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Orchids Paper Products Company and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO. Cases 14–CA–184805, 14–CA–184807, 14–CA–188413, 14–CA–189031, 14–CA–190022, 14–CA–192908, and 14–CA–199035

November 20, 2018

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On September 15, 2017, Administrative Law Judge Andrew S. Gollin issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge’s rulings, findings,² and conclusions only to the extent consistent with this Decision and Order.

INTRODUCTION

The Respondent, which produces paper products, employs approximately 185 employees at its Pryor, Oklahoma converting facility. The employees are represented by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO (Union), with the most

¹ There are no exceptions to the judge’s dismissal of the complaint allegations that the Respondent violated Sec. 8(a)(5), (3), and (1) of the Act by unlawfully withdrawing from a verbal agreement regarding the use of temporary employees to perform non-production overtime work; violated Sec. 8(a)(5) and (1) by failing to bargain over the implementation of clothing and shoe policies; violated Sec. 8(a)(3) by suspending and disciplining an employee for failing to adhere to a unilaterally implemented flame-resistant clothing policy; and violated Sec. 8(a)(1) by coercively accusing an employee of harassment and threatening him with discharge because of his union activities, by informing an employee that he was being held to a higher work standard because of his union activities, and by interrogating an employee regarding his union membership.

² The Respondent has 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.

recent collective-bargaining agreement effective June 25, 2012, to June 25, 2016, and extended by mutual consent. The General Counsel alleged, and the judge found, that the Respondent committed numerous unfair labor practices from August 2016 through May 2017.³ We affirm many of these violations, but reverse the judge’s findings as to five allegations, as discussed below.

DISCUSSION

1. The 8(a)(5) and (1) violations

We agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by: (1) unilaterally implementing a policy requiring employees to wear flame-resistant clothing at all times;⁴ (2) suspending and disciplining an employee for failing to comply with the unilaterally implemented flame-resistant clothing policy;⁵ (3) failing to continue in effect the terms and conditions of the parties’ collective-bargaining agreement by converting production lines six and seven to “op-tech lines” without the Union’s consent; and (4) unilaterally changing employees’ health insurance.⁶

³ All further dates are in 2017 unless otherwise indicated.

⁴ We find that the Union never requested bargaining and that there is insufficient record evidence to determine whether the parties reached an agreement prior to the Respondent’s initial implementation of its policy regarding when employees would have to wear the flame-resistant clothing. Nonetheless, the Union never waived its right to bargain over the Respondent’s broadening of this policy to mandate that the maintenance employees wear the flame-resistant clothing at all times while on duty nor did the parties bargain to impasse over it. Thus, we agree with the judge that the Respondent’s announcement and implementation of the broader flame-resistant clothing policy was an unlawful unilateral change.

Member McFerran would affirm the judge’s finding that the Respondent’s unilateral change to the flame-resistant clothing policy without providing the Union with notice or an opportunity to bargain over the decision violated Sec. 8(a)(5) and (1) of the Act.

⁵ Because we agree that employee Michael Besley’s suspension and discipline violated Sec. 8(a)(5) and (1), we find it unnecessary to pass on the allegation that his discipline for failing to correctly track work orders and follow escalation procedures also violated Sec. 8(a)(3), as finding this additional violation would not materially affect the remedy.

Member McFerran would affirm the judge’s finding that the Respondent unlawfully disciplined Besley in retaliation for his protected concerted and union activities.

⁶ Changing employees’ health insurance plans and benefits is a mandatory subject of bargaining. See *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), enfd. 308 F.3d 859 (8th Cir. 2002); *Seiler Tank Truck Service*, 307 NLRB 1090, 1100 (1992). In addition to the change in the identity of the employees’ health insurance provider, noted by the judge, the Respondent admits that the new health insurance offered lower premiums, an expanded network, and removed the need for primary care physician referrals. Although these changes appear largely beneficial to employees, whether the changes were beneficial or detrimental does not affect the Respondent’s duty to bargain. *Allied Mechanical Services*, 332 NLRB 1600, 1609 (2001); see also *Atrium at Princeton, LLC*, 353 NLRB 540, 562-563 (2008), reaffirmed and incorporated by reference 356 NLRB 5 (2010), enfd. 684 F.3d 1310 (D.C. Cir. 2012). Thus, we agree that the Respondent violated Sec.

However, we find, contrary to the judge, that the Respondent did not violate Section 8(a)(5) and (1), on February 8 and May 5, by modifying the parties' collective-bargaining agreement to prevent union officials from conducting union business during work time. The agreement states: "It is expected that the officers and/or the shop steward will be away from their regular job assignment as little as possible. It is understood that if union business or investigation of grievances need [sic] to be conducted during working hours, supervisory permission must be obtained in any departments affected." On February 8, employee and union steward Chris Montoya attended a meeting with management to discuss allegations that he left his work station and threatened another employee's family as part of a disagreement regarding a decertification petition. During this meeting, Site Manager Court Dooley told Montoya that union activities should be limited to nonwork time. We find that this statement, made only once in response to an incident regarding a decertification petition, not official union business, was not an unlawful modification by the Respondent of the provision in the parties' collective-bargaining agreement pertaining to employees conducting union business during working hours.

Similarly, on May 5, employee Shawn Teiger asked Michael Besley, the Union's president, for his assistance regarding an attendance issue. After the pair discussed the issue for a few minutes during work time, Besley said that he would look into it later. Thereafter, Process Specialist Jeff Cochrell approached Teiger and informed him that he could not conduct union business on work time in work areas; Teiger then repeated the prohibition to Besley. When confronted by Besley with the fact that union business was in fact allowed on work time with supervisory permission, Cochrell replied that he was new and unaware that it was permitted. This one-time misstate-

8(a)(5) and (1) by unilaterally changing the bargaining unit employees' health insurance without providing notice and an opportunity to bargain to the Union.

We further observe that the judge's statement that the mere identity of employees' health insurance carrier is a mandatory subject of bargaining is imprecise because it is not merely the change in the identity of health insurance carriers that affects employees, but also the change in the availability of certain benefits and the manner in which those benefits are administered that accompanies the change in the identity of a health insurance carrier. See *Connecticut Light & Power Co.*, 196 NLRB 967, 968-969 (1972), enf. denied 476 F.2d 1079 (2d Cir. 1973).

Member McFerran further observes that under extant Board precedent "an employer is not free to change [health insurance] carriers, without notice to the certified bargaining representative and an opportunity to bargain on the issue." *Aztec Bus Lines*, 289 NLRB 1021, 1036 (1988); see also *Seiler Tank Truck Service*, 307 NLRB 1090, 1100 (1992) ("The identity of the health insurance carrier is as much a mandatory subject of bargaining as is the level of benefits to be enjoyed by employees.").

ment by a new supervisor did not, by itself, constitute a modification of the parties' collective-bargaining agreement. It was a good-faith mistake that did not interfere with Besley's discussion with Teiger, and there is no record evidence that Cochrell ever repeated it once confronted with correct information.

Accordingly, in light of the circumstances described above, including the isolated nature of the statements at issue, we find that the Respondent did not unlawfully modify the contract provision allowing for employees to conduct union business when needed on work time with supervisory permission and, therefore, we dismiss those allegations.⁷

2. The 8(a)(1) violations

We agree with the judge's findings that the Respondent violated Section 8(a)(1) of the Act by: (1) threatening an employee with discipline for not complying with the unilaterally implemented flame-resistant clothing policy; (2) instructing an employee not to contact the Occupational Safety and Health Administration unless management had been informed first; (3) prohibiting employees

⁷ Member McFerran would affirm the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally modifying the terms of the parties' agreement without the consent of the Union. See *Alaris Health at Rochelle Park*, 366 NLRB No. 86, slip op. at 4 (2018). It is clear that the plain language of the parties' agreement permits union officers and stewards to engage in union business during work hours with supervisory approval, and the record reflects that was indeed the practice. While the majority attempts to dismiss the General Counsel's allegation as isolated statements, the record does not support such a conclusion.

Instead, the record contains multiple, relevant statements made by Dooley and Cochrell to several union leaders that demonstrate the Respondent's inconsistent application of the agreement's terms. A few months prior to Dooley informing Chris Montoya and Darla Reed that union activities were limited to nonwork time and non-work areas, Dooley told Michael Besley and Reed that they could not talk union business on the work floor, only during break time. Furthermore, Dooley's conversation with Jason Gann on January 25 illustrates Dooley's working knowledge of the parties' agreement, including its allowance for union activities during work time on the work floor with supervisory approval. For example, when Gann's lead man confirmed that when Gann leaves his work station he tells him where he is going and what he is doing Dooley responded by telling Gann to be sure to let somebody know when he leaves his work station.

While Cochrell's statement could have been a good-faith mistake, it must be viewed in the context of Dooley's statements and considered as another example where the Respondent deviated from the terms of the parties' agreement. Additionally, whether Cochrell's statement interfered with Besley's discussion with Teiger is not relevant to the issue of whether the Respondent unlawfully modified the terms of the parties' agreement. See *Fort Pierce Jai-Alai*, 310 NLRB 862, 862 (1993) ("It is well established that Sec. 8(a)(5) and (1) and Sec. 8(d) of the Act prohibit an employer that is a party to an existing collective-bargaining agreement from modifying the terms and conditions of employment established by the agreement without obtaining the consent of the union.") For these reasons, Member McFerran would affirm the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act.

from discussing the Union on the production floor or during work time while permitting employees to discuss other nonwork-related subjects;⁸ (4) accusing employees of harassment for engaging in union activities;⁹ (5) telling an employee that his union activities were disrespectful to management; (6) creating the impression of surveillance of an employee's union activities;¹⁰ (7) prohib-

⁸ In finding the violation, Member Emanuel agrees that an employer cannot prohibit an employee from discussing unions on the production floor or during work time to the extent that the employer permits discussions of other nonwork-related subjects. However, he notes that this does not grant employees the right to engage in union activities during work time that would interrupt or interfere with their work any more than their discussions during work time of other nonwork-related subjects.

Because we agree that Site Manager Dooley prohibited employees from discussing the Union while permitting discussion of other nonwork-related subjects on November 29, 2016, we find it unnecessary to pass on the allegation that Dooley and Human Resources Manager Doug Moss similarly prohibited discussion of the Union during work time on February 8. Finding this additional violation would not affect the remedy. Member Kaplan would reverse the judge's finding of a violation because Dooley's February 8 statement was not a general prohibition against discussing the Union but a narrower directive limiting when and where employees could conduct official union business.

⁹ In affirming this violation, we note that the employee in question had been accused of harassing employees in the break room over a decertification petition just weeks prior to the December 16, 2016 accusation of harassment. Under these circumstances, an employee would reasonably associate the later accusations of harassment with the first accusation that was explicitly linked to her union activity.

Member Emanuel would reverse the judge's findings that the Respondent violated Sec. 8(a)(1) by accusing a union officer of harassment. On December 16, 2016, and February 6, the Respondent told a union official that it had received reports that she had been harassing coworkers. There is no contention that the union official was engaging in protected activities immediately beforehand or that the Respondent made any reference to her protected activities. Although the Respondent had accused the union official on November 29, 2016, of harassing employees over a decertification petition, the General Counsel did not allege that to be a violation, and the Respondent's statements on December 17 and February 6 made no reference to the decertification petition. Member Emanuel recognizes that an employer has an obligation to prevent harassment in the workplace. Here, the Respondent's statements on December 16 and February 6 did not in any way connect the claims of reported harassment with the union official's protected activities, and the Respondent's separate accusation weeks earlier would not give the union official any reasonable basis for thinking the Respondent was making such a connection. Accordingly, Member Emanuel finds that the Respondent's mere mentioning of the reports of harassment to the union official was not unlawful.

¹⁰ In adopting the judge's finding, we note that *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294 (2009), cited by the judge, was issued at a time when the Board lacked a quorum, but was subsequently reaffirmed by a three-member panel. See 357 NLRB 633 (2011), enfd. sub nom. *Mathew Enterprise, Inc. v. NLRB*, 498 Fed. Appx. 45 (D.C. Cir. 2012).

The judge found that Site Manager Dooley's statement to employee Jason Gann that "people are reporting to me saying you are doing union business on company time" unlawfully created the impression of surveillance. We agree. Member Kaplan additionally observes that the Respondent presented no evidence that department supervisors were

iting employees from speaking or asking questions during employee meetings;¹¹ and (8) prohibiting employee union officials from conducting union business on the production floor or during work time while permitting employees to discuss other nonwork-related subjects.¹²

However, we reverse four 8(a)(1) violations found by the judge. To begin, we find that a remark by Human Resources Manager Doug Moss to employee Michael Besley was not a threat of unspecified reprisals. Besley was called into a meeting with several managers to discuss the proper way in which to wear the flame-resistant clothing the Respondent had recently issued to employees. Besley had been wearing his pants with the legs rolled up, complaining that they were too long and that he was walking on them. After being told that the pant legs had to be worn down, Besley questioned the reason for this requirement. In response, Moss asked him "why he was beating the pants thing to death asking people about them?" Although his remark suggested that he may have been exasperated with Besley's questions, Moss did not imply that Besley would be disciplined or that any other adverse action would be taken if he continued to question management about the flame-resistant clothing policy. Accordingly, we find that an employee

required to report instances they had granted permission to engage in union business during work time, no evidence that Gann had been abusing the practice, and no other justification for Dooley's statement.

Member Emanuel would reverse the judge and find that the Respondent did not unlawfully create an impression of surveillance. He finds that Dooley's statement was merely to alert Gann that he had heard that Gann was engaging in union business during work time.

¹¹ We agree with the judge that overbroad statements by Human Resources Manager Moss unlawfully prohibited employees Darla Reed and Darlene Russell from commenting on policies of general interest during future employee meetings.

Member Emanuel would reverse the judge and find that the Respondent did not unlawfully prohibit employees from speaking or asking questions during meetings. The judge declined to discredit the Respondent's witness, Human Resource Manager Doug Moss, who testified that he told employees Darla Reed and Darlene Russell that "if they had objections to the policies and they felt that strongly about it, if they wanted to cuss me or raise their voice at me to do so before the meeting or after the meeting in my office or in some other office but not to conduct themselves that way in a company meeting." The Respondent did not discipline the employees. Member Emanuel believes that an employer does not violate the Act by instructing employees not to use profanity or otherwise act disruptively in an employee meeting and that this statement, by itself, would not reasonably interfere with employees engaging in protected activities during future employee meetings.

¹² Member Emanuel agrees with the violation to the extent that the employee union official's union business on the production floor during work time—a brief discussion with an employee about his points under the Respondent's attendance policy that lasted a few minutes—did not cause any greater interference or intrusion on employees' work than the Respondent's practice of permitting employees to discuss other nonwork-related subjects on the production floor during work time.

would not reasonably interpret Moss' remark as a threat of unspecified reprisals.

Next, we reverse the judge's findings that, during a conversation on January 25, Site Manager Dooley unlawfully created the impression that employee Jason Gann's union activities would be placed under greater scrutiny and that Dooley unlawfully prohibited Gann from conducting union business. Gann was called into Dooley's office to discuss his conduct while acting as the union representative for another employee earlier that day. During this meeting, Dooley, among other things, asked if Gann had notified his supervisor when he left his work station to conduct union business. Gann replied in the affirmative. As discussed above, under the parties' collective-bargaining agreement, supervisor permission is required if union business is done during work time. In context, Dooley merely inquired as to whether Gann had complied with the terms of the collective-bargaining agreement and did not create an impression of placing his union activities under greater scrutiny. Further, Dooley's inquiry did not prohibit Gann from conducting union business during work time with supervisor permission.

Finally, we find that the Respondent did not unlawfully promulgate a rule prohibiting employees from talking to employees in other departments. To support his finding, the judge relied on a single statement made by Process Specialist Kelly Foss to employee Darla Reed that employees were not allowed to go to any other production line to talk to other people. As the Board has repeatedly stated, before assessing whether an alleged rule is facially unlawful, we must initially determine whether the Respondent, in fact, promulgated a rule. See *Teachers AFT New Mexico*, 360 NLRB 438, 438 fn. 3 (2014) (employer did not orally promulgate rules during one-on-one conversations with employees where the record failed to show that employer's statements were communicated to any other employees or would reasonably be construed as establishing a new rule or policy for all employees). Here, the statement was only communicated to one employee and, although Reed testified that she saw Foss speak with employees on other lines after she received the directive, there is no evidence that the prohibition was repeated to those employees as a general requirement. Accordingly, we find that the Respondent did not promulgate an unlawful work rule prohibiting employees from speaking with employees in other departments.¹³

¹³ Member McFerran notes that in finding the violation, the judge relied upon unrefuted testimony that various supervisors or managers had instructed union leaders that they could not conduct union business during work time or on the production floor. Had the General Counsel

3. Violations based on joint employer status

We also agree with the judge that the Respondent is a joint employer of the temporary employees supplied by People Source Staffing Professionals, LLC (People Source), a nationwide staffing company.¹⁴ For that reason, the Respondent violated Section 8(a)(5) and (1) by failing to apply certain terms of the parties' collective-bargaining agreement to the "permanent temporary" employees,¹⁵ violated Section 8(a)(3) and (1) by discharging

alleged that the Respondent unlawfully promulgated and maintained a rule prohibiting employees from discussing the union or engaging in union activities as opposed to a rule prohibiting employees from *talking to employees from other departments*, the record in this case would have supported finding such a violation. See *Fresh & Easy Neighborhood Market, Inc.*, 356 NLRB 588, 591-592 (2011), *enfd.* 459 Fed. Appx. 1 (D.C. Cir. 2012) (finding that Respondent unlawfully promulgated a rule in response to union activity when a manager informed an employee on two separate occasions that she was not allowed to talk about the Union while on the clock or on the sales floor).

¹⁴ In affirming the judge's finding that the Respondent is a joint employer of the temporary employees, we do not rely on the Respondent's limited involvement in the employees' wages, which were set and paid by People Source. The Respondent's role was to maintain the temporary employees' timecards, verify the hours worked by a temporary employee if a question arose, and send the timecards to People Source for processing and payment. This limited recordkeeping is not indicative of joint-employer status.

Members Kaplan and Emanuel agree that the Respondent is a joint employer of the temporary employees under the standard set forth in *Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015). They continue to believe that the Board should reconsider that standard in a future proceeding. See *The Standard for Determining Joint-Employer Status*, 83 Fed. Reg. 46681, 46681-46687 (2018). However, in this case, Members Kaplan and Emanuel find that the result would be the same under the joint employer standard overruled in *Browning-Ferris* because the Respondent directly exercised control over the temporary employees' terms and conditions of employment that was more than limited or routine in nature.

Member McFerran would affirm the judge's finding that the Respondent is a joint employer of the temporary employees under *Browning-Ferris*. In *Browning-Ferris*, the Board explained that when faced with a multifactor common law inquiry such as joint employer "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." 362 NLRB No. 186, slip op. at 16 quoting *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 258 (1968). Furthermore, Member McFerran disagrees with her colleagues that the Board's existing joint employer standard warrants reconsideration, especially in light of its reasoned application here. See *The Standard for Determining Joint-Employer Status*, 83 Fed. Reg. 46681, 46687-46692 (2018).

¹⁵ The Respondent, as the joint employer of the "permanent temporary" employees and the signatory to a contract for a unit that included them, had a statutory obligation to apply to the "permanent temporary" employees the contractual terms it had negotiated, to the extent that those terms regulate the "permanent temporary" employees' working conditions under the Respondent's control. See *Gourmet Award Foods, Northeast*, 336 NLRB 872, 874 (2001), *enfd.* 2005 WL 23349 (D.C. Cir. 2005). Hence, the remedy for this violation is to require the Respondent to apply the contract provisions to the "permanent tempo-

five “permanent temporary” employees,¹⁶ and violated Section 8(a)(1) by informing employee Gann that the “permanent temporary” employees had been discharged because of the Union’s actions on their behalf.

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.¹⁷

The Respondent, having unilaterally changed employees’ health insurance, must make employees whole for any losses they suffered as a result. The make-whole remedy 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).

In his remedy, the judge appears to have erroneously determined that the Respondent was obligated to apply the entire collective-bargaining agreement to the temporary employees. However, as discussed above, the Respondent is only required to apply those provisions of the agreement that regulate the terms and conditions of the

rary” employees as to those working conditions the Respondent controls. See *id.* at 875.

We find it unnecessary to pass on the allegation that the Respondent additionally violated Sec. 8(a)(5) and (1) by discharging the five “permanent temporary” employees without “just or reasonable cause” as required by art. 6 of the parties’ agreement. Given that the Respondent undoubtedly has control over whether to terminate the temporary employees’ assignments and that art. 6 applies to those employees, the remedy for this violation would be subsumed by the remedy for our more general finding.

Member McFerran would affirm the judge’s finding that the Respondent violated Sec. 8(a)(5) and (1) when it terminated the employment of the five permanent temporary employees without “just or reasonable cause” in violation of the parties’ agreement.

Members Kaplan and Emanuel note that no party excepts to the appropriateness of the bargaining unit as a multi-employer unit, consisting of both the Respondent’s solely employed employees as well as employees who are jointly employed by the Respondent and People Source, without the Respondent’s and People Source’s consent. However, they believe the Board should reconsider the issue in a future appropriate case.

¹⁶ Member Emanuel finds it unnecessary to pass on whether the discharges also violated Sec. 8(a)(3) and (1) as finding the violation would not materially affect the remedy.

¹⁷ We take administrative notice that the Union, General Counsel, and People Source entered into an informal settlement agreement on June 19. Any issues regarding the effect of that settlement, if any, on the Respondent’s reinstatement and backpay obligations, and the Respondent’s defenses to any reinstatement or backpay obligations, may appropriately be addressed in compliance.

“permanent temporary” employees under its control.¹⁸ See *Gourmet Award Foods, Northeast*, 336 NLRB at 874-875. Because the matter of the Respondent’s control was litigated only in general terms for the purpose of evaluating its joint employer status, the record does not permit a detailed determination of each contract provision that must, under this standard, be applied to the “permanent temporary” employees. Any issues regarding the Respondent’s control¹⁹ over specific working conditions governed by particular contract provisions will be resolved at the compliance stage of this proceeding.²⁰

We shall further modify the judge’s recommended Order to conform to the violations found herein and the Board’s standard remedial language. We shall substitute a new notice to conform to the Order as modified.

ORDER

The National Labor Relations Board orders that the Respondent, Orchids Paper Products Company, Pryor, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to continue in effect the terms and conditions of its 2012–2016 collective-bargaining agreement with United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO (Union), by failing to apply the provisions of its collective-bargaining agreement pertaining to terms and conditions of employment under the Respondent’s control to the “permanent temporary” employees supplied by People Source Staffing Professionals, LLC performing work at the Respondent’s Pryor, Oklahoma facility.

¹⁸ We observe that the Respondent made a blanket refusal to apply any of the terms and conditions of the collective-bargaining agreement to the “permanent temporary” employees despite having a statutory duty to apply those contractual terms to the extent that they regulate their working conditions under the Respondent’s control.

¹⁹ Member McFerran notes that for purposes of determining the appropriate remedy all evidence of the Respondent’s control—direct, indirect, and reserved—over the employees’ working conditions should be evaluated. See *Browning-Ferris*, *supra*, at slip op. 16–17. Here, for example, the existence of a cost-plus contract and its explicit delegation of reserved authority to the Respondent to pay for holiday and vacation pay (which it does offer employees according to its employee handbook) are indicia of the Respondent’s potential control over wages and benefits. See *id.* at slip op. 13–17, 19.

²⁰ To the extent the Respondent’s failure to apply particular contract provisions to the “permanent temporary” employees resulted in their cessation of employment, we order the same traditional remedies as ordered to remedy the Respondent’s discriminatory discharge of the five “permanent temporary” employees, including reinstatement and make-whole relief, as set forth in the remedy section of the judge’s decision as amended in this decision.

(b) Failing to continue in effect the terms and conditions of its 2012–2016 collective-bargaining agreement with the Union by converting production lines six and seven to “op-tech lines” without the Union’s consent.

(c) Changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain, including by implementing a flame-resistant clothing policy and by changing employees’ health insurance.

(d) Suspending, disciplining, or otherwise discriminating against employees for failing to comply with the unilaterally implemented flame-resistant clothing policy.

(e) Discharging or otherwise discriminating against employees because the Union took actions on their behalf.

(f) Threatening an employee with discipline for not complying with the unilaterally implemented flame-resistant clothing policy.

(g) Prohibiting employees from engaging in union or other protected concerted activities, including by instructing an employee not to contact the Occupational Safety and Health Administration unless management had been informed first, prohibiting employees from speaking or asking questions during employee meetings, and accusing employees of harassment for engaging in such activity.

(h) Prohibiting employees from discussing the Union on the production floor or during work time while permitting employees to discuss other nonwork-related subjects.

(i) Telling employees that their union or other protected concerted activities are disrespectful to management.

(j) Creating the impression that it is engaged in surveillance of its employees’ union or other protected concerted activities.

(k) Prohibiting employee union officials from conducting union business on the production floor or during work time while permitting employees to engage in comparable discussions of other nonwork-related subjects.

(l) Informing employees that other employees were discharged because the Union acted on their behalf.

(m) 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) Apply the provisions of its 2012-2016 collective-bargaining agreement that pertain to terms and conditions of employment under its control to the “permanent temporary” employees supplied by People Source Staff-

ing Professionals, LLC who perform work at its Pryor, Oklahoma facility.

(b) Make the “permanent temporary” employees supplied by People Source Staffing Professionals, LLC who performed work at its Pryor, Oklahoma facility and the Union whole for any loss of earnings and other benefits suffered as a result of its failure to apply the provisions of the 2012–2016 collective-bargaining agreement that pertain to terms and conditions of employment under its control, in the manner set forth in the remedy section of the judge’s decision as amended in this decision.

(c) Continue in effect all the terms and conditions of employment contained in its 2012–2016 collective-bargaining agreement, or other applicable collective-bargaining agreement, with the Union.

(d) On request of the Union, rescind the conversion of production lines six and seven.

(e) 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 employees in the following bargaining unit:

(f) The Respondent’s employees employed at its Pryor, Oklahoma Converting facility with the exception of executives, office, sales, clerical employees, professional employees, guards, watchmen, and supervisory employees as defined in the Labor Management Relations Act of 1947, as amended.

(g) On request of the Union, rescind the unilaterally implemented change to the employees’ health insurance.

(h) On request of the Union, rescind the unilaterally implemented flame-resistant clothing policy.

(i) Make unit employees whole for any loss of earnings and other benefits suffered as a result of the unlawful unilateral changes in terms and conditions of employment, in the manner set forth in the remedy section of the judge’s decision as amended in this decision.

(j) Within 14 days from the date of this Order, offer John Aguilar, Carrie Bunnell, Brandon Glory, Rebecca Scott, and Jennifer Whisenhunt 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.

(k) Make John Aguilar, Carrie Bunnell, Brandon Glory, Rebecca Scott, and Jennifer Whisenhunt 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 the judge’s decision as amended in this decision.

(l) Make Michael Besley whole for any loss of earnings and other benefits suffered as a result of the unlaw-

ful suspension and discipline against him, in the manner set forth in the remedy section of the judge’s decision as amended in this decision.

(m) Compensate Michael Besley, John Aguilar, Carrie Bunnell, Brandon Glory, Rebecca Scott, and Jennifer Whisenhunt for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

(n) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discipline or unlawful discharges, and within 3 days thereafter, notify Michael Besley, John Aguilar, Carrie Bunnell, Brandon Glory, Rebecca Scott, and Jennifer Whisenhunt in writing that this has been done and that the suspension and discipline or discharges will not be used against them in any way.

(o) 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.

(p) Within 14 days after service by the Region, post at its Pryor, Oklahoma facility copies of the attached notice marked “Appendix.”²¹ Copies of the notice, on forms provided by the Regional Director for Region 14, 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. Reasonable steps shall be taken by the Respondent 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

²¹ 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.”--

and former employees employed by the Respondent at any time since March 22, 2016.

(q) Within 21 days after service by the Region, file with the Regional Director for Region 14 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. November 20, 2018

Lauren McFerran, Member

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 fail to continue in effect the terms and conditions of our 2012–2016 collective-bargaining agreement with United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO (Union), by failing to apply the provisions of the collective-

bargaining agreement pertaining to terms and conditions of employment under our control to “permanent temporary” employees supplied by People Source Staffing Professionals, LLC performing work at our Pryor, Oklahoma facility.

WE WILL NOT fail to continue in effect the terms and conditions of our 2012–2016 collective-bargaining agreement with the Union by converting production lines six and seven to “op-tech lines” without the Union’s consent.

WE WILL NOT change the terms and conditions of employment of our unit employees without first notifying the Union and giving it an opportunity to bargain, including by implementing a flame-resistant clothing policy and changing your health insurance.

WE WILL NOT suspend, discipline, or otherwise discriminate against you for failing to comply with the unilaterally implemented flame-resistant clothing policy.

WE WILL NOT discharge or otherwise discriminate against you because the Union took actions on your behalf.

WE WILL NOT threaten you with discipline for not complying with the unilaterally implemented flame-resistant clothing policy.

WE WILL NOT prohibit you from engaging in union or other protected concerted activities, including by instructing you not to contact the Occupational Safety and Health Administration unless management had been informed first, prohibiting you from speaking or asking questions during employee meetings, and accusing you of harassment for engaging in such activity.

WE WILL NOT prohibit you from discussing the Union on the production floor or during work time while permitting you to discuss other nonwork-related subjects.

WE WILL NOT tell you that your union or other protected concerted activities are disrespectful to management.

WE WILL NOT create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT prohibit union officials from conducting union business on the production floor or during work time while permitting you to engage in comparable discussions of other nonwork-related subjects.

WE WILL NOT inform you that other employees were discharged because the Union acted on their behalf.

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 apply the provisions of our 2012–2016 collective-bargaining agreement that pertain to terms and conditions of employment under our control to the “permanent temporary” employees supplied by People

Source Staffing Professionals, LLC who perform work at our Pryor, Oklahoma facility.

WE WILL make the “permanent temporary” employees supplied by People Source Staffing Professionals, LLC who perform work at our Pryor, Oklahoma facility and the Union whole for any loss of earnings and other benefits resulting from our failure to apply the provisions of the 2012–2016 collective-bargaining agreement that pertain to terms and conditions of employment under our control, less any net interim earnings, plus interest, and WE WILL also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL continue in effect all the terms and conditions of employment contained in the 2012–2016 collective-bargaining agreement, or other applicable collective-bargaining agreement, with the Union.

WE WILL, on the Union’s request, rescind the conversion of production lines six and seven.

WE WILL, 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 our employees in the following bargaining unit:

All employees employed by us at the Pryor, Oklahoma Converting facility with the exception of executives, office, sales, clerical employees, professional employees, guards, watchmen, and supervisory employees as defined in the Labor Management Relations Act of 1947, as amended.

WE WILL, on the Union’s request, rescind the unilaterally implemented change to your health insurance.

WE WILL, on the Union’s request, rescind the unilaterally implemented flame-resistant clothing policy.

WE WILL make you whole, for any losses suffered by reason of the unlawful unilateral changes in terms and conditions of employment, plus interest.

WE WILL, within 14 days from the date of the Board’s Order, offer John Aguilar, Carrie Bunnell, Brandon Glory, Rebecca Scott, and Jennifer Whisenhunt 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 John Aguilar, Carrie Bunnell, Brandon Glory, Rebecca Scott, and Jennifer Whisenhunt whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest, and WE WILL also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

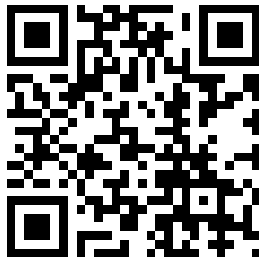
WE WILL make Michael Besley whole for any loss of earnings and other benefits suffered as a result of our unlawful suspension and discipline, plus interest.

WE WILL compensate Michael Besley, John Aguilar, Carrie Bunnell, Brandon Glory, Rebecca Scott, and Jennifer Whisenhunt for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discipline or unlawful discharge of Michael Besley, John Aguilar, Carrie Bunnell, Brandon Glory, Rebecca Scott, and Jennifer Whisenhunt, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the suspension and discipline or discharge will not be used against them in any way.

ORCHIDS PAPER PRODUCTS COMPANY

The Board's decision can be found at <https://www.nlr.gov/case/14-CA-184805> 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.



William LeMaster and Julie Covel, Esqs., for the General Counsel.

Steven A. Broussard and Molly A. Aspan, Esqs., for the Respondent.

Steven R. Hickman, Esq., for the Charging Party.

DECISION

I. STATEMENT OF THE CASE¹

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. These consolidated cases were tried before me on June 20–22, 2017, in Tulsa, Oklahoma, following the issuance of an Amended Fifth Consolidated Complaint and Notice of Hearing (the Complaint) by the Regional Director for Region 14 of the National Labor Relations Board (the Board) on June 19, 2017. The Complaint was based on the above unfair labor practice charges that the United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO (the Union) filed against Orchids Paper Products Company (Respondent), between September 20, 2016 and June 2, 2017, alleging that Respondent violated Sections 8(a)(5), (3), and (1) and Section 8(d) of the National Labor Relations Act (the Act).² Respondent filed its Answer to the Complaint, denying the alleged violations.

The Complaint alleges Respondent violated the Act when it: (1) failed to apply the terms of the parties' collective-bargaining agreement to "temporary" employees after they completed the contractual 60-day probationary period, without the Union's consent; (2) discharged temporary employees who had completed their probationary period after the Union sought to have them covered by the parties' agreement; (3) unilaterally withdrew from a verbal agreement to utilize temporary employees to perform non-production overtime work when not enough unit employees volunteered to perform that work; (4) failed to abide by the terms of the collective-bargaining agreement by converting two existing production lines to "Op-Tech" lines without the Union's agreement; (5) unilaterally changed health insurance carriers without bargaining with the Union over the decision or its effects; (6) unilaterally implemented clothing, shoe, and flame-resistant clothing policies without bargaining with the Union over the decision or its effects; (7) disciplined the local union president for violating the unilaterally implemented flame-resistant clothing policy and other policies; (8) failed to abide by the terms collective-bargaining agreement regarding when and where Union officials could handle Union matters, without the Union's consent; (9) unilaterally promulgated and maintained an overly broad rule prohibiting employees from talking to employees from other departments, except during non-work times; and (10) made various statements that independently violated Section 8(a)(1) of the Act.

At the hearing, all parties were afforded the right to call, examine, and cross-examine witnesses, present any relevant doc-

¹ Abbreviations in this decision are as follows: "Tr." for transcript; "Jt. Exh." for Joint Exhibits; "GC Exh." for General Counsel's Exhibit; "CP Exh." for Charging Party's Exhibit; "R. Exh." for Respondent's Exhibit; "GC Br." for General Counsel's brief; and "R. Br." for Respondent's brief.

² Previous versions of the complaint identified Orchid Paper Products and People Source Staffing Professionals, LLC (People Source) as a joint employer respondent. On June 19, 2017, the Union, the General Counsel, and People Source entered into an informal settlement agreement resolving all allegations against People Source. The terms of that settlement were not introduced into the record.

umentary evidence, and argue their respective legal positions orally. Respondent and General Counsel filed post-hearing briefs, which I have carefully considered. Accordingly, based upon the entire record, including the post-hearing briefs and my observations of the credibility of the witnesses, I make the following³

II. FINDINGS OF FACT⁴

A. Jurisdiction

Respondent operates a paper mill and a converting facility in Pryor, Oklahoma, where it has been engaged in the manufacture and the nonretail sale of paper products, such as toilet paper, paper towels, and napkins. In conducting its operations during the 12-month period ending September 30, 2016, Respondent sold and shipped from its Pryor, Oklahoma facility goods valued in excess of \$50,000 directly to points outside the State of Oklahoma. Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act. Based on the foregoing, I find this dispute affects commerce and the Board has jurisdiction of these cases, pursuant to Section 10(a) of the Act.

At all material times, these individuals were statutory supervisors and agents for Respondent: Eric Diring (Vice President of Operations), Brian Merryman (former Converting Plant Operations Manager), Court Dooley (Site Manager), Doug Moss (Human Resource Manager), Brad Blower (Process Specialist), Jeff Cochrell (Process Specialist), Kelly Foss (Process Specialist), Kris Thorn (Safety Lead), Matt Rhodes (Maintenance Lead), Richard Keith (Maintenance Planner), and Graham Darby (Maintenance Engineering Manager).

B. Collective-Bargaining Relationship

The Union, through its local unions, represents employees at Respondent's paper mill and converting facility. Local 930 represents the approximately 85 employees at the paper mill. Local 1480 represent the approximately 185 employees at the converting facility. Each unit has its own collective-bargaining agreement. The dispute largely concerns the employees at the converting facility represented by Local 1480.

The collective-bargaining agreement at issue was in effect from June 25, 2012, to June 25, 2016. In June 2016, the parties entered into a six-month extension agreement, which included a wage increase. Thereafter, the parties orally agreed to continue all terms and conditions of the expired agreement until a new agreement is reached. (Tr. 791-792.)

The following are some of the relevant provisions from the agreement covering the converting facility:

³ On July 20, 2017, the parties filed a joint motion to correct exhibits in the record. After reviewing the exhibits at issue, I hereby grant this joint motion. Additionally, the court reporting service issued an amended transcript to include witness testimony was inadvertently omitted from the original transcript.

⁴ Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case.

ARTICLE 4 RECOGNITION

The Company recognizes the Union as the exclusive bargaining agent in respect to wages, hours, and conditions of employment for the Company's employees at its Pryor, Oklahoma Converting facility with the exception of executives, office, sales, clerical employees, professional employees, guards, watchmen, and supervisory employees as defined in the Labor Management Relations Act of 1947, as amended.⁵

ARTICLE 6 MANAGEMENT RIGHTS

The Company has and shall retain the full right of management, the direction of the work force, and its plant operations. These management rights include, but are not limited to, the right to plan, direct, control, increase, decrease, or discontinue operations in whole or in part, to determine products to be manufactured, processed, types of work or methods, to change machinery and methods, facilities, introduce new methods, processes, techniques, machinery and products; to transfer, suspend, discipline or discharge for just and reasonable cause; hire, promote, to add or reduce the number of shifts, to determine the number of employees it shall employ at any time and the qualifications necessary for any existing or future jobs and to relieve employees from duties because of lack of work or other legitimate reasons.

ARTICLE 8 GRIEVANCE PROCEDURE

section 5: There shall be no discrimination against any officer or shop steward because of their having represented other employees with management during regular working hours on the plant premises. It is expected that the officers and/or the shop steward will be away from their regular job assignment as little as possible. It is understood that if union business or investigation of grievances need to be conducted during working hours, supervisory permission must be obtained in any departments affected. When practical, the Company and the Union will agree to conduct formal grievance meetings during worktime when such meetings will not impact production or work schedules. Such meetings shall be scheduled by the Company in all cases. Union representatives will be paid at the regular rate of pay for all time spent in such meetings.

ARTICLE 16 MOVEMENT OF PERSONNEL-BIDDING

section 3: In general, management will endeavor to fill vacancies from qualified people within the bargaining unit. But, where such people are not available, they will be hired from

⁵ Appendix A of the agreement contains job classifications and the wage scale for each classification during the life of the agreement.

the outside.

...

Section 5: New employees and those hired after a break in service shall be considered probationary employees for sixty (60) days following their date of hire. The retention or dismissal of probationary employee shall be in the sole judgment of the Company. An employee who is retained in the employ of the Company after the end of the probationary period shall be given continuous service credit back to the date of hire.⁶

...

SECTION 7: The Company retains exclusive right to determine whom its employees shall be and from what source(s) they will be chosen outside of the bargaining unit.

ARTICLE 24
GROUP INSURANCE/401(K)/DISABILITY

Section 1: It is agreed that the Company will furnish the following insurance to each employee upon completion of the probationary period:

...

b. Medical/dental benefits: The company cannot guarantee what type of coverage can be offered in the future. For that reason types of health care will not be specified. The Company will pay 80% and the employee will pay 20% of whatever plan the employee chooses or is available.

ARTICLE 25
HEALTH, SAFETY, AND SANITATION

The Company shall make reasonable provisions for the health, safety and sanitation of its employees during the hours of their employment. The Company will cooperate with the Union in investigating health, safety, and sanitary conditions and will carefully consider any recommendations made by the Union in respect thereto. The Union and the Company will cooperate in assisting and maintaining the company's rules regarding health, safety, and sanitation.

ARTICLE 37
LINE 8 AND ANY NEW LINE

This language is to outline the operation and requirements to staff a new line including hours of work, shifts, and pay

Op-Techs will be expected to operate and conduct running maintenance on all pieces of equipment contained in the new line (line 8). They will also use lifts to supply paper and vitals to the line.

⁶ Respondent's Employee Handbook also states employees will be considered regular employees once they successfully complete their 60-day probationary period. (GC Exh. 24).

...

After the successful startup of the line, the company may entertain the idea to expand this opportunity to line 7 and/or line 6. The understanding is both parties will discuss and must agree before expanding cell concept to existing lines. (GC Exh. 2).

III. ALLEGED UNFAIR LABOR PRACTICES⁷

Respondent's Use of Temporary Employees

1. Background

Respondent utilizes temporary employment agencies to provide manual labor to work at its converting facility. In February 2015, Respondent contracted with People Source Staffing Professionals, LLC (People Source), a nationwide staffing company, for this purpose. People Source recruits, interviews, screens, hires, and sets the wages and benefits for the employees it refers out. When Respondent needs temporary employees, one of its supervisors will contact People Source with an order containing the number of employees needed, the shift(s), the start date, the type of assignment, and, at times, how long the assignment is expected to last. Respondent can identify, by name, who it wants People Source to refer out to fill the order. (GC Exh 32.) If no one is identified, People Source will assign based on qualifications.

Respondent typically uses these temporary employees to remove Display Ready Products (DRPs) of tissue paper or paper towels from the conveyor lines and hand stack them onto pallets to be shipped out to retail customers, or to clean, sweep, and wipe down around the facility. Respondent also uses some of the temporary employees to work on production lines or in other areas of the facility, performing the same or similar tasks as the unit employees.

The assignments can vary in length. Respondent can request People Source provide temporary employees for a specific project or period of time. Respondent, however, has converted temporary employees to what are referred to as "permanent temps." (GC Exhs. 30-32.) These permanent temps receive the same pay and benefits that they had been receiving as temporary employees. The key difference is that they are assigned to a shift and a rotating schedule, and the assignment is for an

⁷ The following factual summary is a compilation of the credible and uncontroverted testimony. To the extent that there is a critical dispute in testimony, I have assessed the witnesses' credibility considering a variety of factors, including the context of the witness' testimony, the witness' demeanor, corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *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). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, supra.

indefinite period of time.⁸

People Source does not have supervisors at the converting facility. The evidence is limited regarding who supervises the temporary employees and what that supervision involves. The two temporary employees who testified (Whisenhunt and Bunnell) both stated while they contacted People Source with questions or issues related to their employment, they received their day-to-day work assignments and direction from lead people or supervisors who worked for Orchids. (Tr. 155–156;163) (Tr. 169–170). Bunnell testified that her supervisor also supervised Orchids employees. (Tr. 170.) Whisenhunt testified that her Orchids supervisor informed her that she was being converted to a permanent temp, and later informed her that Orchids had ended her assignment. (Tr. 155–156.)

According to the evidence, if a temporary employee is going to be absent because of an illness or an appointment, Orchids has the choice of replacing the employee for the day, or permanently. Similarly, if a temporary employee has attendance issues, Orchids can end that employee's assignment and have People Source send a replacement. (GC Exhs. 32–33.)

The temporary employees record their time using a People Source time clock located at the converting facility. Respondent remits the time cards to People Source. People Source will then total up the hours worked and send that information back to Respondent for verification. Once verified, People Source will complete the payroll process, and later invoice Respondent for the hours worked.

2. Solicitation of authorization cards

Prior to the expiration of the collective-bargaining agreement covering the employees at the converting facility, Union Staff Representative Chad Vincent instructed Local 1480 Vice President Jason Gann to solicit employees to join the Union, in part to get their input regarding the upcoming contract negotiations. Gann went through the converting facility and talked with individuals, including those who had been referred by People Source. Certain employees informed Gann that they could not sign union authorization cards because they were temporary employees. After speaking further with them, Gann learned that some of these employees had worked at the converting facility for more than 60 days, and some had been classified as “permanent temps.” Gann later reported this to Vincent. Vincent stated that, under the terms of the collective-bargaining agreement, if the employees had worked for more than 60 days, they were part of the unit and could sign an authorization card. Gann then went back and obtained cards from five of these “temporary” employees who had worked longer than 60 days. Thereafter, in accordance with his normal practice, Gann took the portions of the signed cards that authorized dues deduction and left them in the company mailbox for “Stacey” the “payroll lady” in the accounting department to process. (Tr. 268–269.) Gann later found the cards in the Union's mailbox with an unsigned note stating the employees who signed the cards were not in the computer system as Respondent's employees. (Tr. 197–198.) Gann took no other action regarding the cards. (Tr.

⁸ Respondent's production employees work either A, B, C, or D shift. Each 12-hour shift rotates 4 days on, 4 days off, 4 nights on, and 4 nights off. Permanent temps are assigned to one of these shifts.

280.)

3. August 4, 2016 meeting

On around August 4, 2016, Respondent and the Union were scheduled to meet. Chad Vincent and Jason Gann were present for the Union, along with Local 1480 President Michael Besley. Site Manager Court Dooley and Operations Manager Brian Merryman were present for the company. At the start of the meeting, Vincent raised the topic of temporary employees, stating that there were “temporary” employees at the converting facility who had worked more than 60 days and not been given the pay and benefits set forth in the parties' collective-bargaining agreement.⁹ Dooley responded that they were not Orchid's employees, and they were not performing unit work. Dooley further stated that the company could get employees from wherever they wanted. Vincent agreed that the Union had no say in where the company got their employees, but when the employee has been there for more than 60 days, he/she becomes covered under the terms of the agreement. (Tr. 48.) At some point during this conversation, Vincent mentioned that he had read the Board's Browning-Ferris decision, which he stated “discussed contract workers coming in and working at the facility, and they were able to join the union.” (Tr. 51.) Vincent made reference to filing unfair labor practice charges if the parties were not able to resolve the matter.

Dooley testified that after this meeting he and Merryman were uncertain what the Union wanted Respondent to do regarding these temporary employees, so they made the decision to suspend the use of all temporary labor until the matter was resolved. Respondent contacted People Source to notify them.¹⁰

Dooley later spoke with Gann and expressed the company's confusion about what the Union wanted the company to do regarding the “temporary” employees. Gann later informed Vincent. On August 12, 2016, Vincent sent Dooley an email, stating:

I spoke with Jason Gann and he informed me that you had some confusion as to the direction to go on probationary employees. I will give you a detailed explanation of how this issue shall be resolved.

All employees that the company has hired through a hiring

⁹ The collective-bargaining agreement provides certain benefits to nonprobationary employees. For example, a nonprobationary employee receives holiday pay (Article 14, sec. 2), is entitled military leave (17), receives paid leave for jury duty (Article 20), and is eligible for health benefits, accident and life insurance, and 401(k) plan participation (Article 24). (GC Exh. 2.)

¹⁰ The record is unclear when Respondent first notified People Source that it was no longer going to use temporary employees. There is an August 22, 2016 email from Brian Merryman to Melanie McMains at People Source, which states: “The Union has filed a cease and desist with regards to any temporary worker who works over 60 consecutive scheduled shifts. In the future all temps assigned to Orchids Paper must work no more than the 59 shifts in order to keep us aligned with the collective bargaining agreement. Kelly [Foss] and Brad [Blower] will continue to work with you, when we need temporary resources, to support our work force.” (GC Exh. 25.)

agency or off the street shall have the same sixty (60) day probationary period as defined in the CBA under Article 14 as well as Article 16 section 5.

Any employees (sic.) that the company has hired that was not made a permanent employee by the Company after the sixty (60) day probationary period, shall be made a permanent employee.

These employees shall be given continuous service credit back to the hire date as stated in Article 16, section 5.

All employees that have completed their sixty (60) day probation and did [not] receive the correct pay in accordance with Appendix A, shall be back paid and made whole.

All employees that have completed their sixty (60) days probation and that did not receive holiday pay for holidays falling after this time shall receive full payment of such and made whole.

All employees that completed their sixty (60) days probation and were eligible for insurance shall have insurance offered and the Company shall be responsible for any medical bills during this time frame that the company violated the CBA.

If at this time any employees [sic.] fits this criteria and are laid off, shall be recalled before any attempt to hire any new employees. These employees shall have seniority in accordance with the Article 16, Section 5.

This should clear up any confusion that you had. If the company disagrees with this assessment please respond in writing, if I received no response in writing I will conclude that we are in agreement and these issues shall be resolved swiftly. (GC Exh. 4.)

On August 16, 2016, Dooley responded with an email, stating, in pertinent part, that:

The company disagrees with your position on the temporary contract workers. Below are the reasons for our position:

These workers are employees of the temporary staffing agency, and not Orchids Paper, and therefore not covered by the Collective-Bargaining Agreement (CBA). They were hired by the agency, and never intended to be a full-time Orchids Paper employees.

These individuals were not performing work as defined by the job classifications in the Appendix A of the CBA. Work assignment was provided to these workers by the temporary staffing agency, not Orchids Paper. These individuals are also paid by the temporary staffing agency for their work, not by Orchids Paper.

These workers do not meet the Orchids Paper employment criteria also. They were not vetted through the company's standard hiring process. They applied for and were hired by the temporary staffing agency, not by Orchids Paper.

Article 6 and Article 16, section 7 of the CBA provide that the Company has the exclusive right to determine whom its employees shall be and what sources they will be chosen from outside of the bargaining unit. (GC Exh. 5.)¹¹

¹¹ Respondent hires employees without going through a temporary employment agency. There is no dispute that these employees are required to take and pass certain tests before they are hired

On August 16, 2016, Gann filed a grievance on behalf of the temporary employees who completed the 60-day probationary period, requesting they be made whole per the collective-bargaining agreement. (GC Exh. 10.) Vincent later made written requests to Respondent for information concerning the temporary employees. (GC Exhs. 6 and 8.) Dooley provided the Union with information, but continued to insist that the temporary employees were not the company's employees and not covered by the agreement. (GC Exhs. 7 and 9.)

On August 24, 2016, Gann filed a second grievance alleging Respondent should follow the contractual recall procedure and call back the three "temporary" employees the company had sent home after the August 4 meeting. (GC Exh. 11.) Gann also had a conversation with Dooley about this. (Tr. 222.) According to Gann, Dooley told him that the company got rid of those temporary employees because the Union told the company to get rid of them. (Tr. 223.)

Alleged Verbal Agreement Regarding Non-Production Overtime Work

After suspending use of the temporary employees, Respondent still needed individuals to perform the work the temporary employees had been performing. Respondent referred to this work as non-production overtime work. Article 11 of the parties' agreement sets forth the process for distributing overtime work. It states the company is to first seek volunteers to perform the work and award the work to the volunteers based on seniority. If there are not enough volunteers, then the company can draft employees to perform the overtime work based on reverse seniority. (GC Exh. 2, pgs 6-7.)

In late August or early September, Dooley had a conversation with Gann about this work, and that the company would have to utilize its own employees to perform it. Gann responded that he believed this was a bad idea because unit employees were not going to respond well to being drafted to perform this manual labor. Following this conversation, the company posted a sign-up sheet for volunteers to perform this work, but no one volunteered. Thereafter, the company began drafting employees to perform the work, in accordance with Article 11 of the parties' collective-bargaining agreement. (Tr. 818-819.)

Gann later met with Dooley and said the membership was unhappy with the company drafting employees to perform this work. Gann requested that the company start using temporary employees again to perform this work. Dooley explained that until this matter was cleared up between the company and the Union, the company was going to follow the contract and continue to use its own employees. (Tr. 821-822.) Following this conversation, Gann later met with Vice President of Operations Eric Diring to discuss the matter (discussed below).¹²

¹² The General Counsel alleges that Gann and Dooley reached a verbal agreement in August 2016 that the company could post for volunteers to perform this non-production overtime work, and, if there were not enough volunteers, the company could use temporary employees. The General Counsel relies upon the testimony of Jason Gann to establish this verbal agreement. (Tr. 215-216.) I, however, do not credit Gann on this matter. His recollection of these conversations was limited and he was unable to provide much detail. Additionally, I do not believe that Dooley would have agreed to such an arrangement at

In September, the parties met on the grievances. On September 22, Eric Diring sent Chad Vincent a letter stating that the company was willing to negotiate bringing the work performed by temporary employees into the bargaining unit under certain circumstances, and he explained what he believed those circumstances should be. (GC Exh. 12.)

At some point, Diring met with Gann. They eventually agreed that the company would first seek volunteers to perform the nonproduction overtime work, and, if there were not enough volunteers, the company would use temporary employees to cover the rest of the work, on a week-by-week basis. (Tr. 221.) On October 4, Dooley sent Vincent an email addressing the agreement Diring and Gann had reached. (G.C. Exh. 13.) Thereafter, the company again began using temporary employees, but limited them to no more than 59 days. Dooley spoke with Gann about this, and Gann did not object. (Tr. 823–824.)

Conversion of Lines 6 and 7 to Op-Tech Lines

1. Background

Respondent has several converting lines on the production floor. Prior to the fall 2016, the first seven lines were standard lines, and the rest were Op-Tech lines. A standard line is older and operated by bid positions, such as a line coordinator, a back tender, a machine operator, and possibly a core operator. Each position has specific duties and responsibilities. Op-Tech lines are high performance work systems. They are staffed by people trained to run different parts of the line, with the eventual goal that everyone on the line be cross-trained to perform all jobs on the line.

As previously stated Article 37 of the parties' agreement states, in pertinent part, that: "After the successful startup of [line 8], the company may entertain the idea to expand this opportunity to line 7 and/or line 6. The understanding is both parties will discuss and must agree before expanding cell concept to existing lines." (GC Exh. 2, pg. 29.)

2. Communications regarding converting lines 6 and 7 to Op-Tech Lines

At the August 4 labor-management meeting, Brian Merryman raised that the company wanted to convert lines 6 and 7 to Op-Tech lines. Vincent told Merryman to email him his proposal. Merryman told Vincent that the company had already engaged in large-scale capital projects to start converting the lines. On October 7, 2016, Court Dooley sent Vincent an email with the company's proposal, noting that the timeline was crucial to the start of the "new assets" on line 6. (GC Exh. 14.) The proposal went through how the conversion of the two lines

the time, because the parties were disputing the status of these temporary employees, and I do not believe that Dooley would have verbally agreed without involving Vincent, who was the one who raised concerns about the temporary employees. Additionally, if Dooley had agreed to the arrangement, then there would not have been a need for Gann to go over Dooley's head and request a meeting with Diring to further discuss the issue. For these reasons, I do not find that there was the alleged verbal agreement between Dooley and Gann regarding the use of temporary employees to perform this non-production overtime work. I, therefore, credit Dooley's clearer and more plausible recollection regarding these conversations.

would work, as well as the handling/movement of unit personnel who did not want to work on an Op-Tech line. Vincent reviewed the proposal and spoke to unit employees. On October 17, 2016, Vincent sent Dooley an email stating that "the Union is not agreeable at this time of transitioning lines 6 & 7 to an Op-Tech system. The Union will gladly discuss during negotiations." (GC Exh. 15.) The following day, Dooley emailed Vincent and informed him that upon reviewing the contract language and interviewing past Union committee members involved in the last contract negotiations, the matter of transitioning the two lines to Op-Tech lines was already negotiated and agreed upon by the Union. Dooley noted that former union Officers Chris Montoya and Willa Wright, who were involved in the prior contract negotiations, acknowledged that the parties had previously negotiated and agreed to these conversions, and that the company would transition lines 6 and 7 to the Op-Tech system, effective January 9, 2017.¹³ (G. Exh. 16.) That same day, Vincent responded to Dooley's email, stating that the Union's position had not changed and it was not in agreement to change to the Op-Tech lines at this time. Dooley responded that, for the reasons previously given, the company was moving forward with the transitioning of the two lines. (GC Exh. 17.) Respondent eventually converted lines 6 and 7 to Op-Tech lines.

November 29, 2016 Conversation Between Dooley, Besley and Reed

In the fall 2016, there was an effort to decertify the Union. In late November 2016, Respondent received reports from employees that Local 1480 Recording Secretary Darla Reed was harassing employees about this decertification effort, and she was threatening to get employees fired if they signed the petition. At some point after Thanksgiving, Reed was called into Court Dooley's office about the accusations. Reed had Local 1480 President Michael Besley present as her union representative. Human Resource Manager Doug Moss was also present. At this meeting, Dooley accused Reed of harassing employees in the break room, telling them that she was going to get them fired over the decertification petition. Dooley also accused Reed of harassing another employee, who worked on a different line than her, about the decertification petition. Reed denied talking to any employee about the decertification petition. Dooley then said there would be an investigation. (Tr. 302–303.)

At some point, Besley asked Dooley why it was okay for another employee (Andrew Mason) to pass a decertification petition around on the floor and get signatures, and Reed was being called into the office for harassment. Dooley answered that they had put a stop to it and that Mason was no longer getting signatures on company time. Later, Dooley told Reed and Besley that they could not talk Union business on the floor. It had to be on their breaks. (Tr. 303.) Dooley did not refute this testimony.

¹³ Dooley did not provide any specifics regarding his conversations with Montoya or Wright on this topic. Respondent also did not call or question Montoya or Wright about this alleged agreement. Absent this evidence, I do not credit Dooley's testimony that such an agreement had been reached.

According to Reed and Besley, the past practice has been to allow employees to discuss the Union on the production floor. (Tr. 304) (Tr. 374). Both Reed and Besley also testified that the company allowed employees to discuss other non-work topics, such as sports and vacations, while on the production floor, without the threat of discipline. (Tr. 304) (Tr. 378). This testimony was unrefuted.

Reed never received any discipline for her alleged harassment.

December 21, 2016 Conversation Between Blower, Foss and Reed

Prior to Christmas 2016, Brad Blower and Kelly Foss approached Union Recording Secretary Darla Reed on the production floor and asked her to come to the office. Reed asked Darlene Russell, a Union steward, to come with her. When they arrived at the office, Blower and Foss told Reed that they had received reports she had been on the floor harassing people, and that it needed to stop. They did not provide specifics regarding the alleged harassment. Reed did not say anything. (Tr. 306–307.) Respondent did not issue her any discipline for this alleged harassment.

December 2016 Changes to Health Insurance

After Doug Moss began working for Respondent as the Human Resource Manager in September 2016, he began reviewing the company's health insurance costs and learned that the company's health insurance carrier, Community Care, was projecting cost increases of approximately 13-percent in the upcoming year. Thereafter, Moss began researching other providers that could provide comparable coverage at a lower cost. At some point, Moss spoke with Michael Besley that he intended to look into other health insurance providers because of the high costs, and that he would get back to Besley when they were deciding what to do (Tr. 394–395).

Moss eventually selected United Healthcare, which offered plans comparable to the Community Care plan, but with lower premiums, particularly for non-tobacco users. Due the timing of the selection of this carrier in relation to the open enrollment period for employees to elect coverage in order to have the change effective January 1, 2017, Moss scheduled mandatory meetings in December 2016, to inform employees about their options so that they could select which United Healthcare plan they wanted. A day or so before these meetings, Besley saw Moss and told him that they needed to discuss the change. Moss responded that the company was already moving forward with it, they had already had the people coming, and they had already changed over to the new carrier. The notice of these mandatory meetings was the first notice Respondent provided the Union that it was changing health insurance carriers.¹⁴ (Tr. 395–396.)

¹⁴ As far as coverage, copays, and prescription costs, the record is unclear whether there were any actual changes. Two of the witnesses (Gann and Besley) testified that there may have been changes in copays and prescription costs, but they were not certain or could not provide specifics. Moss, in contrast, testified that there were no differences, except for one employee who had to pay more for a particular prescription. Moss contacted the insurer and had that issue corrected. (Tr. 778–780.)

January 25, 2017 Conversation Between Dooley and Gann

On around January 25, 2017, Jason Gann was called into a meeting as a union representative for an employee, Gabriel Cutler, who is being disciplined for being away from his work area. Also present at the meeting were Bradley Blower, Doug Moss, Gabriel Cutler, and Shelly (last name unknown). Respondent claimed that Cutler, a machine operator, had left his production line for over an hour and was found later outside. There is a dispute as to whether or not Cutler had been away from his production line for that length of time. In response, Gann informed Blower that Eric Diring, the former plant manager, once told employees during a meeting that he didn't care how long employees were gone or how many smoke breaks they took, as long as somebody was in their spot running the machine and there was no down time or reduced production. (Tr. 239–240.) At the time of this January 2017 disciplinary meeting, Diring had been promoted and moved to the corporate offices in Nashville, Tennessee. In an effort to verify what he was saying, Gann used the phone in the meeting room to call Diring, and put him on speaker phone. Gann asked Diring if he recalled the meeting in which he (Diring) said that he did not care about employees being away from their work area as long as someone was running the machine. Diring asked Gann what this pertained to, and Gann said, "just answer my question." Diring responded, "Well, no, what does this pertain to?" Gann then informed Diring about Cutler's situation. Diring then asked to talk to Blower. Blower then took the phone off speaker and spoke to Diring. Gann then turned to Cutler and said, "See, they are all liars. That's how they work." (Tr. 241.) On cross-examination, Gann acknowledged he may have referred to them as "fucking liars." (Tr. 273.) Blower told Gann to "hush." Diring then spoke to Moss on the phone. Following the conversation, Moss spoke with Gann about resolving the issue, possibly meeting the Union halfway and something. In the end, Respondent reduced Cutler's suspension to a warning.

Following the meeting, Gann went back to work. Approximately 15 or 20 minutes later, Court Dooley called Gann to his office and told him to bring representation. Gann then went to Dooley's office with John Stafford, Gann's lead man, as his representation. Stafford and Gann arrived at Dooley's office. Doug Moss was also present. Dooley told Gann that he did not like the way that Gann had treated his management (during the meeting) and that Gann was not to talk to his management that way. Gann responded that he was a Union officer and "when I am in the office, we are equal, and if they raise their voice at me, and they get smart with me, I can do the same back." (Tr. 244.) Dooley did not respond to the statement.

At some point during this meeting, Dooley said to Gann, "I just want to let you know that people are reporting to me saying you are doing Union business on company time." Gann then asked, "Are you saying you are having me watched?" Dooley responded, "No, I am not having you watched. I am just letting you know that people have been reporting that you have been doing Union business on company time." (Tr. 245.) Dooley then asked Gann if he had let anybody know, supervisor or anybody, when he leaves his work station. Dooley referenced an incident where it had been reported to him that Gann had left his work station and was talking to Darla Reed. Gann respond-

ed that he had done that, and that he had let his lead know. Gann informed Dooley that Stafford was his lead man, and that Dooley could confirm what Gann was saying by asking Stafford. Stafford confirmed that when Gann leaves his work station he tells him where he is going and what he is doing. Dooley told Gann to just be sure and let somebody know whenever he leaves his work station. (Tr. 246.)

Conversations Between Blower, Foss, and Montoya

On around February 6, 2017, Chris Montoya, a Union steward, was working in the warehouse. At around 1 or 2 p.m., Montoya was approached by Brad Blower and Kelly Foss. They told Montoya that they had received reports that he was harassing people.¹⁵ They did not provide him with any details. Montoya said, “Well, let’s go find out who these people are.” Blower or Foss told him that was confidential. Montoya was frustrated and said that he wanted to go and talk with the CEO (Jeff Schoen), and he started walking toward the door to go to the CEO’s office. (Tr. 288–289.) Montoya did not go and speak to Schoen.

The following day, Darla Reed approached Montoya and told him that Foss and Blower wanted to see him. Reed and Montoya then went to the office to meet with Foss and Blower. Blower or Foss told Montoya that the way that he talked to them when they approached him the day before was unacceptable, and that if he did it again, he would be walked out. (Tr. 290) (Tr. 312). Foss and Blower took what Montoya said about going to the CEO as a threat. (Tr. 312.) Montoya was not issued anything in writing. Respondent did not question Blower or Foss regarding this second conversation.

Conversation Between Blower, Foss, and Reed

On around February 6, 2017, Darla Reed was working in the warehouse when an employee, Darlene Russell, approached her and asked her to come with her to the front office to help her address an attendance issue. Reed and Russell walked from the warehouse through the production floor to the office. On their way, Brad Blower and Kelly Foss stopped Reed and told her that they had reports that she had been harassing employees on the production floor. Reed said she had not, and that she had been in the warehouse all day working. Blower and Foss again told her she had been harassing employees on the production floor. They, however, did not provide any details. No further action was taken.

Conversation Between Dooley, Moss, and Montoya

On around February 8, 2017, Chris Montoya was called into a meeting with Court Dooley and Doug Moss. Darla Reed also attended this meeting as Montoya’s Union representative. In this meeting, Dooley accused Montoya of leaving his line to go and threaten another employee’s family member over the decertification effort. Dooley asked Montoya for his version of what happened, and Montoya provided his version. He acknowledged leaving his work area but denied threatening the employee. Dooley or Moss then said to Montoya that he was to

stay on his line and not leave his work area, except for when going on break. (Tr. 317.) Moss’s notes reflect that Dooley explained to those at the meeting that Union activities were limited to non-work time and non-work areas. (Tr. 761–764) (Jt. Exh. 38.) Dooley informed Montoya that he was being suspended pending the outcome of the investigation. Montoya was later discharged for threatening the other employee.

Announced Policy Prohibiting Employees from Talking to Employees in Other Departments (7(a) and 15(a))

In addition to the various statements to Union officers and agents, on around February 8, 2017, Kelly Foss approached Darla Reed while she was working on the production floor. Foss told her that they were not allowed to go to any other line, or to leave their lines. He told her that they were to just stay on their lines, and they could not go to any other line to talk to any of the other people. (Tr. 319.) Reed then saw Foss go and speak to other employees on the other lines. Respondent did not question Foss about this at the hearing.

New Shoe Policy, Clothing Policy and Flame-Resistant Clothing (FRC) Policies Shoe and Clothing Policies

In December 2016, an inspector from the Occupational Safety and Health Administration (OSHA) came to Respondent’s facility in response to complaints of unsafe working conditions. Union representative Darla Reed and members of management were present during the inspection. OSHA later issued Respondent a Notice of Alleged Safety or Health Hazards, which identified various hazards, including, but not limited to, that the maintenance and production employees were not adequately trained on electrical safety work practices, lacked proper personal protective equipment (PPE) for electrical work, and that the overall PPE hazard assessment was not in compliance. The OSHA inspector returned to the facility in February 2017 for an additional inspection on the production floor. Again, Union representative Darla Reed and members of management were present. On February 23, 2017, OSHA issued Respondent a citation and assessed penalties for certain infractions. One of the infractions was that Respondent did not have a hazard assessment performed in the workplace. On March 13, 2017, after receiving the citation, representatives from the company and one representative from the Union (Darlene Russell) had telephone conference call with the OSHA representative regarding abatement and lowering the fine. Respondent later entered into a settlement agreement to address the infractions and reduce the penalties, which included having a hazard assessment done by a third party. Respondent later requested and was granted a 30-day extension from OSHA, giving Respondent until April 28, 2017, to be in compliance.

On March 22, 2017, Daniel Shaw, a third-party safety coordinator, arrived at Respondent’s facility to conduct a hazard assessment. Shaw later issued a written report addressing several topics, including PPE. Thereafter, based on the assessment, Respondent, through Doug Moss, Court Dooley, and Respondent’s Safety Lead Kris Thom drafted new clothing and shoe policies, and then held mandatory meetings for employees regarding these policies in late March and early April 2017. The shoe policy required that employees and all individuals who entered the facility wear steel or composite toed shoes or

¹⁵ One of the employees responsible for the decertification effort was Andrew Mason. Montoya approached Mason’s wife, who also worked at the converting facility, and indicated that Mason should cease his activities, and Montoya impliedly threatened her family if he did not.

boots. Employees would be reimbursed up to \$120 for purchasing these shoes or boots. The clothing policy required employees to wear short or long-sleeved shirts and jeans or khaki pants. Employees could no longer wear shorts, dresses, scrub tops or bottoms, spandex or lycra clothing, shirts with cutoff sleeves, hooded sweatshirts, sweatpants, etc. Respondent also required that production employees wear safety glasses and hearing protection.

On around April 5, 2017, the Union requested to bargain over the “new dress code.” (GC Exh. 23.) The parties were already scheduled to meet for contract negotiations on April 12 at nearby Rogers State University, so they agreed to meet at that end of that bargaining session to discuss the new dress code. At this April 12 meeting, Vincent, Besley, Gann, and Reed were present for the Union. Dooley, Moss, and Thom were present for Respondent. There also were unit employees from the mill at this meeting. Thom went through the hazard assessments and the policies, and then answered questions. The mill employees raised questions about no longer being able to wear hoodie sweatshirts. The converting employees raised questions about no longer being able to wear shorts or leggings. Thom explained the reasons for the changes, including past incidents and safety risks. There was further discussion, and the Respondent agreed to provide employees with shirts, a sweatshirt, and a jacket.

On April 20, 2017, Moss sent Vincent an email asking whether the Union had any response to their meeting regarding the new PPE/dress code policies, noting that the rollout date for the policies was April 28, 2017. On April 25, 2017, Moss sent Vincent an email confirming that Respondent would be providing employees with four short-sleeved T-shirts, one sweatshirt, and a jacket with a tear-off safety hood for those employees who routinely worked outside. On April 27, 2017, Vincent replied that the Union would accept the company’s offer as presented without waiving its right to grieve, bargain, or discuss any issues regarding the implementation of the PPE/clothing policy. Respondent implemented both the clothing and shoe policies, effective April 28, 2017.

FRC Policy

Respondent has electrical cabinets that power machines at its converting facility. The unit maintenance technicians repair and maintain these electrical cabinets. National Fire Protection Association (NFPA) 70E requires an arc flash analysis to be performed on energized electrical systems, like the electrical cabinets. This analysis is to be conducted to determine the arc flash protection boundary and the required PPE for people to wear when within the boundary.

In August 2016, Chad Vincent had a meeting with Court Dooley and Brian Merryman in which Vincent raised concerns that Respondent was not compliant with NFPA 70E, and that Respondent should get compliant. Approximately a month later, Respondent contracted with a third party to conduct an arc flash study. The study took several weeks to complete.

While the study was being completed, Respondent’s Maintenance Engineering Manager Graham Darby, who has experience with arc flash studies and the PPE, anticipated the results of the study and took steps to order arc flash rated protective

clothing, helmets, and gloves for the maintenance technicians. Respondent contracted with Cintas to measure the technicians and provide the flame-resistant (FR) protective clothing. In around February or March 2017, Cintas came and began fitting the maintenance employees, including Local 1480 President Michael Besley, for their FR shirt and pants. Darby then had meetings with the maintenance employees regarding their FR clothing.

At the April 12, 2017 bargaining session at Rogers State University, the parties discussed the FR clothing. The Union asked whether the maintenance employees would need to wear their FR clothing all the time, and Dooley responded that he did not see why they would need to wear it other than when they were working near the electrical cabinets. There was no other discussion regarding this.

The employees received their clothing in early May 2017. Darby informed the maintenance employees that they should begin wearing their protective clothing, but that the company would not begin enforcing the policy until June 1, 2017. Thereafter, most of the employees began wearing their FR clothing.

At around this time, employees were asking Besley whether they needed to wear their FR clothing at all times, because they were being told that they did. On around May 6, 2017, Besley had a conversation with Matt Rhodes. Besley asked Rhodes if maintenance employees had to wear the FR clothing all the time. Rhodes responded, “No. You can have the shirt ready with your helmet.” (Tr. 405–406.) Thereafter, Besley spoke with Darby about it. Darby informed Besley that he expected the maintenance employees to be wearing their FR clothing at all times. Respondent’s FRC policy, which was finalized on May 23, 2017, states that maintenance employees are to wear FR clothing at all times while on duty. (Jt. Exh. 11.)

Conversation Between Moss and Reed

On around April 20, 2017, Respondent held meetings with employees to discuss the new safety clothing and shoe policies. Kris Thom and Doug Moss held such a meeting that was attended by the “B” crew. Darla Reed attended this meeting. In the course of the meeting, Moss and Thom talked about the personal protective equipment and clothing employees needed to wear. Employees were going to need to start wearing jeans to work, and they could no longer wear shorts or capris pants. Toward the end of the meeting, Reed spoke up and asked Moss and Thom if they were going to come down on the production floor and work with the production employees in 110-degree heat, in jeans. There was reference to the air conditioning out on the production floor, and Reed stated that air conditioning unit was “not worth shit.” (Tr. 337–338.) Reed also used the term “bullshit.” At that point, Moss called an end to the meeting. (Tr. 326–327.)

Approximately 30 minutes later, Reed was summoned to the office. Reed had Darlene Russell accompany her as her Union representative. According to Reed, when they arrived at the office, Doug Moss and Kelly Foss were present. Moss began by accusing Reed of singling him out during the meeting. Reed denied singling Moss out. She told him that she asked if they all were going to come out on the floor in that 110-degree

weather and work with the employees in blue jeans. According to Reed, Moss then said to her that from here on out, if she had anything to say, she was to say it before the meeting or after the meeting, and she could not say anything during the meeting. (Tr. 329.) Russell did not testify at the hearing.

According to Moss, he told Reed and Russell that “if they had objections to the policies and they felt that strongly about it, if they wanted to cuss me or raise their voice at me to do so before the meeting or after the meeting in my office or in some other office but not to conduct themselves that way in a company meeting.” (Tr. 787.)

Conversation Between Cochrell and Besley

On around May 5, 2017, Local 1480 President Michael Besley was working, performing maintenance on a machine near line 2, when a unit employee, Shawn Teiger approached to discuss his points under the company’s attendance policy. Besley spoke with Teiger for a few minutes and said he would look into it later. Besley then walked away. Jeff Cochrell then walked up to Teiger, said something, and then walked away. Teiger then approached Besley to tell him that Cochrell said that they could not do union business on the floor on company time. Besley then walked over to Cochrell and told him that he could not tell them not to do union business on the floor. Cochrell replied that he was new and did not know that they could do union business on the floor. No further action was taken regarding this incident. (Tr. 384-385.)

Conversations Between Management and Besley Related to PPE

On around May 5, 2017, Graham Darby approached Michael Besley and asked where his safety glasses were. Besley, who wears glasses, stated that he was unaware that he had to wear safety glasses. Darby told Besley to follow him into his office. The two went into Darby’s office, and Darby told Besley that he needed to be wearing side shields with his glasses, and he gave Besley some side shields. Darby said that employees were supposed to be wearing safety glasses all the time, and that he (Besley) had been told three times that day to wear them. Besley asked Darby who had allegedly told him to wear safety glasses that day, and Darby said he did not have that information. Besley said that he would wear the safety glasses/shields. He put on the side shields and then left Darby’s office. A few minutes after leaving Darby’s office, Court Dooley saw Besley and asked him to come into the office. Besley went into Dooley’s office. Dooley then said that Besley had been told three times that day about wearing safety glasses. Besley asked Dooley who had told him three times to wear the safety glasses, and Dooley could not name them.

According to Besley, Dooley then told him that because he was the Union President, he was held to a higher standard and that he should be a role model for the others. (Tr. 423–425.)

According to Dooley, he explained to Besley that the two of them were both leaders at the facility, and he wanted Besley’s help with these new safety policies and procedures and practices that the company was implementing because they were being implemented for the employees’ safety. Dooley stated that he was basically pleading with Besley as a leader of the Union to help with this process. (Tr. 833–834.) I am crediting Dooley’s

recollection over Besley. At times, Besley had poor or limited recall of conversations. He also had a tendency to paraphrase conversations or testify about what his overall impression was from a conversation, as opposed to actually what was said. I find this to be one of those situations.

On around May 6, 2017, Besley had a conversation with Matt Rhodes. In this conversation, Besley asked Rhodes if the maintenance employees had to wear the FR clothing all the time. Rhodes responded, “No. You can have the shirt ready with your helmet.”

On May 7, 2017, Besley attended the pre-shift maintenance meeting.¹⁶ He was wearing his street clothes to this meeting. After the meeting, he went to get a laptop to use for the day. As he did, he was approached by Richard Keith, who asked him where his FR clothing was. Besley responded that it was in his locker. Keith asked him, “Aren’t you going to put them on?” Besley said, “I didn’t know we needed to.” Keith then told Besley to come into his office. The two went into the office and closed the door. Matt Rhodes was in the office. Rhodes asked Besley if he wanted to have union representation. Besley said he did and he went out and got Cory Pendleton, a junior mechanic, to come into the office. When Pendleton came into the office, Rhodes asked him, “You’re not – are you in the union?” Pendleton said no. Rhodes then asked Besley, “Can he still represent you?” Besley responded, “I don’t know why he couldn’t.” But then Besley recalled that Jason Gann was there, so he called Gann on the radio and asked him to come up the office. Gann eventually arrived, and then Pendleton left. After Gann arrived, Rhodes told Besley that if he did not put his uniform on that they were told by Darby to suspend Besley until further investigation. Besley asked Rhodes about their conversation the previous day when Rhodes had said that the employees did not have to wear their FR clothing all the time. Rhodes responded that he was misinformed. Rhodes reiterated “If you refuse to put your uniform on, we’ll have to suspend you.” Gann and Besley had a conversation, and Besley agreed to go and put on his FR clothing, because he did not want to leave the three junior mechanics working that day to work the shift alone. Besley then left to put on the FR clothing and walked by the supervisor’s office to show them that he was fully dressed.

Because of schedule rotations, Besley next worked the night shift on around May 15, 2017. He arrived late to work that day, so he was unable to change into his FR clothing before the start of the pre-shift meeting. Matt Rhodes and Richard Keith came into the meeting. After the meeting got over, they asked Besley to stay over. They informed Besley that he had been warned before about not showing up in his FR clothing, and that they were going to have to suspend him. They took his access badge and then walked him out of the facility.

On around May 23, 2017, following his return from the sus-

¹⁶ A shift change meeting is where the previous shift and the new shift coming on meet and talk about outstanding work orders and any issues that they have as a team. If there are work orders still open because the prior shift did not get a job completed, it is assigned to someone to continue that job. The maintenance employee is given the work order number.

pension, Besley was called into a meeting with Graham Darby, Doug Moss, and Jason Gann. Darby spoke with Besley about the clothing policies and gave him copies of the written policies. Darby reiterated that Besley needed to wear his FR clothing all the time (i.e., the steel-toed shoes, the FR pants, and the FR shirt). Darby then spoke with Besley about CMMS (Computer Maintenance Management System), which is a software program that maintenance employees have on their laptops to track work orders and productivity. There is no dispute that Besley was failing to properly log his time and work orders. There also was a discussion about Besley's alleged failure to escalate maintenance issues, which is the reporting process maintenance employees are to follow if they are unable to resolve a maintenance issue in a timely manner. Darby issued Besley a written warning for refusing to wear PPE as directed by company management; continuing to improperly utilize the CMMS system to correctly track his work orders and productivity (despite recent training); and failing to follow proper escalation procedures concerning when a maintenance technician is required to notify a supervisor if he is unable to resolve a maintenance issue within a certain period of time.

At the hearing, Respondent introduced witness statements and reports regarding these issues. This evidence reflects that Besley was frequently away from his work area or not performing or not logging in his work into CMMS. This was a longstanding and relatively frequent issue. The same is true regarding Besley's failure to follow the escalation procedures regarding equipment. Besley was disciplined in June 2016 for failing to escalate a maintenance issue. But there was no discipline issued until the May 23, 2017 written warning.

The FR clothing, particularly the pants, ran long in order to make sure the necessary areas were covered. Besley rolled up his pants so he was not walking on the cuffs. On around May 25, 2017, Besley was called into a meeting with Doug Moss, Graham Darby, Richard Keith, and Matt Rhodes. Darby began by telling Besley that he needed to unroll his pants and wear them down. Besley stated that the pants were too long and that he was walking on them. Darby told him that he needed to wear them down. Besley asked questions about needing to have the pants rolled down. Besley stated how he had talked with other employees about the length of their FR pants. Moss then asked Besley why he was "beating the pants thing to death asking people about them." Besley said it was because he was the Union president and people were coming to him with questions. (Tr. 466-470.)

At some point during this conversation, the topic turned to OSHA. According to Besley, he had made a statement about contacting OSHA, and Moss said, "Don't be calling OSHA on us." Moss denied telling Besley not to call OSHA. Rather, Moss testified that he told Besley, "When there is a safety issue in the plant, the fastest way to get it fixed is to come to -- go to KrisThom, our safety manager; contact Court, contact Graham Darby, our maintenance manager; or come get me. Let us as a company address these issues immediately. If we don't respond or if we don't do what we're supposed to do, then by all means contact OSHA."

IV. LEGAL ANALYSIS

A. Respondent's Handling of "Temporary" Employees

1. Allegations and arguments

The complaint contains several allegations surrounding Respondent's handling of the "temporary" employees referred by People Source who worked at the converting facility for more than 60 days. Paragraph 13 of the complaint alleges that Respondent violated Sections 8(a)(5) and (1) and 8(d) of the Act when it failed to continue in effect all the terms and conditions of the parties' collective-bargaining agreement, without the Union's consent, by employing these employees for more than 60 days without giving them credit for their continuous service from their date of hire and without applying the terms of the agreement to determine their wages and other terms and conditions of employment. Paragraph 13 also alleges that Respondent violated Sections 8(a)(5) and (1) of the Act (on the respective dates) when it failed to bargain with the Union before discharging the following five employees who all worked at the converting facility for more than 60 days: Carrie Bunnell (August 8, 2016), Rebecca Scott (August 14, 2016), John Aguilar (August 10, 2016), Brandon Glory (September 9, 2016), and Jennifer Whisenhunt (September 11, 2016). Paragraph 8(a) of the complaint alleges Respondent also violated Section 8(a)(3) and (1) of the Act when it discharged these individuals because the Union pursued their inclusion in the bargaining unit and demanded that Respondent apply the terms of the collective-bargaining agreement to them, and to discourage the Union and employees from engaging in these and other union activities.

The General Counsel contends that Article 16, Section 5 of the parties' agreement states that employees retained after the end of the 60-day probationary period shall be given continuous service credit back to the date of hire. Yet, Respondent failed to follow the parties' agreement when it did not convert "temporary" employees John Aguilar, Carrie Bunnell, Brandon Glory, Rebecca Scott, and Jennifer Whisenhunt, who there is no dispute all worked at Respondent's converting facility for more than 60 days. The General Counsel also asserts that Respondent discriminated or retaliated when it informed People's Source that these individuals were no longer needed only after the Union claimed that they were unit employees covered by the parties' agreement because they had completed their probationary period.

Respondent denies these allegations, arguing that each is premised on an assumption that these employees referred by People Source were also employees of Respondent. Respondent argues that the employees at issue were not employees of Respondent, regardless of how long they worked at Respondent's converting facility, because Respondent and People Source are not joint employers. Furthermore, even if they were considered Respondent's employees, Respondent did not violate Section 8(a)(3) and (1) of the Act because there is no evidence that it knew the employees engaged in protected concerted or union activities, and there is no evidence of discriminatory animus. Additionally, Respondent contends that it had no obligation to bargain with the Union over a decision that had no impact on the bargaining unit, and, even if it did, Respondent

did bargain in good faith when it met with the Union.

2. Joint-employer relationship

The first issue to be resolved is whether Respondent and People Source were joint employers of the temporary employees assigned to the converting facility. In *BFI Newby Island Recyclery*, 362 NLRB No. 186 (2015), the Board revised the joint employer standard. Prior to BFI, joint employer status existed where “two separate entities share or codetermine those matters governing the essential terms and conditions of employment.” See *TLL, Inc.*, 271 NLRB 789 (1984), *Laerco Transportation*, 269 NLRB 324 (1984). The level of control needed to be “direct and immediate” as to employment actions such as hiring, firing, discipline, supervision, and direction. See, e.g., *Airborne Freight Co.*, 338 NLRB 597 (2002). In *BFI*, the Board adopted a two-part test to determine if there was a joint employer relationship. The Board held that “the initial inquiry is whether there is a common-law employment relationship with the employees in question.” *BFI*, 362 NLRB No. 186, at slip op. 2 (2015). If the common-law employment relationship exists, then the inquiry turns to “whether the putative joint employer possesses sufficient control over employee’s essential terms and conditions of employment to permit meaningful collective bargaining.” *Id.* The Board no longer requires that a joint employer possess and exercise the authority to control employees’ terms and conditions. Rather, the Board held that “control” can now be direct, indirect, or even a reserved right to control, whether or not that right is ever exercised. Additionally, in defining essential terms and conditions of employment, the Board held it includes not only hiring, firing, discipline, supervision, direction, and determining wages and hours, but it also includes dictating the number of workers to be supplied, controlling scheduling, seniority, overtime, and assigning work and determining the manner and method of how work is to be performed. *Id.* The Board noted that the burden of proving joint-employer status rests with the party asserting that relationship. *Id.*

Based on the evidence, I find that the General Counsel has presented sufficient evidence to establish that Respondent and People Source were joint employers over the temporary employees referred to work at the converting facility. As previously stated when Respondent requires temporary employees, one of its supervisors submits a work order to People Source that identifies the number of employees needed, where they will be needed (e.g., an identified production line or area of the facility), what shift they will be working, and, at times, how long the assignment will last. Respondent can identify, by name, who it wants People Source to refer out to fill the order. Once assigned, Respondent can convert a temporary employee to a “permanent temp.” The means the individual is assigned to work on the A, B, C, or D shift, with the unit employees, for an indefinite period of time.

Respondent also can terminate a temporary employee’s assignment. For example, if a temporary employee is unable to work a shift because of an illness or appointment, Respondent can replace the employee for the day, or replace him/her permanently. Additionally, if an employee has attendance issues,

such as failing to report for work or leaving early, Respondent can inform People Source to end the assignment and send a replacement. There is no dispute that Respondent contacted People Source to terminate the assignments of all the permanent temps working at the converting facility following the August 4 meeting. Also, there is no dispute that Respondent notified People Source that, in the future, assignments could not last longer than 59 days.

People Source has no supervisors or managers working at Respondent’s converting facility. The only onsite supervisors or lead people are those who work for Respondent. The evidence is limited regarding who supervises the temporary employees and what that supervision involves. However, the two temporary employees who testified (Whisenhunt and Bunnell) both stated that they were given their work assignments and direction from lead people or supervisors who worked for Respondent. Bunnell testified that the person who supervised her also supervised Orchids employees. Whisenhunt testified that her Orchids supervisor was the individual who informed her that she was being converted to a permanent temp, and later informed her that Respondent was ending her assignment.

Finally, Respondent is involved in the temporary employees being paid. As previously stated, the temporary employees assigned to the converting facility record their time using a People Source time clock. Respondent gathers and remits the time cards to People Source for processing. People Source calculates the hours worked and then sends the totals back to Respondent to verify that the employees worked the hours listed. Once verified, People Source then completes the payroll process, including issuing the paychecks.

Based on the foregoing, I find that Respondent and People Source are joint employers because they directly codetermine the essential terms and conditions of employment for these temporary employees.

3. Failure to adhere to contract and discriminatory termination of assignment

As a joint employer, Respondent had an obligation to apply the terms of the agreement to those who fall within the bargaining unit. *Gourmet Award Foods*, 336 NLRB 872, 874 (2001).¹⁷ The General Counsel alleges Respondent failed to abide by the terms of the parties’ agreement regarding its handling of these temporary employees who worked at the converting facility for more than 60 days. Per Article 16, section 5 of the parties’ agreement, when an employee completes 60 days of employment, he/she shall be given continuous service credit back to the date of hire. The agreement also states that employees are eligible for various contractual benefits once they have completed their 60-day probationary period (e.g., holiday pay, military leave, pay for jury duty, health insurance, accident and life

¹⁷ Respondent contends that these temporary employees do not become unit employees regardless of how long they work because they are not performing bargaining unit work. I reject this claim. These temporary employees perform DRP and cleaning work, but that work is also performed by unit employees. Additionally, the temporary employees who become permanent temps also are assigned to work on the production lines and other areas, and they perform some of the same tasks the unit employees perform.

insurance, and 401(k) plan participation).

There is no dispute that John Aguilar, Carrie Bunnell, Brandon Glory, Rebecca Scott, and Jennifer Whisenhunt each completed 60 days of employment, but did not receive the contractual pay or benefits.¹⁸ Respondent has presented no contract provision, other than the provisions in Article 16 and Article 6 giving it the right to decide whom to hire, to support its claim that it had no obligation to apply the terms of the contract to those temporary employees once they completed the 60-day probationary period. I, therefore, find that Respondent failed to abide by the terms of the agreement by not providing the contractual pay or benefits to those temporary employees who completed their 60 days of employment, without the Union's consent, in violation of Section 8(a)(5) and (1) and Section 8(d) of the Act.

Additionally, there is the issue of whether Respondent failed to abide by the terms of the parties' agreement when it terminated the assignments of these temporary employees following the August 4 meeting. Article 6 states an employee can be "discharged for just and reasonable cause" and/or can be relieved of duty "because of lack of work or other legitimate reasons." Dooley acknowledged that Respondent suspended its use of the temporary employees (which resulted in terminating the assignments of the above individuals), only after the Union asserted that the temporary employees were covered by the agreement. Dooley testified that Respondent took this action because it was uncertain following the August 4 meeting what the Union wanted the Respondent to do. Assuming *arguendo* that there was confusion following that meeting, I find that confusion was resolved by Vincent's August 12 email to Dooley explaining exactly what should happen per the terms of

¹⁸ The Complaint alleges Respondent made unilateral changes and contract modifications. In *Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005), the Board addressed the difference between the two, holding:

The "unilateral change" case and the "contract modification" case are fundamentally different in terms of principle, possible defenses, and remedy. In terms of principle, the "unilateral change" case does not require the General Counsel to show the existence of a contract provision; he need only show that there is an employment practice concerning a mandatory bargaining subject, and that the employer has made a significant change thereto without bargaining. The allegation is a failure to bargain. In the "contract modification" case, the General Counsel must show a contractual provision, and that the employer has modified the provision. The allegation is a failure to adhere to the contract. In terms of defenses, a defense to a unilateral change can be that the union has waived its right to bargain. A defense to the contract modification can be that the union has consented to the change. In terms of remedy, a remedy for a unilateral change is to bargain; the remedy for a contract modification is to honor the contract. Thus, where, as here, the General Counsel's sole allegation is the allegation of unlawful modification of the contracts within the meaning of Section 8(d), the Board is limited to determining whether the employer has altered the terms of a contract without the consent of the other party.

Id. (internal citations omitted).

In a contract modification case, if an employer has a "sound arguable basis" for its interpretation of a contract and is not "motivated by union animus or . . . acting in bad faith," the Board ordinarily will not find a violation. *Id.* citing to *NCR Corp.*, 271 NLRB 1212, 1213 (1984). In such cases, there is, at most, a contract breach, rather than a contract modification. *Id.* citing to *NCR*, *supra* at fn. 6.

the agreement. Based on Dooley's admission, Respondent did not terminate the assignments for just and reasonable cause or because of lack of work or other legitimate reasons. Respondent, therefore, failed to abide by Article 6 of the parties' agreement, without the Union's consent, in violation of Section 8(a)(5) and (1) and Section 8(d) of the Act.

Furthermore, because Dooley acknowledged Respondent terminated the assignments of these five named employees in response to the Union asserting that such employees were covered by the parties' agreement and entitled to receive contractual pay and benefits, I find that those terminations were because of protected concerted and union activities, in violation of Section 8(a)(3) and (1) of the Act. See *Schrock Cabinet Co.*, 339 NLRB 182 (2003) (discipline followed assertion of contractual right).

B. Verbal Agreement

Paragraphs 8 and 11 of the complaint allege that Respondent violated Sections 8(a)(5), (3), and (1) of the Act when it withdrew from a verbal agreement the parties reached regarding the use of temporary employees to perform non-production overtime work. The General Counsel alleges that in August or September 2016, Jason Gann and Court Dooley entered into a verbal agreement to first offer this nonproduction overtime work to volunteers from the unit, and, if not enough employees volunteered, then Respondent could use temporary employees to perform the work. The basis for these allegations is the testimony of Jason Gann, who is the only witness with personal knowledge that testified that he and Dooley had reached this oral agreement. And as previously stated, I do not credit Gann's testimony. As I find that Respondent did not enter into such a verbal agreement, I find that Respondent did not unlawfully withdraw the same. Consequently, I recommend that these allegations be dismissed.

C. Conversion of Lines 6 & 7 To Op-Tech Lines

Paragraphs 14(a), (b), and (c) of the Complaint allege that Respondent unilaterally converted Lines 6 and 7 to "Op-Tech" Lines, without the Union's consent, in violation of Section 8(a)(5) and (1) and Section 8(d) of the Act. Section 8(d) of the Act defines the obligation to bargain with respect to wages, hours, and other terms and conditions of employment, but states that the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Consequently, when a collective-bargaining agreement is in effect, a party is under no obligation to consent to, or even discuss, proposed midterm modifications of a contractual term, unless the agreement contains a reopener provision. *Kellogg Co.*, 362 NLRB No. 86, slip op. at 5 (2015) ("[W]hen a collective-bargaining agreement is in effect, a party is under no obligation to consent to, or even discuss, proposed midterm modifications of a contractual term, unless the agreement contains a reopener provision."). An employer violates Section 8(a)(5) and (1) and Section 8(d) of the Act when during the term of a collective-bargaining agreement it modifies any provision govern-

ing a mandatory subject of bargaining. See e.g., *Daycon Products Co., Inc.*, 357 NLRB 508 (2011), reaff. 360 NLRB No. 54 (2014); *Republic Die & Tool Co.*, 343 NLRB 683, 686 (2004); *St. Barnabas Medical Center*, 341 NLRB 1325 (2004).

Article 37 of the parties' agreement explicitly addresses the conversion of lines 6 or 7 to Op-Tech lines and requires that "both parties will discuss and must agree" before conversion of one or both of those lines could occur. When Respondent proposed converting lines 6 and 7 to Op-Tech lines, the Union, through Vincent, declined to agree to the change. Respondent, nonetheless, went forward with the conversion. Respondent contends that it was permitted to make this change, claiming that the contractual language in Article 37 was ambiguous, and that the extrinsic evidence from two individuals formerly from the Union's negotiating committee involved in negotiating the contract (Montoya and Wright) was that the Union had previously agreed to allow the conversions at issue. The General Counsel counters that Article 37 is unambiguous and, therefore, extrinsic evidence is inadmissible. I agree. Article 37 unambiguously requires that the Union agree to the conversion of lines 6 and/or 7. Board precedent prohibits the use of parol evidence to vary the unambiguous terms of a collective-bargaining agreement. See *NDK Corp.*, 278 NLRB 1035 (1986).

Additionally, even if I were to find the language ambiguous, I do not credit the testimony offered by Court Dooley that the parties had previously discussed the conversions of these lines, and the Union agreed to it. Respondent failed to introduce sufficient evidence regarding these alleged negotiations and resulting agreement to conclude that a valid agreement existed. As previously stated, Respondent did not call witnesses or present evidence regarding this alleged agreement.

As a result, by failing to get the Union's consent before moving forward with the conversions of lines 6 and 7 to Op-Tech lines, Respondent violated Sections 8(a)(5) and (1) and Section 8(d) of the Act.

D. Health Insurance

Paragraph 11(b) of the Complaint alleges that Respondent unilaterally changed health insurance, without providing the Union with timely notice and an opportunity to bargain over the decision or its effects, in violation of Section 8(a)(5) and (1) of the Act. The General Counsel contends that Respondent, through Moss, notified the Union after the decision to change carriers had been made and implemented. An employer violates Section 8(a)(5) when it unilaterally institutes changes in mandatory terms of employment without bargaining in good faith. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). In general, good-faith bargaining requires timely notice and a meaningful opportunity to bargain regarding a proposed change. See *Brimar Corp.*, 334 NLRB 1035, 1035 (2010); *Wackenhut Corp.*, 345 NLRB 850, 868 (2005). Once notice is received, the union must act with "due diligence" to request bargaining, or risk a finding that it has waived its bargaining right. See *KGTV*, 355 NLRB 1283 (2010). A union may be excused from requesting to bargain if the notice provides too little time for negotiation before implementation, or if the employer otherwise has made it clear that it has no intention of bargaining the

issue. In these circumstances, a bargaining request would be futile, because the employer's notice informs the union of nothing more than a fait accompli. *Id. Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982), *enfd.* 722 F.2d 1120 (3d Cir. 1983)

Respondent unilaterally changed the unit's health insurance carrier from Community Care to United Healthcare, and it first notified the Union that it had changed carriers after the decision had been made and a day or so before the insurer was going to begin enrolling employees. Respondent does not dispute that it failed to provide the Union with timely notice or an opportunity to bargain. Moss also did not dispute Besley's testimony that Respondent was unwilling to bargain with the Union over this change when Besley requested to bargain. Rather, Respondent contends that there is no violation because the General Counsel failed to establish that the change was substantial, material, and significant. However, the Board had held that the identity of the employees' health insurance carrier is as much a mandatory subject of bargaining as is the level of benefits the employees enjoys. *Seiler Tank Truck Service, Inc.*, 307 NLRB 1090, 1100 (1992); *Connecticut Light Co.*, 196 NLRB 967 (1972), *rev.* 476 F.2d 1079 (2d Cir. 1973); *Aztec Bus Lines*, 289 NLRB 1021, 1036 (1988). As a result, I find that Respondent had an obligation to bargain over the change in carriers and the effects of that change, and that its failure or refusal to do so violates Section 8(a)(5) and (1) of the Act. See *Dodge of Naperville, Inc.*, 357 NLRB 2252 (2012) (no waiver of effects bargaining by failing to request bargaining when change announced as a fait accompli).

E. Clothing, Shoe, and FRC Policies

Paragraph 12 of the complaint alleges that Respondent violated Sections 8(a)(5) and (1) of the Act when it implemented a shoe policy, a clothing policy, and flame-resistant clothing policy without providing the Union with notice and an opportunity to bargain over the decision or its effects. The Board has held that work rules requiring the use of safety and personal protection equipment are mandatory subjects of bargaining. See *Public Service Co. of Oklahoma*, 334 NLRB 487, 489 (2001), *enfd.* 318 F.3d 1173 (10th Cir. 2003) ("work and safety rules" are a mandatory subject of bargaining); *AK Steel Corp.*, 324 NLRB 173 (1997). See also *Castle Hill Health Care Center*, 355 NLRB 1156, 1183 (2010); *Kohler Mix Specialties*, 332 NLRB 631, 632 (2000); and *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 29 (1982), *enfd.* 711 F.2d 348 (D.C. Cir. 1983). The General Counsel alleges that Respondent failed to bargain in good faith with the Union regarding these policies because it announced them as a fait accompli. I reject this claim as it relates to the protective clothing and shoe policies. Respondent implemented these policies in response to an OSHA investigation which determined that Respondent had failed to conduct a required hazard assessment and ensure that employees had the necessary personal protective equipment. Union representatives Darla Reed and Darlene Russell were aware of the OSHA inspection and the subsequent findings. Respondent later entered into an informal settlement agreement with OSHA requiring that Respondent have a hazard assessment performed and then adopt personal protective equipment policies to ensure the

safety of the employees working at the converting facility, and Respondent needed to be in compliance by April 28, 2017. The evidence, however, is unclear whether Reed or Russell knew that Respondent had agreed to implement new clothing and shoe policies as part of this resolution. In late March and early April 2017, Respondent notified the employees that it had created protective clothing and shoe policies that would become effective April 28, 2017. On April 5, 2017, the Union requested to meet and bargain over the dress code, and Respondent agreed. At their April 12 meeting, the parties reached an agreement in which Respondent would provide employees with shirts, a sweatshirt, and a jacket (for employees who worked outdoors). On April 20, 2017, Doug Moss sent Chad Vincent an email asking whether the Union had any response to their meeting regarding the new PPE/dress code policies, noting that the rollout date for the policies was April 28, 2017. On April 27, 2017, Vincent replied that the Union would accept the company's offer as presented without waiving its right to grieve, bargain or discuss any issues regarding the implementation of the PPE/clothing policy. Respondent already offered to reimburse employees up to \$120 for the purchase of safety shoes, and the Union did not request to bargain further over that policy.

In light of these facts, I do not find that Respondent announced these policies as a *fait accompli* or that it implemented them without providing the Union with notice or an opportunity to bargain over the decision or its effects. After the April 12 meeting, the Union did not make any further demand to bargain. I, therefore, do not find that Respondent failed or refused to bargain over the decision to implement the clothing and shoe policies, or their effects, and I recommend the dismissal of the allegations in paragraph 12 as they relate to the clothing and shoe policies.

I reach a different conclusion regarding Respondent's later implementation of its flame-resistant (FR) clothing policy. With regards to that policy, there was discussion between Respondent and the Union in around August 2016 about the need for Respondent to become compliant with NFPA 70E, which required the performance of an arc flash study to determine the FR rating of the protective clothing and equipment that the maintenance employees would need to wear within the arc flash boundary area. Thereafter, Respondent commissioned the study, and the results of that study were issued in April 2017. Darby informed Besley that Respondent would be providing FR clothing and equipment to the maintenance employees for them to wear to be compliant with NFPA 70E. At the April 12, 2017 bargaining session at Rogers State University, the parties discussed the FR clothing for the maintenance employees. The Union asked Court Dooley whether the maintenance employees would need to wear their FR clothing all the time, and Dooley responded that he did not see why they would need to wear it other than when they were working near the electrical cabinets. Matt Rhodes gave Michael Besley a similar answer when the two spoke in early May 2017.

Unlike when Respondent announced that it was going to implement the clothing and shoe policies, the Union did not request to bargain when Respondent announced that it intended to require that the maintenance employees wear FR-rated clothing

in accordance with NFPA 70E. However, Respondent, through Darby, broadened the FRC policy in May 2017 when he announced that maintenance employees would be required to wear their FR clothing at all times while they were on duty, as opposed to when they were working within the arc flash boundaries. I find Respondent announced and implemented this broader policy without providing the Union with notice or an opportunity to bargain over the decision or its effects, in violation of Section 8(a)(5) and (1) of the Act.

F. Discipline of Michael Besley

Paragraph 9 of the Complaint alleges that Respondent violated Section 8(a)(3) and (1) of the Act when it suspended and later issued a written warning to Michael Besley on May 15, 2017 and May 23, 2017, respectively, because he engaged in protected concerted and union activities. Paragraph 12(c) and (d) of the complaint alleges that Respondent violated Section 8(a)(5) and (1) of the Act when it suspended and later issued a written warning to Besley on these dates, because it did so based on the unilaterally implemented FRC policy requiring that maintenance employees wear their FR clothing at all times during their shift. Under clearly established Board law, if an employer's unilaterally imposed rule was a factor in the discipline or discharge of an employee, the discipline and discharge violates Section 8(a)(5) and (1) of the Act. *Consec Security*, 328 NLRB 1201 (1999); *Behnke, Inc.*, 313 NLRB 1132, 1139 (1994); *Equitable Gas Co.*, 303 NLRB 925, 931 fn. 29 (1991). Since there is no dispute that Respondent suspended Besley on May 15, 2017 because he failed to comply with the unilaterally implemented FRC policy requiring that maintenance employees wear their FR clothing at all times during their shift, that suspension violates Section 8(a)(5) and (1) of the Act. The same holds true for the portion of the May 23, 2017 warning Respondent issued to Besley for failing to comply with this unilaterally implemented rule. Based on my findings that these disciplines made pursuant the unlawfully implemented broader FRC policy violated Section 8(a)(5) of the Act, I need not consider the General Counsel's Section 8(a)(3) theory regarding those actions.

But I must consider the General Counsel's Section 8(a)(3) theory as it relates to the portion of the written warning Respondent issued to Besley on May 23, 2017. The warning disciplined Besley for failing to properly utilize the CMMS system to correctly track his work orders and productivity (despite recent training). The warning also disciplined him for failing to follow proper escalation procedures concerning when a maintenance technician is required to notify a supervisor if he is unable to resolve a maintenance issue within a certain period of time.

The General Counsel contends Respondent issued Besley this warning in retaliation for his protected concerted and union activities as the Local Union President, including challenging the FRC policy and its enforcement. An employer violates Section 8(a)(3) and (1) of the Act by taking adverse action against employees because of their protected concerted and union activities. Under *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), the General Counsel bears the initial burden to

show that the employees' protected activity was a motivating factor for the adverse action by demonstrating: (1) the employee's protected activity; (2) knowledge of that activity; and (3) animus. See *Austal USA, LLC*, 356 NLRB 363, 363 (2010). The Board has held that animus or discriminatory motive can be inferred from evidence of suspicious timing, false reasons given in defense of the action, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly disciplined or discharged, and disparate treatment of the disciplined or discharged employees. *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), *enfd.* 577 F.3d 467 (2d Cir. 2009); *Medic One, Inc.*, 331 NLRB 464, 475 (2000). The burden then shifts to the employer to show that it would have taken the same action, even in the absence of the employee's protected activity. *Austal USA, LLC*, 356 NLRB at 363–364. Under *Wright Line*, an employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996).

In applying these factors, I find that Besley was engaged in protected concerted and union activities at around the time he received this discipline, including when he spoke to Darby and other supervisors regarding these shoe, clothing, and FRC policies, and Respondent was clearly aware of these activities. Respondent introduced testimony and documentary evidence that Besley was frequently away from his work area or on break when he should have been working; he was frequently failing to properly log his time in CMMS; and he repeatedly failed to follow the escalation procedure. But that evidence indicates that this was occurring for several months prior to the issuance of the May 23, 2017 written warning, which was the first time in almost a year that he received any discipline for these offenses. I find the timing of this warning in relation to Besley's protected concerted and union activities, as well as Respondent's apparent tolerance of the infractions prior the protected activities at issue, support that the warning was motivated by animus. Respondent failed to offer a credible explanation for why it waited to issue Besley the warning, and it failed to present comparable evidence that it would have issued the warning if he had not engaged in protected activities. Consequently, I find that the issuance of the written warning for failing to properly use CMMS and comply with escalation requirements was discriminatorily motivated, in violation of Section 8(a)(3) and (1) of the Act.

G. Promulgation of Overbroad Policy & Modification of Agreement Regarding Union Activities

Paragraph 7(a) of the Complaint alleges that on about February 8 and 9, 2017, Respondent verbally promulgated and since then maintained an overly broad rule prohibiting employees from talking to employees from other departments, except during non-work time, in direct response to employees' union activities and to discourage its employees from forming, joining or assisting the Union or engaging in other concerted activities, in violation of Section 8(a)(1) of the Act. Paragraph 15 of the Complaint alleges that since on about February 8 and 9, 2017,

Respondent failed to continue in effect all the terms and conditions of the parties' collective-bargaining agreement by prohibiting employees from engaging in any union activities during working time and on the work floor, without the Union's consent, in violation of Sections 8(a)(5) and (1) and 8(d) of the Act.

Article 8, section 5 of the agreement states that “[i]t is expected that the officers and/or the shop steward will be away from their regular job assignment as little as possible. It is understood that if union business or investigation of grievances need to be conducted during working hours, supervisory permission must be obtained in any departments affected.”

The unrefuted testimony from Union Officials Besley, Montoya, and Reed was that various supervisors or managers stated that they were not to conduct Union business during work time or on the production floor. According to Reed and Besley, the past practice has been to allow employees to discuss the Union or union business on the production floor. Reed and Besley also testified that the company has allowed employees to discuss other nonwork related topics, such as sports and vacations, while on the production floor, without restriction or the threat of discipline. Respondent failed to refute this evidence. It is well settled that an employer may prohibit discussions regarding union matters “during periods when the employees are supposed to be actively working,” if the employees are also prohibited from discussing other subjects “not associated or connected with the employees' work tasks.” *Scripps Memorial Hospital Encinitas*, 347 NLRB 52 (2006), quoting *Jensen Enterprises*, 339 NLRB 877, 878 (2003); see also *Sam's Club*, 349 NLRB 1007, 1009 (2007). However, if employees are permitted to discuss other matters unrelated to work during work time, an employer violates Section 8(a)(1) by prohibiting similar conversation regarding union-related issues. *Sam's Club*, 349 NLRB at 1009; *Scripps Memorial Hospital Encinitas*, 347 NLRB at 52. Based on the evidence, I find that Respondent discriminatorily promulgated rules prohibiting Union officers or agents from talking to employees in other areas, except during nonwork time, while allowing employees to discuss other, nonunion related matters during work time, in violation of Section 8(a)(1) of the Act.

I further find that Respondent unilaterally modified the terms of the parties' agreement (Article 8, sec. 5), without the Union's consent, by making these blanket statements to Union officers that they were prohibited from discussing Union business during work time or on the production floor, regardless of whether they obtained their supervisor's permission, in violation of Section 8(a)(5) and (1) and Section 8(d) of the Act.

H. Independent 8(a)(1) Violations

1. Background

The Complaint alleges Respondent, through its supervisors and agents, committed several independent violations of Section 8(a)(1) of the Act. Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of” their rights to engage in protected union and concerted activity. In deciding whether an employer has made a threat in violation of this prohibition, the Board considers the totality of the circumstances in assessing

whether a statement or conduct has a reasonable tendency to interfere, restrain, or coerce employees. *KSM Industries*, 336 NLRB 133 (2001); *Mediplex of Danbury*, 314 NLRB 470, 471 (1994). The test for is an objective one. *G4S Secure Solutions (USA) Inc.*, 364 NLRB No. 92, slip op. at 2-3 (2016). “[T]est of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer’s motive or on whether the coercion succeeded or failed.” *American Tissue Corp.*, 336 NLRB 435, 441 (2001), citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946).

2. August 24, 2016 conversation between Dooley and Gann

The General Counsel alleges that on or about August 24, 2016, Court Dooley violated Section 8(a)(1) of the Act when he told Jason Gann that Respondent discharged the temporary employees because the Union sought to include them in the bargaining unit. (Complaint ¶ 6(a)). This allegation concerns the conversation between Dooley and Gann when Gann filed his second grievance and told Dooley that Respondent needed to recall the three temporary employees who worked 60 days. Dooley responded that the Union had told Respondent to get rid of the temporary employees (during their August 4, 2016 meeting). Dooley testified that he and Merryman were confused following the August 4 meeting as to what the Union wanted Respondent to do regarding the temporary employees, because they both believed that Vincent was upset with having temporary employees performing unit work and wanted them gone. However, Dooley did not seek clarification before terminating the employees’ assignments, and he did not recall those employees after Vincent sent his August 12 email to Dooley clarifying that the Union’s position was that those temporary employees who worked more than 60 days were covered under the terms of the parties’ agreement. Therefore, at the time Dooley made this statement, effectively blaming the Union for the discharge of these temporary employees, he knew that is not what the Union was seeking. I find that Dooley continuing to blame the Union for the discharge of these employees after he knew that not to be true, particularly in response to a union official filing a grievance regarding those temporary employees, had a reasonable tendency to interfere, restrain or coerce employees in the exercise of their Section 7 rights. Under the circumstances, I find the statement violates Section 8(a)(1) of the Act.

3. November 29, 2016 conversation between Dooley, Reed, and Besley

The General Counsel alleges that on or about November 29, 2016, Court Dooley violated Section 8(a)(1) of the Act when he told Reed and Besley that they were prohibited from talking about the union or union business during working time or while on the work floor, while permitting employees to talk about other nonwork related subjects. (Complaint ¶ 6(b)). The conversation at issue followed Respondent receiving reports from employees that Reed was harassing and threatening employees if they supported the decertification effort. Besley asked Dooley why it was okay for another employee (Andrew Mason) to pass a decertification petition around on the floor and get signatures, and Reed was being called into the office for harassment. Dooley answered that they had put a stop to it and that Mason was no longer getting signatures on company time.

Later, Dooley told Reed and Besley that they could not talk Union business on the floor. It had to be on their breaks. (Tr. 303.)

The General Counsel contends that, according to Reed and Besley, the past practice has been to allow employees to discuss the Union on the production floor. Both Reed and Besley also testified that the company allowed employees to discuss sports and vacations while on the production floor, without restriction or the threat of discipline. Respondent failed to refute this evidence. As previously stated, if employees are permitted to discuss other matters unrelated to work during work time, an employer violates Section 8(a)(1) by prohibiting similar conversation regarding union-related issues. *Sam’s Club*, 349 NLRB at 1009; *Scripps Memorial Hospital Encinitas*, 347 NLRB at 52. As a result, I find that Dooley’s broad statement prohibiting employees from discussing the Union while on work time or on the work floor, contrary to past practice, while allowing other nonwork related discussions, violated Section 8(a)(1) of the Act.

4. December 2016 conversation between Blower, Foss, and Reed

The General Counsel alleges on or about December 16, 2016, Bradley Blower and Kelly Foss violated Section 8(a)(1) of the Act by coercing Darla Reed by accusing her of harassment because she engaged in union activity. (Complaint ¶ 6(c)). This allegation relates to the meeting Blower and Foss had with Reed in which they called her into their office and told her that they had received reports that she was harassing employees on the production floor, and that she needed to stop. They did not provide her with specifics regarding what she allegedly was doing to harass employees. I find that, under these circumstances, the vague accusations of harassment and instructions to stop could reasonably be interpreted as reaching protected—but unwelcome—union solicitation or activity. Such a prohibition is unlawful. See generally, *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) (broad written rules or policies vaguely prohibiting conduct or statements unlawful). As a result, I find the statements violate Section 8(a)(1) of the Act.

5. January 25, 2017 conversation between Dooley and Gann

The General Counsel alleges that on around January 25, 2017, Court Dooley violated Section 8(a)(1) of the Act when he told Jason Gann that his union activities were disrespectful to management (Complaint ¶ 6(d)). This alleged violation occurred in the meeting Dooley had with Gann after the meeting in which Gann acted as the Union representative for Gabriel Cutler. Dooley told Gann that he did not like the way that Gann had treated his management during the meeting and that Gann was not to talk to his management that way. Dooley did not specify what Gann said that was offensive, only that he was not to do again. In this case, Dooley made the statement to a Union officer about statements while acting in his representational capacity. Under the circumstances, I find Dooley’s blanket statements reasonably would have a tendency to interfere with, restrain, or coerce employees in the exercise of their protected concerted and union activities, in violation of Section 8(a)(1) of the Act.

The General Counsel alleges that during this same conversation Dooley also violated Section 8(a)(1) of the Act by creating the impression that Gann's union activities were under surveillance. (Complaint ¶ 6(e).) Specifically, Dooley said to Gann, "I just want to let you know that people are reporting to me saying you are doing Union business on company time." Gann then asked, "Are you saying you are having me watched?" Dooley responded, "No, I am not having you watched. I am just letting you know that people have been reporting that you have been doing Union business on company time." The Board's test for determining whether an employer has created an unlawful impression of surveillance as whether under all the relevant circumstances reasonable employees would assume from the statement in question that their union or protected activities had been placed under surveillance. *Stevens Creek Chrysler*, 353 NLRB 1294, 1295–1296 (2009); *Bridgestone Firestone South Carolina*, 350 NLRB 526, 527 (2007). Where an employer tells employees that it is aware of their union activities but fails to tell them the source of that information, Section 8(a)(1) is violated because employees are left to speculate as to how the employer obtained the information causing them reasonably to conclude that the information was obtained through employer monitoring. *Stevens Creek Chrysler*, supra at 1296; *Conley Trucking*, 349 NLRB 308, 315 (2007). I find that Dooley's statement, after he chastised Gann for his behavior while acting as a Union representative, reasonably would cause an employee to assume his protected union activities were under surveillance, particularly when Dooley vaguely referred to receiving reports from "people" about Gann's activities, in violation of Section 8(a)(1) of the Act.

Finally, the General Counsel alleges that during this conversation Dooley further violated Section 8(a)(1) of the Act by effectively prohibiting Gann from conducting union business on the production floor in contravention of the parties' collective-bargaining agreement (Complaint ¶ 6(f)). Specifically, after making the above statements about receiving reports that Gann had been doing union business on Company time, Dooley asked Gann if he had let anybody know, supervisor or anybody, when he leaves his work station. Gann told Dooley that he had let his lead know when he goes to deal with union matters. Gann informed Dooley that Stafford was his lead man, and that Dooley could confirm what Gann was saying by asking Stafford. Dooley told Gann to just be sure and let somebody know whenever he leaves his work station. At the outset this may seem like Dooley ensuring that Gann is complying with the contractual requirements for performing Union business on company time. However, in the context of his other statements to Gann, I find that Dooley's statements reasonably create the impression that Gann's union activities would be placed under greater scrutiny; thus, having a reasonable tendency to interfere with, restrain, or coerce him in acting as a union steward. *Apex Elec. Servs., Inc.*, 350 NLRB 40, 42 (2007). Under these circumstances, I find that Dooley's statements violate Section 8(a)(1) of the Act.

6. February 2017 Conversation Between Blower, Foss, and Reed

The General Counsel alleges that on or about February 6,

Bradley Blower and Kelly Foss violated Section 8(a)(1) of the Act by again coercing Darla Reed by accusing her of harassment because she engaged in union activity. (Complaint ¶ 6(h).) This allegation relates to the second conversation between Blower, Foss, and Reed in which they stopped her on the production floor to tell her that they were again receiving complaints that she was harassing employees. Again, they did not provide her with specifics regarding what she allegedly was doing to harass employees. I find that, under these circumstances, the vague accusations of harassment and instructions to stop could reasonably be interpreted as reaching protected—but unwelcome—union solicitation or activity. Such a prohibition is unlawful. *Lutheran Heritage Village-Livonia*, supra. As a result, I find the statements violate Section 8(a)(1) of the Act.

7. February 2017 Conversations Between Blower, Foss, and Montoya

The General Counsel alleges that on or about February 6, 2017, Bradley Blower and Kelly Foss violated Section 8(a)(1) of the Act by coercing Chris Montoya by accusing him of harassment because he engaged in union activities. (Complaint ¶ 6(g).) This allegation relates to when Blower and Foss approached Montoya in the warehouse to inform him that they had received reports that he was harassing people. They did so because there were reports that Montoya impliedly threatened harm to an employee's family member because her husband was involved in the decertification effort. Blower and Foss did not provide Montoya with details of the accusations in this conversation, but Montoya was informed of the accusations in a subsequent conversation near in time. In this context, I find that Montoya was not engaged in protected activity because the accusations of harassment related to physical threats, and Montoya was aware that it related to such threats. In *Re Strack & Van Til Supermarkets*, 340 NLRB 1410, 1413 (2004).

The General Counsel alleges that on or about February 6, 2017, Bradley Blower and Kelly Foss violated Section 8(a)(1) of the Act by threatening to terminate Chris Montoya because of his Union activities. (Complaint ¶ 6(i).) This allegation relates to the meeting the morning when Blower or Foss told Montoya that the way that he talked to them when they approached him the day before was unacceptable, and that if he did it again, he would be walked out. Under the circumstances, I do not find that Montoya was engaged in protected concerted or union activities when he stated that he wanted to speak to the CEO. I, therefore, do not find that the statement that a threat to discharge him for that behavior would reasonably tend to interfere with, restrain, or coerce him in the exercise of his statutory rights. As a result, I do not find the alleged threat to violate Section 8(a)(1) of the Act.

8. Conversation Between Moss and Dooley and Reed and Montoya

The General Counsel also alleges that on or about February 8, 2017, Court Dooley and Doug Moss violated Section 8(a)(1) of the Act by telling Darla Reed and Chris Montoya that employees were prohibited from talking about the union or union business during working time or while on the work floor while permitting employees to talk about other nonwork related subjects. (Complaint ¶ 6(j).) As previously stated, if employees

are permitted to discuss other matters unrelated to work during work time, an employer violates Section 8(a)(1) by prohibiting similar conversation regarding union-related issues. *Sam's Club*, 349 NLRB at 1009; *Scripps Memorial Hospital Encinitas*, 347 NLRB at 52. As a result, I find that Dooley's broad statement prohibiting employees from discussing the Union while on the work floor or on work time, while allowing other nonwork related discussions, violated Section 8(a)(1) of the Act.

9. Conversation Between Moss, Reed, and Russell

The General Counsel also alleges that on or about April 12, 2017, Doug Moss violated Section 8(a)(1) of the Act when he called Darla Reed and Darlene Russell into his office and prohibited them from speaking during meetings and requiring that they only talk before or after the meetings. (Complaint ¶ 6(k).) According to Reed, Moss told her that from here on out, if she had anything to say, she was to say it before the meeting or after the meeting, and she could not say anything during the meeting. According to Moss, he told Reed and Russell that "if they had objections to the policies and they felt that strongly about it, if they wanted to cuss me or raise their voice at me to do so before the meeting or after the meeting in my office or in some other office but not to conduct themselves that way in a company meeting." I find that regardless of which version I credit, Moss's statement restricting what Reed and Russell can say in future employee meetings was overbroad, even if he was restricting them from using profanity. The Board has found that an employer violates Section 8(a)(1) of the Act by maintaining rules that are so broad that they would reasonably be construed to limit protected criticism of the employer. See *Lafayette Park Hotel*, 326 NLRB at 828 (rule against "false, vicious, profane, or malicious" statements about the employer was overbroad); *Southern Maryland Hospital Center*, 293 NLRB 1209, 1221 (1989) (rule against "derogatory attacks" was unlawful), *enfd in rel. part*, 916 F.2d 932 (4th Cir. 1990); and *Great Lakes Steel*, 236 NLRB at 1037 (rule against distributing "libelous, defamatory, scurrilous, abusive, or insulting" literature was unlawfully overbroad). Under the circumstances, I do not find that the comments Reed or Russell made during the meeting were directed at Moss personally. But rather their commentary, as Union officers, targeted the new clothing policy. Such commentary, even if it involved brief profanity, is protected activity. See *Prescott Industrial Products Co.*, 205 NLRB 51, 51-52 (1973) (referring to protection afforded to a "moment of animal exuberance"). As a result, I find that Moss's statement restricting similar conduct in the future violates Section 8(a)(1) of the Act.

10. Conversation between Cochrell and Besley

The General Counsel alleges that Jeff Cochrell violated Section 8(a)(1) of the Act on or about May 5, 2017, when he prohibited Michael Besley from conducting union business on the production floor. (Complaint ¶ 6(l).) This allegation relates to when unit employee Shawn Teiger approached Besley about points he had received under the company's attendance policy. Jeff Cochrell later walked up to Teiger and said that they could not do union business on the floor on company time. Teiger told this to Besley, and Besley then walked over to Cochrell

and told him that he could not tell them not to do union business on the floor. Cochrell replied that he was new and did not know that they could do union business on the floor. The past practice was that employees could discuss the Union and Union business on the production floor and during work time. They also are able to discuss non-union, non-work-related topics, such as vacations and sports, during work time, without restriction or threat of discipline. As previously stated, if employees are permitted to discuss other matters unrelated to work during work time, an employer violates Section 8(a)(1) by prohibiting similar conversation regarding union-related issues. See *Sam's Club*, 349 NLRB at 1009; *Scripps Memorial Hospital Encinitas*, 347 NLRB at 52. As a result, Cochrell's statement about discussing Union business on the production floor on company time violated Section 8(a)(1) of the Act.¹⁹

11. May 5, 2017 conversation between Dooley and Besley

The General Counsel alleges that Court Dooley violated Section 8(a)(1) of the Act on or about May 5, 2017 when he told Michael Besley that he was held to a higher standard because of his union position. (Complaint ¶ 6(m).) This allegation relates to the conversation Besley had with Dooley regarding Besley's failure to wear side shields on his glasses. As previously stated, I credit Dooley's recollection of this conversation over Besley's. Dooley testified that he explained to Besley that the two of them were both leaders at the facility, and he wanted Besley's help with these new safety policies that the company was implementing because they were being implemented for the employees' safety. Dooley stated that he was basically pleading with Besley as a leader of the Union to help with this process. Respondent had recently implemented these personal protective equipment measures, without any objection from the Union. Article 25 of the parties' agreement, which deals with health and safety, states, in pertinent part, that "[t]he Union and the Company will cooperate in assisting and maintaining the company's rules regarding health, safety, and sanitation." I find that Dooley's statement to Besley was consistent with this policy, and he was asking Besley's assistance as the Local Union President in maintaining the recently implemented rules. I, therefore, find that under the circumstances Dooley's statement to Besley did not violate Section 8(a)(1) of the Act.

12. May 7, 2017 conversation between Besley, Rhodes, and Keith

The General Counsel alleges that Matt Rhodes and Richard Keith violated Section 8(a)(1) of the Act on or about May 7, 2017 when they threatened Besley with suspension if he failed to wear his FR clothing. (Complaint ¶ 6(n).) The threat to discipline employees for not complying with a unilaterally implemented rule violates Section 8(a)(1) of the Act. See *GHR Energy Corp.*, 294 NLRB 1011, 1048 (1989); *Advanced Installations, Inc.*, 257 NLRB 845 (1981). As previously stated, I find that Respondent modified the policy to require that maintenance employees wear their FR clothing at all times

¹⁹ There is no complaint allegation that Respondent's use of company time was overbroad. However, such restrictions are unlawful. See *NLRB v. Chicago Metallic Corp.*, 794 F.2d 527 (9th Cir. 1986), enforcing in part 275 NLRB 871(1985).

while on duty, without providing the Union with prior notice and an opportunity to bargain over this change. As such, I find that the threat to discipline for failing to comply with this rule violated Section 8(a)(1) of the Act.

The General Counsel also alleges that on or about May 7, 2017, Matt Rhodes violated Section 8(a)(1) of the Act when he asked Corey Pendleton whether he was a Union member. (Complaint ¶ 6(o).) This alleged violation occurred in the same conversation. Keith and Rhodes asked Besley if he wanted Union representation, and Besley stated that he saw Pendleton outside and he would ask him to come in and join them. When Pendleton came in, Rhodes asked Pendleton if he was a Union member, Pendleton said he was not. Besley then radioed to Jason Gann for him to come to act as Besley's representative during the meeting. When Gann arrived, Pendleton was excused.

The issue is whether Rhodes' question to Pendleton as to whether he was a union member constituted unlawful interrogation. In determining whether a question is coercive in violation of Section 8(a)(1), the Board applies the standard set forth in *Rossmore House*, 269 NLRB 1176 (1984), *affd. sub nom. Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). *Rossmore House* sets forth factors to consider in determining whether any particular question falls outside the legal bounds and into unlawful interrogation. The factors are as follows: (1) the background, (2) the nature of the information sought, (3) The identity of the questioner, (4). The place and method of interrogation, and (5) truthfulness of the reply. These factors are not meant to be mechanically applied. The issue is whether the questioning would reasonably have a tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. This is an objective standard and does not turn on whether the employee was actually intimidated. *Multi-Aid Service*, 331 NLRB 1126 (2000), *enf. 255 F.3d 363 (7th Cir. 2001)*.

In this case, Besley, the local union president, called Pendleton into a meeting in the supervisors' office with two lower-level supervisors to be his union representative. Rhodes asked Pendleton the single question of whether he was a member of the Union to determine if he could act as a union representative, and Pendleton truthfully replied that he was not a member. Pendleton remained in the office for the discussion that Gann was going to be called to come and be Besley's union representative, so he had an understanding as to why he was asked the question. Under these circumstances, I find that Rhodes' single question to Pendleton to determine whether it was appropriate for him to act as a Union representative for Besley did not constitute unlawful interrogation, in violation of Section 8(a)(1) of the Act.

13. May 25 Conversation between Moss and Besley

The General Counsel alleges that on or about May 25, 2017, Doug Moss violated Section 8(a)(1) of the Act when he threatened Besley with unspecified reprisals for continuing to ask questions about Respondent's implementation of a new clothing policy. (Complaint ¶ 6(p).) This allegation involves the situation in which Besley was called into a meeting with Doug Moss, Graham Darby, Richard Keith, and Matt Rhodes. Darby

began by telling Besley that he needed to unroll his pants and wear them down. Besley stated that the pants were too long and that he was walking on them. Darby told him that he needed to wear them down. Besley asked questions about needing to have the pants rolled down. Moss then asked Besley why he was "beating the pants thing to death asking people about them." Besley said it was because he was the Union president and people were coming to him with questions. Under the circumstances, particularly that Respondent unilaterally changed the FRC policy to require employees to wear that clothing at all time while on duty, I find that Moss's question to Besley as to why was he beating the pants thing to death amounted to a threat of unspecified reprisals.

The General Counsel alleges that on or about May 25, 2017, Moss violated Section 8(a)(1) of the Act when he instructed Besley not to report Respondent to OSHA. (Complaint ¶ 6(q).) According to Besley, he made a statement about contacting OSHA, and Moss said, "Don't be calling OSHA on us." This was in response to the Union previously contacting OSHA to report safety concerns. The Board has held that an employer cannot lawfully interfere with, restrain or coerce employees' in their concerted communications regarding matters affecting their employment with third parties such as governmental agencies. *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171-1172 (1990). Moss's statement, even if it was that Respondent wanted Besley to report the issues internally and wait to see if they got it handled internally before contacting OSHA, unlawfully interferes with or restrains employees' right to engage in protected concerted activities of seeking outside assistance in matters relating to employees' terms and conditions of employment. I, therefore, find that Moss's statement about contacting OSHA violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent, Orchids Paper Products Co., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent and People Source Staffing Professionals, LLC (People Source) are joint employers of the temporary employees People Source refers to work for Respondent at the converting facility.

2. The Union, United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the Union has been the certified exclusive collective-bargaining representative, within the meaning of the Section 9(a) of the Act, of Respondent's employees at its Pryor, Oklahoma Converting facility with the exception of executives, office, sales, clerical employees, professional employees, guards, watchmen, and supervisory employees as defined in the Labor Management Relations Act of 1947, as amended; and Respondent and the Union have been parties to a collective-bargaining agreement, dated June 25, 2012, to June 25, 2016, which was extended until the parties reach a new agreement, covering this unit of employees.

4. Respondent violated Section 8(a)(5) and (1) of the Act when it verbally promulgated and since then maintained an overly broad rule prohibiting employees from talking to em-

ployees from other departments, except during nonwork times, without providing the Union with prior notice and an opportunity to bargain over this rule.

5. Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally changed health insurance carriers without providing the Union with prior notice and an opportunity to bargain over this change or its effects.

6. Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally changed the flame-resistant clothing policy to require that covered employees wear that clothing at all times while on duty, without providing the Union with prior notice and an opportunity to bargain over this change or its effects.

7. Respondent violated Section 8(a)(5) and (1) of the Act when it suspended Michael Besley on May 15, 2017, and later disciplined him on May 23, 2017, for violating the unilaterally changed flame-resistant clothing policy requiring that covered employees wear that clothing at all times while on duty, which was changed without providing the Union with prior notice and an opportunity to bargain over the change or its effects.

8. Respondent violated Section 8(a)(3) and (1) of the Act when it discharged Carrie Bunnell, Rebecca Scott, John Aguilar, Brandon Glory, and Jennifer Whisenhunt, because the Union asserted that temporary employees who worked for Respondent for more than 60 days be included in the bargaining unit and covered by the terms of the collective-bargaining agreement, and to discourage employees from engaging in these and other union activities.

9. Respondent violated Section 8(a)(3) and (1) of the Act when it disciplined Michael Besley on May 23, 2017, because he engaged protected concerted and union activities, and to discourage employees from engaging in these activities.

10. Respondent violated Sections 8(a)(5) and (1) and Section 8(d) of the Act when it failed to continue in effect all the terms and conditions of the parties' collective-bargaining agreement by employing temporary employees for more than 60 days without giving them credit for their continuous service from their date of hire and without applying the terms of the agreement to determine their wages and terms and conditions of employment, without the Union's consent.

11. Respondent violated Sections 8(a)(5) and (1) and Section 8(d) of the Act when it failed to continue in effect the terms and conditions of the parties' collective-bargaining agreement by discharging Carrie Bunnell, Rebecca Scott, John Aguilar, Brandon Glory, and Jennifer Whisenhunt, who had been employed for more than 60 days, without complying with the terms of the parties' agreement related to discharge of employees, without the Union's consent.

12. Respondent violated Sections 8(a)(5) and (1) and Section 8(d) of the Act when it failed to continue in effect the terms and conditions of the parties' agreement when it converted existing lines 6 and 7 to Op-Tech lines, without the Union's agreement.

13. Respondent violated Sections 8(a)(5) and (1) and Section 8(d) of the Act when it failed to continue in effect the terms and conditions of the parties' agreement when it prohibited employees from engaging in union activities during working time and on the work floor, without the Union's consent.

14. Respondent violated Section 8(a)(1) of the Act on or about August 24, 2016, by telling employees that Respondent discharged the temporary employees because the Union sought to include them in the bargaining unit and covered by the collective bargaining agreement.

15. Respondent violated Section 8(a)(1) of the Act on or about November 29, 2016, prohibiting employees from talking about the union or union business during working time or while on the work floor while permitting employees to talk about other nonwork related subjects.

16. Respondent violated Section 8(a)(1) of the Act on or about January 25, 2017, by telling employees that their union activities were disrespectful to management.

17. Respondent violated Section 8(a)(1) of the Act on or about January 25, 2017, by creating an impression of surveillance by telling employees that they were being watched and had been seen conducting union business on the production floor.

18. Respondent violated Section 8(a)(1) of the Act on or about January 25, 2017, by prohibiting employees from conducting union business on the production floor in contravention of the parties' collective-bargaining agreement.

19. Respondent violated Section 8(a)(1) of the Act on or about February 8, 2017, prohibiting employees from talking about the union or union business during working time or while on the work floor while permitting employees to talk about other nonwork related subjects.

20. Respondent violated Section 8(a)(1) of the Act on or about April 12, 2017, by prohibiting union officers from speaking during employee meetings and requiring that they only talk before or after the meetings.

21. Respondent violated Section 8(a)(1) of the Act on or about May 5, 2017, by prohibiting employees from conducting union business on the production floor in contravention of the parties' collective-bargaining agreement.

22. Respondent violated Section 8(a)(1) of the Act on or about May 7, 2017, by threatening employees with suspension because of their union activities.

23. Respondent violated Section 8(a)(1) of the Act on or about May 25, 2017, by threatening employees with unspecified reprisals for continuing to ask questions about Respondent's implementation of its changed flame-resistant clothing policy.

24. Respondent violated Section 8(a)(1) of the Act on or about May 25, 2017, by prohibiting employees from engaging in protected, concerted activities by instructing employees not to report Respondent to OSHA.

25. Respondent violated Section 8(a)(1) of the Act on or about February 8 and 9, 2017, promulgating and maintaining an overly rule prohibiting employees from talking to employees from other departments except during nonwork times in response to employees' union activities and to discourage its employees from forming, joining, or assisting the Union or engaging in other concerted activities.

26. Respondent violated Section 8(a)(1) of the Act on or about December 16, 2016, and on February 7, 2017, by vaguely accusing a union officer of harassment.

27. Respondent has not violated the Act except as set forth

above.

PROPOSED REMEDY

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

The Respondent, having unlawfully suspended employee Michael Besley on May 15, 2017, shall make Besley whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful suspension of him. The make whole remedy shall be computed in accordance with *Ogle Protection Service, Inc.*, 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). In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent shall compensate Besley 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 14 a report allocating backpay to the appropriate calendar year for Besley. 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. Respondent shall withdraw from its files all references to its May 15, 2017 suspension and May 23, 2017 discipline of Besley.

The Respondent, having discriminatorily terminated the assignment of John Aguilar, Carrie Bunnell, Brandon Glory, Rebecca Scott, and Jennifer Whisenhunt, must offer each of them reinstatement and make each of them whole for any loss of earnings and benefits they suffered as a result of the discrimination against them from the date of the discrimination to the date of their reinstatement, 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). The Respondent shall compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee. See *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). The Respondent shall also compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. See *King Soopers, Inc.*, 364 NLRB No. 93 (2016). Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

The Respondent, having unilaterally changed employees' health insurance, must rescind, upon request, the changes it made to employees' health insurance and make employees'

whole for any losses they suffered as a result.

The Respondent, having unilaterally implemented a flame-resistant clothing requirement that covered employees must wear their flame-resistant clothing at all times while on duty, must rescind that policy, upon request.

The Respondent must also bargain in good faith with the Union over the aforementioned mandatory subjects of bargaining.

The Respondent, having discriminatorily modified Article 16, Section 5 of the parties' collective-bargaining agreement without the Union's consent and, as a result, failed to convert temporary employees to unit employees after 60 days, failed to credit those temporary employees for their continuous service from the date of hire, and failed to apply the terms of the collective-bargaining agreement to determine their wages and terms and conditions of employment, must convert the following employees to unit positions, give each of them credit for their continuous service from the date of hire, make each of them whole for any loss of earnings and benefits they suffered as result of Respondent's unlawful conduct, and offer to each of them immediate and full reinstatement to unit positions: John Aguilar, Carrie Bunnell, Brandon Glory, Rebecca Scott, Jennifer Whisenhunt, and other employees that may be identified after a review of Respondent's records.

The Respondent, having unilaterally converted lines 6 and 7 to "Op Tech" lines without the Union's consent and in violation of Article 37 of the parties' collective-bargaining agreement, must, upon request, convert lines 6 and 7 back.

The Respondent, having implemented a policy prohibiting employees from engaging in any union activities during working time and on the work floor without the Union's consent and in violation of the parties' collective-bargaining agreement, must rescind this policy and abide by the parties' collective-bargaining agreement.

Respondent shall post an appropriate informational notice, as described in the attached Appendix. This notice shall be posted at the Respondent's Pryor, Oklahoma facility wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. 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.²⁰

²⁰ As part of its requested remedy, General Counsel seeks a notice reading. The General Counsel, however, makes no argument in his post-hearing brief as to why such a remedy is warranted. Traditionally, the Board has granted this remedy when the violations found were either egregious or extensive (i.e., widespread) and serious. See, e.g., *Postal Service*, 339 NLRB 1162, 1163 (2003); *Evenflow Transportation, Inc.*, 361 NLRB No. 160, slip op at 1 (2014). In this case, I have found several violations. While serious, I do not view these violations as widespread or egregious. Accordingly, I deny the General Counsel's request for a notice reading.

Similarly, the General Counsel requests that I order Respondent to pay consequential damages to the discriminatees as a result of Respondent's unfair labor practices. As the Board has recognized, a change in Board law would be required for me to award consequential damages. See, e.g., *Guy Brewer 43 Inc.*, 363 NLRB No. 173, slip op. at 2 fn. 2 (2016). Since I must follow existing Board law (which does not

In the event that, during the pendency of these proceedings Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since March 22, 2016. When the notice is issued to Respondent, it shall sign it or otherwise notify Region 14 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²¹

ORDER

Respondent, Orchids Paper Products Co., at its Pryor, Oklahoma facilities, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Failing or refusing to bargain with the Union as the designated collective-bargaining representative of Respondent's employees at its Pryor, Oklahoma Converting facility with the exception of executives, office, sales, clerical employees, professional employees, guards, watchmen, and supervisory employees as defined in the Labor Management Relations Act of 1947, as amended.

(b) Making unilateral changes to wages, hours, or other terms and conditions of employment of the bargaining unit employees without first providing the Union with notice and an opportunity to bargain over the change or its effects, including the change to the health insurance carriers and the change in the flame-resistant clothing policy to require that covered employees wear their flame-resistant clothing at all times while on duty

(c) Suspending or disciplining employees for violating the unilaterally implemented or changed policies relating to flame-resistant clothing.

(d) Discharging or terminating the assignment of employees because the Union pursued their inclusion in the bargaining unit and demanded that terms of the collective-bargaining agreement applied to them, and to discourage the Union employees from engaging in these and other union activities.

(e) Disciplining employees because they engaged protected concerted and union activities, and to discourage employees from engaging in these activities.

(f) Failing to continue in effect the terms and conditions of the parties' June 25, 2012, to June 25, 2016 collective-bargaining agreement, which the parties agreed to extend until a new agreement was reached, by employing employees for more than 60 days without giving them credit for their continuous service from their date of hire and without applying the terms of the agreement to determine their wages and terms and conditions of employment, without the Union's consent.

(g) Failing to continue in effect the terms and conditions of

authorize me to award consequential damages), I deny the General Counsel's request.

²¹ 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.

the parties' June 25, 2012, to June 25, 2016 collective-bargaining agreement, which the parties agreed to extend until a new agreement was reached, by discharging Carrie Bunnell, Rebecca Scott, John Aguilar, Brandon Glory, and Jennifer Whisenhunt, who had been employed for more than 60 days, without complying with the terms of the parties' agreement related to discharge of employees, without the Union's consent.

(h) Failing to continue in effect the terms and conditions of the parties' June 25, 2012, to June 25, 2016 collective-bargaining agreement, which the parties agreed to extend until a new agreement was reached, by converting existing lines 6 and 7 to Op-Tech lines, without the Union's agreement.

(i) Failing to continue in effect the terms and conditions of the parties' June 25, 2012, to June 25, 2016 collective-bargaining agreement, which the parties agreed to extend until a new agreement was reached, when it prohibited employees from engaging in union activities during working time and on the work floor, without the Union's consent.

(j) Telling employees that Respondent discharged employees because the Union sought to include them in the unit and covered by the collective bargaining agreement.

(k) Prohibiting employees from talking about the union or union business during working time or while on the work floor while permitting employees to talk about other non-work related subjects.

(l) Telling employees that their union activities were disrespectful to management.

(m) Suggesting to employees that they were being watched and had been seen conducting union business on the production floor.

(n) Prohibiting employees from conducting union business on the production floor in contravention of the parties' collective-bargaining agreement.

(o) Prohibiting union officers from speaking during employee meetings and requiring that they only talk before or after the meetings.

(p) Threatening employees with suspension because of their union activities.

(q) Threatening employees with unspecified reprisals for continuing to ask questions about Respondent's implementation of a changed flame-resistant clothing policy.

(r) Prohibiting employees from engaging in protected, concerted activities by instructing employees not to report Respondent to OSHA.

(s) Promulgating and maintaining an overly rule prohibiting employees from talking to employees from other departments except during nonwork times in response to employees' union activities and to discourage its employees from forming, joining, or assisting the Union or engaging in other concerted activities.

(t) Vaguely accusing union officers of harassing other employees.

(u) In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

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

(a) Abide by the terms and conditions of the parties' collective-bargaining agreement dated June 25, 2012, to June 25,

2016, which the parties agreed to extend until a new agreement is reached.

(b) Upon request, rescind the changed flame-resistant clothing policy requirement that covered employees must wear their flame-resistant clothing at all times while on duty.

(c) Upon request, rescind the change in health insurance carriers and make employees' whole for any losses they suffered as a result.

(d) Make Michael Besley whole for any loss of earnings and benefits he suffered as a result of his unlawful May 15, 2017 suspension and May 23, 2017 discipline.

(e) Offer John Aguilar, Carrie Bunnell, Brandon Glory, Rebecca Scott, and Jennifer Whisenhunt 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, and make each of them whole for any loss of earnings and benefits they suffered 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). The Respondent shall compensate them for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 14, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee. See *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). The Respondent shall also compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. See *King Soopers, Inc.*, 364 NLRB No. 93 (2016). Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

(f) Convert temporary employees John Aguilar, Carrie Bunnell, Brandon Glory, Rebecca Scott, Jennifer Whisenhunt, and other employees that may be identified after a review of Respondent's records who worked for Respondent for more than 60 days, credit them for their continuous service from the date of hire, and make each of them whole for any loss of earnings and benefits they suffered as result of Respondent's unlawful conduct.

(g) Upon request, rescind the conversion of lines 6 and 7 to Op-Tech lines.

(h) Rescind the policy prohibiting employees from engaging in any union activities during working time and on the work floor.

(i) Within 14 days from the date of this Order, remove from its files any reference to the unlawful termination of assignment of John Aguilar, Carrie Bunnell, Brandon Glory, Rebecca Scott, and Jennifer Whisenhunt, and within 3 days thereafter, notify the employees in writing that this has been done and that the termination of assignment will not be used against them in any way.

(j) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discipline

of Michael Besley, and within 3 days thereafter, notify the employees in writing that this has been done and that the suspension and discipline will not be used against him in any way.

(k) 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.

(l) Within 14 days after service by the Region, post at its Pryor, Oklahoma facility copies of the attached notice marked "Appendix."²² Copies of the notice, on forms provided by the Regional Director for Region 14, 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(m) Within 21 days after service by the Region, file with the Regional Director for Region 14 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., September 15, 2017.

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 do anything to prevent you from exercising the

²² 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."

above rights.

WE WILL NOT fail or refuse to bargain in good faith with the United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, as the exclusive collective-bargaining representative of Respondent's employees at its Pryor, Oklahoma Converting facility with the exception of executives, office, sales, clerical employees, professional employees, guards, watchmen, and supervisory employees as defined in the Labor Management Relations Act of 1947, as amended.

WE WILL NOT accuse you of harassing other employees because you engage in union activities including opposing a decertification effort.

WE WILL NOT tell you that your lawful union and protected, concerted activities are disrespectful to management.

WE WILL NOT create the impression that we are watching your union or protected, concerted activities.

WE WILL NOT threaten suspension, termination, or other unspecified reprisals because you engage in union or other protected, concerted activities.

WE WILL NOT tell employees that they have been fired because of the Union or because the Union filed a grievance seeking to include them in the bargaining unit or covered by the collective bargaining agreement.

WE WILL NOT tell employees that they are prohibited from discussing Union issues or union business while on work time or while on the work floor.

WE WILL NOT prohibit you from conducting union business on the production floor in

contravention of our collective-bargaining agreement with the Union.

WE WILL NOT prohibit employees from engaging in union activities by prohibiting them from speaking during meetings with management.

WE WILL NOT tell you cannot engage in union and other protected concerted activity such as reporting concerns to OSHA.

WE WILL NOT maintain a rule prohibiting you from talking to employees from other departments except during nonwork times.

WE WILL NOT terminate the assignment of an employee because the Union sought to include them in the unit.

WE WILL NOT discipline or suspend you because of your union membership or support or because you engaged in union activities.

WE WILL NOT fail and refuse to comply with the provisions of our collective-bargaining

agreement with the Union concerning the status and retention of employees who have exceeded their 60-day probationary period.

WE WILL NOT fail and refuse to comply with the provisions of our collective-bargaining agreement with the Union concerning the conversion of existing manufacturing lines to "Op-Tech" lines without the Union's agreement.

WE WILL NOT refuse to put into effect changes in wages, hours and working conditions that we have negotiated with the Union.

WE WILL NOT change bargaining unit employees' health insurance benefits or their health insurance plan without provid-

ing the Union with notice and an opportunity to bargain over the decision and its effects.

WE WILL NOT change policies regarding flame-resistant clothing without providing the Union with notice and an opportunity to bargain about the decision and its effects.

WE WILL NOT vaguely accuse union officers of harassing other employees.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL rescind the rule which prohibited Union officials from talking to employees in other departments, except during non-work time.

WE WILL, upon request, bargain in good faith with the Union as the exclusive collective-bargaining representative of our unit employees over changes to wages, hours, and other terms and conditions of employment.

WE WILL offer Carrie Bunnell, Rebecca Scott, John Aguilar, Brandon Glory, and Jennifer Whisenhunt who exceeded their 60-day probationary period immediate and full reinstatement to unit positions, without prejudice to their seniority or any other rights and/or privileges previously enjoyed.

WE WILL pay Carrie Bunnell, Rebecca Scott, John Aguilar, Brandon Glory, and Jennifer Whisenhunt for the wages and other benefits they lost because we terminated their assignment, compensate them for any adverse tax consequences of receiving one or more lump-sum payments covering periods longer than a year, and file a report with the Social Security Administration allocating backpay to the appropriate quarters.

WE WILL apply the terms and conditions of the collective-bargaining agreement to Carrie Bunnell, Rebecca Scott, John Aguilar, Brandon Glory, and Jennifer Whisenhunt and any other employees who completed their 60-day probationary period and make them whole for any wages and other benefits they lost as a result of our failure to apply the terms of the agreement to them.

WE WILL remove from our files all references to the termination of assignment of Carrie Bunnell, Rebecca Scott, John Aguilar, Brandon Glory, and Jennifer Whisenhunt and WE WILL notify them in writing that this has been done and that the termination of assignment will not be used against them in any way.

WE WILL abide by the terms of our collective-bargaining agreement concerning employees who have exceeded their 60-day probationary period and will not change those terms without the agreement of the Union.

WE WILL abide by the terms of our collective-bargaining agreement concerning the performance of union business during working time and will not change those terms without the agreement of the Union.

WE WILL abide by the terms of our collective-bargaining agreement requiring discussion and agreement with the Union prior to converting existing manufacturing lines to "Op-Tech" lines.

WE WILL, upon request of the Union, rescind our conversion of Lines 6 and 7 to "Op-Tech" lines and WE WILL notify the Union in writing that this has been done.

WE WILL, upon request of the Union, rescind changes to bar-

gaining unit employees' health insurance, and WE WILL notify the Union in writing that this has been done.

WE WILL make unit employees whole for any losses sustained due to the unlawfully implemented change in the health insurance carrier.

WE WILL, upon request of the Union, rescind changes to the flame-resistant clothing policy requiring that covered employees wear their flame-resistant clothing at all times while on duty, and WE WILL notify the Union in writing that this has been done.

WE WILL make Michael Besley whole for any loss of earnings and benefits he suffered as a result of his unlawful suspension on May 15, 2017.

WE WILL remove from our files all references to the May 15, 2017 suspension and May 23, 2017 discipline of Michael Besley, and WE WILL notify him in writing that this has been done and that the suspension and discipline will not be used against him in any way.

ORCHIDS PAPER PRODUCTS CO.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/14-CA-184805 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.

