

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

In the Matter of	:	
	:	
KNIGHT PROTECTIVE SERVICE, INC.	:	
	:	
Respondent	:	
	:	
and	:	Cases GR-7-CA-51139
	:	GR-7-CA-51388
	:	
LOCAL 206, UNITED GOVERNMENT	:	
SECURITY OFFICERS OF AMERICA,	:	
(UGSOA)	:	
	:	
Charging Union	:	

**RESPONDENT'S ANSWERING BRIEF TO
COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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Pursuant to Section 102.46 of the National Labor Relations Board's ("NLRB") Rules and Regulations, Respondent Knight Protective Service, Inc. ("Knight") hereby submits this Answering Brief to the Counsel for the General Counsel's Exceptions to the Decision of the Administrative Law Judge ("Exceptions").

I. INTRODUCTION

The General Counsel brought this action on behalf of United Government Security Officers of America, Local 206 ("UGSOA" or the "Union"), claiming Knight violated section 8(a)(5) of the National Labor Relations Act ("NLRA") by unilaterally eliminating pay for lunch breaks for certain employees at the Battle Creek Hart-Doyle-Inouye Federal Center. (ALJD 1:7-11)¹ Knight contends (and the ALJ found) that there was no unilateral change because: (i) Knight satisfied its bargaining obligations by giving the Union notice and an opportunity to bargain before implementing the change; and (ii) Knight did in fact negotiate with the Union over this matter and the Union confirmed to Knight that it was satisfied with the negotiations. In light of the undisputed evidence shown at the hearing on this matter on March 18, 2009, and for the reasons set forth in the ALJ's June 29, 2009 Decision, and herein, Knight submits that the Board should adopt the ALJ's Decision and dismiss the complaint.

II. FACTS

A. Background

Knight provides security guard services to the federal government at various locations throughout the United States, including the Hart-Doyle-Inouye Federal Center in Battle Creek, Michigan. (ALJD 2:31-34) Knight's services at the Hart-Doyle-Inouye Federal Center are

¹ "ALJ" refers to the Administrative Law Judge, and references to the Administrative Law Judge's June 29, 2009 Decision in this action are cited as "ALJD" The transcript of the hearing held on March 18, 2009 is referenced as "Hearing Tr."

provided under the terms Knight's contractual agreement with the Federal Protective Service ("FPS"), an arm of the Department of Homeland Security. (ALJD 2:35-39) UGSOA has been the collective bargaining representative of unit employees at the Battle Creek Hart-Doyle-Inouye Federal Center (as defined in collective bargaining agreements between Knight and UGSOA) since about 2004. (ALJD 3:5-13; Hearing Tr. 39:2-9, 65:5-7)

Knight and the Union negotiated and entered into a collective bargaining agreement in 2006 ("2006 CBA"), which was in effect during the material times in this action, and which addresses Knight's bargaining obligations in this case. (GC Ex. 3)² Section A of Article XXIX of the 2006 CBA, entitled "Government Requirements," provides:

...The Union agrees that any actions taken by the Company [p]ursuant to a requirement of the United States Government shall not constitute a breach of this Agreement. Nothing in this Agreement shall be construed to prevent institution of any change prior to discussion with the Union where immediate change is required by the United States Government. The [C]ompany will, however, negotiate with the Union concerning the effects of any such change.

(GC Ex. 3; ALJD 3:18-24) Further, Section G of Article XXX provides that

...the Company retains the sole and exclusive right in its discretion to manage its business....provided, however, that with respect to any action which results in a change in established work rules, existing hours of work, or the size of the work force, the Company shall give prior notice to the Union before taking such action and shall afford the Union a reasonable opportunity to negotiate on such matters to the extent practicable and consistent with the Company's operational requirements.

(GC Ex. 3; ALJD 3:30-42)

William Hopkins ("Hopkins") became President of the Union in 2007. (ALJD 4:9-10; Hearing Tr. 39:20-25) The evidence is undisputed that Hopkins did not want to be President, took on that role as a figurehead only, did not have an active role in the Union, and was not

² All references herein to "GC Ex." refer to the General Counsel's exhibits admitted into evidence at the March 18, 2009 hearing, and all references herein to "R. Ex." refer to Respondent's exhibits admitted into evidence at the March 18, 2009 hearing.

involved in negotiations with Knight. (ALJD 4:17-24, 41-46; Hearing Tr. at 56:1-22) The evidence also is undisputed that the Union's Vice President, rather than its President, was responsible for negotiating with Knight. (ALJD 4:25-34, 47-50; Hearing Tr. at 56:23-57:4) From April to October 2007, Denny O'Brien ("O'Brien") was the Vice President of the Union (ALJD 4:12-14; Hearing Tr. at 173:8-9, 195:2-6) On or about October 17, 2007, Jeffrey Miller ("Miller") became the Vice President of the Union. (ALJD 4:13-14, Hearing Tr. at 69:8-10)

Although no longer Vice President at the time of the hearing, O'Brien still is a member of the Union. (Hearing Tr. at 173:1-5, 177:4-12) He has a master's degree in labor relations and has been involved with labor relations and served as a union negotiator for over 25 years. (ALJD 4:47-50; Hearing Tr. 175:12-176:6) He testified without contradiction that he was the person within the Union who communicated with Knight on behalf of the Union, and that he told this to Knight. (ALJD 4:25-34, Hearing Tr. at 173:24 – 174:5) Knight's Human Resources Manager, Donna Snowden ("Snowden"), also testified that O'Brien told her he would be the face of the Union (ALJD 4:30-34; Hearing Tr. at 206:4-207:2) Similarly, and consistent with the role of the Union's Vice President, Miller currently is the person within the Union who communicates with Knight on behalf of the Union regarding negotiations, grievances, and day-to-day concerns. (Hearing Tr. at 140:17-23; ALJD 12:44-47)

B. The Government Directed Knight To Eliminate Certain Posts, Resulting In The Guards Being Unable To Relieve Each Other For Lunch Breaks

Prior to October 1, 2007, the entrances of the Battle Creek Hart-Doyle-Inouye Federal Center were staffed as follows: two guard posts at each side entrance, and three guard posts at the main entrance. (ALJD 2:41-3:3; Hearing Tr. at 134:19-135:2) For their lunch breaks, the guards relieved each other so that when a guard took lunch, there still was one guard at each side entrance and two guards at the main entrance. (ALJD 5:18-24; Hearing Tr. at 237:21-238:3)

Between March and September 2007, Knight became aware through rumors and other informal communications that its government client, Federal Protective Service (“FPS”), was considering directing Knight to eliminate one guard post from each of the side entrances and the main entrance. (ALJD 4:36-5:6; Hearing Tr. at 133:10-134:11) FPS formally communicated the change to Knight on or about September 20, 2007. (ALJD 5:14-16, 5:43-49; Hearing Tr. at 135:22-136:12; R. Ex. 4) This staffing change meant that the guards could no longer relieve themselves for their lunch breaks, because to continue to do so would leave the posts completely unguarded at the side entrances, and inadequately guarded at the main entrance. (ALJD 5:18-24; Hearing Tr. at 237:21-238:20)

C. Knight Gives Notice To And Negotiates With The Union Over The Elimination Of Paid Lunch Breaks, And The Union Is Satisfied

On or about June 27, 2007, prior to receiving formal notice of a final decision from FPS regarding the elimination of the three posts, Knight posted a memo on the Union’s bulletin board/table in the break room giving notice that there was a possibility of three posts being eliminated. (ALJD 5:6-12; Hearing Tr. at 45:22-46:9; GC Ex. 4) On September 20, 2007, FPS communicated to Knight that it made a final decision to eliminate the three posts effective October 1, 2007. (ALJD 5:14-16, 5:43-49; Hearing Tr. at 135:22-136:12; R. Ex. 4) Later that same day, Captain Ronald Umbarger (“Umbarger”) spoke with Hopkins in his office regarding that change and the loss of paid lunch breaks. (ALJD 6:9-20; Hearing Tr. at 49:7-20) Hopkins then sent Umbarger a letter dated September 21, expressing concerns about the change. (ALJD 6:22-23; Hearing Tr. at 50:8-13; GC Ex. 5) Around that same time, Hopkins called O’Brien and asked him to discuss the loss of paid lunch breaks with Umbarger. (ALJD 7:8-19; Hearing Tr. 178:11-17) O’Brien testified that he understood that he would be the only member of the Union negotiating the lunch break issue with Knight. (Hearing Tr. at 180:17-180:25)

Both O'Brien and Umbarger testified without contradiction that they negotiated the lunch break issue. (ALJD 7:21-8:20) Specifically, O'Brien testified:

Q And I understand that Mr. Hopkins asked you to make some contact, *but did you actually negotiate with Mr. Umbarger about the lunch hour issue?*

A *I would call it negotiations, yes.*

(Hearing Tr. at 178:11-24 (emphasis added); *see also* 141:1-142:16) Umbarger described the specific conversation in which the negotiations took place as "in-depth" and "lengthy" and O'Brien confirmed that the negotiations lasted about an hour. (Hearing Tr. at 141:6-11, 178:21-179:1) O'Brien testified that this conversation occurred in mid-September 2007, at some point after September 15. (Hearing Tr. at 181:10-16) Umbarger confirmed that the conversation occurred at some point during the week of September 20. (Hearing Tr. at 166:13-167:11)

O'Brien testified without contradiction that during the negotiations he and Umbarger discussed various possible solutions, and that Umbarger asked him for suggestions. (Hearing Tr. at 179:2-16) For example, in the course of the negotiations, Umbarger discussed with O'Brien the options of using current roving guards (i.e., guards not assigned to specific posts) to cover the affected posts while the guards took their lunch breaks, or eliminating pay for the lunch breaks and bringing on relief guards to cover the posts while the guards signed out for lunch breaks. (Hearing Tr. at 141:15-142:10; 144:20-145:11) After O'Brien talked to Umbarger, O'Brien spoke with Donna Snowden ("Snowden"), Knight's Human Resources Manager. (ALJD 8:22-31; Hearing Tr. at 181:2-9)

O'Brien, Umbarger and Snowden all testified without contradiction that O'Brien told Knight that he was satisfied with the negotiations. Specifically, O'Brien testified:

Q And is it fair to say that you communicated to Ms. Snowden that you felt that Captain Umbarger had done everything in his power?

A Yes.

Q And that you were satisfied with the negotiations?

A Yes.

Q And that you felt that Captain Umbarger had satisfied the contract, the collective bargaining agreement?

A Yes.

...

Q Did you report to [the Union executive committee] that you had negotiated this issue?

A Yes.

Q And did you report to them that you were satisfied with the course of the negotiations?

A Yes.

(Hearing Tr. at 183:23-184:20 (emphasis added)) Umbarger also testified:

Q And did Mr. O'Brien communicate that he was satisfied with these negotiations?

A Yes.

Q Okay. Did he communicate that he considered that the issue had been resolved?

A Yeah.

(Hearing Tr. at 142:11-16) (emphasis added). Snowden confirmed that O'Brien told her that he had negotiated with Umbarger and was satisfied with the negotiations. (Hearing Tr. at 207:11-208:3, 209:6-10)

Umbarger also testified without contradiction that before his discussion with O'Brien, Knight had *not* made a final decision as to how to effectuate the elimination of the three posts with regard to lunch breaks. (Hearing Tr. at 142:17-21) ("Q Okay. ***And before your communication with Mr. O'Brien, you hadn't made a final decision as to how to effectuate***

this change, correct? A We were still working on it, trying to piece it together and come up with a really good way of doing that.”) (emphasis added) O’Brien also confirmed that no decision was made until after he negotiated with Umbarger and was asked to propose suggestions. (Hearing Tr. at 179:14-16; 180:7-16) Umbarger testified that a final decision was made on or about September 24, 2007, and that on or about September 25, 2007, Knight posted a memorandum to the guards informing them that effective October 1, 2007, lunch breaks would no longer be paid. (Hearing Tr. at 143:8-20; GC Ex. 6)

O’Brien testified without contradiction that at some point after his negotiations with Knight, he reported back to the Union’s executive committee that he negotiated the lunch break issue with Knight and that he was satisfied with the course of the negotiations. (ALJD 8:33-41, 8:48-51; Hearing Tr. at 184:7-20) O’Brien also testified that the Union’s executive committee later brought up the possibility of filing a grievance, but did not ask O’Brien to go back and try to negotiate further. (ALJD 8:33-41, 8:48-51; Hearing Tr. at 185:2-4) O’Brien told them that if they were going to file a grievance they had to do it immediately, but that he did not think they had anything to grieve. (ALJD 8:33-41, 8:48-51; Hearing Tr. at 185:5-8)³

D. Knight Offers To Bargain Again With The Union Over The Lunch Break Issue In Fall Of 2008

After the instant litigation commenced, Knight attempted to bargain again with the Union over the lunch break issue. (ALJD 10:44-48) On October 27, 2008, Knight’s counsel contacted the international representative of UGSOA, Desiree Sullivan (“Sullivan”) and offered to negotiate the lunch break issue again (even though it had already been negotiated between Umbarger and O’Brien in September 2007). (R. Ex. 6; Hearing Tr. 211:25-212:12) The Union

³ The Union filed a grievance regarding the lunch break matter on October 25, 2007, which ultimately was denied as untimely. (ALJD 9:25-26, 9:44-51)

never responded to Knight's offer to negotiate. (Hearing Tr. 212:13-15)

On November 20, 2008, Knight met with the Union to negotiate a new collective bargaining agreement. At that meeting, Knight's counsel made at least three attempts to negotiate the lunch break issue with the Union but was rebuffed each time. (Hearing Tr. at 213:6-20; *see also* R. Ex. 7, R. Ex. 8) At one point, the Union even walked out of the room. (R. Ex. 7)

III. ARGUMENT

A. The ALJ's Factual Findings Are Proper And Supported By The Record

The General Counsel's first three exceptions are with respect to several of the ALJ's factual findings which were based largely on the testimony and credibility of certain witnesses. It is well-settled Board policy not to overrule an ALJ's credibility resolutions unless the clear preponderance of all the relevant evidence is to the contrary. *Battle Creek Health System*, 341 NLRB No. 119, 341 NLRB 882, n.3 (2004) ("The Board's established policy is not to overrule and administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect."); *Bell Atlantic Corporation*, 336 NLRB No. 113, 336 NLRB 1076, n.1 (2001) (same).

1. Evidence Shows That O'Brien Was The Main Contact For The Union In Dealing With Knight

The record evidence fully supports the ALJ's finding that O'Brien was the main contact for the Union in dealing with Knight. O'Brien *testified without contradiction* that he was the person within the Union who was responsible for communicating with Knight on behalf of the Union, and that he informed both Snowden and Umbarger of this fact. (ALJD 4:25-34, Hearing Tr. at 173:24 – 174:5) The ALJ expressly opined that O'Brien (who is a current Union member) was a "*reliable witness*" and gave "*credible*" testimony. (ALJD 7:48-49, 18:26-28) (emphasis

added) Snowden further testified without contradiction that O'Brien told her he would be the face of the Union (ALJD 4:30-34; Hearing Tr. at Hearing Tr. 201:1-2, 206:4-207:2) Umbarger also testified without contradiction that when a concern was raised by the Union, he would typically communicate with the Union's Vice President – O'Brien in 2007, and Miller more recently. (Hearing Tr. 140:17-23)

Further, Hopkins, the General Counsel's own witness, testified that it was O'Brien's responsibility as the Union's Vice President to communicate with Knight. (Hearing Tr. 58:24-59:1) Hopkins also testified that he did not want to be the Union's President, that he took the role on as a figurehead, and that he did not have an active role in the Union. (Hearing Tr. 56:1-12) Notably, the General Counsel does not except to the ALJ's finding (which was based on the testimony and credibility of O'Brien and Hopkins) that Hopkins specifically requested O'Brien to discuss the lunch pay issue with Umbarger on behalf of the Union (ALJD 7:1-19). The General Counsel also does not except to the ALJ's finding that O'Brien had the requisite authority (both actual and apparent) to bargain on behalf of the Union (ALJD 12:1-51, 13:22-27). In sum, the credible and uncontroverted testimony of the witnesses from both Knight and the Union demonstrated that O'Brien was the main Union contact in dealing with Knight.

The General Counsel's assertions to the contrary in Exception 1, and its attempts to discredit the testimony of O'Brien (and Umbarger, Snowden and Hopkins) are wholly unsupported by the record. Particularly egregious are the General Counsel's assertions that: (i) "[a]t no time did Umbarger or Snowden indicate that it was unusual for Hopkins to be the 'face of the Union' or that they should, instead deal with O'Brien." (Exceptions at p. 6); and (ii) "the evidence shows that it was Hopkins who was regarded as the go-to Union representative..." (Exceptions at p. 6). There was no such testimony, and not surprisingly the General Counsel

fails to give any citation to the record for these assertions. Moreover, Snowden testified that **O'Brien** told her he was the face of the Union. (Hearing Tr. 201:1-2) Further, both O'Brien and Snowden testified without contradiction that O'Brien told Snowden that he was the person within the Union with whom Knight should communicate. (ALJD 4:25-34, Hearing Tr. at 173:24 – 174:5, 206:4-207:2) Furthermore, Hopkins admitted that he did not have an active role in the Union, and was not involved in negotiations with Knight. (ALJD 4:17-24, 4:41-46; Hearing Tr. at 56:1-22)⁴

The General Counsel again misstates the record in its assertion that “[t]he record evidence shows that O'Brien had not, as Vice President of the Union, taken any part in contract negotiations, filed or handled any grievances or discussed any workplace issues with Snowden,” O'Brien's actual testimony simply was that he had not yet had “occasion to file any grievances” while he was Vice President of the Union. (Hearing Tr. 188:13-17; Exceptions at pp. 5-6) Moreover, when testifying as to his responsibilities, O'Brien stated that it was his responsibility to “follow-up on any grievances.” (Hearing Tr. 173:12-18)

The General Counsel also points to the fact that O'Brien did not take part in collective bargaining agreement negotiations. However, the General Counsel leaves out the fact that O'Brien was not the Union's Vice President during the time periods when the 2006 and current collective bargaining agreements were negotiated. (ALJD 4:12-14; Hearing Tr. at 173:8-9, 195:2-6)⁵

⁴ The General Counsel makes much of the fact that Umbarger had interactions with more than one Union official, but such evidence is irrelevant in the face of the uncontroverted and credible evidence discussed above that O'Brien was the main the contact for the Union in dealing with Knight.

⁵ The Union's current Vice President Miller negotiated on behalf of the Union with respect to the current collective bargaining agreement between Knight and the Union.

2. Evidence Shows That Umbarger Posted Notice Of The Change On September 25

The General Counsel's Exception 3 is with respect to the ALJ's finding that Umbarger posted notice of the change on September 25. (Exceptions at p. 6)⁶ Umbarger testified without contradiction that he posted the memo the day after he wrote it. Specifically:

Q And what's the date of that memo?

A The date is September 24th. I believe I posted it on the 25th, however – I mean it seems like that to me. After I concluded doing this, I may have posted it on the board the next day.

Q So you made your decision, wrote your memo, and then the next day you posted it?

A Yes, ma'am.

The General Counsel attacks Umbarger's credibility and the ALJ's finding based on Umbarger's use of the words "may have." (Exceptions at p. 6) Given Umbarger's definitive answer as to the order – writing the memo and then posting it the next day – and the fact that there was no testimony or other evidence contradicting Umbarger's testimony, the ALJ appropriately concluded that the notice was in fact posted on September 25, the next day after the September 24 date on the memo.

3. Evidence Shows That The Conversation Between Umbarger And O'Brien Took Place Prior To September 25

The General Counsel's Exception 2 is with respect to the ALJ's finding that the conversation between Umbarger and O'Brien (during which they negotiated the lunch pay issue) took place prior to September 25 (the date Umbarger posted the notice of the change). (Exceptions at pp. 6-7) The ALJ's finding was based on the "*uncontroverted and entirely*

⁶ Knight addresses Exception 3 before Exception 2 because this is the order in which the General Counsel discusses them in its supporting memorandum.

credible” and *“entirely consistent”* testimony of O’Brien and Umbarger. (ALJD 8:48-51, 18:26-28) (emphasis added)

Both O’Brien and Umbarger testified that their negotiations took place prior to Knight’s final decision and Umbarger’s posting of the notice announcing the change. Umbarger testified that before his discussion with O’Brien, Knight had *not* made a final decision as to how to effectuate the elimination of the three posts with regard to lunch breaks. (Hearing Tr. at 142:17-21) (“Q Okay. And before your communication with Mr. O’Brien, you hadn’t made a final decision as to how to effectuate this change, correct? A We were still working on it, trying to piece it together and come up with a really good way of doing that.”) O’Brien also testified that he understood that no decision was made until after he negotiated with Umbarger and was asked to propose suggestions. (Hearing Tr. at 179:14-16; 180:7-16)

As noted, the ALJ expressly found the testimony of O’Brien and Umbarger as to their negotiations over the lunch pay issue to be *“uncontroverted and entirely credible”* and *“entirely consistent.”* (ALJD 8:48-51, 18:26-28) The General Counsel questions the credibility of these witnesses by offering much unsupported speculation but little evidence or citation to the record (i.e., Exceptions at p. 7 “why would he wait four days to speak to Hopkins? Why would he not immediately inform Hopkins of the conversation and put the issue to bed once and for all?”)⁷

⁷ The General Counsel also mischaracterizes the evidence by asserting that (i) O’Brien communicated with the Union’s Executive Board on the same day that he spoke with both Umbarger and Snowden; and (ii) O’Brien communicated with the Union’s Executive Board by attending a meeting and driving an hour to get there. (Exceptions at p. 7) These assertions are unsupported by the record. O’Brien actually testified :

Q We’re still talking about in September of 2007. At any point subsequent to your communications with Captain Umbarger and Ms. Snowden that same day, did you report back to your executive committee?

A I did yes. (Hearing Tr. 184:7-11)

Q Okay. And you said you had spoken to Mr. Hopkins about the issue again after you

The ALJ properly considered the evidence and found that the conversation between O'Brien and Umbarger (during which negotiations took place) occurred prior to Umbarger's September 25 posting of the notice.

B. The ALJ Correctly Found That Knight's Decision To Eliminate Unit Employees' Lunch Pay Was Not A *Fait Accompli*

The General Counsel concedes that its sole theory of the case is that Knight had "no intention of engaging in good faith bargaining with the Union on the subject [of the lunch pay issue]," and thus the decision to eliminate lunch pay was a *fait accompli*. (Exceptions at p. 8) Exceptions 4 through 10 are grounded entirely in this theory.⁸ The General Counsel has no

spoke with Ms. Snowden?

A That's correct.

Q Okay. And do you know how soon after you spoke with Ms. Snowden?

A Either the same day or the next day, pretty close to the time that I actually had contact with him.

(Hearing Tr. 194:5-11). There was no testimony as to the manner by which O'Brien communicated with the Union's executive committee, i.e, by phone call, meeting, etc. Further, Knight's counsel said "same day" in her question to refer to the fact that O'Brien's *communications with Umbarger and Snowden* occurred on the same day. Furthermore, O'Brien affirmed that he reported to his executive committee – not the Union's Executive Board. Moreover, Hopkins confirmed that O'Brien did not report back to him on the negotiations until after September 28:

Q Okay. All right. And had you discussed the matter with Mr. O'Brien at any point before you made your demand to bargain?

A Well, on the 28th after Captain Umbarger told me that he and Denny had negotiated this settlement, and using Denny O'Brien's words so to speak, and I later spoke with Denny O'Brien via the telephone and asked him – [testimony interrupted by comments between ALJ and Counsel for the General Counsel]

Q So on the 28th you had this conversation – anytime before that?

A Oh, I'm sorry.

Q Had you spoken with Mr. O'Brien at all about this lunch break issue?

A No. I'm sorry.

(Hearing Tr. 61:13-25)

⁸ See e.g., the following summaries / excerpts: Exception 4 – "The ALJ erred [by failing

evidence to support its theory, and based on the uncontroverted testimony and other record evidence, the ALJ correctly found that Knight intended to bargain – and did bargain – with the Union in good faith, and thus there was no *fait accompli*.

1. Evidence Shows That Knight Provided The Union With Proper Notice And Opportunity To Bargain

As noted, Knight first gave the Union notice on or about June 27, 2007 when it posted a memorandum regarding the potential change in the Union’s breakroom. (ALJD 5:6-12; Hearing Tr. at 45:22-46:9; GC Ex. 4) On September 20, 2007, FPS communicated to Knight that it made a final decision to eliminate the three posts effective October 1, 2007. (ALJD 5:14-16, 5:43-49; Hearing Tr. at 135:22-136:12; R. Ex. 4) Later that same day, Umbarger spoke with Hopkins regarding that change and the loss of paid lunch breaks. (ALJD 6:9-20; Hearing Tr. at 49:7-20) The General Counsel concedes that the timing of the notice was adequate. (Exceptions at p. 8) (“The Counsel for the General Counsel conceded that the timing of the notice was adequate. The argument was not one of timing, but was one of intent.”) To support its *fait accompli* theory, the General Counsel repeatedly asserts – without any evidentiary support or citation to the record – that Knight had no intent of bargaining in good faith. *See e.g.*, Section III.A. of its Exceptions (addressing Exceptions 4 and 6).

The General Counsel ignores the evidence showing Knight’s good faith efforts, which the ALJ properly recognized and relied upon in making his finding that there was no *fait accompli*. For example, Umbarger first gave the Union notice in June, over two months prior to the change,

to find] that Respondent made a ‘final unalterable decision before it communicated the change to the Union and because it never had any intention of bargaining with the Union about the change;’ Exception 5 – ALJ’s finding evidence of Knight’s intent to bargain with the Union was error; Exception 6 – “The ALJ failed to properly consider the objective evidence of Respondent’s intent, regardless of the timing of the announcement;” Exception 7 – “The ALJ erred in finding that the Respondent notified the Union of the change before the unit employees was evidence of lawful behavior. Board law looks to the intent of the Respondent...”

and then again on September 20, ten days prior to the change. (*See p. 5, supra*) Further, Umbarger personally gave Hopkins notice on the same day that Knight was given notice by FPS of the staffing reductions. (*See p. 5, supra*) Furthermore, Umbarger gave this notice to Hopkins by having a private meeting with Hopkins in his office. (*See pp. 5, supra*; Hearing Tr. 49:7-12) As the ALJ properly recognized, the advance notice to the Union and the manner by which Umbarger informed the Union of the potential change are factors demonstrating Knight's good faith bargaining efforts. (ALJD 14:9-15:38)

Moreover, as discussed further below, Umbarger engaged in negotiations with O'Brien, in which he explained his own efforts to explore alternative solutions, and *actively solicited suggestions from the Union*. (ALJD 18:18-22, 21:29-46) Additionally, Umbarger negotiated with O'Brien at Hopkins' request. (ALJD 7:1-19, 12:1-51, 13:22-27; Hearing Tr. 178:1-24) As the ALJ correctly recognized, the determination of whether or not a Section 8(a)(5) violation occurred involves examining an employer's "course of conduct" and the overall totality of the circumstances. (ALJD 13:1-16, 13:28-46) *See Regency Service Carts, Inc.*, 345 NLRB No. 44, 345 NLRB 671 (2005); *ACF Industries, LLC*, 347 NLRB No. 99, 347 NLRB 1040, 1044 (2006). Here, all of the factors addressed above show Knight's good faith bargaining efforts and intentions, and undercut the General Counsel's speculation that Knight lacked intent to bargain in good faith.⁹

The General Counsel cites to several cases in support of its proposition that it is possible

⁹ *See Clarkwood Corporation*, 233 NLRB No. 167, 233 NLRB 1172 (1977) (rejection Union's "fait accompli" argument when Union had notice and an opportunity to bargain prior to implementation of the change); *Komatsu America Corporation*, 342 NLRB No. 62, 342 NLRB 649, 650 (2004) ("it is undisputed that post-July 1 bargaining was substantive and covered all open issues. In these circumstances, the Union was not deprived of its bargaining leverage, nor was it presented with a fait accompli...[Respondent] satisfied its Section 8(a)(5) effects bargaining obligation.")

for a bargaining violation to occur even if the Union was notified before the employees were notified. (Exceptions at p. 9, Exception 7) However, the circumstances in those cases are distinguishable from the circumstances here. For example, in *Pontiac Osteopathic Hospital*, 336 NLRB No. 101, *5-6, 336 NLRB 1021, 1023-24 (2001), the employer sent a letter to the union in which it expressly and unequivocally stated its intent to make unilateral changes (“it is the intention of [the Respondent] to unilaterally implement several wage and benefit revisions...”), and “did not allow the Union any opportunity to engage in bargaining before implementing that change.” In *UAW Daimler Chrysler National Training Center*, 341 NLRB No. 51, *6, 341 NLRB 431, 433 (2004), the employer afforded the Union no opportunity to bargain and told the Union that “there was nothing to talk about.” In *S & I Transportation Inc.*, 311 NLRB No. 189, *5, 311 NLRB 1388, 1390 (1993) there was testimony that the employer had made a final decision long before it met with the Union, and that the only reason the employer even met with the Union was due to the Union’s letter to the employer threatening legal action. In *Cook Dupage Transportation Company*, 354 NLRB No. 31, *11, 186 L.R.R.M. 1225 (2009), the employer “did not give the Union the opportunity to have input [in connection with the change at issue].” By contrast, here the testimony was undisputed that Knight actively sought the Union’s input and meaningfully negotiated with the Union prior to implementing the change. (See pp. 5-7, *supra*)

The General Counsel also cites to *Michigan Ladder Company*, 286 NLRB No. 4, *19-20, 286 NLRB 21, 31 (1987), for its proposition mentioned above. This case, like the others, stands in stark contrast to the circumstances here. In *Michigan Ladder*, the testimony established that the employer “deliberately misled the Union” about the change, and there were problems with the credibility of the employer’s witnesses involving false testimony. Here, there simply is *no*

evidence of any intent to mislead the Union, and the General Counsel's *speculation* as to any such intent is unwarranted. (Exceptions at p. 14, Exception 10) Further, the ALJ found Knight's witnesses to be "*entirely consistent and credible.*" (See pp. 9, 12-13, *supra*)

2. **Knigh Did Not Harbor A Fixed Position Of Being Unwilling To Bargain**

There simply was no evidence that Knight harbored a fixed position of being unwilling to bargain. Based on Knight's conduct addressed above, which was supported by uncontroverted record evidence, the ALJ properly found that Knight intended to bargain – and did bargain – in good-faith. (ALJD 13:47-22:51)

The General Counsel argues that Knight used "unequivocal language" that evidenced a lack of intent to bargain in good faith. (Exceptions p. 12, Exception 9) Again, the General Counsel mischaracterizes the record evidence. Contrary to the General Counsel's assertion that Umbarger told Hopkins "there was nothing that could be done about the change in pay," Hopkins actually testified that with regard to the September 20 conversation with Umbarger, his *subjective view* of the *general tone* of the conversation was that there was nothing that could be done about FPS' decision. (Exceptions at p. 12; Hearing Tr. 49:25-50-3; ALJD 6:50-51) Hopkins was "*careful to stress that this was not an exact quote.*" (ALJD 6:50-51; Hearing Tr. 49:25-50-3) (emphasis added) Further, as to a second conversation with Umbarger, which took place on September 28 (after the decision had been made and the memorandum notice posted), Hopkins testified that Umbarger said:

he had negotiated with the then vice president, Denny O'Brien, concerning that matter about lunch breaks and reduction in force and that everything would be status quo just as he said it was going to be, and that was that and nothing he could do about it, and basically he said he's sorry, but there's nothing he can do about it.

(Hearing Tr. 53:10-15) The General Counsel cites to this portion of the record in support of its

argument that Knight used unequivocal statements of futility, but fails to acknowledge that Hopkins conceded that this alleged statement by Umbarger was *after he had already negotiated with O'Brien*. Again, the General Counsel makes much speculation about Knight's intentions, but fails to produce evidence showing that Knight lacked intent to bargain in good faith. As addressed above, based on the uncontroverted testimony and other record evidence, the ALJ correctly concluded that Knight intended to bargain – and did bargain – in good faith.

Further, the General Counsel's contention in Exceptions 5 and 8 that "no member of management ever contacted any Union official about the change until September 28, days after the decision had been made and announced to employees," is misleading in that it wholly ignores the fact that Umbarger and Snowden meaningfully negotiated with O'Brien prior to September 25 (Exceptions at p. 10; *see pp. 5-8, supra*). The fact that O'Brien phoned Umbarger and Snowden as opposed to Umbarger or Snowden phoning O'Brien is a distinction without a difference – what is relevant is that O'Brien and Umbarger had a lengthy conversation during which they negotiated over the lunch pay issue and the Union's input was solicited. Perhaps most relevant is the fact that O'Brien told both Umbarger and Snowden that he was satisfied with the negotiations.¹⁰ (*See pp. 5-8, supra*)

C. The ALJ Correctly Found That Meaningful Bargaining Occurred

The General Counsel contends that there was no meaningful bargaining because "the decision had already been made and finalized. There was nothing that O'Brien could have said to change course on the matter...The conversation was an announcement, not a negotiation." (Exceptions at p. 13, Exception 11) Again, the General Counsel cites to no record evidence to

¹⁰ The fact that O'Brien phoned Umbarger and Snowden further supports the ALJ's finding that O'Brien was the main contact for the Union in dealing with Knight. (*See p. 9, supra*)

support this speculation. Indeed, *both Umbarger and O'Brien testified without contradiction that they negotiated the lunch pay issue.* (see pp. 5-8, *supra*, ALJD 7:21-40, 8:1-20)

Specifically, O'Brien testified:

Q And I understand that Mr. Hopkins asked you to make some contact, but did you actually negotiate with Mr. Umbarger about the lunch hour issue?

A I would call it negotiations, yes.

(Hearing Tr. at 178:11-24; *see also* Hearing Tr. at 141:1-142:16; 178:21-179:1) O'Brien testified without contradiction that he and Umbarger discussed various possible solutions, and that Umbarger asked for the Union's input. (Hearing Tr. at 179:2-16)

The General Counsel mischaracterizes the evidence and contends (without citation to the record) that "Umbarger admitted to O'Brien that the company had made a final decision." (Exceptions p. 16) To the contrary, Umbarger testified without contradiction that before his discussion with O'Brien, Knight had *not* made a final decision as to how to effectuate the elimination of the three posts with regard to lunch breaks. (Hearing Tr. at 142:17-21) O'Brien confirmed that no decision was made until after he negotiated with Umbarger and was asked to propose suggestions. (Hearing Tr. at 179:14-16; 180:7-16)

The General Counsel also speculates that O'Brien "would have believed that any such request [for further bargaining] would be futile." There was no testimony to this effect, and the General Counsel cites to none. Indeed, both Umbarger and O'Brien testified without contradiction that O'Brien told Knight that he was satisfied with the negotiations. (*See* pp. 5-8, *supra*; Hearing Tr. at 142:11-16; 181:2-9; 183:23-184:20; 207:11-208:3, 209:6-10; ALJD 8:22-31) The ALJ found the testimony of Umbarger and O'Brien on the subject of their negotiations to be "*entirely consistent and credible.*" (ALJD 18:26-28). Based on this uncontroverted testimony, and his assessment of the credibility of the witnesses, the ALJ properly concluded that

meaningful bargaining had occurred.

D. The ALJ Correctly Found That The Union Waived Its Right To Further Bargain Over The Change

The General Counsel contends that there could be no waiver because there was a *fait accompli*. (Exceptions p. 17, Exception 12) For the reasons addressed above, the ALJ properly found that there was no *fait accompli*. The General Counsel argues that even if there was no *fait accompli*, there was no clear expression of waiver made by O'Brien because although he "testified to the effect that he said he was satisfied," he did not "elaborate[] on the exact intent underlying those words." (Exceptions at p. 17) The General Counsel proceeds to speculate as to four possible meanings of O'Brien's use of the word "satisfied." (Exceptions at p. 17)

The General Counsel raised these same speculations in her post-hearing brief, and the ALJ properly rejected them based on the "*uncontroverted and credible testimony*" that O'Brien told Knight he was satisfied with their negotiations and considered the lunch pay issue to have been resolved. (ALJD 20:48-51, 21:48-49; Hearing Tr. 142:11-16; 181:2-9; 183:23-184:20; 207:11-208:3, 209:6-10) (emphasis added) The fact that O'Brien has over 25 years of experience as a union negotiator and a masters degree in labor relations further dispels any doubt as to his intent when, on behalf of the Union, he unequivocally communicated to Knight that he was satisfied with the negotiations and that the bargaining obligation had been fulfilled. (ALJD 4:47-50; Hearing Tr. 175:12-176:6; 142:11-16; 181:2-9; 183:23-184:20; 207:11-208:3, 209:6-10)

As the ALJ properly recognized, O'Brien's statements to Umbarger and Snowden constitute clear and unmistakable waiver of any further right to bargain over the lunch break pay change. (ALJD 21, lines, 3-21) *Allison Corporation*, 330 NLRB No. 190, 330 NLRB 1363, 1365 (2000) ("To meet the 'clear and unmistakable' standard...it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have

waived its rights consciously yielded its interest in the matter.”); *See Washoe Medical Center, Inc.*, 348 NLRB No. 22, 348 NLRB 361, 364 (“we find that the parties discussed the proposed change during their negotiations, and the Union acquiesced in the changes. Accordingly, we dismiss this allegation of the complaint.”); *EAD Motors Eastern Air Devices, Inc.*, 346 NLRB No. 93, 346 NLRB 1060, 1065 (2006) (“[t]he record shows that the Respondent conferred with union leadership [a union steward] prior to altering French’s schedule. Moreover, it shows that the Union agreed to this change... Thus, the Respondent did not violate Section 8(a)(5)...”); *Kansas National Education Association*, 275 NLRB No. 92, 275 NLRB 638, 639-640 (Union “waived its rights to bargain regarding this change” when employer “consulted with Union Official” prior to change who “did not indicate that the Union otherwise protested the transfer,” and Union subsequently protested and requested bargaining). Knight was entitled to rely on O’Brien’s communication that the Union was satisfied with the negotiations and that the bargaining obligation had been fulfilled.

E. The ALJ Correctly Found That Knight Did Not Violate 8(A)(5) And That Knight Had No Back-Pay Liability

For the reasons discussed above, the Board should adopt the ALJ’s decision and dismiss the complaint, and thus no backpay should be awarded. However, if any backpay is to be awarded, the backpay period ends as of October 27, 2008, when Knight offered to bargain again with the Union over the lunch break issue. (*See* p. 8, *supra*) The Union never responded to Knight’s offer, and subsequently walked out of negotiations in November 2008 when Knight reiterated its offer to bargain again.¹¹ *Id.* Thus, even though the lunch breaks continue to be

¹¹ Even assuming, *arguendo*, that the backpay period would not be tolled as of October 27, 2008, the backpay period plainly would be tolled after the Union’s November 20, 2008 refusal to bargain over the lunch break issue.

unpaid, any backpay liability is cut off by the Union's refusal to bargain despite Knight's good-faith attempts to do so. See *Paramount Liquor Company*, 307 NLRB No. 110, 307 NLRB 676 (1992) (Union's conduct of walking out of meeting and refusing to bargain amounted to waiver of its right to further bargain over the issue); *Serramonte Oldsmobile, Inc.*, 318 NLRB No. 6, 318 NLRB 80 (1995) (when union engages in conduct that prevents parties from reaching agreement employer may be privileged to implement change), *enforced in part and denied in part*, 86 F.3d 227 (D.C. Cir. 1996).¹²

IV. CONCLUSION

In light of the undisputed evidence shown at the hearing on this matter on March 18, 2009, and for the reasons set forth in the ALJ's June 29, 2009 Decision, and herein, Knight respectfully requests that the Board adopt the ALJ's Decision and dismiss the complaint.

Date: August 21, 2009

Respectfully submitted,



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¹² For the reasons set forth above, no backpay should be awarded. However, if any backpay is to be awarded, Knight submits that the Board should continue its current practice of awarding only simple interest, and reject the General Counsel's request that the Board replace its practice by compounding interest. (Exceptions at pp. 20-28)

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August 2009 the foregoing Respondent's Answering Brief to Counsel for the General Counsel's Exceptions to the Decision of the Administrative Law Judge was electronically filed with the Board, the requisite number of paper copies were filed with the Board via Federal Express, and a true and accurate copy was served by electronic mail and first-class mail, postage prepaid, upon:

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