Foods*, 360 NLRB 1097, 1098 (2014).

[90] Tr. 1902–1910; R. Exh. 9.

adequate notice and an opportunity to bargain over both the voluntary and involuntary layoffs. To begin, the Respondent decided it needed to lay off employees due to a decline in business. Because the decision was motivated by economic conditions, the layoffs and their effects were mandatory subjects of bargaining. On June 15, Rutt informed Johnson and Zaputil that the Respondent was going to voluntarily lay off some employees and transfer other employees around. The Respondent began soliciting for volunteers the same day. Rutt made no mention at that time of needing to implement involuntary layoffs, if not enough employees volunteered. On June 28, the Respondent made the decision to lay off 12 additional employees, including five treater operators, and again sought volunteers. When he informed Zaputil of that decision at some point thereafter, Rutt again made no mention of involuntary layoffs. The first time the Union received specific notice of the Respondent wanting to involuntarily lay off employees and the names of the three employees was on July 7, when Rutt told Johnson and Zaputil that information. The Respondent implemented the layoffs the same day. Rutt's conduct fairly can be described as merely informing the union of a course of action the Respondent would take, meaning the layoffs were presented as a fait accompli. *Viejas Casino & Resort*, 366 NLRB No. 113, slip op. at 8–9 (2018); *Ciba-Ceigy Pharmaceutical Division*, 264 NLRB 1013, 1017–1018 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983). Once the Respondent did so, the Union was relieved of any obligation to object. *Burrows Paper Corp.,* 332 NLRB 82, 83 (2000); *Intersystems Design Corp.*, 278 NLRB 759, 759–760 (1986). That conclusion is further solidified by the Respondent advising the Union of the voluntary and involuntary layoffs on the same days it began seeking volunteers or implemented the layoffs. The Respondent did not provide the Union with a meaningful opportunity to bargain.

The Respondent defends against this allegation by again invoking *Raytheon* and arguing that its conduct was in conformance with an existing past practice for temporary layoffs. The Respondent relies upon a letter from February 2, 2004, notifying Hesler that she accepted a voluntary layoff due to business conditions requiring a reduction in force.[91] That one employee once accepted a voluntary layoff some 14 years ago is not a past practice. The Respondent also relies upon the "Voluntary Lay Off Information Sheet" signed by Zaputil, which stated the Respondent would implement mandatory layoffs if not enough employees volunteered for them. It also stated the mandatory layoffs would be done by seniority, except where the Respondent determined it needed to retain a certain number of employees in each job classification to meet production. The notion that one employee receiving and signing this document establishes a past practice as to voluntary or involuntary layoffs is nonsensical.[92] Although Rutt and Zaputil testified that voluntary layoffs had been done numerous times and were the preferred method of addressing overstaffing, such generalized testimony does not establish a past practice. To show a past practice similar in kind and degree to the temporary layoffs, the Respondent had to establish it regularly laid off employees in response to business slowdowns; when it did so, it first offered voluntary layoffs to employees; and, if an insufficient number of employees volunteered, the Respondent then involuntarily laid off employees. The Respondent also had to demonstrate it used seniority to determine who would be laid off. The record evidence falls well short of doing so. See, e.g., *Eugene Iovine, Inc.*, 353 NLRB 400, 400 (2008), reaffd. 356 NLRB 1056 (2011) (past practice of layoffs was not established, where no showing was made of when, how frequently, or under what circumstances unilateral layoffs occurred); *Litton Microwave Cooking Products*, 300 NLRB 324, 413–414 (1990) (General Counsel failed to establish employer had past practice of permitting employees to volunteer for layoffs, where evidence consisted of only two voluntary layoffs in first three years the facility was open). Therefore, the Respondent has not demonstrated that its voluntary layoffs from June 26 to July 7 or its involuntary layoffs of McClurg, Nichols, and Shives on July 7 continued an existing term and condition of employment and maintained the status quo. The temporary layoffs violate Section 8(a)(5).

C. Did the Respondent's Layoff of Morlan or its Refusal to Recall Nichols Violate Section 8(a)(3)? (Complaint Paragraphs 8(b) and 8(c))

The General Counsel's complaint alleges that the Respondent's layoff of Morlan on July 7 also violated Section 8(a)(3). The theory advanced is that the Respondent chose Morlan for layoff and retained Bradshaw, even though Morlan had greater seniority, because Bradshaw was an antiunion employee. The complaint also alleges the Respondent's failure to recall Nichols from her temporary layoff on July 24 also violated Section 8(a)(3), because it was motivated by Nichols' union activity. The Respondent and General Counsel agree that these allegations must be evaluated under *Wright Line*.

The General Counsel's legal theory as to Morlan's discharge appears novel. Indeed, the General Counsel cites to no Board decision in which a violation has been found under similar circumstances. However, Section 8(a)(3) broadly prohibits discrimination "to encourage or discourage membership in any labor organization." An employer's decision to retain an employee facing layoff because the employee opposed a newly-certified union would discourage other employees' membership in and support of a union. Thus, I conclude the legal theory is viable. The question is how to apply *Wright Line* in these circumstances, because Morlan admittedly engaged in no union activity. The first two elements of the General Counsel's burden must focus on whether Bradshaw engaged in antiunion activity and whether the Respondent was aware of that activity. The third element would remain the same, requiring a showing the Respondent had animus towards the union or its employees' union activity. Then, under the burden shifting model, the Respondent has to demonstrate it would have retained the antiunion employee, even if the employee was not opposed to the union.

Applying that standard to Morlan's layoff, the General Counsel has met the required initial burden. Although the testimony

[91] R. Exh. 16.

[92] That the Respondent stated in the sheet given to employees who took a voluntary layoff that the company would involuntarily lay off employees if it did not get enough volunteers also does not constitute notice to the Union that it would do so.

concerning Bradshaw's activity was not extensive, it sufficiently demonstrates he engaged in antiunion activity of which the Respondent was aware. This included acting as the Respondent's observer at the election; wearing a "Vote No" hat that he printed himself and distributing the same hat to other employees; handing out flyers criticizing the Union's performance in bargaining in the lunch and break rooms; and making comments critical of other employees who wore union insignia. The Respondent's animus towards the Union has amply been demonstrated as discussed above, including by numerous unfair labor practices occurring close in time to Morlan's layoff.

Thus, the burden shifts to the Respondent to demonstrate it would have laid Morlan off, absent Bradshaw's antiunion activity. To do so, the Respondent contends Morlan was laid off because the Nova Flow system eliminated his job. I do not agree. The main duty of Morlan's job was to create ink formulas based on color requests from new customers. He manually added different inks to match a color request and used X-Rite to verify when he had done so. In contrast, prior to Nova Flow, Bradshaw's job was to blend ink to proper colors. Specifically, he dispensed ink manually from the drums into 5-gallon containers using the formulas created by Morlan, so the ink could be used in the actual bag manufacturing process. When it first purchased Nova Flow, the only function the Respondent utilized in the software was ink dispensing. After Morlan entered all his existing ink formulas into the system and included solvent, the colors were automatically blended. Thus, Nova Flow eliminated Bradshaw's, not Morlan's, job. Bradshaw was the one dispensing inks to blend them into proper colors for manufacturing bags. Nova Flow could do that automatically, because it dispensed the different portions of ink necessary to create a color from a formula entered into the system.

To support its contention that Morlan's job was eliminated by Nova Flow, the Respondent relies on this testimony[93] from Morlan:

> Q: As the formulas got entered into the Nova Flow system, and as the Company began to utilize the other additional functions with that system, you ended up with less and less to do, right?
> A: Not in particular. I mean, it's – it's – as far as – besides the technology of the Nova Flow, even going back to 1990, we do the same process: The formulation would be made, and it would be – back then it would be put into a rolodex, where they would mix by hand.
> Q: Right.
> A: Once you got it done, it was done.
> Q: Right. So you've gone from a rolodex with handwritten cards with formulas –
> A: Yeah.
> Q: – on them, okay, to a machine that literally, you know, a utility guy in another room can just tap the screen, and the ink will be dispensed? (Indicating.)
> A: I suppose so, yes.

This testimony confirms that the only change in Morlan's job from Nova Flow was how he stored the ink formulas he created—previously in writing and then electronically in Nova Flow. It also confirms that Nova Flow automated Bradshaw's ink making/dispensing. Even Augustiniak described Nova Flow as an "ink mixing machine" that would retain ink formulas and allow dispensing of ink with a push of a button. Nonetheless, Augustiniak contended the Nova Flow system rendered Morlan's job obsolete, even though he was not an ink dispenser.[94] I do not credit that testimony and find Nova Flow eliminated Bradshaw's job. As a result, the Respondent's asserted reason for laying off Morlan is a pretext, meaning it cannot sustain its *Wright Line* burden. The permanent layoff of Morlan likewise violates Section 8(a)(3).[95]

Moving on to the Respondent's initial failure to recall Nichols from her temporary layoff, I find no violation of the Act occurred. As described above, the General Counsel has met the initial *Wright Line* burden regarding Respondent's adverse actions against Nichols. However, the Respondent demonstrated that it would not have recalled Nichols from the temporary layoff, even absent her union activity. Johnson's credited testimony establishes that Rutt made a mistake when not recalling Nichols. Rutt had laid her off as a treater operator, but then mistakenly treated her as an extrusion operator for purposes of the recall. Rutt caught the mistake and advised Johnson of it at a time when the Union was unaware Nichols had not been recalled. The Respondent then fully reimbursed Nichols for the mistake, including agreeing to her request to include overtime pay when reimbursing her for lost wages. Because Rutt's action was a mistake, it would have occurred with or without Nichols' union activity.

V. THE RESPONDENT'S CHANGES TO WORK SCHEDULES AND SENIORITY PREFERENCES IN JANUARY 2018

FINDINGS OF FACT

The Respondent's downturn in business during the first half of 2017 was short lived. In September, the Respondent learned that it could be awarded a large contract from National Beef. On October 12, Rutt emailed Johnson prior to their scheduled weekly meeting to advise him of Rutt's desire to discuss "both near term and long term challenges" to the expected National Beef contract. Rutt identified "staffing and scheduling" as longer-term challenges, then stated specifically that the Respondent expected to "need to operate the entire facility 24/7 in order to meet the orders resulting" from the contract. Rutt further stated to Johnson that he would like to "begin discussions with [Johnson] over how and when we would move to 24/7, how we would structure shifts and the manner in which we would staff those shifts." At this time, the employees in the finishing and press departments worked traditional 8-hour days and 40-hour workweeks. Employees in the extrusion department already were on a 24/7 schedule with 12-hour shifts. At their

[93] Tr. 846.

[94] Tr. 2069–2071.

[95] In reaching this conclusion, I note the lack of testimony from the "press area supervisor" who, according to their job descriptions, supervised both Morlan and Bradshaw. That supervisor could have testified concerning the job duties of both employees before and after Nova Flow. Bradshaw also was absent from the hearing, despite his being aligned with the Respondent in opposition to employees being represented by the Union. I do not, however, draw any adverse inferences as a result.

meeting that day, Johnson asked Rutt for options besides 12-hour shifts when the Respondent went to a 24/7 schedule. Rutt responded that he would set up a meeting with himself, Johnson, interim plant manager Randy Flynn (who replaced Augustiniak), and employees to discuss alternatives. Rutt told him he would not do anything with the schedules until after the sit down.[96]

At some point between October 12 and November 3, Rutt resigned his employment and Michael Livingood took over as the Respondent's human resources manager in Centerville. On November 8, Livingood met with Johnson at the Respondent's facility in Des Moines. Livingood raised the need to change employees shifts when the Respondent went to a 24/7 schedule. Johnson proposed the Respondent keep 8-hour shifts and adopt a continuous operation model being used at the Des Moines facility. Livingood told him he would take the idea back to his management team. Livingood and Johnson also discussed the shift-bidding process to fill four open positions in the extrusion department. They agreed to use department seniority. After the meeting, Livingood sent Johnson an email summarizing their meeting discussion. He detailed four steps for filling open extrusion operator positions. The first step was that shift preference would be based upon department seniority. He also stated that Johnson had requested 8-hour shifts on a continuous operation like in Des Moines when Respondent went to 24/7 operations in Centerville. On November 9, Johnson responded to Livingood's email. Johnson stated: "The steps for filling open operator look good." As to the 24/7 schedule, Johnson told Livingood the Union was not asking for the Des Moines model exactly, but a different model than going to 12-hour shifts.[97]

On November 14, Livingood sent an email to Johnson to "follow up on our conversations and email exchanges last week on the 24/7 schedule in addition to our process for open positions." The email continued with a section entitled "Filling Open Positions." The text thereafter was the same four step process contained in Livingood's November 8 email, except all references to Extrusion Operator were eliminated. Livingood explained the change to Johnson by saying: "We intend on using this process for filling open jobs associated with the National Beef Crew up as well." As a result, department seniority would be used for employee shift preference selection. Livingood stated the Respondent "believes this outlined process is consistent with the language the parties have been negotiating" in bargaining for an initial contract. Regarding the 24/7 continuous operation, Livingood advised Johnson that the Respondent rejected his "suggestion" of implementing 8-hour work shifts. Livingood stated the Respondent "will be moving forward" with a 12-hour shift schedule and included schedules for employees in each department. Livingood concluded: "Our intent is to post these schedules by November 20, 2017, effective January 1, 2018."[98]

Later that same day, Livingood and Johnson spoke by phone, with Zaputil and other representatives on both sides present. The two again discussed the extrusion support operators and how to move people back into that position using department seniority. Following the meeting, Livingood and Johnson spoke twice on the phone one-on-one the same day. Johnson suggested moving forward with the National Beef scale up using the same process they had been discussing for the open extrusion operator positions, as Livingood had proposed. Johnson said they could see what problems, if any, arose using that process and address them at that time. Livingood followed up with a second email to Johnson summarizing their discussions that day. Livingood thanked Johnson for offering his suggestion for the National Beef scale up. He also reiterated that the Respondent would move to a 24/7 operation effective December 31, and would begin canvassing employees for their preferred shifts using the four-step process they previously agreed to for the open extrusion operator positions. Johnson read both of Livingood's emails the evening of November 14.[99]

On November 15, the Respondent announced to employees that the Centerville plant would be moving to a 24/7 operation. The announcement also set forth the four-step process to which Livingood and Johnson agreed, and stated shift preference would be determined by department seniority. Livingood gave Zaputil a copy of the announcement. On the same date, the Respondent began canvassing employees for their preferred new shifts from the options outlined in Livingood's morning email to Johnson on November 14. In a sidebar during contract negotiations that day, Johnson asked Livingood when they were going to get their meeting with the plant manager and employees to go over shift options for the 24/7 operation. Livingood reiterated that the Respondent was going forward with 12-hour shifts plant wide. Neither Johnson nor Zaputil said anything to Livingood about using department seniority for employee shift selection.[100]

At a second sidebar around the end of November, Johnson told Livingood the Union was getting blowback from some employees, because the Respondent was using department seniority instead of plant seniority for the shift preference canvass. Johnson proposed that the Respondent reset department seniority to plant

[96] Tr. 290–292, 1629–1634; GC Exh. 410, p. 2. I credit Johnson's testimony about his discussion with Rutt on October 12. Zaputil corroborated the testimony and Rutt did not testify about this meeting.

[97] Tr. 1637–1640, 1986–1994; GC Exhs. 411, 412. I do not credit Johnson's testimony that he reiterated to Livingood his request for a meeting with Flynn and employees to discuss different options for work shifts in a 24/7 operation. Zaputil did not corroborate that testimony and Livingood made no mention of it in his summary of their discussion.

[98] GC Exh. 414. In contract negotiations around this time, the Respondent and the Union both proposed using department seniority for shift preference, even though it previously had been done using plant seniority. (GC Exhs. 816, 823, 832.)

[99] Tr. 1697–1700, 1996–2002; GC Exh. 414, p. 4. In making the findings of fact about the discussions between Livingood and Johnson on November 14, I do not credit Johnson's testimony that the only matter the two discussed was the process for filling the open extrusion operator positions. In doing so, I rely upon Livingood's contemporaneous documentation detailing their discussions, which is the best evidence. Both Johnson and Livingood provided sometimes vague and uncertain testimony on this subject. Moreover, Johnson did not address or testify about his subsequent calls with Livingood. I find it inherently improbable that Livingood would not have discussed expanding the process for filling extrusion operator positions to the entire National Beef scale up, because he specifically mentioned that topic in the email he sent to Johnson that morning before those discussions.

[100] Tr. 292–293, 1646, 2003–2007; R. Exh. 20.

seniority for shift selection, then use department seniority going forward. On December 12, Livingood rejected the proposal to use plant seniority for employee shift selection. Livingood cited the fact the Respondent already had canvassed and started assigning employees to new shifts using department seniority.[101]

In late November following the shift preference canvass, Livingood met with Zaputil and employees on restricted, 8-hours-per-day work schedules. He told the employees that, when the Respondent moved to 12-hour shifts, they would be working 4 days in the first week and 3 days in the second week. They would be assigned to a 12-hour shift, but only work 8 hours on those days. Thus, their hours would be reduced from 80 to 56 every 2 weeks. Zaputil asked why the employees could not just work a straight, 40-hour-a-week schedule without being assigned to a specific shift. Livingood told her that would be favoritism. Before announcing this to the employees, Livingood had not discussed it with Johnson or Zaputil. Subsequently on December 14, Livingood spoke to Johnson about the restricted employees. Livingood said only that the Respondent would not force them to work more than 8 hours a day or 40 hours a week and that they could sign up for extra shifts to make up for the hours they had lost. Once the restricted employees started to work their new schedules, the Respondent required them to call into its payroll system each day they worked and report being absent for four out of the 12-hours of the shift they were not working.[102]

On December 31, the Respondent implemented 12-hour shifts for all employees at the Centerville facility.

LEGAL ANALYSIS

A. Did the Respondent's Changes to Employees' Work Schedules Violate Section 8(a)(5)? (Complaint Paragraph 14(f))

The General Counsel's complaint alleges the Respondent unilaterally announced altered work schedules for employees from primarily 5-days-per-week, 8-hours-per-shift to continuous operations 7-days-per-week, 12-hours-per-shift on November 15, then unilaterally implemented those changes on January 1, 2018.

Employees' work schedules are a mandatory subject of bargaining. See, e.g., *Green Apple Supermarket of Jamaica, Inc.*, 366 NLRB No. 124, slip op. at 22–23 (2018); *Indiana Hospital*, 315 NLRB 647, 655–657 (1994). Thus, the same unilateral change framework described above applies to this allegation. The Respondent could not change employees' work shifts from 8 hours to 12 hours or their number of workdays per pay period from 10 to 7, without providing the Union notice and an opportunity to bargain.

The Respondent first notified the Union of the move to 24/7 operations and the need to "begin discussions" over the structuring and staffing of shifts on October 12. After being notified, Johnson asked Rutt on that date for options besides 12-hour shifts. They agreed to a meeting with the plant manager and employees to discuss those options. After Rutt resigned his employment, Livingood next discussed the potential new shifts with Johnson on November 8. On that date, Johnson proposed staying with 8-hour shifts and adopting a continuous operating model used in Des Moines. The next day, Johnson clarified that the Union was amenable to any different model that did not involve 12-hour shifts. On November 14, the Respondent rejected the Union's request to stick with 8-hour shifts. Livingood told Johnson the Respondent would be moving forward with 12-hour shifts, begin canvassing employees for their shift preferences within a week, and implement the new schedules at the beginning of the following year.

Against this factual backdrop, the Respondent argues it met the bargaining obligations it had over the shift schedule changes. I do not agree. To begin, the Union never agreed to 12-hour schedules. Johnson continually objected to that model and asked for alternatives. Despite the lack of agreement, the Respondent announced to the Union on November 14 that it was going to 12-hour schedules and provided the new schedules it intended to use. Prior to then, the parties met only two times, on October 12 and November 8. The Respondent rejected one proposal Johnson made involving 8-hour schedules and called it a day on bargaining. It did so some 6 weeks prior to when it intended to move to a 24/7 operation. That left plenty of time to continue negotiations, albeit with greater urgency than the Respondent had displayed to that point. After rejecting Johnson's call for some form of 8-hour shifts, the Respondent did not make any counterproposals. Instead, it simply advised the Union it was moving forward with 12-hour shifts and began canvassing employees for their shift preferences. Once again, the Respondent merely informed the Union of what it would do, presenting the change as a fait accompli. In any event, because contract negotiations were ongoing, the Respondent was not free to implement the schedule changes absent the Union's consent.

The impact of the Respondent's unilateral change on the affected employees' day-to-day lives was pronounced. Instead of working 8 hours a day, 5 days a week, they now were required to work 12 hours a day, 3 days the first week and 4 days the next. Before implementing such a drastic change to their work lives, the law required the Respondent to provide the employees' bargaining representative with a meaningful opportunity to bargain. These facts do not come close to establishing the Respondent did so. Accordingly, I conclude the Respondent violated Section 8(a)(5) when it unilaterally changed employees' work schedules from 8 to 12-hour shifts and from 10 workdays to 7 per pay period.[103]

I find the Respondent's unilateral change to the schedules of restricted employees likewise violates Section 8(a)(5). The

[101] Tr. 327–328, 1702–1704, 2009–2013; GC Exh. 416.

[102] Tr. 37–38, 99–107, 294–296, 2013–2015.

[103] The Respondent's other arguments on this issue likewise lack merit. First, the Respondent claims the parties repeatedly discussed the need to move to a continuous shift operation. But the General Counsel's complaint does not allege that the move to a 24/7 schedule was unlawful, only the move to 12-hour shifts. A 24/7 operation is not limited to operating 8- or 12-hour shifts. Second, the Respondent again argues that its change was permissible under *Raytheon*, because it had an established past practice of changing employees' work schedules. The only evidence relied upon by the Respondent in that regard is that extrusion department employees already were working 12-hour shifts. The Respondent offered no evidence concerning how those employees came to be working those shifts. This showing again falls well short of establishing a past practice.

record evidence establishes that Livingood told the employees about the changes to their schedule at the end of November, without previously mentioning it to Johnson or Zaputil. Moreover, when he got around to discussing it with Johnson 2 weeks later, Livingood did not offer to bargain over it, but merely informed him of the Respondent's plan of action. Any objection made by the Union on either date would have been futile. The Respondent provided the Union with no meaningful opportunity to bargain over this change either, which resulted in the affected employees having their work hours reduced by 30 percent. This unilateral change also was unlawful.[104]

B. Did the Respondent's Change in Seniority Preferences for Shift Bidding Violate Section 8(a)(5)? (Complaint Paragraph 14(g))

The General Counsel's complaint also alleges that the Respondent unilaterally announced changes to its seniority preference policies for shift bidding on November 15, then unilaterally implemented those changes on January 1, 2018. The allegation is premised upon the Respondent utilizing department seniority, rather than plant seniority, to determine which shifts employees would be assigned, once the plant moved to a 24/7 operation. Like work schedules, seniority is a mandatory subject of bargaining. See, e.g., *The Sheraton Anchorage*, 363 NLRB No. 6, slip op. at 34 (2015); *L & L Wine and Liquor Corp.*, 323 NLRB 848, 852–853 (1997).

The analysis of this complaint allegation requires a determination as to whether the Respondent and the Union reached agreement to use department seniority for shift bidding. I find that they did. On November 9, Johnson agreed to Livingood's proposal to use a four-step process for open extrusion operator positions. One of the steps was that employees would choose their shift preference by department seniority. On November 14, Livingood proposed expanding that process to employees' selection of shifts for the National Beef scale up. Based upon my credibility determination described above, Johnson agreed to that proposal that same day and said the parties could address any issues with implementation as they arose. The local agreement to use department seniority was consistent with the Union's and the Respondent's proposals in contract negotiations at that time. After complaints from some employees to the use of department seniority, Johnson sought to change the agreement approximately 2 weeks later. Nonetheless, having already reached an agreement, the Respondent was entitled to reject Johnson's proposal. Accordingly, I find the Respondent did not violate Section 8(a)(5) in this regard and recommend dismissal of this complaint allegation.

VI. BARGAINING BETWEEN THE RESPONDENT AND THE UNION FOR A FIRST CONTRACT

A. Did the Respondent Fail to Meet with the Union at Reasonable Times, in Violation of Section 8(d) and 8(a)(5)? (Complaint Paragraph 16(b))

FINDINGS OF FACT

The Respondent and the Union began bargaining for an initial Centerville contract on August 23, 2016. At the time of the hearing in August 2018, the parties had not reached an agreement, but negotiations remained ongoing. As of April 26, 2018 (the date the General Counsel issued the complaint), the parties had reached a total of only eight tentative agreements on the following subjects (with the date the agreement was reached): recognition (November 1, 2016), probationary period (January 18), employee safety (April 2), labor agreement (May 3), leave of absence for union business (June 14), general leave of absence (September 13), grievance and arbitration procedure (April 16), and seniority (April 18, 2018).[105]

The Respondent's chief negotiator is John Haberman, the associate general counsel for litigation and labor/employment. Haberman has been employed by the Respondent for 18 years. He reports to the Respondent's general counsel and to its chief human resources (HR) officer. His job duties are "high level" and include managing global litigation, counseling the HR group on employment and labor issues, and managing labor relations. He supervises three "direct reports:" the director of labor relations, a litigation attorney, and a paralegal. The labor relations director handles the day-to-day labor relations work, including typically contract negotiations. Haberman works from the company's headquarters in Neenah, Wisconsin, more than 400 miles from Centerville.

The Union's chief negotiator has been Philip Roberts, an international representative of the Graphic Communications Conference of the International Brotherhood of Teamsters. He has been in that position for 30 years. Roberts frequently negotiates contracts on behalf of local unions affiliated with the international. He has done so between 250 and 300 times. Roberts is

[104] The General Counsel did not specifically advance this theory of a violation. The complaint allegation on this issue states: "About November 15, 2017, Respondent announced altered schedules of employees from primarily 5-days-per-week, 8-hours-per-shift, to continuous operations 7 days a week on 12 hour shifts and implemented the changes on about January 1, 2018." I find the allegation language sufficiently broad to encompass the change to the restricted employees' work schedules.

Even if it was not, the requirements to find an unalleged violation are met, because the issue is closely connected to the subject matter of the complaint and was fully litigated by the parties. *Pergament United Sales*, 296 NLRB 333, 334–335 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). As to the first requirement, the unilateral change to restricted employees' workdays and shifts is closely related to the complaint allegation, because the change occurred as part of the move to a 24/7 operation, 7 days a week. As to the second, the General Counsel elicited testimony on this issue from employee Ruth Husted, Lowe, and Zaputil. (Tr. 37–38, 99–107, 294–296.) The Respondent's counsel cross examined Lowe and Husted and questioned Livingood about the issue. (Tr. 79–80, 115–119, 2014–2015.) That latter testimony all went to the Respondent's position that it continued to honor the restricted employees' limitation to 8 hours of work per day. Furthermore, Livingood's testimony establishes the violation, because it is insufficient to demonstrate the Respondent provided notice and an opportunity to bargain over the schedule changes. Because it questioned multiple witnesses on this issue, the absence of this allegation from the complaint did not prejudice the Respondent. *Kankakee County Training Center for the Disabled, Inc.*, 366 NLRB No. 181, slip op. at 3–4 (2018) (finding allegations closely connected and matter fully litigated, where allegations shared the same issue and facts and a respondent witness provided essential details to finding the unalleged violation).

[105] GC Exh. 522.

stationed near Nashville, Tennessee, almost 600 miles from Centerville. The closest major metropolitan area to Centerville is Des Moines, Iowa, a little under 100 miles away. Roberts attended all the sessions and Haberman attended all but the first two days. The two did almost all the talking in those meetings. The Union's bargaining team included Johnson and Zaputil. At various times, it also included Debbie Bullock, a Centerville employee who also served as the local union's secretary/treasurer, and Elizabeth Nichols, until she left the Respondent's employ. The Respondent's team typically included whomever was the Centerville plant manager at the time, as well as both local and corporate human resources representatives.[106]

1. Bargaining Sessions During the Union's Certification Year

Following the Union's certification on May 13, 2016, Roberts emailed on June 8, 2016 a request for bargaining and for information to Amy Foran, then the Respondent's director of labor relations. Foran initially was going to handle the negotiations for the Respondent. On June 13, 2016, the two agreed that the first bargaining sessions would take place on August 23−24, 2016, and September 14−15, 2016, in Centerville. Negotiations took place at two different hotels near the Respondent's facility. Although no formal ground rules were adopted, bargaining days typically began at 9 a.m. and ran until 5 p.m.[107]

The parties' first negotiation sessions took place as scheduled on August 23−24, 2016. Thereafter, the Respondent asked to reschedule the September 14-15, 2016 bargaining dates. Haberman had met with Foran after the bargaining dates in August and decided she had too much on her plate to handle the Centerville negotiations. Haberman himself took over the negotiations for the Respondent.[108] The parties did not meet again until November 1, 2016, approximately 10 weeks after the initial dates. The two sides met for three full days, the only time they would meet for that duration. At the end of negotiations on November 3, Haberman and Roberts discussed the diminishing returns from bargaining on the third day. Due to the cancelled September 2016 dates, Roberts also asked to meet more frequently than once a month. They agreed to the following bargaining dates going forward: November 29 (half day)-30, 2016; December 20−21, 2016; January 17−18; and February 7−8. Those sessions all took place except January 17, which the parties agreed to cancel due to a snowstorm.[109]

At the end of bargaining on January 18, Roberts sent Haberman an email proposing three-day bargaining sessions in 4 consecutive weeks in February and March. At the time, the parties already had scheduled February 7−8 for bargaining. Haberman responded that, other than the two previously scheduled dates, February and early March were "bad." Haberman instead proposed March 8, as well as March 29 and 30. When Roberts asked to tack on an additional day to March 8, Haberman declined and noted that one member of the Respondent's bargaining team was not even available for March 8. Roberts responded: "Let me know about the dates as soon as you can. I have to believe there are other dates we can secure over the span of time we offered." Haberman did not respond.[110]

At the February 8 bargaining session, Roberts told Haberman they could meet every week to get a contract done. The parties agreed to three, two-day bargaining sessions, one each in March (previously scheduled), April, and May. However, at the time, the next bargaining session was scheduled for March 29, 7 weeks out. On February 10, Roberts sent an email to Haberman confirming the agreed upon dates and stating:

> Additionally, you agreed to review your groups (sic) schedules to add a third (or fourth) day to any or all of the above listed dates. Please advise us at your earliest convenience on which additional dates you can offer. Also, due to the difficulty of coordinating dates among all the participants, we requested that you review your schedules after the May 3rd date and offer multiple additional dates that you are available to meet. We hope you share our interest in completing this negotiation in a timely manner. However, we are disappointed in the time elapsing between the most recent scheduled dates and urge you to advise us if other dates open up in your groups schedules.

Haberman did not immediately respond. On February 24, Roberts emailed him again and noted he had not heard from Haberman about additional meeting dates. Haberman then sent a written letter back to Roberts on February 27, telling Roberts his "innuendo" that the Respondent was unnecessarily delaying negotiations or obstructing progress on reaching an agreement was "getting tiresome." Haberman detailed the history of the parties' bargaining dates. He noted the Union declined the Respondent's offer to meet on March 8, because the Union felt single days of bargaining were not sufficiently productive to justify the travel to Centerville. He concluded by saying the Respondent would notify the Union, if it could add a third day to the scheduled sessions in April and May. Haberman also offered to meet for two-day sessions on May 31−June 1 and June 13−14. Roberts agreed to the newly offered dates. The parties met as scheduled on March 29−30, April 12−13, and May 2−3. At the May 2 meeting, Haberman told Roberts that Foran was leaving the company and Rutt would be replacing Bray as human resources manager. When Roberts asked for additional bargaining dates, Haberman said he would have to look at the dates after Rutt came aboard.[111]

On May 13, the Union's certification year expired. In the 8½ months from August 23, 2016, until May 13, the parties negotiated for a total of 18 days in nine different trips to Centerville. Thus, they averaged approximately 2.1 days of bargaining each month. Three trips and 6 days of bargaining occurred in the last month preceding the end of the certification year. All of the meetings in Centerville encompassed 2 days of bargaining, except for the 3-day session at the beginning of November 2016

[106] Tr. 867–869, 884–889, 2110–2115, 2121–2123. I take administrative notice of the distance between the various locations from Google maps (https://www.google.com/maps). *Bud Antle, Inc.*, 359 NLRB 1257, fn. 3 (2013), reaffd. 361 NLRB 873 (2014).

[107] Tr. 2194–2195.

[108] Foran left the company in mid-2017 and the director of labor relations position remained vacant until mid-2018. While that position was vacant, Haberman also handled two other contract negotiations in 2018. (Tr. 2128.)

[109] Tr. 929, 1414–1415, 2222–2223.

[110] GC Exh. 521, pp. 48–52.

[111] Tr. 960−961, 1031, 1035; GC Exh. 521, pp. 57, 63, 65–67.

and the one-day session in January where an additional, scheduled day was cancelled due to a snowstorm. The longest time between sessions was 10 weeks from August 24 to November 1, due to Haberman replacing Foran as the Respondent's lead negotiator. The second longest was 7 weeks from February 8 to March 29, a period Haberman told Roberts was "bad" for available dates. However, Haberman offered March 8 as a bargaining date which Roberts declined, feeling it was too expensive and not a good use of time given the travel. The remaining bargaining sessions occurred within 2 to 4 weeks of each other.

2. Bargaining Sessions from May 13, 2017, to April 26, 2018

After bargaining on June 1, the parties had only one future session scheduled, for June 13 and 14. On June 2, they agreed to bargain again on July 25 and 26. Roberts offered three additional sets of bargaining dates: June 27−29, July 6−7, and July 10−11. Haberman did not respond. On June 14 and July 14, Roberts made additional requests for more bargaining dates to Haberman, who again did not respond.[112]

At the end of bargaining on July 26, Haberman offered August 22−23, September 12−13, and October 10−11, all of which Roberts accepted. After they agreed to these dates, Roberts asked the same day for September 26−27 or September 27−28, and October 3−4 or October 4−5. Roberts said he thought it was "crucial that we try to move this along." Haberman did not respond to that request. At the session on September 12, Roberts offered the end of September dates again. The next day, he reiterated that offer and also offered the full weeks of October 16, 23, 30, and November 13. In doing so, Roberts stated: "As we discussed, we have been working for a year now to reach an agreement and we should accelerate our availability so that we can meet as often as we can in order to get this done." Haberman responded by agreeing to bargain November 15−16, as well as offering November 29−30. Roberts accepted those dates and asked for additional dates prior to then. On October 29, Roberts emailed Haberman, noted the parties only had two confirmed bargaining sessions going forward, and asked for dates from the Respondent prior to the upcoming holidays.[113]

On October 31, a unit employee filed a decertification petition with the Board.

On November 9, Roberts reiterated his October 29 request to Haberman and asked for additional bargaining dates in December. Haberman responded the next day, referring to the upcoming November 15−16 and 29-30 negotiation dates and stating: "We have four days set aside in the next few weeks, 2 days before the holiday season and 2 days after the holiday season begins. Additionally, I have a new negotiating team with recent departures from Bemis Company. I propose we discuss additional dates after we see how the next few meetings proceed." Roberts responded the same day, telling Haberman "[r]espectfully, I disagree. I understand you have turnover on your committee, but dates are hard to nail down. Progress so far had (sic) been very slow, and I do not anticipate that two more 2-day sessions will be sufficient. I would renew my request that we agree to two more sets of dates in December." Haberman responded the same day, stating: "I appreciate your position, however I am unprepared to provide dates at this time. If you would like to propose dates, the Company will take them under advisement. That being said, I am doubtful the Company will be prepared to meet in December, much less twice in December." Roberts concluded the day's back and forth by emailing Haberman that he did not accept the idea that they could not meet in December. He told Haberman he could offer dates or make himself available per Haberman's schedule.[114]

On November 15 and 16, the parties met as scheduled. At the end of the day on the latter date, Roberts again asked via email if the Respondent had any bargaining dates to offer for December. Haberman replied: "The Company does not have any dates to propose. If the union would like to propose dates, the Company will review the dates offered and respond whether it has any availability. As mentioned in email to you last week, I am doubtful the Company will have availability due to schedules and the holidays." That same day, Roberts offered the following dates for future bargaining: December 12−13 or 13−14, December 19−20 or 20−21, and December 27−28. Getting no response from Haberman, Roberts emailed him again on November 21 and asked for two sets of dates of two to three days in January. Haberman responded the next day, reiterating to Roberts that "[w]ith respect to December, the Company is unavailable on the dates you provided . . .principally due to work schedules, but also due to vacations scheduled over the last week of December." Haberman himself had to travel to Brazil for a full week for work, then was out a 2nd week that month for different contract negotiations.[115] On November 27, Haberman sent an additional email to Roberts, in which he again detailed the parties' bargaining dates history, this time for all of 2017. Haberman noted the Respondent offered two separate sets of dates in November "in anticipation that its December schedule would preclude a meeting opportunity in December." Haberman pledged that the Company would continue to meet with the Union regularly in 2018. He also suggested to Roberts that, "[r]ather than focus on putting dates on the calendar, the Company recommends that the union focus instead on making the most of our scheduled meetings and that it be prepared for the times we schedule, including having proposals ready and being prepared to discuss those proposals." Roberts responded the next day, telling Haberman the Union believed a more intensive schedule was required to reach an initial agreement.[116]

The Respondent and the Union bargained again on November 29 and 30. Near the end of the session, Haberman emailed Roberts and told him the Company was available to meet on January 10−11, 2018. Roberts agreed to those dates, while asking if they could bargain for three days and if Haberman had another set of January dates to offer. In response, Haberman wrote:

> The Company proposes the parties wait to see the progress

[112] GC Exh. 521, pp. 82, 85, 87.

[113] GC Exh. 521, pp. 89–91, 113, 115–117, 138.

[114] GC Exh. 521, pp. 139–142.

[115] Haberman also testified generally that another reason the Respondent gave the Union for not being available on requested bargaining dates was the unavailability of either the plant manager or human resources manager. (Tr. 2228–2229.) He noted the two managers had quarterly management meetings at headquarters.

[116] GC Exh. 521, pp. 156–162.

> made over the rest of today and during our next two sessions in January before setting additional negotiation sessions. If the union would like to offer other dates, the Company will consider the dates offered however this is to advise you that I presently have the two weeks following our next two sessions held for other matters that require my attention. With respect to future dates and your suggestion to consider three days in a row, I remind you of the parties' earlier concerns about stringing together more than two days in a row based on the diminishing returns of additional days beyond the second day. If you are interested in reconsidering that earlier position, the Company request (sic) that you also reconsider your earlier reluctance to meet on single days.

Roberts responded the same day and agreed to meet on a couple of single, additional days in January, if that was the only way the Respondent could meet.[117]

The parties met on January 10 and 11, 2018, as scheduled. As had become routine at this point, Roberts emailed Haberman near the end of the session asking to get additional dates for further bargaining. Roberts noted that his schedule was flexible for the remainder of January and February. He asked Haberman to provide as many dates as possible, so they could get the contract resolved. Haberman responded the same day, offering February 1−2, 2018, and February 19−20, 2018, which Roberts accepted.[118]

After the first February session, Roberts sought to schedule additional dates beyond the ones then on the books. Haberman again replied that, if the Union had dates to offer, the Respondent would review them and respond. He also said that, without plant manager Randy Flynn available at that time, he could not provide any certain dates. Roberts responded by offering the following 3- and 4-day periods: February 28, 2018−March 2, 2018; March 5−9, 2018; March 12−16, 2018; March 21−23, 2018; and March 26−28, 2018. Haberman replied on February 7, 2018, agreeing to March 15−16. Haberman did not accept any additional dates, because he had to attend the Respondent's global leadership conference during 1 week and a continuing legal education conference in another week. He followed up via email on February 12, telling Roberts that the Respondent did not have dates to offer at that time, but would be prepared to discuss them when the parties met to bargain the following week.[119]

Near the end of the bargaining day on February 20, 2018, Roberts emailed Haberman, noted that March 15−16, 2018, were the only bargaining dates scheduled, and asked for additional dates the Respondent was available. He again noted the Union was willing to bargain for three consecutive days. Haberman responded the same day, offering a two-day period made up of half days on April 16 and 18, 2018, as well as a full day of bargaining on April 17, 2018. Roberts accepted the offer, while also asking that the Respondent schedule other dates earlier than those April dates and noting his prior offer of numerous March dates. On February 27, 2018, Roberts renewed his request for more dates prior to April 16, 2018. On March 3, 2018, Haberman responded and said: "I was out of the office all last week with limited access to email. In response to your email . . ., the Company continues to be available March 15-16 but is not available on the other March dates provided by the Union."[120]

In the 11½ months from May 13, 2017, when the Union's certification year ended to April 26, 2018, the Respondent and the Union bargained for a total of 26 days during 13 different trips to Centerville. Thus, they bargained for an average of 2.3 days per month. All of the sessions included 2 days of bargaining. The Respondent did not agree to any of the Union's requests for 3-day bargaining sessions, because of Haberman's concern about diminishing returns and because it was "very difficult" for Haberman to find a full week where he could be out of the office, given the additional two days of travel to get to Centerville.[121] The periods of time between trips ranged from 2 to 6 weeks.

LEGAL ANALYSIS

The General Counsel's complaint alleges the Respondent violated Section 8(d) and 8(a)(5) by refusing to meet with the Union at reasonable times from November 1, 2016 through April 26, 2018, the date the complaint in this case issued.

Section 8(d) of the Act requires that an "employer and the representative of the employees . . . meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ." The Board considers the totality of the circumstances when determining whether a party has satisfied its duty to meet at reasonable times. *Garden Ridge Management, Inc.*, 347 NLRB 131, 132 (2006), citing to *Calex Corp.*, 322 NLRB 977, 978 (1997), enfd. 144 F.3d 904 (6th Cir. 1998).

By any objective measure, the number of times the Respondent and Union have met to bargain is substantial. During the 18-month period in question, the Respondent and the Union bargained for 42 days during 21 trips to Centerville.[122] The parties averaged 1.2 trips to Centerville and 2.3 days of bargaining per month.

However, the reasonable times inquiry is not limited solely to an examination of the number of sessions held and the totality of the circumstances here paints a much different picture. First and

---

[117] GC Exh. 521, pp. 164–166.

[118] GC Exh. 521, pp. 191, 193, 195.

[119] GC Exh. 521, pp. 219–224; Tr. 2226–2228. Haberman testified that, in mid- to late-2017, he developed a habit of telling the Union he did not have any specific dates to provide when Roberts asked generally for dates, and instead asked Roberts to provide him with specific proposed dates for bargaining. (Tr. 2219–2220.) Haberman said he did this "for a variety of reasons," but did not say what those reasons were.

[120] GC Exh. 521, pp. 235, 238, 240, 244–245.

[121] Tr. 2222–2223.

[122] In finding that the parties bargained for 42 days during the alleged time period, I rely on the Respondent's and the Union's contemporaneously written bargaining notes, both of which were organized by date. (GC Exh. 520; R. Exh. 24.) The Respondent repeatedly claims the parties met 55 or 56 times from August 2016 to April 2018, even though the total was 44 days. The Respondent cites to a comment in the General Counsel's opening statement and a statement by Roberts in response to an unrelated question. (R. Br., pp. 3, 79, 84, 97, 99, 101, 105; Tr. 13, 1206.) Stating something repeatedly does not make it so. The General Counsel's opening statement is not evidence. Moreover, Roberts did not specify the time period covered by his assertion that 55 or 56 meetings occurred. The parties continued to bargain after the issuance of the complaint in this case, which may account for the inflated figure.

foremost, the parties are reaching tentative agreements at a glacially slow pace. For all that bargaining, the Respondent and the Union have signed off on only eight tentative agreements. The majority address minor subject matters and/or involve minimal text. Prior to the end of the certification year, the parties agreed to provisions on union recognition (which already was mandated by the Board election), a probationary period for new employees, safety, and a "labor agreement" stating the contract was between the Respondent and the Union. In the second year of bargaining, they agreed to leaves of absence for union business, general leaves of absence, grievance and arbitration, and seniority. The seniority provision defines the term, but does not address how seniority will apply, if at all, to layoffs, transfers, or other job actions. The grievance and arbitration provision sets forth the procedure to be followed. It does not include a process for disciplining employees. It also does not include just cause or any other standard by which employee discipline is to be evaluated by an arbitrator. Not one of the tentative agreements addresses economics. Thus, while at first glance 2.3 bargaining dates a month appears sufficient to meet the statutory requirement, the average is cast in a different light given the inconsequential progress the parties have made towards reaching a whole agreement.[123] The Board has found an employer failed to meet at reasonable times in circumstances where the parties made significantly greater progress than has been made here. See *Garden Ridge Management*, supra at 131–132 (parties met 20 times in 11 months and reached 28 tentative agreements); *Calex Corp*., supra at 978 (parties met 19 times in 15 months and reached agreement on 75 percent of the contract).

Given this lack of productivity, the need for a more aggressive bargaining schedule is obvious. Recognizing this, Roberts repeatedly asked Haberman to add bargaining dates, either 2-day sessions or more days to already-scheduled sessions. He repeatedly noted the slow progress of the negotiations. Yet, at every turn, the Respondent rejected those requests. The communication back and forth between Roberts and Haberman regarding additional dates establishes that, overall, the Respondent was willing to meet with the Union only once per month for 2 days. It also establishes that Haberman did not want to schedule future bargaining dates until the parties were at or near the end of their already-scheduled sessions. When Roberts asked for more dates, Haberman often did not respond, told Roberts he did not have dates to offer but invited Roberts to propose dates, or offered one session of 2-days further out from whatever the last scheduled dates were at the time.

Moreover, the parties held only one, 3-day bargaining session at the beginning of negotiations. The Respondent thereafter refused to bargain for more than 2 days at a time. Although it appears the Union initially agreed a third session day was not productive, Roberts began requesting 3-day sessions 5 months into negotiations, thereby indicating he had changed his mind. Haberman said he would consider going to 3-day bargaining sessions, but only if the Union would agree to also meet on single days. He did not explain why. The undesirability of travelling 2 days to get to and from Centerville to meet for one bargaining day is readily apparent. Furthermore, even if a third bargaining day resulted in diminishing returns, the progress still would be greater than not meeting at all. Haberman otherwise provided no explanation as to why a third day could not be added to the bargaining sessions.

As to the reasons for not agreeing to more dates, Haberman at first rarely offered any explanation, other than to say dates were "bad." Towards the tail end of the two-year period when the Union's requests for more dates increased, Haberman told Roberts work schedules and holidays prevented further meetings; he was unavailable because of other matters which required his attention; he had been out of the office and could not respond; or members of his negotiating team were new or unavailable. Haberman is in a high-level position with the Respondent and had numerous job duties occupying his time. He undoubtedly had difficulty finding more than one 2-day period to negotiate this contract per month. But the "busy negotiator" defense to an allegation that a party failed to meet at reasonable times long has been rejected by the Board.[124] See, e.g., *People Care, Inc.*, 327 NLRB 814, 825 (1999), citing to *Lawrence Textile Shrinking Co.*, 235 NLRB 1178, 1179 (1978).

In sum, the Respondent's repeated refusal to agree to additional bargaining dates likewise supports a finding that it failed to meet at reasonable times. See, e.g., *Regency Service Carts, Inc.*, 345 NLRB 671, 672–673 (2005) (despite 29 bargaining sessions in 32 months, employer failed to meet at reasonable times, in part due to consistent refusal to agree to dates offered by the union and preferring to meet after the last date provided by the union); *Lancaster Nissan, Inc.,* 344 NLRB 225, 227–228 (2005) (employer turned deaf ear to union's repeated requests for additional meetings and would schedule no more than two meetings per month); *Garden Ridge Management*, supra (employer rejected without explanation eight requests from a union to meet more frequently); *People Care*, supra (employer's negotiator available only once per month and refused to set times for future meetings in advance, saying he could only agree on a date at the next session).

To defend against this allegation, the Respondent principally relies upon the sheer number of bargaining dates, but that number, standing alone, is not dispositive. The Respondent also notes that both Roberts and Haberman acknowledged the difficulties of negotiating a first contract and having to travel to and from Centerville for bargaining. That a first contract typically requires greater effort to reach agreement means the parties must be open to the need for additional bargaining dates, not locked into a particular number of days per month as the Respondent was here. Moreover, like the busy negotiator defense,

[123] I also note Haberman was verbose when testifying at the hearing, a speaking style that is reflected in his own notes of the bargaining discussions. (R. Exh. 24.) Haberman acknowledged he spoke "a little bit more in depth" during negotiations. (Tr. 2206.) Roberts stated that Haberman sometimes "would take off on quite extended discussions of different subjects" when bargaining. (Tr. 957–958.) Haberman's speaking style likely contributed to the parties' lack of productivity, which also supports the conclusion that 2.3 bargaining days a month was insufficient to meet the statutory requirement in the circumstances of this case.

[124] The Respondent concedes that it often could not accommodate the Union's requests for additional days of bargaining, due to "competing work schedules, vacations, and holidays." (R. Resp. Br., p. 28.)

geographic inconvenience does not take precedence over the statutory demand that the bargaining process take place with expedition and regularity. *Caribe Staple Co.*, 313 NLRB 877, 893 (1994).

The Respondent arbitrarily limited bargaining to an average of 2 days per month, despite reaching only eight tentative agreements in 1½ years and leaving almost all of the significant issues outstanding. It steadfastly refused the Union's repeated requests for more bargaining dates. The Respondent either offered no explanation or the "busy negotiator" defense for its refusals to meet more often. As a result, the Respondent violated Section 8(d) and 8(a)(5) by failing to meet at reasonable times to reach a first contract.[125]

B. Did the Respondent Engage in Surface Bargaining in Violation of Section 8(a)(5)? (Complaint Paragraph 16(c))

FINDINGS OF FACT[126]

1. The Initial Bargaining Sessions

At the opening meeting on August 23, 2016, the Union presented a partial, non-economic proposal to the Respondent. The provisions included one on non-discrimination, whereby the parties would agree not to discriminate against any employee because of race, color, creed, religion, age, sex, sexual orientation or national origin, with regards to working conditions. It also included one on family and medical leave (FMLA), whereby the Respondent would acknowledge its obligations under federal law and not require employees to substitute paid leave when on FMLA leave. Another provision addressed past practices, stating that all existing benefits and practices that were more favorable than any of the contract's terms would remain in effect for the life of the agreement, unless the Respondent and the Union agreed to a change. A discipline and discharge provision required a showing of just cause to discipline an employee. Finally, the Union proposed a management-rights' clause stating the Respondent "retains the right to manage its business, to make all decisions, and to take whatever action it deems necessary in connection therewith, except as subject to the provisions of this contract." The Respondent, through Foran, provided counterproposals to some of the Union's proposals on August 24. One of the counterproposals was on management rights, stating:

> A. Except as specifically limited by the express language in this Agreement, all management rights, powers, authority and functions, whether heretofore or hereafter exercised, and regardless of the frequency or infrequency of their exercise, shall remain vested exclusively in the Company. It is expressly recognized that such Company rights, powers, authority, and functions include, but are by no means limited to, the following which shall not be subject to arbitration.
>
> B. The full and exclusive control, management and operation of its business and its facility.
>
> C. The determination of the scope of its activities, products to be produced, processed or manufactured, and the methods pertaining thereto, the location of such production, processing or manufacturing; the materials and products to be acquired or utilized; the machinery and equipment to be utilized, and the layout thereof.
>
> D. The determination of the number of employees and the assignment of duties thereto; the staffing of machinery and support processes; the number of crews and crew positions and the right to change, increase or reduce the same; the right to fill or not fill vacancies; the direction of the working forces, including but by no means limited to hiring, selecting and training of employees, and suspending, scheduling, assigning, discharging, laying off, recalling, promoting, retiring, demoting, and transferring employees.
>
> E. The right to establish, change, combine or eliminate shifts, schedules of work and production schedules and standards; the right to establish, change, combine or eliminate jobs, positions, job classifications and descriptions; the right to establish wage rates for new or changed jobs or positions; the right to establish, change, or eliminate incentive or bonus compensation; the right to establish, modify, add or eliminate polices and work rules; the right to make and enforce safety and security rules and rules of conduct.
>
> F. The right to introduce new or improved procedures, methods, processes, facilities, machinery and equipment or make technological changes; the right to maintain order and efficiency; the right to transfer any work; the right to contract or subcontract any work.[127]

For the November 1−3 bargaining dates, Haberman took over for Foran as the Respondent's chief negotiator. In recent years before then, Haberman had not done much contract negotiating, although it was a core part of his job when he first started working for the Respondent. Haberman withdrew all counterproposals Foran previously provided the Union. He spent the morning of November 1 giving an overview of the entire company and recent changes made at corporate, utilizing portions of a presentation the Respondent made to its investors in March 2015. Haberman then discussed how it was a new relationship between the Respondent and the Union at Centerville, meaning it made sense to start out with a relatively basic contract setting the framework of the relationship. Haberman told Roberts he was a minimalist, whose view of a collective-bargaining agreement was something which could be written on the inside of a matchbook cover. He said he did not like to burden a contract with verbiage. Haberman also told Roberts it was very important to the Respondent that it retain flexibility and agility to move

[125] In reaching this conclusion, I do not rely on or find meritorious the General Counsel's argument that the Respondent repeatedly was late to bargaining sessions.

[126] At the hearing, the bargaining notes of both Roberts and Haberman were entered into the record as substantive evidence. *Mack Trucks*, 277 NLRB 711, 725 (1985). I rely heavily on those contemporaneous notes, particularly Haberman's very detailed ones, in reaching the findings of fact in this section. Although both Roberts and Haberman testified credibly concerning negotiations, their recall was limited, given the number of sessions and amount of elapsed time.

[127] GC Exhs. 701, 703.

employees to the right jobs. Haberman stated he understood flexibility sometimes created tensions with a union, but the Respondent wanted to be able to react to the marketplace. In addition, he identified as a priority that employees have accountability for their job duties and expectations, including giving the Respondent flexibility to remove them from their jobs. Roberts responded that employees wanted transparency from the company, including knowing what the work rules and job expectations were. He said employees had concerns about policies changing in the middle of the night.[128]

The Respondent also responded to some of the Union's initial proposals. Regarding the Union's non-discrimination and FMLA proposals, Haberman told Roberts he did not like to put language in a contract that was duplicative of statutory law. Haberman said he did not want employees to get two bites at the apple. Roberts responded that the grievance procedure would be more expedient for employees than going the statutory route. They also discussed seniority, with Haberman saying the Centerville plant primarily used plant seniority, not department or classification seniority. He added that the Respondent's last layoffs were in 2008 and 2013. He said the Respondent sought volunteers for those layoffs before involuntarily laying off any employees. As to the Union's past practices proposal, Haberman told Roberts his position was that, unless it was set out in the contract, the Respondent would be able to make any changes. He said the Company would provide advanced notice for changes to economic conditions. On November 3, the Union also sought the Respondent's approval to post the Union's summary of what occurred during bargaining that month. Haberman and Foran required the Union to make three changes to the summary before agreeing to post it.[129]

As negotiations progressed, one significant area of dispute was promotions and transfers. During the next bargaining session on November 29 and 30, 2016, the Union presented a proposal on that topic. Haberman told Roberts he was willing to discuss promotions and transfers, but did not think it was appropriate to include the subject in the contract. He said the Respondent currently evaluated job bids based on employee qualifications, a process that worked well and was important to the company. He stated the Respondent's approach was worth preserving, but he also wanted to retain the leeway to modify the approach if needed. Roberts noted the Union heard a resounding message from employees that the promotions and transfers process was something they wanted addressed. Haberman acknowledged vocal concerns of favoritism in the finishing department, but said the Respondent addressed and resolved them. Roberts said the best way to resolve the situation was a mutually-agreed-upon process memorialized in the contract. He added that employees would not be receptive to leaving the subject out of the contract for the Respondent to administer on its own. Haberman responded that he was open to discussing the issue and maybe part of the process could be memorialized. Roberts said a lack of transparency fostered conspiracy theorists and employees needed a basic sense of fairness.[130]

2. Bargaining During Winter 2016–2017

At the start of bargaining on December 20, 2016, Paul Kubicek, the Respondent's senior director of corporate safety and health, made a presentation on Bemis' safety record that took the entire morning. This occurred after Haberman became upset at Roberts' suggestion in an earlier session that the Respondent did not have a good safety record in Centerville. The Respondent also presented a written proposal on promotions and transfers, which stated:

> The company has an internal policy on filling open positions. This policy will be provided to the union and is available in the HR Office. In the event the Company believes it necessary to make changes to this policy, it will give the union advance notice of its intent to modify the policy and an opportunity to meet and discuss any proposed changes.

The Respondent did not provide the Union with the actual policy, because it did not have one at the time. Haberman proposed that employees could see the policy to address Roberts' stated desire for transparency. He proposed that the Respondent retain the right to modify the policy during the contract, in case the policy did not allow the company to get the right people in the right places. Roberts told Haberman that the Union would not agree to let the Respondent keep a unilateral right to change this policy. Roberts said one of the reasons employees voted the Union in was because they felt promotions and transfers had not been done fairly in the past. He said the Union had a mandate to get language in the contract protecting employees' ability to move to other jobs, including promotions. In addition, the Respondent provided a counterproposal on discipline to the Union. That proposal stated:

> The company shall have the right to discipline and discharge any employee, including union representatives. In the event of discharge, the Company shall notify the Union within twenty-four (24) hours after such discharge of the reasons therefore.

Regarding layoffs, the Union presented a counterproposal whereby the Respondent would offer voluntary layoffs to employees, prior to implementing involuntary layoffs. In response, Haberman told Roberts that he wanted to keep voluntary layoffs outside the contract, so that the Respondent could use them at its discretion based on the circumstances at the time. Finally, Roberts told Haberman that seniority issues were very important to the membership. He noted employees were upset with how the Respondent had applied seniority to layoffs and promotions in the past. Roberts said employees also had given the Union a mandate to get seniority memorialized, so that everyone knew their rights.[131]

At the January 18 bargaining session, the Respondent submitted an updated discipline proposal, which stated:

[128] Tr. 912–913, 915–916, 918, 2138–2142; GC Exh. 520 (pp. 4–6); R. Exh. 24 (pp. 24491–24498).

[129] Tr. 919–921, 924–926, 1202; GC Exhs. 39–41, 520 (pp. 7–8, 11); R. Exh. 24 (pp. 24501–24502, 24509).

[130] GC Exhs. 707, 709; R. Exh. 24 (pp. 24551–24552); Tr. 1370–1371.

[131] Tr. 926, 935–943, 1305–1316, 1370–1371, 2148–2152; GC Exhs. 710 (p. 2), 715, 717; R. Exh. 24, p. 24373–24374.

> The company has an internal policy on discipline under which it has the right to discipline and discharge any employee. This policy will be provided to the union and is available in the Human Resources Department. In the event the Company believes it necessary to make changes to this policy, it will give the union advance notice of its intent to modify the policy and an opportunity to meet and discuss any proposed changes.
>
> In the event of discharge, the Company shall notify the Union as soon as possible, but in no event later than twenty-four (24) hours after such discharge of the reasons therefore.

The Respondent also provided the Union with its disciplinary policy. The overview stated: "It is Bemis Company policy to ensure that all employees are treated fairly and with dignity and respect. In that regard Bemis Company has a process for administering discipline." The policy went on to describe a progressive discipline process with four steps, any of which the Respondent could bypass. The policy contained a significant amount of language that was the same as the Respondent's progressive discipline system in its existing employee handbook. Roberts told Haberman the Respondent's discipline proposal maintained at-will employment and it was important to the Union and employees that the agreement have just cause as a basis for discipline. Roberts noted employees were not satisfied with the Respondent's record on discipline. Haberman said this was a first-time agreement and he did not want to agree to something that might not work. He said the Respondent may want to change the policy along the way, if it was not working. Roberts responded that the Union had never been "unreasonable people" and they could come to some sort of mutual agreement if an issue arose. But Roberts also said he was not interested in leaving discipline outside the contract and to the Respondent's discretion.[132]

The parties also discussed the requirement in the Union's proposal that the Respondent notify the Union when it issued any discipline to an employee. Haberman told Roberts privacy was a big concern for the Respondent. He said he did not think most employees wanted the Union to know or to have it be public knowledge when they were being disciplined. He told Roberts, if the Union wanted that information, it could request the information from the Respondent. Either at that time or on a subsequent date, Roberts told Haberman that, without notification of employee discipline, the Union would risk missing the deadline to file a grievance.[133]

The Union also submitted a written proposal for an interim grievance procedure, pending the parties' agreement on a full contract. The proposal was modeled upon a dispute resolution policy of the Respondent, which had not been implemented previously in Centerville. The proposal called for the Union to receive notification of employee discipline, as well as a process by which a peer review panel made up of employees appointed by the Respondent and the Union would conduct a hearing to determine if the discipline fairly applied the company's policies, rules, and practices. The Union made the proposal, because of disciplinary issues occurring at the plant at that time. The Union wanted an agreement on an interim procedure which complied with the Board's decision in *Total Security Management Illinois 1,* 364 NLRB No. 106, slip op. at 9 fn. 22 (2016).[134]

At or shortly after bargaining on February 7, the Respondent submitted multiple proposals on promotions and transfers. For the first time, the Respondent also provided the Union with its promotions and transfers policy. This policy, like the one for discipline, also borrowed language from the Respondent's existing handbook provision for job postings.[135]

On February 8, Haberman sent Roberts the Respondent's counterproposal, entitled "interim conflict resolution policy." During bargaining, Haberman told Roberts the Respondent had gone as far as it was willing to go on the issue and intended to implement the proposal on February 20. Then on February 12, Roberts sent an email to Haberman, which stated:

> During our most recent bargaining session for a labor agreement covering the Company's Centerville, IA [p]lant, we spent a substantial amount of time attempting to reach an Interim Grievance and Arbitration procedure under "Total Security[.]" Unfortunately, we were unable to reach a mutual agreement on an Interim Grievance & Arbitration procedure. We would advise you the Union will not raise objections if you utilize the modified Bemis Dispute Resolution Procedure represented by your final proposal to the Union on February 8, 2017. You stated that it is your intention to roll this out in the plant to become effective February 20, 2017. However, the Union expressly reserves its rights under "Total Security" [i]n respect to the "pre-imposition" bargaining rights regarding discretionary discipline as outlined in the decision.

On February 15, Haberman responded via email:

> Upon reflection, the company has decided against implementing its Conflict Resolution Policy. To the extent there are disciplinary matters moving forward, we will continue to operate under the NLRB's rules.

On February 27 and in response to Roberts' requests to continue bargaining over an interim procedure, Haberman wrote the Respondent preferred to maintain the status quo and operate under *Total Security* until the parties reached agreement on a complete contract. Haberman later told Roberts that he had pulled the Respondent's interim conflict resolution proposal, because of the lack of trust between management and labor at the Centerville facility.[136]

3. The Spring 2017 Bargaining Sessions

The parties next met for negotiations on March 29 and 30. The Respondent submitted counterproposals, including on discipline. The only change the Respondent made was to add "covered by this Agreement" to the end of the sentence which stated: "The company has an internal policy on discipline under which

[132] Tr. 947–953, 1376, 1392–1399; GC Exhs. 16 (p. 24), 728 (p. 2), 729.

[133] Tr. 953; GC Exh. 724.

[134] Tr. 1319–1320; GC Exh. 733.

[135] GC Exhs. 16 (pp. 46–47), 736, 742, 743.

[136] Tr. 961–964, 1111, 1208, 1319–1326; GC Exhs. 521 (pp. 58–59, 64), 740. Given these facts, I find that the parties did not reach an agreement on the interim grievance procedure. Roberts' testimony on that issue was inconsistent.

it has the right to discipline or discharge any employee." Haberman noted the lack of substantive changes in the language and said he knew the Union did not like the fact the Respondent was proposing to keep the provision out of the collective-bargaining agreement. He said the parties had a "philosophical disagreement" in that regard.[137]

The parties also discussed the "Labor Agreement" provision. The Union's second proposal on August 24, 2016, stated:

> This agreement is made and entered into by and between the Centerville, Iowa Plant of Bemis Company, Inc., its successors or assigns (hereinafter referred to as the "Company") and Graphic Communications Conference/International Brotherhood of Teamsters Local #727, (hereinafter referred to as the "Union"), for the purpose of establishing terms and conditions of employment and preventing or adjusting misunderstandings, is (sic) set forth in the following Articles.

On March 29, the Respondent provided a counterproposal, stating:

> This agreement is made and entered into by and between the Centerville, Iowa Plant of Bemis Company, Inc. ("Company") and Graphic Communications Conference/International Brotherhood of Teamsters Local #727-S, ("Union").

Haberman told Roberts he would not agree to the Union's proposal to include "for the purpose of establishing terms and conditions of employment and adjusting misunderstandings or disagreements regarding the terms of this Agreement, as set forth in the following Articles" to the end of the sentence. Haberman said adding that language could give the Union additional rights beyond the body of the contract. He said the agreement itself should set the terms and conditions, including any changes.[138]

The topic of union access to the plant also arose at this session. The Union's initial proposal on August 23, 2016, stated: "The employer will allow Union representatives reasonable access to the plant for the purposes of Union business." As of March 29, the Respondent's counterproposal was:

> Where necessary for the investigation and/or proper disposition of a complaint raised under Article ___ - Grievance and Arbitration Procedure of this Agreement, a local or international union representative may visit the plant during working hours. When a visit is desired, the union representative must make application to the Human Resources Manager. Such visits shall be held to the minimum time necessary and shall not interfere with business operations. A visit will not be unreasonably denied.

The Union submitted a counterproposal the same date, which sought to add the ability for its representatives to visit the plant "to conduct the business of the Union" and "to meet with representatives of the Company." On March 30, the Respondent rejected the sought changes and resubmitted its prior counterproposal. In explaining the rejection, Haberman said the additions did not need to be in the language, because the Union could conduct its business outside of the plant. He added that the Union's vice president and the Respondent's human resources manager were building a good relationship, meeting and talking (about discipline).[139] Haberman said, as the relationship grew, the parties could add language. He reiterated his earlier statement that this was a first contract and they should get a framework. Roberts responded that they had no established relationship at this point and the Union was more comfortable with defining the parameters of the relationship. Shortly thereafter, Roberts said the Union believed it was best for the relationship to have specifics in the contract. Haberman responded that approach was "like having a prenuptial agreement before you get married; you're saying the relationship won't work." At the end of the discussion that day, Haberman addressed the Union's proposal for a past practice provision, saying he did not think either a past practice or a zipper clause was appropriate. Haberman said the Respondent did not have past practices moving forward, that the collective-bargaining agreement was the way to move forward. He said, to the extent the Respondent wanted to change the status quo, the NLRB had a process which had to be followed.[140]

The parties also addressed the Union's proposal for a bulletin board at the Centerville facility. The Union's initial August 23, 2016 proposal called for a bulletin board in a mutually satisfactory place, with the Union retaining sole authority regarding what items could be placed on it. As of the March 29 session, the Union's counterproposal called for the Respondent to provide union bulletin boards in each department and at the main entrance. The Union retained the authority to determine what could be posted but would meet with the Respondent and discuss if the posting should be modified or removed. On March 30, Haberman told Roberts at bargaining that he was not interested in having separate bulletin boards and the Union had other ways of communicating with its members. Haberman said separate boards differentiated between union and nonunion employees.[141]

On the Union's security/check off proposal, Haberman told Roberts the Respondent was not interested in collecting dues money for the Union. He said the Union had other ways to collect it. He added, if the law changed, the Respondent would sit down and talk to the Union to the extent required by law.[142]

In its counterproposal on grievance and arbitration, the Respondent added the following language:

> Section 2. Matters Excluded from Grievance Procedure. Should an unfair labor practice charge be filed by the Union or the Employee involving the subject matter of a grievance or should the grievance allege matters that could be presented as an unfair labor practice charge, then any such grievance, regardless of its stage in the grievance procedure, shall no longer be processed and shall not be subject to final and binding arbitration but shall proceed exclusively before the National Labor Relations Board. In addition, any interpretation of this arbitral exclusion shall not be subject to final and binding arbitration,

[137] GC Exhs. 744 (p. 10), 749 (p. 9); Tr. 969.

[138] GC Exhs. 520 (p. 41), 702 (p. 2), 744 (p. 2), 745; Tr. 964–965.

[139] By this time, Zaputil and Bray had begun their weekly meetings where Bray would present the Respondent's intended discipline of employees to her.

[140] GC Exhs. 701 (p. 16), 744 (p. 15), 745 (p. 3–4), 749 (p. 14); R. Exh. 24, pp. 24452–24453.

[141] Tr. 965–967; GC Exhs. 701 (p. 10), 703 (p. 5), 745 (pp. 4–5).

[142] Tr. 967.

> but shall be within the exclusive jurisdiction of the federal court.

The Union objected to this proposal limiting employee access to the grievance procedure.[143]

Finally, the Respondent included a no-strike, no-lockout proposal for the first time.[144] The proposal stated:

> Section 1. During the term of this Agreement there shall be no strikes, sympathy strikes, work stoppages, slowdowns, boycotts, intentional interruption of production, delays or suspension of work of any nature, and no other acts that interfere with the Company's operations or the production or sale of its products or services by the union, its officers, agents or members, or by the employees.
>
> Section 2. During the term of this Agreement there shall be no lockout of any employees by the Company.
>
> Section 3. The union agrees that it will make every effort possible to discourage, prevent and end any strike or proscribed activity and will inform all employees who participate in such activity that it is their individual responsibility to comply with this Agreement.
>
> Section 4. Any or all employees participating in any such activity proscribed herein shall be discharged.

The Respondent and the Union next met for negotiations on April 12 and 13. On the first day, the Union provided counterproposals on discipline, as well as promotions and transfers. Again, both proposals were drafted as articles contained in the collective-bargaining agreement. On April 13, the Respondent submitted a counterproposal on promotions and transfers, with language which was substantively identical to its initial proposal on December 20, 2016. The April 13 proposal simply changed "HR Office" to "Human Resources Department" and added a phrase clarifying that the referenced internal policy was "applicable to all employees covered by this Agreement." However, substantive changes were made to the promotions and transfers policy, which would remain outside the contract. At bargaining that day, the two chief negotiators extensively discussed the impact of keeping the Respondent's internal policies outside the contract. According to his notes, Haberman first stated: "The policies are subject to bargaining under NLRB act, if we changed during the contract." When Roberts countered that it actually meant he could just change the policies at his will, Haberman initially disagreed. He told Roberts that, by referencing the policies in the contract, the Respondent was making any changes subject to the grievance and arbitration procedure to determine if they were done fairly and correctly. He also contended that employees could grieve whether the Respondent had followed the policies. But shortly thereafter, Haberman acknowledged the Respondent's proposals only required it to "meet and discuss," not bargain, over any changes[145]

When the discussion turned to discipline, Haberman said the Respondent recognized that one of the reasons why employees "narrowly" voted the Union in was due to issues the Respondent had with administering discipline. He acknowledged the company had "not been perfect" and continued to work to improve. But he stated he had reviewed the Respondent's disciplinary records and only 15 percent of the employees were in the disciplinary progression. He said the company was not arbitrarily handing out discipline all over the place. Haberman told Roberts there were workplaces all over the world which did not have review of issued discipline and things go fine. He said the Respondent did not have a discipline counterproposal and it was comfortable with its own proposal and language, i.e. keeping the discipline policy out of the contract. Haberman also agreed with Roberts' contention that the Respondent could make changes to the policy without the Union's consent. However, he contended the Respondent was giving the Union an opportunity to provide input and voice its concerns regarding the changes. Roberts called that "window dressing" giving the Respondent unilateral control.[146]

At bargaining on May 2 and 3, the Respondent made a counterproposal on promotions and transfers. The language now specified that the Respondent would give the Union no less than 30 days of advance notice of any proposed changes to the policy. Haberman said the company "wouldn't unilaterally make change(s) and do it over night and spring it on employees." But when Roberts responded that the Respondent's proposal still did not require an agreement with the Union to change the policy, Haberman replied, "That's correct." Roberts said the Respondent was asking the Union to waive its right to bargain over any changes. Haberman confusingly responded: "NLRB talks about bargaining outside of the contract with a new contract. We would abide by all rules of the NLRB." He did not elaborate further.

Roberts noted that nothing was more critical to employees on the floor than promotions and discipline. He told Haberman the Union might be fine if the contract language required mutual agreement between the parties for any changes to the policy.[147]

Roberts also suggested for the first time that the parties move on to economics. He noted that the parties' positions on noneconomic issues were fairly rigid at that point and it might be time to set them aside. Haberman responded that he wanted some time to talk about expanding into economics.[148]

Bargaining resumed on May 31 and June 1. Roberts renewed his request that the parties get into economics. In response, Haberman noted the Respondent had provided the Union with a full response, it's fifth noneconomic proposal, at the May 3 session. He said the Respondent had not prepared anything on economics but would not reject any Union offering. Haberman told Roberts the Respondent was unlikely to have a response to any economics proposal the Union submitted at that time. He noted the parties' next scheduled bargaining dates were in 2 weeks and the Respondent would be able to start working on it then. He said

[143] Tr. 1121–1122, 1336; GC Exh. 744, p. 11.

[144] GC Exh. 744, p. 13. The Respondent made the same no-strike proposal on August 24, 2016 when Foran was the negotiator, but Haberman pulled that proposal on November 1, 2016. (GC Exh. 703, p. 9.)

[145] GC Exhs. 710 (p. 2), 752, 753, 754 (p. 2), 755; R. Exh. 24, pp. 24295–24296; Tr. 1024–1027.

[146] R. Exh. 24, pp. 24297–24298.

[147] GC Exh. 758, p. 7; R. Exh. 24, pp. 24462–24463; Tr. 1748.

[148] R. Exh. 24, p. 24474; Tr. 1033.

the Respondent would expect to have a full economic proposal at the as-yet unscheduled meetings thereafter. Haberman told Roberts he wanted to maintain their focus on noneconomics.[149]

The parties again discussed their latest proposals on discipline. The Respondent's counterproposal extended the notice period for changes to the discipline policy from 30 to 45 days. Haberman said his hang up with the Union's latest proposal was that, at the end of the day, the Union would get final say on any discipline policy changes. Haberman had the same concern over the Union's proposal on promotions and transfers. Roberts asked where the just cause requirement was in the Respondent's discipline proposal. Haberman responded that the Respondent's policy reflected a commitment to treat employees fairly and with dignity and respect. He also said, if the Respondent went directly to discharge, the Union could challenge it. Roberts asked how that would be possible without a just cause requirement.[150]

The parties also discussed their grievance and arbitration procedure proposals. In prior discussions, Haberman and Roberts disagreed multiple times concerning whether the sources of arbitrators to hear grievances should be the American Arbitration Association (AAA) or the Federal Mediation and Conciliation Service (FMCS). Roberts told Haberman that AAA was very expensive and FMCS provided essentially the same list of arbitrators at a much lower cost. The Union was concerned that, if the cost was too high, employees' access to arbitration would be restricted. Haberman said that AAA provided a higher quality of arbitrator, to which Roberts responded that the parties could specify to FMCS what qualifications they wanted in an arbitrator. At one point, Roberts asked Haberman what the cost of a AAA panel was. Haberman responded $400, but Roberts had researched it and told him it was closer to $1,400. He told Haberman that corporate would be highly upset the first time they got an arbitration bill from AAA. Haberman said he would have to check on the AAA cost. At the May 31-June 1 session, Roberts reiterated the Union's position that using AAA for arbitrators was too expensive and FMCS provided a perfectly workable solution. Haberman confirmed that

Roberts' prior estimation of the cost of a AAA arbitrator was accurate.[151]

The Respondent also reiterated that it wanted to retain discretion over voluntary layoffs and not put that subject in the contract. Haberman noted the Respondent had offered a continuation of benefits to employees for the most recent layoff but did not want that in the agreement either.[152]

Finally, Haberman informed Roberts the Respondent was having difficulty establishing employees' department seniority dates, because of records issues from prior owners and a human resources computer system change. He said the Respondent might not be able to identify all jobs previously held by employees. The parties discussed different scenarios for identifying prior jobs held by employees. Plant and department seniority lists were important to the Union, because it wanted to maintain the status quo at both levels.[153]

At the next bargaining sessions on June 13 and 14, the Union presented its initial economic proposal. In addition, the Respondent presented a modified promotions and transfers proposal. The Respondent changed the requirement that it "meet and discuss" proposed changes to its policy with the Union to "meet and confer…in an attempt to reach an agreement on its proposed changes." The Respondent also added the requirement that it post the new policy for 15 days and distribute it to employees, prior to implementation. The Respondent made the same changes, including changing "meet and discuss" to "meet and confer," in its revised discipline proposal. When Roberts asked Haberman if "meet and confer" meant bargaining, Haberman told him no, it did not rise to the level of bargaining or require an agreement by the parties or a ratification vote of the union membership.[154]

At the same sessions, the parties discussed their seniority proposals. Haberman rejected the idea of including anything in the contract requiring the Respondent to post an employee seniority list. Haberman stated he had not heard this was a problem and thus it did not need to be addressed in the contract. Haberman also said he was deleting text from the Respondent's seniority proposal stating the language would apply to layoffs and promotions. He explained, if seniority applied to a specific subject like layoffs, there would be language in the layoffs provision. Haberman told Roberts he was not going to put language in the seniority provision that the Union might argue later granted it a right he did not intend to give it. Roberts said the Union was sticking with its position that the language should be in both areas. Finally, when Roberts asked for a full employee seniority list to ensure that any contract agreement did not upset the status quo, Haberman said the Respondent was still working on it.[155]

4. The Summer 2017 Bargaining Sessions

Six weeks later, the Respondent and the Union met on July 25 and 26 to continue bargaining. At the start, Haberman detailed the current status of the negotiations. He noted the parties had exchanged noneconomic proposals back and forth at the prior session. He said the Union had provided its initial economic proposal then, which the Respondent did not have a chance to go over with Roberts at that session. He noted that five specific noneconomic proposals were discussed in the prior session. He appeared to be referring to discipline, promotions and transfers, grievance and arbitration, leave of absences for union business, and seniority. He said the Respondent needed a "clear explanation" from the Union on its proposals in those five areas. Haberman and Roberts rehashed their prior arguments over whether discipline and promotions/transfers should be inside or outside

[149] R. Exh. 24, p. 24475.

[150] R. Exh. 24, pp. 24483–24484; GC Exhs. 767, 772 (p. 2); Tr. 1041, 2152–2153.

[151] R. Exh. 24, p. 24475; Tr. 1038–1040, 1339–1340. At other points in their discussions on this topic, the Union proposed specifying an alternative source of arbitrators in addition to AAA or agreeing on a permanent panel. (Tr. 1141−1142, 1564–1565.) Haberman replied that the Respondent's proposal did not preclude the parties from doing either of those things, even if that language was not included in the contract. He also suggested the parties could use FMCS for routine labor arbitrations. (Tr. 1341–1342.)

[152] Tr. 1040.

[153] Tr. 1108.

[154] GC Exhs. 785–787; Tr. 1145–1146, 1358–1360.

[155] R. Exh. 24, p. 24440; Tr. 1047–1049.

the contract. They also argued over whether discipline should be subject to a just cause standard. Haberman said, if the Respondent did agree to just cause, the provision would not be in the contract, only in the discipline policy. Roberts also stated the Respondent was not prepared to get into economics, to which Haberman responded they planned on doing so. Roberts said they had 22 meetings and were stuck in a little circle. Near the end of the day on July 26, the Respondent submitted its first economic proposal. The proposal was a partial one, covering the subjects of work week, overtime, safety shoes, break periods, jury duty, leaves of absence, tool allowance, holidays, health insurance, and dental insurance. It did not include proposals on wages, retirement, shift differential, and bereavement leave.[156]

At the September 12 and 13 bargaining sessions, the Respondent submitted its second economic proposal. The Respondent added provisions on wages, bereavement leave, and short-term disability. Its wage proposal was not substantive but stated that an as yet unattached appendix would set forth employees' wage rates for the duration of the contract.[157]

5. The Fall 2017 Bargaining Sessions

During bargaining on October 10 and 11, the Respondent presented its first, complete economic proposal. For wages, the Respondent added that it would "meet with the Union annually to discuss modification" of the wage rates set forth in the appendix. Haberman told Roberts wage increases were likely and the Respondent would let the Union know every year what they would be. Haberman said they were not willing to agree to specified wage increases in the contract. The Respondent also proposed that it would retain the ability to unilaterally determine or change employee schedules, overtime, and holidays. As for noneconomics, the Respondent proposed for the first time an attendance policy outside the contract, pursuant to which employees could receive a documented verbal warning at five occurrences. At the time, the Respondent's existing attendance policy in its employee handbook did not impose such discipline until an employee with more than one year of service had eight occurrences and employees with less than one year of service had six occurrences. The parties discussed how the Respondent's proposal was more restrictive than its existing policy.[158]

At the November 15−16 bargaining sessions, the Union made a counterproposal on voluntary layoffs which stated: "When reducing the work force in a department, the Company may elect, but shall not be required, to offer Optional Layoffs." The Respondent rejected the proposal on November 29. Haberman said he did not see the Union's language as necessary. He added that, in the future, the Respondent would sit down and talk with the Union if the company felt a voluntary layoff was a good option, just as it had the prior summer. Roberts asked Haberman whether he felt the Respondent would have to bargain over the terms of a voluntary layoff going forward or if the Union would be waiving its right to bargain without any contract language on the subject. Haberman responded that the company would need to talk about it with the Union but not come to an agreement, unless it violated some other term of the contract. Roberts noted the Union's concern that, with the Respondent's proposed management rights clause, the Union would lose its right to bargain on this subject. Haberman responded that a general principle of labor law was, if a contract had a management rights clause, any subject not in the contract did not exist. But he said again that the Respondent would have to talk about any change in policy that effected terms and conditions of employment. Shortly thereafter, Haberman said his position was, if a subject was not in the contract, the Respondent could unilaterally change it. However, he then stated inconsistently that "I think the law indicates that just because isn't in the contract does not mean we do not meet. Does not mean we get to do what we want[.]" At this point, the Respondent's management rights proposal was the same as its initial one proposed in August 2016. It granted the Respondent numerous rights, including "suspending, scheduling, assigning, discharging, laying off, recalling, promotions, retiring, demoting, and transferring employees." It also gave the Respondent the authority to change employees' work schedules, eliminate job classifications, establish wage rates for new or changed positions, and establish or change incentive and bonus compensation.[159]

During the same meetings on November 29 and 30, Roberts asked Haberman if the Respondent made any changes to its discipline proposal. Haberman replied no. The two argued again over a just cause standard for discipline. Haberman stated that, even without just cause in the contract, arbitrators would approach a termination challenge with a mind towards the just cause question. He rejected the Union's position that arbitrators would not automatically use a just cause standard, if it was not contained in the contract. Haberman claimed the Respondent could not change its discipline policy arbitrarily. He added that, if the company did not follow the policy and treated employees disparately, the grievance and arbitration provision provided employees with a remedy. He concluded by saying, if the Respondent did not follow its own policy, an arbitrator "is going to whack us!" Haberman and Roberts also repeated their discussion from earlier negotiations about whether the Respondent would notify the Union of employee discipline. Haberman stuck to his position that the Respondent was not going to share that information, due to concerns over employee privacy.[160]

Beyond discipline, the Respondent rejected the Union's proposal to put promotions and transfers language in the contract, with an additional mid-term reopener requiring mutual agreement to modify the provision. The parties also discussed the Respondent's proposal limiting the Union to challenge a matter with either a grievance or an unfair labor practice charge. Haberman said he was not particularly married to it but wanted to wait and see if the new Board General Counsel would change or drop some of the prior General Counsel's directives regarding deferral to arbitration. Haberman and Roberts also repeated

[156] R. Exh. 24, pp. 22892–22894; GC Exhs. 782–786, 790; Tr. 1110–1113.

[157] GC Exh. 821.

[158] GC Exhs. 16 (p. 12), 827 (pp. 2, 8, 10), 828 (p. 2); Tr. 1121–1123, 1207, 2209.

[159] GC Exhs. 841 (p. 4–5), 842 (pp. 5–6); R. Exh. 24, pp. 22468–22469, 22471–22472; Tr. 1147, 1772–1773.

[160] Tr. 1128–1137, 1140–1145, 1766–1767, 1779–1780; GC Exhs. 450 (p. 64), 520 (pp. 102–103); R. Exh. 24, pp. 22466, 22470.

earlier arguments on a number of topics, without any changes to their respective positions. The first was the Union's desire for its own bulletin board at the Centerville facility. Haberman again said the Union had other ways to communicate with its members, such as social media, and mentioned service to customers. Roberts said he did not understand how it related to customers. When Roberts said he was talking about two separate boards, one company and one union, Haberman responded that it would separate the employees. Next, Haberman again told Roberts that the Union's nondiscrimination language did not belong in the contract, because it was statutory. He said the same thing regarding the Union's military leave proposal. Finally, the two rehashed earlier discussions on voluntary layoffs and whether an outside-the-contract policy would be subject to grievance and arbitration.[161]

6. Bargaining from January 1 to April 26, 2018

Following the Respondent's implementation of the 12-hour schedule facility-wide on December 31, the parties discussed seniority at length during meetings on January 10−11 and February 1−2, 2018. The Respondent provided the Union with a seniority list on January 10 with plant and department seniority.[162] It wanted the Union's agreement on the list prior to posting it in the plant. The Union reviewed it and noticed discrepancies with certain employees. When the Union asked for an electronic version of the list, Haberman responded he wanted agreement on the form of the list, not the specific dates for each employee. He said the parties could work on discrepancies at a later date. The Union disagreed and wanted the dates resolved before any agreement on the contract provision governing seniority.[163]

Prior to the complaint in this case issuing, the Respondent and the Union last met to bargain on April 17 and 18, 2018.[164] On these dates, the parties reached tentative agreements on seniority and the grievance and arbitration procedure. In the seniority TA, the Union agreed to the Respondent's demand that the provision not state the job actions, including layoffs, to which seniority would apply. Thus, the provision simply defined how seniority would be determined. Prior to the TA, the Respondent made 13 seniority proposals. By the time the parties reached the TA, the Union also had withdrawn its voluntary layoff proposal because, as Roberts framed it, "we had gotten nowhere with it." For grievance and arbitration, the Union agreed to the Respondent's demand that employees could not submit certain disputes to both the NLRB and to an arbitrator. It also agreed to the Respondent's proposal that AAA arbitrators be used. With respect to prior tentative agreements which the parties reached, the Union acceded to the Respondent's demand that the recognition clause make no reference to the contract "establishing terms and conditions of employment" or "adjusting misunderstandings" related to the agreement. On promotions and transfers, the Respondent submitted its eleventh proposal, which stated:

> The company has an internal policy on filling open positions applicable to all employees covered by this Agreement. This policy will be provided to the union and is available in the Human Resources Department. In the event the Company believes it necessary to make changes to this policy, it will give the union no less than forty-five (45) calendar days advance notice of any proposal to modify the policy. During this time the Company will offer the union an opportunity to meet and confer over the Company's proposed changes in an attempt to reach an agreement on the proposed changes. Before implementing any new policy, the Company will post the policy for an additional fifteen (15) calendar days and distribute it to employees.

At this time, the Respondent's most recent contract proposal on discipline was submitted on November 29. It stated:

> The company has an internal policy on discipline under which it has the right to discipline and discharge any employee covered by this Agreement. This policy will be provided to the union and is available in the Human Resources Department. In the event the Company believes it necessary to make changes to this policy, it will give the union no less than forty-five (45) calendar days advance notice of any proposal to modify the policy. During this time the Company will offer the union an opportunity to meet and confer over the Company's proposed changes in an attempt to reach an agreement on the proposed changes. Before implementing any new policy, the Company will post the policy for an additional thirty (30) calendar days and distribute it to employees.
>
> In the event of discharge, the Company shall notify the Union as soon as possible, but in no event later than twenty-four (24) hours after such discharge of the reasons therefore.

As of this session, the Respondent's only full economics proposal was the one it made on October 10. In addition, the company's most recent proposal on wages came more than two months earlier on February 2, 2018. At that point, the Respondent modified the proposal to require it to negotiate, rather than discuss, with the Union an adjustment to employees' wages each year.[165] The Respondent's proposals on scheduling, overtime, and holidays never changed from the initial proposal on October 10, in which the Respondent retained unilateral control over those subjects. The Respondent also continuously sought to keep its policies on discipline, promotions/transfers, attendance, tool allowance, and voluntary layoffs outside the contract.

[161] Tr. 1137–1140, 1148–1151, 1326–1330, 1776–1777.

[162] The parties dispute when the Respondent first provided the Union with a full departmental seniority list for all unit employees. I find that this occurred at the January 10, 2018 session. Although it did provide other seniority lists prior to that date, those lists contained only plant seniority dates or department seniority dates solely for extrusion department employees. (GC Exhs. 406, 417; R. Exhs. 1, 7; Tr. 1560.)

[163] Tr. 1158–1176.; GC Exh. 849.

[164] At the hearing, the Respondent attempted to put into evidence testimony concerning negotiations between the parties after April 26, 2018. I sustained the General Counsel's objection and did not allow the testimony. (Tr. 2131–2137.) I reaffirm that ruling now, because evidence of negotiations outside of the bad-faith time period alleged by the General Counsel is irrelevant. See *National Automobile and Casualty Insurance Co.*, 199 NLRB 91, 91 fn. 2 (1972). However, I did allow the Respondent to make an offer of proof using a question-and-answer format. (Tr. 2255–2261; R. Exhs. 25 and 26, rejected.)

[165] The Union did not submit a full economics counterproposal to the Respondent at any point after October 10. (Tr. 2210.)

Haberman's explanation to the union representatives for this approach was that he was going to be a "hard sell" and they would have to help him understand why it was necessary to put a subject into the contract.[166]

LEGAL ANALYSIS

The duty to bargain in good faith under Section 8(d) of the Act requires both the employer and the union to negotiate with a "'sincere purpose to find a basis of agreement,'" *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984) (quoting *NLRB v. Herman Sausage Co.,* 275 F.2d 229, 231 (5th Cir. 1960)). Although the statute cannot compel a party to make a concession, an employer is, nonetheless, "'obliged to make *some* reasonable effort in *some* direction to compose his differences with the union, if [Section] 8(a)(5) is to be read as imposing any substantial obligation at all.'" Ibid. (quoting *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 135 (1st Cir. 1953), cert. denied 346 U.S. 887 (1953)). (Emphasis in original.) Therefore, "mere pretense at negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirements of the Act." *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), enfd. sub nom. *NLRB v. Hardesty Co.*, 308 F.3d 859 (8th Cir. 2002) (quoting *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210 (8th Cir. 1965)).

In determining whether a party has violated its statutory obligation to bargain in good faith, the Board examines the totality of the party's conduct, both at and away from the bargaining table. *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003); *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991). From the context of the party's total conduct, the Board must decide whether the party is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. *PSO*, supra.

The Board considers several factors when evaluating a party's conduct for evidence of surface bargaining. These include delaying tactics, the nature of the bargaining demands, unilateral changes in mandatory subjects of bargaining, and efforts to bypass the union. *Atlanta Hilton & Tower*, supra at 1603. It has never been required that a respondent must have engaged in each of those enumerated activities before it can be concluded that bargaining has not been conducted in good faith. *Altorfer Machinery Co.*, 332 NLRB 130, 148 (2000).

"Although the Board does not evaluate whether particular proposals are acceptable or unacceptable, the Board will examine proposals when appropriate and consider whether, on the basis of objective factors, bargaining demands constitute evidence of bad-faith bargaining." *PSO*, supra, citing *Reichhold Chemicals*, 288 NLRB 69 (1988), affd. in relevant part 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991). An inference of bad-faith bargaining is appropriate when the employer's proposals, taken as a whole, would leave the union and the employees it represents with substantially fewer rights and less protection than provided by law without a contract. *PSO*, supra at 487–488. This includes proposals that require a union to cede its representational functions. *Regency Service Carts*, 345 NLRB 671, 675 (2005).

Applying this legal framework here, I conclude the totality of the Respondent's conduct establishes it engaged in surface bargaining. At the bargaining table, the Respondent's refusal to memorialize agreements; bargaining proposals giving it unilateral control over mandatory bargaining subjects; and its refusal to meet at reasonable times, along with other dilatory tactics, demonstrate it did not intend to reach a collective-bargaining agreement with the Union. Away from the table, the Respondent's numerous unilateral changes to significant terms and conditions of employment and its direct dealing with employees support the same conclusion.

Starting with conduct at the bargaining table and bargaining proposals, the Respondent insisted throughout negotiations that its discipline and promotions/transfers policies remain outside the contract. At the outset, Haberman informed Roberts he preferred a minimalist agreement without a lot of verbiage. He also wanted to maintain flexibility by giving the Respondent the ability to change employees' jobs and to discipline them. These two areas just so happened to be ones the employees wanted addressed in the contract, because they strongly felt the Respondent had not been treating them fairly in those areas. In the negotiations over the next 18 months, the Respondent made 11 promotions/transfers proposals and six discipline proposals. In all of them, the two policies remained outside the contract. Thus, even though the parties were negotiating policy language, any agreement on that language would not be memorialized in a collective-bargaining agreement. The Board has found similar conduct unlawful for multiple reasons. In *Herald Statesman*, 174 NLRB 371, 371–372 (1969), enf. denied on other grounds 417 F.2d 1259 (2d Cir. 1969), an employer stated repeatedly in bargaining that it had policies covering mandatory subjects of bargaining, but "was not prepared to write [them] into the contract." The policies covered pensions, hospital and medical benefits, sick leave, severance pay, dismissal notice pay, and an incentive pay plan. The Board expressed its disapproval of this approach by stating:

> We cannot agree that by engaging in such a course of bargaining, Respondent was merely requesting that the Union agree to leave certain matters to its discretion. On the contrary, it is clear from the evidence set out above that Respondent asserted unequivocally on several occasions that it would not include in a contract any agreement that might be reached on certain mandatory subjects of bargaining. Under these circumstances, any protests by the Union would have been an exercise in futility for to insist at this stage upon agreement to reduce the result of any negotiations to writing would have foreclosed negotiations on that subject. The announcement in advance of a determination not to comply with the statutory requirement to reduce any understanding reached to a signed and binding agreement displays the absence of a good-faith intention to conclude an agreement. Such avoidance of the statutory obligation is a violation of Section 8(a)(5). Further by stating that it would not

[166] GC Exhs. 522 (pp. 7–9.), 828, 842 (p. 7.), 864 (p. 2, 6), 874 (p. 2), 903, 907 (p. 2.); Tr. 942, 2146–2147.

> include even existing company policies in the contract, Respondent foreclosed bargaining with respect to these mandatory areas. Such foreclosure is tantamount to a refusal to negotiate about such subject matters and each instance is an independent violation of Section 8(a)(5) of the Act. Accordingly, we find that Respondent violated Section 8(a)(5) and (1) of the Act by stating that it would not include in a contract any agreed on provisions concerning pensions, hospital and medical benefits, sick leave, severance pay, dismissal notice pay and incentive pay plan.

The Respondent here also steadfastly refused to include policies involving mandatory subjects of bargaining in a collective-bargaining agreement, even if the Respondent and the Union ultimately agreed upon the policy language. The written contract is the goal of the bargaining process and what separates a unionized workplace from a nonunionized one. Wanting to keep these policies outside the agreement is not, as Haberman claimed, a "philosophical difference." Rather, it is a method for the Respondent to retain unilateral control over terms and conditions of employment. Haberman said he was a "hard sell" and would require an explanation from the Union as to why something needed to be in the contract. Why a mandatory subject of bargaining needs to be addressed in a contract is self-explanatory: if the Union bargained over a subject in contract negotiations and agreed to leave it outside the contract, it was opening up the possibility of having waived its right to bargain over the subject going forward. The Respondent's refusal to include these policies in a contract constitutes both a lack of good-faith bargaining under Section 8(a)(5) and a failure to comply with Section 8(d)'s requirement to execute a written contract incorporating any agreement reached.[167] *Bethea Baptist Home*, 310 NLRB 156, 156 (1993) (employer's refusal to put agreements on proposals in the collective-bargaining agreement supported finding of surface bargaining).

The Respondent's approach to discipline and promotions/transfers was part of a broader attempt to retain unilateral control over numerous, significant mandatory subjects of bargaining. The Respondent's management-rights proposal, which never changed over the course of 18 months of bargaining, would have granted it the right to suspend, discharge, layoff, recall, demote, and transfer employees, as well as eliminate their job classifications and transfer or subcontract their work. It also gave the Respondent the authority to unilaterally change employees' work schedules, wage rates for new or changed positions, incentive and bonus compensation, and policies and work rules. These rights were unfettered, "except as specifically limited by the express language" in the collective-bargaining agreement. But Haberman sought to avoid those limitations with his minimalist approach and aversion to putting language in the contract. In addition to discipline and promotions/transfers, the Respondent sought to keep the attendance policy, tool allowance policy, and voluntary layoff procedure outside the contract. The Respondent's contract proposals also gave it unilateral control over overtime, work schedules, and the number of holidays.

Despite the litany of bargaining waivers being sought, the Respondent did not, at any point in bargaining, offer any significant carrot to the Union in return. Indeed, the only concessions the Respondent points to in its proposals are to the discipline and promotions/ transfers provisions. The Respondent's final proposals on these matters required it to give the Union 45 days' notice of any changes and the opportunity to "meet and confer" over them "in an attempt to reach an agreement." If no agreement was reached, the Respondent could implement the changes, shortly after it notified employees of them. Thus, the so-called concessions did not alter the bottom line: at the end of the day, the Respondent could implement whatever changes it wanted, absent agreement from the Union. This meant the Union still was waiving its right to bargain to agreement or impasse on any proposed changes. Roberts assessment that these concessions were "window dressing" was an accurate characterization. Agreeing to these proposals would have left the Union in a worse position than having no contract.[168]

Moreover, the Respondent repeatedly sent mixed signals about the effects of keeping the policies outside the contract. Haberman made inconsistent statements, including in the same meeting, concerning whether the Union would be waiving its right to bargain over changes to the policies by agreeing to the company's proposals. On April 12, Haberman told Roberts that the NLRB would require bargaining over any changes, even if the policies were outside the collective-bargaining agreement. But then, he acknowledged the contract proposal only required the Respondent to meet and discuss any changes it wanted to make and conceded the Respondent ultimately could make changes without the Union's consent. At the June 13-14 sessions where the Respondent changed its "meet and discuss" language to "meet and confer," Haberman told Roberts "meet and confer" did not rise to the level of bargaining. How he came to this conclusion is unknown, because Section 8(d) of the Act uses those exact words to define what it means to bargain collectively. *Parsons Electric, LLC*, 361 NLRB 207, 212 (2014). In the earlier April 12 meeting, Haberman acknowledged this, saying "the NLRB would disagree," when Roberts told him meeting and conferring about changes was not bargaining. An objective reading of the Respondent's final contract proposals in these areas is that it would be required to bargain with the Union for 45 days over any proposed changes, after which it could implement them unilaterally absent agreement. But Haberman never explicitly set forth or agreed to that interpretation during bargaining.[169]

[167] The General Counsel did not allege the Respondent's conduct in this regard to independently violate the Act, as the Board found in *Herald Statesman*. Thus, I rely on this conduct only as evidence of surface bargaining.

[168] Haberman also testified that the Respondent made a concession regarding the seniority provision, when it agreed to Johnson's proposal to allow plant seniority to equal department seniority for anyone hired prior to contract ratification, but then use department seniority moving forward. (Tr. 2181–2182.) But Haberman told Roberts during negotiations that the Respondent had no "dog in this hunt" on seniority and "didn't really care" what was used. (Tr. 1172.) Thus, the Respondent's willingness to agree to Johnson's proposal cannot properly be characterized as a concession.

[169] In justifying its insistence on keeping certain provisions outside the contract, the Respondent argues the Union likewise made contract proposals that left certain subjects, including health insurance and a

Haberman also told Roberts multiple times that, if the Respondent did not comply with the discipline policy, the Union could invoke the grievance and arbitration procedure. In addition, Haberman told Roberts repeatedly that, irrespective of it not being in the contract or policy, an arbitrator would use a "just cause" standard in evaluating any discipline issued to an employee. He apparently based this on the statement in the overview section of the discipline policy that its purpose was "to ensure that all employees are treated fairly and with dignity and respect." Even so, the only way the Union could grieve the Respondent's failure to adhere to the policy and an arbitrator could require employees to be treated "fairly" when disciplined would be if the policy was incorporated by reference into the contract, because it was mentioned in the Respondent's contract language. See, e.g., *Omaha World-Herald*, 357 NLRB 1870, 1870–1872 (2011); *BP Amoco Corp. v. NLRB*, 217 F.3d 869, 873–874 (2000). Indeed, Haberman testified at one point that:

> In fact, we've got a grievance and arbitration provision that I think talks about that. And even with these policies I've talked about, they are essentially incorporated into the contract. There is no way an arbitrator would ever allow us to say that our discipline policy is not subject to the grievance and arbitration provision.[170]

If Haberman actually did have that view and the policies were incorporated by reference, he was spinning his wheels in negotiations by continually insisting on the policies being outside the contract and the Respondent's intransigent position is strong evidence of bad-faith bargaining. If he did not, his statements to Roberts that the Union could grieve the Respondent's failure to follow its discipline policy and arbitrators would use a just cause standard to evaluate discipline are far from certain. The tentative agreement on grievance and arbitration allows Union challenges only for alleged violations of the collective-bargaining agreement. It also limits the arbitrator's authority to interpretation of specific provisions of the contract. The procedure says nothing about internal policies outside the contract. Furthermore, the discipline policy does not contain a specific standard for evaluating discipline issued to an employee. An arbitrator would have to infer that the introductory statement saying the policy's purpose was to ensure employees were treated "fairly" was the standard to be applied, even though the policy does not say so. The Respondent's repeated mixed signals meant the Union was never given a clear picture as to what exactly it would be agreeing to if the policies were kept outside the contract. They are indicative of a lack of good faith to find middle ground and reach an agreement

The Respondent also rejected numerous union proposals which would have enabled the Union to more easily communicate with employees. The Respondent would not agree to providing the Union with notice of all employee discipline, even though the Union is obligated to represent all employees at the facility and is entitled to that information upon request. The Respondent refused to provide the Union with a bulletin board, saying it would separate employees. An explanation as to how it would do that was never provided, but the more likely scenario is that communications on a union board might influence how nonsupporters viewed the Union. Even before that, the Respondent required the Union to obtain its approval to post anything and demanded changes to communications before giving its approval. The Respondent also rejected expanding the Union's access to its facility beyond that necessary to address employee disciplinary issues. This conduct reflects the Respondent's desire to limit the Union's ability to obtain further employee support and to maintain the division reflected in the May 2016 election.

The Respondent also engaged in dilatory tactics designed to draw out negotiations for as long as possible without reaching an agreement. First, the Respondent's unlawful refusal to meet at reasonable times warrants an inference of bad faith. See, e.g., *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 5–6, 8 (2018); *Regency Service Carts, Inc.*, 345 NLRB 671, 672 (2005). The strict adherence to averaging only one bargaining trip per month and the refusal to increase the number of bargaining days during a trip or the number of trips as the negotiations dragged on is particularly telling.

Second, the Respondent hemmed and hawed about moving on to economics. When Roberts first suggested getting into economics on May 3, Haberman said he "wanted some time." At that point, the parties already had bargained for 18 days and were approaching the end of the Union's certification year. Nearly a month later on May 31, Haberman again deferred, telling Roberts he wanted to maintain the focus on noneconomics. Although he invited the Union to make an economics proposal, he predetermined that he would be unlikely to respond to it at that session. He said the Respondent could start working on it at the next session but would not have a full proposal until the following session thereafter, some two months later. At no point did he offer an explanation as to why the Respondent needed all this time to draft an economics proposal. At the beginning of bargaining on July 25−26, Haberman told Roberts he needed a "clear explanation" from the Union regarding their proposals on five noneconomic issues: discipline, promotions/transfers, grievance and arbitration, leave of absences for union business, and seniority. At that time, the parties had bargained for 22 days and the Union's positions on the issues did not lack clarity. But the next 2 days were spent discussing noneconomics, until the Respondent finally submitted its first, partial economic proposal at the end of the day on July 26.

Third, the Respondent continually pushed paper across the table, submitting so-called counterproposals to the Union which were the same as previously submitted proposals or contained no substantive language changes. For example, during bargaining on February 7-8, the Respondent submitted a promotions and

401(k) plan, outside the contract. (GC Exh. 787, pp. 7, 12; Tr. 2166–2167.) The argument lacks merit, as the Union's contract proposals specifically stated that the Respondent's health insurance and 401(k) plans would be incorporated by reference into the contract. Moreover, by doing so, the Union was making the plan documents part of the contract as well, meaning the Respondent could make any changes, annual or otherwise, that were authorized in those plan documents. Thus, the Union's proposals inured to the Respondent's benefit.

[170] Tr. 2163.

transfers proposal which changed "HR Office" to "Human Resources Department." On March 29, the Respondent added language to the same provision stating its internal policy on filling open positions was "applicable to all employees covered by this Agreement." In its June 1 proposal on the same topic, the Respondent changed "Employees not selected for interviews will be notified of the reason(s) for not being selected" to "Employees not interviewed shall be provided the reason(s) for not being selected." In its seniority proposal dated September 12, the Respondent changed the sentence "Continued seniority in no way confers a right to benefits unless specifically set forth in this Agreement" to "Continued seniority shall not confer a right to continued benefits unless specifically set forth in this Agreement." Its seniority proposal the next day added "/voluntary resigns" after "An employee quits." In its third economic proposal dated October 10, the Respondent deleted "at its sole discretion" from the sentence "Time outside the normal workday or workweek shall be performed as assigned by the Company at its sole discretion." In its November 29 grievance and arbitration proposal, the Respondent changed the word "borne" to "paid for" in a sentence concerning fees and expenses. In its February 2, 2018 layoff proposal, the Respondent changed "seniority in the department" to "department seniority." Finally, in its fourteenth seniority proposal dated April 18, the Respondent changed the word "that" to "the" in one sentence. It also added the word "while" twice to its promotions and transfers policy. This conduct does not reflect an intention to bridge the gap between the two sides and reach an agreement.

Finally, the Respondent's unlawful conduct away from the bargaining table was substantial and strongly demonstrates bad faith. The Respondent made numerous unilateral changes to employees' terms and conditions of employment while bargaining was ongoing. The violations included: the permanent layoffs of four employees; the elimination of the ink controller and maintenance laborer job classifications; the temporary layoffs of numerous employees; changing employees' number of work days from 10 to 7 and work schedules from 8-hour to 12-hour shifts; and changing the work schedules and hours of employees on restricted work schedules. The unlawful change in work shifts to 12 hours is particularly noteworthy for the jarring impact on employees' day-to-day lives. Making the move unilaterally sent a strong message to employees suggesting the Union's efforts on their behalf were futile and the Union was irrelevant to their working conditions. The Respondent also dealt directly with employees when it offered the permanently laid off employees severance agreements, in exchange for a waiver of claims, after telling the Union it would deal directly with those employees on their layoffs. Taken as a whole, the unilateral changes demonstrate the Respondent wanted to continue doing things its own way, despite the Union having become the employees' bargaining representative. At the table, the Respondent wished to maintain "flexibility" allowing it to move employees around, change their schedules, or let them go, all the same things it was doing unilaterally at the plant. Thus, a nexus exists between the unlawful acts and the Respondent's conduct in negotiations sufficient to show the Respondent did not intend to bargain in good faith. *Mid-Continent Concrete*, 336 NLRB 258, 261 (2001). Moreover, the Respondent's unlawful conduct did not end there. The Respondent discharged Hesler due to her strong union support and permanently laid off Morlan because he was not anti-union. It banned locker room postings to prevent Union newsletters from being posted. It downgraded an employees' evaluation because she tried to convince another employee to support the Union. These other contemporaneous unfair labor practices likewise show an intent to undermine the Union and bolster the finding that the Respondent was not negotiating in good faith. *Coal Age Service Corp.*, 312 NLRB 572, 572–573 (1993). Finally, much of this unlawful conduct occurred in close proximity to the end of the Union's certification year. The Respondent was well aware of the Union's margin of victory in the initial election, with Haberman commenting to Roberts at the table about the Union's "narrow win" and Augustiniak telling McMeins that it was a "very close vote." The Respondent knew it only had to turn a few employee votes for a decertification effort to be successful.

When looking at the totality of the Respondent's conduct, as the law requires, the final portrait displays an employer who wanted to convince its employees they were worse off for having chosen to be represented by the Union. The Respondent attended numerous bargaining sessions and exchanged many proposals, but I conclude it simply was going through the motions in doing so and did not intend to reach an initial contract with the Union. The Respondent engaged in surface bargaining.

VII. ADDITIONAL ALLEGED EMPLOYEE HANDBOOK VIOLATIONS (COMPLAINT PARAGRAPH 7)

Finally, the General Counsel's complaint alleges the Respondent unlawfully maintained four additional rules in its employee handbook.

A. The No-Distribution Rule

The Respondent's handbook includes "Plant Guidelines & Generally Accepted Work Rules." This section's stated purpose is to set forth "generally acceptable behavior to create and maintain a safe, healthy, productive and teamwork environment at Bemis." One of the guidelines is:

> 8. Do not post, distribute or remove notices, signs or written material on Company property at any time without specific approval of plant management.

Dees, the Respondent's senior HR director, testified that the rule's purpose was to maintain a professional work environment, given that customers regularly visit the Centerville plant and the Respondent is a food-grade provider.[171]

The General Counsel contends this rule is unlawful, because it prohibits distribution of any written material on "company" property at any time.[172] As previously noted, prohibitions on

[171] GC Exh. 16, p. 51; Tr. 1917.

[172] The General Counsel also argues that the Respondent unlawfully applied this rule when it banned all locker room postings by employees in March 2017. However, in its memo to employees announcing that posting ban, the Respondent relied upon its nonsolicitation policy, not the posting ban described here. (GC Exh. 20.) Thus, the rule cannot be found unlawful on that basis.

employee distribution of union literature during nonworking times in nonworking areas are presumptively unlawful, unless the employer can affirmatively demonstrate the restriction is necessary to protect a proper interest. *Waste Mgmt. of Arizona, Inc.*, 345 NLRB 1339, 1346 (2005). In addition, any rule that requires employees to secure permission from their employer as a precondition to engaging in protected activity on the employees' own time and in nonwork areas is unlawful. *Chromalloy Gas Turbine Corp.*, 331 NLRB 858, 858–859 (2000), citing to *Brunswick Corp.*, 282 NLRB 794 (1987).

Given that precedent, no question exists that the Respondent's maintenance of the distribution ban violates Section 8(a)(1). The prohibition is not limited to work times and/or work areas. As with "company time," the term "company property" is overbroad and can be reasonably construed by employees as applying to nonwork areas. The rule's requirement that employees obtain the approval of management to distribute anything likewise renders the rule unlawful. Dees' blanket assertion that the rule is needed to maintain a professional work environment when customers visit the facility is insufficient to establish a proper interest, especially given the rule's all-encompassing breadth. Dees offered no specifics on how allowing employee distribution in nonwork areas during nonwork time would impact, if at all, customers visiting the facility or would make the work environment unprofessional.[173]

B. The Ban on False or Malicious Statements

The plant guidelines section of the Respondent's employee handbook also contains this rule:

> 18. Do not make or publish false, vicious or malicious statements concerning any employee, supervisor, the company or its products.

Dees testified the ban on false or malicious statements is the Respondent's "golden rule" reflecting its "core value of treating each other with respect."[174]

In *Boeing Co.*, 365 NLRB No. 154 (2017), reconsideration denied 366 NLRB No. 128 (2018), the Board set forth a new analytical framework for determining whether facially neutral rules violate Section 8(a)(1). The initial determination to be made is whether the rules, when "reasonably interpreted," "focusing on the employee's perspective," would potentially interfere with the exercise of Section 7 rights. If so, a balancing test is applied, to determine if the nature and extent of the potential impact on the Act's rights outweighs the legitimate justifications associated with the rule. 365 NLRB No. 154, slip op. at 3, 16.

Prior to *Boeing*, the Board routinely found rules prohibiting false statements to be unlawful. See, e.g., *First Transit, Inc*., 360 NLRB 619, 629 (2014); *LaFayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). However, in *Boeing*, the Board held that rules "requiring employees to abide by basic standards of civility" were lawful to maintain. 365 NLRB No. 154, slip op. at 3–4, 15. Here, the Respondent's guidelines, including this rule, establish acceptable behavior with a goal of creating a teamwork environment. The ban on false statements also ensures employees treat each other with respect. Accordingly, the rule provides a basic standard of civility and is lawful.

C. The Social Media Rule

In its handbook, the Respondent also maintains a social media policy, stating:

> Employees are expected to be respectful and professional when using social media tools. With the rise of websites like Facebook, MySpace, and LinkedIn, the way in which employees can communicate internally and externally continues to evolve. We expect our employees to exercise judgment in their communications relating to Bemis so as to effectively safeguard the reputation and interests of Bemis.
>
> Employees should:
> - Communicate in a respectful and professional manner;
> - Avoid disclosing proprietary information; and
>
> Each employee is responsible for respecting the rights of their co-workers and conducting themselves in a manner that does not harass, disrupt, or interfere with another person's work performance or in a manner that does not create an intimidating, offensive, or hostile work environment.

Dees testified that the Respondent wants employees to be mindful of what they post on social media. She stated the Respondent and its customers spend a lot of time and money branding their products. She added the Respondent does not want employees to post anything that could jeopardize either the company or its customers. Dees provided one example of this, where an employee posted a photograph on Twitter of an upcoming customer promotion which had not been released yet to the public. The customer was very angry over it and the Respondent's corporate leaders had to explain to the customer the steps taken to insure it would not happen again.[175]

The General Counsel alleges that the rule's first paragraph is unlawful. The paragraph's initial sentence, instructing employees to be "respectful and professional" when using social media, appears to be a basic standard of civility under *Boeing*. However, as written, the instruction applies to all social media use by employees. The second sentence likewise references employees' external communications outside the workplace. Because both sentences apply to private social media activity, they significantly impact employees' discussions about their working conditions. The last sentence of the rule instructs employees to avoid communications on social media which would harm the reputation of the Respondent. But employees have the right to communicate with each other about their terms and conditions of employment. They also have the right to seek support from the public over their working conditions. See, e.g., *Boch Honda*, 362 NLRB 706, 715–716 (2015); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171–1172 (1990). Thus, as to the initial determination required by *Boeing*, all three sentences potentially

[173] The Respondent offers no specific defense to this allegation. It generally defended the unlawful rule allegations by relying on *Boeing Co.*, 365 NLRB No. 154 (2017). As previously noted, that decision had no impact on the Board's standard for evaluating rules banning solicitation and distribution.

[174] GC Exh. 16, p. 51; Tr. 1918.

[175] GC Exh. 16, p. 25; Tr. 1916, 1918–1919.

interfere with Section 7 rights. The remaining rule language does not cure the defects. Moving to the *Boeing* balancing test, the Respondent's only justification for the rule was to protect its and its customers' brand. But requiring employees not to post anything harmful to the Respondent's reputation is an attempt to shield the company from criticism by its employees, a protected right. *Jimmy John's*, 361 NLRB 283, 284 (2014); *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989). The specific example provided by Dees could be addressed with a rule much more narrowly written than this paragraph. The rule's broad reach would have a significant impact on the exercise of Section 7 activity, far outweighing the Respondent's stated justification. Accordingly, the first paragraph of the Respondent's social media rule violates Section 8(a)(1).

D. The Off-Duty Access to Company Property Rule

In its handbook, the Respondent maintains the following rule governing "off-duty access to company property."

> Employees are not to remain on or enter company property unless: scheduled to work, attending a company-sponsored event, or meeting with a Supervisor or Human Resources Representative. To be on company property for any other reason will require approval by a supervisor or a member of management from the facility.

Dees testified that this rule is necessary to keep employees safe by knowing their whereabouts during a natural or other emergency at the facility. She also said the rule protects the Respondent from incurring liability, if an employee is injured while hanging out in the plant parking lot.[176]

In *Tri-County Medical Center*, 222 NLRB 1089 (1976), the Board held that a rule restricting employees access to outside areas of a facility are valid only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. The Board also found that a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid. In *Boeing Co.*, the Board looked favorably upon *Tri-County Medical Center*, because the standard set forth therein balanced employees' rights with an employer's interests in determining whether the rule was lawful. 365 NLRB No. 154, slip op. at 8 fn. 32 (2017). Under *Tri-County*, the Respondent's off-duty access rule is unlawful, because it does not limit access solely with respect to the interior of the plant and other working areas. Again, the use of the term "company property" includes nonwork areas outside the plant. That includes parking lots, an area Dees mentioned as being restricted.[177]

CONCLUSIONS OF LAW

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

2. The Union is a Section 2(5) labor organization and the designated exclusive collective-bargaining representative of the following appropriate unit of the Respondent's employees: All full-time and regular part-time production employees working in extrusion, press and pre-press, and finishing departments; and all full-time and regular part-time employees working in maintenance, quality assurance, distribution, and shipping and receiving departments; excluding office clerical, sales, engineers, temporary employees, and supervisors and guards as defined in the Act, as amended.

3. The Respondent violated Section 8(a)(1) by, at all material times, maintaining its nonsolicitation, no distribution, social media, and off-duty access to company property rules.

4. The Respondent violated Section 8(a)(1) by, on March 27, 2017, banning employee postings on their lockers, pursuant to its unlawful nonsolicitation rule and in response to employees' union activity.

5. The Respondent violated Section 8(a)(1) by, on April 9, 2017, stating in Elizabeth Nichols' appraisal that her lower rating in "Work Relationships" was due to her union activity.

6. The Respondent violated Section 8(a)(1) by, on June 23, 2017, instructing Philip McMeins, a supervisor, to engage in surveillance of Nichols' union activity.

7. The Respondent violated Section 8(a)(3) by, on April 9, 2017, downgrading Elizabeth Nichols' appraisal due to her union activity.

8. The Respondent violated Section 8(a)(3) by, on July 7, 2017, permanently laying off Kent Morlan rather than an employee opposed to the Union.

9. The Respondent violated Section 8(a)(3) by, on July 28, 2017, discharging Linda Hesler due to her union activity.

10. The Respondent violated Section 8(a)(5) by, on June 26, 2017, unilaterally implementing voluntary layoffs of employees and involuntarily laying off Jeff McClurg, Elizabeth Nichols, Brian Shives, both on a temporary basis.

11. The Respondent violated Section 8(a)(5) by, on July 7, 2017, unilaterally and permanently laying off Coty Gearin, Tyler Lewis, Kent Morlan, and Chet Varner.

12. The Respondent violated Section 8(a)(5) by, on July 7, 2017, unilaterally eliminating the bargaining unit job classifications of ink controller and maintenance laborer.

13. The Respondent violated Section 8(a)(5) by, on July 7, 2017, bypassing the Union and dealing directly with bargaining unit employees by offering them severance agreements in connection with their permanent layoffs.

14. The Respondent violated Section 8(a)(5) by, since August 9, 2017, refusing to furnish the Union with relevant information the Union requested.

15. The Respondent violated Section 8(a)(5) by, on December 31, 2017, unilaterally changing employees' workdays and schedules, without providing the Union with notice and an opportunity to bargain over the changes.

16. The Respondent violated Section 8(a)(5) and 8(d) by, from November 1, 2016 through April 26, 2018, refusing to meet with the Union at reasonable times for bargaining an initial collective-bargaining agreement.

[176] GC Exh. 16, p. 10; Tr. 1919.

[177] In his brief, the General Counsel moves to withdraw the allegation in paragraph 7 of the complaint that the Respondent's computer use policy violated Sec. 8(a)(1). I grant the unopposed motion.

17. The Respondent violated Section 8(a)(5) by failing to bargain in good faith with the Union for an initial collective-bargaining agreement through its overall conduct from November 1, 2016 through April 26, 2018.

18. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

19. The Respondent has not violated the Act in any of the other manners alleged in the complaint.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Among those actions and to remedy the unlawful discharge of Linda Hesler, as well as the unlawful permanent layoffs of Coty Gearin, Tyler Lewis, Kent Morlan, and Chet Varner, I shall order the Respondent to offer Hesler, Gearin, Lewis, Morlan, and Varner full reinstatement to their former positions or, if the positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges they previously enjoyed, and to make Hesler, Gearin, Lewis, Morlan, and Varner whole for any loss of earnings and other benefits attributable to the unlawful conduct. The Respondent must remove from its files any references to the unlawful discharge of Hesler and the unlawful layoff of Morlan and notify them in writing that this has been done and that the unlawful actions will not be used against them in any way. Upon request, the Respondent must rescind its elimination of the ink controller and maintenance laborer job classifications. Having found the Respondent violated Section 8(a)(5) by unilaterally implementing voluntary layoffs and involuntarily laying off Jeff McClurg, Elizabeth Nichols, and Brian Shives for 2 weeks, I shall order the Respondent to make McClurg, Nichols, and Shives, as well as any other affected employees, whole for any loss of earnings and other benefits attributable to this unlawful conduct.

The make-whole remedy for the above-described violations shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), 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). In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014), the Respondent shall compensate the employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.,* 363 NLRB No. 143 (2016), the 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 18 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), the Respondent must compensate Hesler, Gearin, Lewis, Morlan, and Varner for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, 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).

Having found that the Respondent violated Section 8(a)(5) and (1) by changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain, I shall order the Respondent to rescind the unlawful unilateral changes it made, upon request from the Union. The Respondent also must make unit employees whole for any loss of earnings and other benefits attributable to its unlawful unilateral changes. In this regard, backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th 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). Again, the Respondent must compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 18, 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 years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

Because the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain in good faith and violated Section 8(a)(5) and 8(d) by refusing to meet at reasonable times, I recommend that the Respondent be ordered to meet, upon request, with the Union and bargain in good faith concerning the terms and conditions of employment of the unit employees and, if agreement is reached, to embody such agreement into a signed contract.

In addition to the standard remedy of a cease-and-desist and an affirmative bargaining order, the General Counsel seeks an extension to the Union's certification year. See *Mar-Jac Poultry Co.*, 136 NLRB 785, 787 (1962). In *Mar-Jac*, the Board held that the certification year can be extended where employer unfair labor practices impacted bargaining. In determining the length of any extension, the Board considers the nature of the violations; the number, extent, and dates of the collective-bargaining sessions; the impact of the unfair labor practices on the bargaining process; and the conduct of the union during negotiations. *American Medical Response*, 346 NLRB 1004, 1005 (2006). Here, the Respondent engaged in surface bargaining and failed to meet at reasonable times during a period of approximately 18 months. It also made numerous unlawful unilateral changes to employees' working conditions. The Respondent committed many additional violations of the Act, due to employees' union sentiments or support. The purpose of these violations, in sum, was to convince enough employees to abandon their support of the Union, such that a decertification vote would have a different outcome than the initial election. Thus, despite the parties meeting numerous times for bargaining and reaching some tentative agreements, the Union was not afforded a full opportunity to bargain during the certification year. Under these circumstances, I conclude that a 12-month extension to the certification year is appropriate. *HTH Corp.*, 356 NLRB 1397, 1403 (2011). In addition, the General Counsel requests a minimum bargaining

schedule of four days per months of at least six hours per day, or another schedule agreed to by the Union. It also requests that written bargaining progress reports be submitted every 30 days to the compliance officer of Region 18. Because of the Respondent's dilatory tactic of failing to meet at reasonable times, I conclude the requested schedule and written progress reports are proper. *UPS Supply Chain Solutions, Inc.*, 366 NLRB No. 111, slip op. at 4 (2018); *Professional Transportation, Inc.*, 362 NLRB 534, 536 (2015).[178]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[179]

ORDER

The Respondent, Bemis Company, Inc., Centerville, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining its rules on nonsolicitation, no distribution, social media, and off-duty access to company property.

(b) Enforcing its nonsolicitation policy to ban employee postings on their lockers, in response to employees' union activity.

(c) Telling employees their performance appraisals were downgraded due to their union activity.

(d) Downgrading employees' appraisals due to their union activity.

(e) Instructing supervisors to engage in surveillance of employees' union activity.

(f) Permanently laying off employees due to other employees' antiunion activities.

(g) Discharging employees due to their union activity.

(h) Laying off employees without providing the Union with notice and an opportunity to bargain.

(i) Eliminating bargaining unit job classifications, without providing the Union with notice and an opportunity to bargain.

(j) Bypassing the Union and dealing directly with employees regarding their terms and conditions of employment.

(k) Unilaterally changing employees' workdays and schedules, without providing the Union with notice and an opportunity to bargain over the changes.

(l) Refusing to provide the Union with requested information relevant to the Union's duties as the exclusive collective-bargaining representative of unit employees.

(m) Failing to meet at reasonable times for bargaining a contract with the Union;

(n) Failing to bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit (the "Unit"):

> All full-time and regular part-time production employees working in extrusion, press and pre-press, and finishing departments; and all full-time and regular part-time employees working in maintenance, quality assurance, distribution, and shipping and receiving departments; excluding office clerical, sales, engineers, temporary employees, and supervisors and guards as defined in the Act, as amended.

(o) 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.

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

(a) On request, bargain in good faith and at reasonable times with the Union as the exclusive collective-bargaining representative of the Unit employees concerning terms and conditions of employment until a full agreement or bona fide impasse is reached, and, if an understanding is reached, embody the understanding in a signed, written agreement. The Union's certification is extended for 12 months from the date the Respondent begins to comply with this Order. Upon the Union's request, bargaining sessions shall be held for a minimum of 4 days per month, at least 6 hours per session, or, in the alternative, on another schedule to which the Union agrees. A written progress report will be submitted every 30 days to the compliance officer for Region 18, with a copy served on the Union.

(b) Within 14 days from the date of this Order, offer Linda Hesler and Kent Morlan reinstatement to their former positions or, if their jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or other rights or privileges previously enjoyed.

(c) Make Linda Hesler and Kent Morlan whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(d) Compensate Linda Hesler and Kent Morlan for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, allocating the backpay award to the appropriate calendar years for each employee.

(e) Within 14 days from the date of this Order, remove from its files any references to the unlawful discharge of Linda Hesler and the unlawful layoff of Kent Morlan and, within 3 days thereafter, notify them in writing that this has been done and that these unlawful acts will not be used against them in any way.

(f) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of the Unit employees.

(g) Within 14 days from the date of this Order, offer Coty Gearin, Tyler Lewis, Kent Morlan, and Chet Varner reinstatement to their former positions or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed.

(h) Make Coty Gearin, Tyler Lewis, Kent Morlan, and Chet Varner whole for any loss of earnings or other benefits suffered as a result of their unlawful permanent layoffs, in the manner set forth in the remedy section of this decision.

(i) Compensate Coty Gearin, Tyler Lewis, Kent Morlan, and Chet Varner for the adverse tax consequences, if any, of

[178] I also find these two special remedies sufficient to address the level of severity of the Respondent's unfair labor practices. Therefore, I decline the General Counsel's request that the Union be reimbursed for its bargaining expenses.

[179] 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.

receiving a lump-sum backpay award, and file a report with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, allocating the backpay award to the appropriate calendar years for each employee.

(j) Upon request from the Union, rescind the July 7, 2017, elimination of the ink controller and maintenance laborer job classifications.

(k) Within 14 days from the date of this Order, offer employees who previously held the positions of ink controller and maintenance laborer reinstatement to their former positions with the same wages, benefits, and other terms and conditions of employment that existed prior to July 7, 2017, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(l) Make the former ink controllers and maintenance laborers whole for any loss of earnings and other benefits suffered as a result of the elimination of these positions, in the manner set forth in the remedy section of this decision.

(m) Compensate the former ink controllers and maintenance laborers for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 18, 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 years for each employee.

(n) Make Jeff McClurg, Elizabeth Nichols, Brian Shives, and any other affected employee whole for any loss of earnings or other benefits suffered as a result of their unlawful temporary layoffs, in the manner set forth in the remedy section of this decision.

(o) Compensate Jeff McClurg, Elizabeth Nichols, Brian Shives, and any other affected employee for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, allocating the backpay award to the appropriate calendar years for each employee.

(p) Upon request from the Union, rescind the changes to employees' work schedules.

(q) Make whole any employees who were adversely affected by changes to their work schedules implemented on December 31, 2017.

(r) Rescind the "work performance" rating and narrative in Elizabeth Nichols' April 9, 2017 appraisal and notify her in writing that this has been done and the downgraded rating will not be used against her.

(s) Rescind the nonsolicitation, no distribution, social media, and off-duty access to company property rules.

(t) Furnish all current employees with inserts for the current employee handbook that (1) advise that the unlawful nonsolicitation, no distribution, social media, and off-duty access to company property rules have been rescinded, or (2) provide the language of a lawful policy.

(u) Rescind the ban on employee postings on their lockers and advise employees that this has been done.

(v) Furnish to the Union the information requested by the Union on August 8, 2017, insofar as such information has not already been furnished.

(w) 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.

(x) Within 14 days after service by the Region, post at its Centerville, Iowa, facility copies of the attached notice marked "Appendix."[180] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the 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, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 1, 2016.

(y) 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 Regional Director attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. July 1, 2019.

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

[180] 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."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a rule prohibiting you from solicitation during nonworking times in nonworking areas or from working areas during nonworking time.

WE WILL NOT maintain a rule prohibiting you from distributing or posting union literature during nonworking time in nonworking areas or requiring supervisory approval to do so.

WE WILL NOT maintain a social media rule that restricts your ability to discuss your terms and conditions of employment with other employees or members of the public.

WE WILL NOT maintain a rule restricting your access to nonwork areas outside the plant or requiring supervisory approval to access those areas.

WE WILL NOT ban postings on employees' lockers pursuant to an unlawful nonsolicitation rule or due to union literature being posted on employees' lockers.

WE WILL NOT downgrade employees' performance appraisals due to their union activity.

WE WILL NOT tell employees that their lower performance appraisal ratings are due to their union activity.

WE WILL NOT instruct supervisors to engage in surveillance of employees' union activity.

WE WILL NOT permanently lay off employees in order to retain employees opposed to the Union.

WE WILL NOT discharge employees due to their union activity.

WE WILL NOT lay off employees, without providing Teamsters Local 727-S (the Union) with notice and an opportunity to bargain about the layoffs and their effects.

WE WILL NOT eliminate bargaining unit job classifications, without providing the Union with notice and an opportunity to bargain about the eliminations.

WE WILL NOT bypass the Union and deal directly with you regarding your terms and conditions of employment.

WE WILL NOT refuse to furnish the Union with information it requested that is relevant to its duties as your collective-bargaining representative.

WE WILL NOT change employees' work schedules, without providing the Union with notice and an opportunity to bargain over the changes.

WE WILL NOT refuse to meet with the Union at reasonable times to bargain for a collective-bargaining agreement.

WE WILL NOT fail to bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time production employees working in extrusion, press and pre-press, and finishing departments; and all full-time and regular part-time employees working in maintenance, quality assurance, distribution, and shipping and receiving departments; excluding office clerical, sales, engineers, temporary employees, and supervisors and guards as defined in the Act, as amended.

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

WE WILL, within 21 days of the Union's request, bargain with the Union as the exclusive collective-bargaining representative of bargaining unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. The Union's certification year is extended for 12 months from the date Bemis Company begins to comply with this Order. Upon the Union's request, bargaining sessions shall be held for a minimum of 4 days per month, at least 6 hours per day, or, in the alternative, on another schedule to which the Union agrees. Bemis Company will submit a written progress report every 30 days to the National Labor Relations Board, with a copy served on the Union

WE WILL offer Linda Hesler and Kent Morlan immediate and full reinstatement to their former job or, if their jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges they previously enjoyed.

WE WILL pay Linda Hesler and Kent Morlan for the wages and benefits they lost, because we unlawfully discharged Hesler and unlawfully laid off Morlan.

WE WILL remove from our files all references to the discharge of Linda Hesler and the layoff of Kent Morlan and WE WILL notify them that this has been done, the discharge will not be used against Hesler in any way, and the layoff will not be used against Morlan in any way.

WE WILL, before implementing any changes in your wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union.

WE WILL, if requested by the Union, rescind any unilateral changes we made to your terms and conditions of employment, without providing the Union with notice and an opportunity to bargain, including changes to your work schedule associated with our move to a 24/7 operation in Centerville and the elimination of the ink controller and maintenance laborer positions.

WE WILL offer employees who previously held the positions of ink controller and maintenance laborer reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges they previously enjoyed.

WE WILL make you whole for any losses suffered as a result of our unlawful unilateral changes to your working conditions, including the work schedule changes associated with our move to a 24/7 operation in Centerville and the elimination of the ink controller and maintenance laborer positions.

WE WILL offer Kent Morlan, Coty Gearin, Tyler Lewis, and Chet Varner immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed, to the extent we have not already done so.

WE WILL pay Kent Morlan, Coty Gearin, Tyler Lewis, and Chet Varner for the wages and other benefits lost, because we permanently laid them off without providing the Union with notice and an opportunity to bargain over the layoffs and their effects.

WE WILL make Jeff McClurg, Elizabeth Nichols, Brian Shives and any other affected employees whole for the wages and benefits they lost as a result of our unlawful temporary layoffs of them in July 2017.

WE WILL rescind our unlawful nonsolicitation, no posting, social media, and off-duty access to company property rules.

BEMIS COMPANY, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/18-CA-202617 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.