

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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Drivers, Chauffeurs, and Helpers, Local Union No. 639,	:::
a/w International Brotherhood of Teamsters	:::
	::: Case Nos.: 5-CA-35687
	::: 5-CA-35738
Charging Party,	::: 5-CA-35965
	::: 5-CA-35994
- and -	:::
	:::
	:::
Daycon Products Company, Inc.	:::
	:::
Respondent.	:::
_____	x

**DAYCON PRODUCTS COMPANY, INC'S BRIEF IN SUPPORT OF ITS EXCEPTIONS  
TO THE DECISION AND RECOMMENDED ORDER OF THE ADMINISTRATIVE  
LAW JUDGE**

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Dated: March 15, 2011

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Daycon Products Company, Inc. (hereafter “Respondent,” “Daycon,” “the Employer,” or “the Company”) by its attorneys Epstein Becker & Green, P.C., submits this Brief in Support of its Exceptions to the February 15, 2011 Decision and Recommended Order (“ALJD” or “the Decision”) of Administrative Law Judge Joel P. Biblowitz (“ALJ”) in Case Nos. 05-CA-35687, 05-CA-35738, 05-CA-35965, and 05-CA-35994, and rulings made by the ALJ during the hearing held on November 17, 18, 19 and 22, 2010 (“the Hearing”).

## **I. PRELIMINARY STATEMENT**

While Respondent disagrees with almost everything else in the Decision, it agrees with the statement that “The principal issue herein is whether there was an impasse in the negotiations between the parties thereby permitting the Respondent to unilaterally implement its last bargaining offer[.]” (ALJD 2) Beyond that statement of the primary legal issue, the ALJ utterly failed to grasp the heart of the underlying dispute between Respondent and Teamsters Local 639 (“the Union”) (collectively “the Parties”). This being an impasse case, the primary legal question which needs to be answered is was there any reasonable basis to believe that further negotiations would convince either party to modify its position?

The General Counsel’s (“GC”) theory of the case rests entirely on the misguided notion that Respondent prematurely declared impasse because it left the Parties’ April 22 meeting without first notifying the Union. The Decision simply rubber stamps this erroneous theory without appropriate consideration of the full record and applicable Board precedent. The Decision ignores significant portions of the record – including evidence introduced by the General Counsel itself – which erodes entirely the sole basis upon which the ALJ found the impasse invalid. A plain reading of the Decision shows that the ALJ either disregarded entirely much of the evidence before him, or simply failed to understand the fundamental divide between the Parties.

Stunningly, despite four full days of testimony and more than 100 exhibits, the Decision contains only a single paragraph of analysis purporting to explain why the Parties were not at impasse on April 22, 2010.<sup>1</sup> (ALJD 16:1-25) The central line of reasoning (such that it is) underlying the Decision rests on the notion that “the Respondent foreclosed any further movement in negotiations” by leaving the final meeting between the Parties. (ALJD 16:21-23)

As the ALJ put it:

**If** Respondent had returned to the [April 22] meeting and notified the Union that it was rejecting the five year proposal because it was too expensive, the Union **might have** proposed an alternative plan for progression.

(ALJD 16:19-21) (emphasis added).

“Ifs” and “might haves” are thin reeds on which to rest a legal decision. Trials and judicial rulings are not parlor games, and basing the central holding of a legal decision on nothing more than hypothetical conjecture unsupported by the record evidence disserves the interests of justice. Stated another way, rank speculation cannot be allowed to substitute for, much less overcome actual evidence. Ah, Evidence! That is the “stuff” of which cases are made, and it is the “stuff” upon which rulings must be grounded. And the actual evidence introduced in this case establishes that the Decision cannot stand.<sup>2</sup>

This is especially so when virtually every witness and exhibit established beyond doubt the intractable nature of the Union’s position, as well as the Company’s firmness in its position. Nowhere in the Record is there a scintilla of evidence that either party was willing to give on the most important issue in the negotiations – wage progression to top rate.<sup>3</sup> Indeed, the

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<sup>1</sup> Hereafter, unless stated otherwise, referenced dates shall be 2010.

<sup>2</sup> Accordingly, the Decision should be given no weight. See Gold Standard Enterprises, Inc., 234 NLRB 618 (1978) (Board disregarded decision and reviewed the record *de novo*).

<sup>3</sup> For this reason, the assumption that all that was wrong with the Union’s proposal was that it “was too expensive” (ALJD 16:20-21) betrays the ALJ’s misconception of the nature of the dispute. It was not merely that the proposal

Union's chief negotiator admitted that at no time during the negotiations had the Company ever indicated that it was willing to accept progression to top rate. (Tr. 352-354)

The Parties' dispute centered around the concept of wage "catch-up" or "progression." The central idea of the "catch up" concept was that all employees would progress to the top rate of their classification within a set period of time. (Tr. 70-71) And it was this concept over which the Parties fundamentally disagreed.

Employees can either "catch-up" to the top rate within their classification within a contractually-defined period of employment or they cannot. An important point seemingly misunderstood by the ALJ is that *only one party can get its way on this issue*, and neither party was willing to concede to the other. The Union was "married" to progression to top rate, and the Company was equally firm that it would not allow automatic progression to top rate under any circumstances. Both parties were (and remain) unwilling to concede their respective positions. Accordingly, the ALJ's conclusion that the Union "might have" proposed an "alternative plan for progression" is sheer fantasy. There is no "alternative" here – either there is progression to top rate or there isn't. To pretend that there is some alternative middle ground between the two is akin to suggesting there is a middle ground between one party who insists on a unicycle while the other party insists on two wheels – you can only have one or the other.

Clearly, there were no issues pertaining to progression to top rate left unexplored by the Parties, ignoring this reality accomplishes nothing – one party or the other must come off its position. This was true on April 22, and it remains true today. As stated by the lead negotiator for the Company, "since the commencement of negotiations in November 2009, the

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was too expensive; it was, in addition, contrary to the Company's repeatedly expressed desire to not have an automatic progression to the top rate in a classification within a contractually-defined period of time.

Company's response has been clear: the premise of imposing a deadline upon which employees must be paid at the 'top rate' is unacceptable." (R 15)

The evidence overwhelmingly demonstrates that the Parties' inability to resolve their ideological divide on the "catch-up" issue derailed negotiations and resulted in an impasse being reached on April 22. This fact both establishes the lawful nature of the Company's wage increase and eliminates the supposed unfair labor practice underlying the Union's claim to have engaged in a unfair labor practice strike.

The Union's acknowledgement on April 22 that it was still wedded to wage progression to top rate, its express reiteration of this premise only one week later, its opposition to several attempts from the Company to reach a compromise, its stale proposal from July 13, and both sides' unwillingness to modify their positions in the face of a strike now nearly eleven months old all confirm the validity of the impasse. As such, Respondent respectfully suggests that the Board independently examine the entire record, and confirm what everyone knows – further negotiations would have been futile.

Notably, the burden to prove a causal connection between an unfair labor practice and the alleged unfair labor practice strike rested with the General Counsel. Respondent submits that even if the mountain of evidence that the Parties were at impasse is ignored, the GC failed to meet this burden, and as such, cannot prove the strike was an unfair labor practice strike.

Finally, the allegation that the Company subcontracted work is true, but not a violation of the Act. The contractual language indisputably allows the subcontracting. The testimony of the employees further corroborated that the subcontracting was both necessary and comfortably within the provisions of the collective bargaining agreement. The subcontracting of was not amenable to collective bargaining, and was merely the maintenance of the status quo.

## II. QUESTIONS PRESENTED

1. Whether the Parties negotiations over a successor collective bargaining agreement reached an impasse permitting Respondent to implement the terms of its last offer to the Union.

2. If impasse was prematurely declared, whether the GC satisfied its burden of proving a causal connection between the alleged unfair labor practice and the April 26 strike.

3. Whether Respondent violated section 8(a)(5) of the Act by subcontracting the repair of several snow-throwers in accordance with its long established practice and unchallenged right under an expired collective bargaining agreement.

## III. STATEMENT OF FACTS

### A. The Parties' Bargaining History

The Union has represented the Company's drivers and warehousemen since 1972. (Tr. 644-645) During that time, the Parties have successfully entered into numerous collective bargaining agreements, each of which was for three years. (Tr. 648)<sup>4</sup> In 2000, the Union struck Daycon; that strike quickly settled. (Tr. 275). Since that strike, the Parties have entered into three collective bargaining agreements without any corresponding labor strife.

Over the past decade the Parties have agreed to maintain a two-tier wage structure allowing for the most senior employees of the Company to be paid at a higher hourly rate than their less senior counterparts. (Tr. 595-596) Thus, the current bargaining unit is, and always has been composed of two separate groups of employees – those earning top rate, and those not at top rate. (Tr. 480)

In 2001 the Parties agreed to a mechanism whereby employees being paid below the highest rate within a classification could “catch up” to the top rate within a designated period

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<sup>4</sup> In 1980 the Company negotiated out of the Union's Pension Fund (“Pension Fund”). In every negotiation subsequent to 1980 the Union has proposed that the Company contribute to the Pension Fund. The Company has never agreed to this proposal. (Tr. 272-73)

of time. (GC 63 at 35) (Tr. 658) In 2004 the Parties agreed to eliminate the “catch up” benefit from the collective bargaining agreement. (Tr. 71, 596) In 2007, the Parties agreed to reinsert a “catch up” benefit into the collective bargaining agreement via a “catch up” raise paid to employees who were hired prior to February 1, 2004. (GC 2 at 15) This extra increase paid on an employee’s anniversary date of employment served to bridge the gap between a reduced rate paid to new hires and a “top rate” of pay within the same classification. (Tr. 71-72).

**B. The “Daycon 8” Case**

During the early months of 2009, the Company discovered it had inadvertently overpaid eight individuals due to giving erroneous “catch up” raises which were no longer called for in the contract. (Tr. 240) Upon discovering its error, the Company adjusted the effected employees’ pay rates to their agreed upon and proper levels. (Tr. 241) The Union filed an unfair labor practice charge alleging that the Company had unilaterally reduced employees’ wage rates. (Tr. 240) Following a hearing held on November 8-9, 2009, on January 8, 2010, ALJ Bruce Rosenstein held that the Company was permitted to correct the clerical error and had not violated the Act in correcting the wage rates of the eight employees.<sup>5</sup> Id.

The case (and the eight individuals at issue in it) have since become known by the Parties as the “Daycon 8.” (Tr. 242)(Webber stating “we’ve nicknamed it that.”)<sup>6</sup> Webber acknowledged that the correction of the wages of the “Daycon 8” led “in large measure” to the present case. (Tr. 242) Webber also asked the Board to incorporate his affidavit from the Daycon 8 matter into the file for the present charges. (Tr. 243)

The “Daycon 8” case is useful background for the present controversy, as it fleshes out both the underlying reason for and timing of the Union’s insistence on its wage

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<sup>5</sup> The ALJ took judicial notice of this opinion. (Tr. 811)

<sup>6</sup> The “Daycon 8” consists of Gerald Jackson, Steven Walker, Alvin Phoenix, Hasmon Abraham, Derrall Bridges, Robert Redmond, Trevor Holder and Lynnette Burton. See footnote 4 of the opinion of Judge Rosenstein.

progression proposal in the latest negotiations – simply stated, the Union’s insistence on the expansion of the “catch up” proposal was an attempt to override Judge Rosenstein’s decision, and put the eight employees back at the top rate under the contract. In fact, even before the Daycon 8 case had been heard by Judge Rosenstein, Webber made clear that in the upcoming negotiations, the Union would not negotiate using the “corrected” wages as a baseline – in a request for information prior to bargaining, Webber stated the request did “not indicate the Union’s willingness to bargain for a new CBA with the alleged wage rates Daycon Products asserts as correct[.]” (GC 3)

True to this assertion, throughout negotiations the Union never wavered off of its demand that all employees hired prior to February 1, 2007 be immediately increased to top rate and that all new employees progress to top rate within three years. (Tr. 306)

**C. Negotiations Begin, Initial Progress Made**

The most recent collective bargaining agreement (“the CBA”) between the Parties expired on January 31, 2010. (GC 2) Negotiations between the Parties over a successor contract commenced on November 4, 2009. (Tr. 50) During the first meeting between the Parties, the Union presented its “non-economic” proposals. (GC 6) The parties reached a few minor agreements at this session. (GC 25) In an effort to streamline negotiations, Jay Krupin (“Krupin”), lead negotiator on behalf of the Company, suggested the Union prepare its economic proposals prior to the next session. (GC 5 at 2) The Union complied with this request. (Tr. 64) (GC 7) On December 9, 2009 negotiations resumed with Webber presenting the Union’s economic proposals. (Tr. 68) In addition to proposing that the Company participate in the Teamsters Local 639 Health Fund (“Health Fund”), these proposals included the following three pronged wage proposal:

- 1) A \$0.75 across the board wage increase for all classifications

- 2) Any employee hired prior to February 1, 2007 immediately be paid the top rate of pay for the classification in which he is assigned<sup>7</sup>
- 3) A new hire rate and progression as follows:
  - Hire date – 85% of current top rate
  - 1st Anniversary – 90% of current top rate
  - 2nd Anniversary – 95% of current top rate
  - 3rd Anniversary- 100% of current top rate

(GC 10) (Tr. 246)

Prongs two and three from the Union's wage proposal are designed to guarantee that employees paid below the top rate automatically reach the top rate within their classification within a designated time period. (Tr. 244-247; 268) This concept was (and remains) the most important issue to the Union during negotiations. (Tr. 222)(Webber testifying that "progression" was the "most important" issue) (Tr. 523)(Gibson testifying the Union was "married to the idea of wage progression") (Tr. 533)(catch-up component "was the focus of our negotiations") (Tr. 596-97)(Poole stating wage progression "was a key issue in the negotiations, a critical issue.")

At the next meeting on December 15, 2009 Paul Rosenberg (Rosenberg), co-counsel to Daycon, explained to Webber and his bargaining committee that the Union's economic proposals were unreasonable. (Tr. 78-79)<sup>8</sup> During this meeting and the following

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<sup>7</sup> The Union proposals mistakenly referenced 2008. Webber subsequently corrected this error, and clarified that the Union's proposal was that all employees hired prior to February 2007 would immediately receive the top rate. (Tr. 120) The "Daycon 8" were each hired prior to February 1, 2007; thus, each would have immediately been granted an increase to top rate under the Union's wage proposal. (GC 4) (Tr. 244)(Tr. 633) Jackson and Walker were hired in 2001; Abraham was hired in 2002; Bridges, Holder, and Burton were hired in 2003; and Phoenix and Redmond were hired in 2004. (GC 4)

<sup>8</sup> Combined together the "immediate" catch-up and annual raise prongs of the Union's wage proposal would have an expensive impact, as the new hires progressed towards an ever-increasing top rate. For instance, Lynette Burton, a warehouse worker and one of the Daycon 8, was hired in 2003. When the CBA expired her wage rate was approximately \$16.00 per hour. (Tr. 51-52) (GC 4) The top rate for warehouse workers was approximately \$18.50. (GC 4) Basic math reveals that under the Union's proposal on February 1, 2010, Burton's hourly rate would have "immediately" increased by nearly \$3.15 per hour, or by about 15%, to the new top rate of \$19.15.<sup>8</sup> The impact of the immediate catch-up is compounded when including the annual \$0.65 per hour increase. With these increases, Burton's wage rate would have increased to \$20.42 over a three year period. (Tr. 627) This calculates to nearly a 23% wage increase during the term of a new contract. Since each of the Daycon 8 was hired prior to February 1, 2007, the Union's proposal required that they would all receive a windfall comparable to that of Burton. (Tr. 633)

session on January 5 the Parties focused primarily on language and non-economic issues. During these meetings, multiple tentative agreements were reached. (GC 25) (Tr. 248)(progress was made and issues agreed upon in initial meetings) At the conclusion of the January 5 session Krupin recommended that the Parties pare down their respective positions to the economic issues. (Tr. 249) (GC 13) Three days later, Judge Rosenstein ruled against the Union in the “Daycon 8” case. (Tr. 244)

**D. Wage Progression Becomes the Dominant Issue During Negotiations**

In the first session following Judge Rosenstein’s ruling, on January 19 the Company presented the following two-part wage proposal:

- 1% across the board increase for the entire bargaining unit, and
- An opportunity for the employees to receive an additional bonus payment of up to three percent (3%) of their hourly earnings if certain performance and productivity criterion were reached.

(GC 16)

Additionally, as promised, the Company streamlined its proposals to those items it viewed as “most important.” (GC 16) (Tr. 253, 602-603) The Union rejected the Company’s wage proposal in its entirety, stating that all wage increases must be based off of “cents on the dollar,” rather than percentages. (Tr. 251-152, 602-603) The Company also proposed an “economic distress” clause under which any benefit increases would be temporarily postponed if the Company experienced a 5% drop in gross revenue over a rolling 12- month period. (GC 16 at 2) Throughout the Company’s seventy-plus year history, the 5% trigger point was unprecedented. (Tr. 607) The Union rejected the economic distress proposal. (Tr. 280, 502)

On January 29 negotiations resumed. As described above, the CBA recognized the existing two-tiered wage structure with a catch-up benefit for less senior employees. (Tr. 480) (GC 2 at 15) The Company offered to maintain this structure as follows: (1) employees at

top rate would receive a 1% wage increase during each year of a new contract; and (2) to help bridge the wage differential within the bargaining unit, employees not at top rate would receive a 1.5% wage increase during each year of a new contract. (Tr. 604) (R 3) The Union summarily rejected this proposal. (Tr. 108; 605) Thereafter, Krupin and Webber had a side bar discussion regarding health insurance. (Tr. 605) Webber agreed to withdraw the Union's health insurance proposal if in turn the Company agreed that employees' contribution cost toward health insurance would stay at the current rates of \$20.92 for single coverage and \$85.99 for family coverage during the term of a new contract. (Tr. 254-55; 264-266; 605-06; 729) (GC 17, 25) The Company acquiesced to Webber's request. (GC 17, 25)

With health insurance resolved, the Company turned its efforts towards appeasing the Union's primary concern regarding the wage differential within the bargaining unit. (Tr. 688) (GC 17 at 3)(showing that when negotiations resumed the only topic was "wages") Daycon doubled its wage offer (moving from 1% to a 2% wage increase for employees currently at top rate, and from 1.5% to a 3% wage increase for employees not at the top rate). (Tr. 105-07) (Tr. 604) (GC 19) The Union's response remained the same: only an automatic three-year progression to the top rate was acceptable. (Tr. 108) As Webber explained: "we feel that an employee that has three years tenure with the Company is just as valuable to the Company as somebody that's been there for ten years." Id.

**E. Parties' Positions Solidify, No Progress Made, Talks Break Down**

The next meeting between the Parties was scheduled to occur on February 18. In anticipation of this meeting the Company sent the Union a letter summarizing the current status of negotiations. (GC 22) This correspondence accurately characterized the Union's position on wages as "not being interested in anything less than a three year wage progression." (Tr. 259) The letter included the following chart, summarizing the parties' respective positions:

Issue	Company Position			Union Position
Wage Increases for Employees at Top Rate	DOR \$0.34	1 Year from DOR \$0.17	2 Years from DOR \$0.17	\$0.75 across the board in each year of the contract.
Wage Increases for Employees <u>Not</u> at Top Rate	DOR \$0.50	1 Year from DOR \$0.25	2 Years from DOR \$0.25	Guarantee that all employees are at top rate at the end of a three year contract
Economic Distress Clause	Yes			Rejected
Creation of Helper Classification	Rejected			Yes

(GC 22 at 3)

The February 18 meeting began with the Union rejecting a Company proposal which accommodated the Union's request that all percentage wage increases be converted to cents on the dollar. (GC 24) (Tr. 609-610) Notwithstanding the Union's immovability on the progression issue the Company again sweetened its wage proposal:

Employees at Top Rate:

Date of Ratification ("DOR") \$0.40 per hour  
 1 Year from DOR \$0.20 per hour  
 2 Years from DOR \$0.20 per hour

Employees Below Top rate

Date of Ratification ("DOR") \$0.60 per hour  
 1 Year from DOR \$0.30 per hour  
 2 Years from DOR \$0.30 per hour

(Tr. 122, 276; 610-611) (GC 26)

Poole was hopeful that adding money to the pot while simultaneously giving employees paid below the top rate a significantly larger increase than their more senior co-workers could translate into meaningful progress. (Tr. 610) ("We were trying to get to an offer that the Union could accept.") This offer, too, was rejected.

The Union did decrease (by a dime) its proposed annual increase from \$0.75 to \$0.65 per hour annual increase for all bargaining unit employees. Poole viewed the \$0.10 reduction to the Union's annual increase prong as immaterial. (Tr. 273) At this point, Krupin signaled that the Company was nearing the end of bidding against itself, and that it would make an offer "very close" to where it needed to be. (Tr. 614) Webber testified:

Q. If you would look down at the bottom of the first page of GC-23. Do you see the initials JK? That's Jay Krupin, I take it.

A. Yes.

Q. And then next to that it says will give proposal very close to what Company wants in contract.

A. Yes.

Q. These are your notes for February 18th?

A. Correct.

Q. **Is that what Jay said at that time, that they'd give you something that was real close to what the Company wanted?**

A. **Yes.**

Q. If you'd turn the page with me, please. Down there underneath where it says 4 p.m., Company returns, looks like.

A. Yes.

Q. And then there's a JK. I guess that's Jay Krupin. And it looks like he asked you is it an absolute in your mind that you need three-year catch-up? And then you wrote Webber yes.

A. Yes.

Q. And that was the Union's position, right?

A. Yes.

Q. **The three-year catch-up was absolute?**

A. **Yes.**

(Tr. 260-61)(emphasis added)

The Company then caucused, and prepared yet another proposal. (Tr. 611-612) This proposal provided that all top rate associates would receive a \$0.40 per hour increase for each year of the contract while employees not at top rate would receive a \$0.60 per hour increase

for each year of the contract. (GC 27)<sup>9</sup> This proposal equated to nearly a three percent (3%) wage increase for the bargaining unit over a new contract's duration. (Tr. 613-614) Absent a performance based compensation structure, this was the Company's budgeted figure. (Tr. 613, 695) Accordingly, the Company declared its latest offer on February 18 to be its "best offer." (GC 27) In response, Webber explained it would be difficult to get a deal under terms close to those the Company was proposing, and that a Federal Mediator was necessary. (Tr. 614-616; 735) (R 27 at 6) On direct examination, Webber testified:

Q. Looking at GC Exhibit 27, what was the Union's position with regard to this proposal, the wage proposal –

A. We rejected it.

Q. And why did the Union reject it?

A. We don't think it fit with needs and addressed our proposals adequately.

Q. And how did it not fit your needs, sir, the Union's needs?

A. **It still didn't deal with the progression...[.]**

(Tr. 123)(emphasis added)

Thus, at the close of the February 18 meeting, the Parties' respective positions as to the dominant issue of wages were as follows:

**Company:** Three year annual increases of \$0.40/\$0.60 for top rate/not top rate, respectively

**Union:**

1. \$0.65 annual increase
2. All employees hired prior to February 1, 2007 immediate raise to top rate
3. New hires have a three-year wage progression to top rate in classification

(GC 28)<sup>10</sup>

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<sup>9</sup> The Company also raised the trigger point of the economic distress proposal from 5% to 6%. (GC 27)

<sup>10</sup> The Union had also withdrawn most of its remaining proposals on 2/18. (GC 28) (Tr. 119-20) Webber's notes reflect that the Health and Welfare proposal had been "withdrawn previously," and the only remaining open

**F. Union Takes Strike Vote**

Shortly after the February 18 meeting, Webber prepared a “meeting notice” regarding a meeting to take place at the Union hall on February 27. (GC 29) According to the document, the purpose of the meeting was a “Contract Update and a Strike Vote Will Be Taken.” (GC 29) Webber testified that about 30 members attended the meeting, and that he “reported out the state of the bargaining[.]” (Tr. 127) Webber stated that the Union sometimes uses a strike vote as a bargaining “tool,” and that they decided to take a strike vote here, and did. (Tr. 127-28) Webber prepared an agenda for the strike vote meeting, which included:

THE LOCAL BELIEVES NOW IS THE TIME TO TAKE A STRIKE VOTE.

THE COMPANY NEEDS TO KNOW THAT YOU THE MEMBERS ARE WILLING TO FIGHT FOR A FAIR CONTRACT.

I BELIEVE THE COMPANY THINKS YOU WILL NOT STRIKE.

WE NEED TO SEND THEM A MESSAGE THAT WE ARE UNITED AND WILL IF NECESSARY TO STRIKE FOR AS LONG AS IT TAKES

(R 1)

Webber testified that he informed the employees that the Company needed to know that they would strike to obtain a “fair contract” and that some of the issues in a fair contract would involve “wages and catch-up wages.” (Tr. 273-74) A strike vote was taken, and the employees authorized a strike. (Tr. 391) Thereafter, the last three meetings continued to focus solely on the wage progression concept, with no movement from either party.

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economic item (other than the wages) was the pension, which has been perennially rejected for thirty years. (GC 28) (Tr. 272-73)

**G. Parties Meet With Mediator Without Progress; Union Walks Out**

The next meeting between the Parties occurred on March 17. Pursuant to Webber's request, Gary Eder ("Eder"), a Federal Mediator, was in attendance. (Tr. 132-33) Also in attendance was Tommy Ratliff, the Union's President. (Tr. 132-33) The meeting began with the Union presenting a document titled "Response to Company's Best Offer." (GC 33) This document rejected in writing what Webber had rejected orally on February 18 – the Company's "best offer." (GC 33) Webber stated:

I presented it to ... let them know that we rejected their proposal and **the Union position remained the same as number 8 and 9 as it was on February 18th.** I ... informed the Company again that we were still not interested in their economic distress clause, and I also informed them again that **the Union position was as it was ... proposed on December 9th[.]**

(Tr. 134)(emphasis added)

After the Union's stale position was presented, Ratliff accurately described the Parties as being "very far apart." (Tr. 277) (GC 31) The Parties then caucused. During their caucuses, Eder spoke to both sides separately regarding their respective positions. (Tr. 617-618) The Company explained to Eder that the top rate issue was precluding the Parties from reaching an agreement. Upon the mediator's recommendation, the Parties reconvened to discuss this vital topic. Poole explained what happened next:

- A. The mediator invited us back in. The Company was prepared. I had all my charts, the varied outlay, why I thought the three year catch-up was unreasonable, and as I started to begin my presentation, Tommy Ratliff stood up. He told me that we had the Union's position and then he walked out of the mediation.
- Q. And what happened next?
- A. That was the end of the meeting.
- Q. And did you view this meeting as productive?
- A. No.

(Tr. 618) See also (Tr. 283-84) (Tr. 472)

On March 21, four days after it walked out of negotiations, the Union held a meeting to update its members regarding the contract negotiations. (R 4) In his agenda notes Webber prepared to lead the meeting, Webber wrote:

THERE IS NO RECENT NEWS. THE COMPANY'S POSITION  
HAS NOT CHANGED SINCE OUR LAST MEETING.

PRESIDENT RATLIFF AND I MET WITH THE COMPANY  
AND FMCS THIS PAST WEDNESDAY. **TALKS BROKE  
DOWN.**

(R 5)(emphasis added)

Webber's last agenda item was to "request and set up picket line captains" (R 5) Although Webber testified that he did not go through with this, (Tr. 316), Robert Redmond ("Redmond") testified that at this meeting "one of the members ... stated that if were going to go on strike, then we all need to stand up because I want to know who's going to be with me, who's going to be against me, and that's what we did." (Tr. 405)

#### **H. Company Reaches Out to Union**

On March 26, in an attempt to break the obvious stalemate, at Poole's request Krupin contacted Ratliff to suggest an "off the record" meeting between the Parties (Tr. 284, 424, 629) (GC 56) Ratliff agreed this was a good idea, (Tr. 427) and both sides were optimistic that an "off the record" forum could be productive. (Tr. 291, 629, 667) The meeting occurred on April 1 in a private room at the Monacle Restaurant. (Tr. 143) Present at this meeting were Ratliff, Webber, John Gibson ("Gibson"),<sup>11</sup> the Union's Secretary Treasurer, Poole, Krupin and Rosenberg. (Tr. 143) The sole issue discussed at the April 1 meeting was the wage progression

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<sup>11</sup> Gibson told Poole at this meeting that the "Daycon 8" must be addressed. (Tr. 633)

concept. (Tr. 541) Since the meeting at the Monacle was “off the record” the ideas raised between the Parties were not considered by the Parties as proposals. (Tr. 285-286) (Tr. 540)

Krupin opened the meeting by asking directly “Are you guys married to wage progression and top rate.” (Tr. 523) Webber responded “yes.” (Tr. 303-04) After a brief caucus, the Union raised the possibility of altering its proposal from a three year to a four year progression. (Tr. 285, 430-431, 523, 630) As this proposal still contained the untenable idea of a wage progression to top rate, in order to try to reach some kind of compromise, the Company suggested an alternative to the top rate – a “contract rate.” (Tr. 292-93, 523, 630-31) Instead of progression to a \$20 top rate, the Company floated an \$18 contract rate which new employees could reach within three years. (Tr. 292-93, 523, 630-31) (Tr. 147-148)

The “contract rate” suggestion would have allowed employees at or above the top rate to continue earning annual pay increases, while employees paid below the top rate would reach a lesser and mutually agreed upon “contract rate” within a defined period. (Tr. 663-664) From the Company’s viewpoint, this idea was going “75 percent of the way.” (Id.) The Union never seriously considered the contract rate idea. Instead, it posed the possibility of a five year progression. (Tr. 481; 525; 632) Once again, the meeting ended without any resolution of the primary issue separating the parties, the wage progression concept. Poole testified that:

I was, to tell you the truth, a bit despondent over that meeting. Forgetting the four and five year proposals that we didn’t have an interest in, we were, we were trying to get to a deal. I mean we had put a proposal in to get 75 percent of what the Union had asked for, and they had no interest. They had no interest at all, and I’m thinking wow, I don’t know where to go.

(Tr. 634)

**I. Final Meeting Fails to Move Either Party, Company Declares Impasse**

The next and final meeting between the parties was held on April 22, again with Eder present. (Tr. 154, 635) (R 36) Prior to the negotiation session set for that day the Union indicated that negotiations were “bogged down,” that its members had “drawn a line” and might “walk off the job if there is no significant movement soon.” (R 2) Again that day the only topic of discussion was the wage progression concept, and again the meeting was unproductive. (Tr. 495) This meeting began with Ratliff recapping what occurred at the Monacle Restaurant. (Tr. 635) (R 26) Webber chimed in to clarify that the Union preferred a shorter term agreement, and that the suggestions he made during the off the record meeting for a four or five year progression were purely exploratory. (Tr. 636) (R 26)<sup>12</sup>

In response, Krupin again asked whether the Union was “wedded” to the concept of catch up by the end of the contract, (Tr. 636) (R 26 at 2), and Webber again responded “Yes.” (Tr. 155) Following Webber’s affirmation that the Union was not going to budge on its commitment to the concept of wage progression to top rate, the Company elected to leave the April 22 meeting (Tr. 637) At that point, the Company realized that further bargaining was futile. Poole testified:

A. Well, we went back into one of the meeting rooms there, and I was pretty well done. I didn’t know where we would go. We had just had three consecutive meetings in a row, there was no movement, and the Union was married to their position, and I didn’t think it was prudent for the Company to move forward.

Q. So did the Employer leave?

A. Yes, we left.

(Tr. 637)

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<sup>12</sup> Webber’s notes reflect that Krupin asked the Union whether it was “only interested in a 3 year agreement,” which Webber understood to mean a three year contract with a three year wage progression to top rate. (GC 49) (Tr. 302-03) Webber says that he formally proposed a five-year agreement with a five-year progression at this meeting, but his notes do not reflect this and the testimony is contradicted by all other evidence.

Later that afternoon, the Company declared the parties to be at impasse. (GC 38)

**J. The Parties' Post-Impasse Conduct**

Immediately after learning of the impasse declaration, the Union agreed in a letter to the Company that there was a “bargaining logjam.” (GC 39) In this letter, the Union proclaimed breaking this logjam was contingent upon the Company accepting the Union’s concept of progression within a contractually-defined period. (Id.) On the next day in accordance with its best offer the Company notified the bargaining unit it was implementing an annual \$0.40 per hour increase for employees paid at the top rate; and an annual \$0.60 per hour increase for employees paid below the top rate. (Tr. 639) (Tr. 569) (R 22)

On April 26 the Union initiated a supposed unfair labor practice strike against Daycon. (Tr. 165) Since the strike’s inception, the Union has repeatedly proclaimed that workers are fighting for “equal pay for equal work.” (R 8, 9, 19) The Union did not request any further bargaining until July 2. (Tr. 763-64) On April 29, the Union reiterated that it was holding to its stance that three year progression was a “necessity.” (GC 41) On July 2, the Company received from the Union a purported unconditional offer to return to work. (GC 42) In conjunction with this offer the Union also requested that bargaining resume. (Id.) The Company complied with Webber’s request to resume bargaining, and on July 13 the Parties met at the offices of the FMCS in Washington DC. (Tr. 350, 445, 643) At this session, Webber formally proposed for the first time a five year agreement and five year progression with a \$0.55 per hour per across the board annual wage increase (i.e. a \$0.10 per hour reduction from \$0.65 per hour). (Tr. 643) In addition, Webber proposed that the Employer participate in the Pension Fund beginning in the fourth year of a new contract. (Tr. 446) Prior to an impasse being reached, the Parties never seriously discussed the pension topic. (Tr. 643)

Following a caucus, Krupin explained to the Union's bargaining committee that the Company's best offer remained on the table. (Tr. 646) He also reiterated (yet again) that the Company would not agree to any type of automatic progression to top rate. After the Company rejected its proposals, the Union asked for its own caucus. The Union never returned from this caucus. Three weeks later Ratliff proclaimed that further bargaining was contingent upon the Company rescinding the implemented terms. (Tr. 512; 646) (GC 59) Webber subsequently reiterated that further bargaining was conditioned upon the Company rescinding its best offer. (GC 46 at 1).

**K. Subcontracting**

Article 1(c) of the CBA provides that:

The Company may subcontract work where all regular full time employees are working and during periods of peak demand and/or in accordance with the employer's past practice, provided that subcontracting shall not be used as a subterfuge to violate the other provisions of this agreement.

(GC 2)

This provision has been included in all collective bargaining agreements between the Parties since 1989. (Tr. 647-648) During negotiations the Union never sought to limit the instances when the Company could subcontract work. (GC 27) Over the past two plus decades the Company has continuously exercised its right to subcontract repair work. (Tr. 648-649) This practice has continued without any challenge from the Union during hiatus periods between contracts. (Tr. 649-650)

The winter of 2009 saw several unprecedented snow storms hit the Washington DC and surrounding areas. As a result, the Company's repair shop was inundated with snow blowers from customers that needed repairs. (Tr. 649-652) (R 24) The Company lacked the necessary parts in its repair shop to fix the snow blowers. (Id.) The manufacturer of the

necessary parts had gone out of business. (Tr. 651) (Tr. 368) (Tr. 236) Consequently, the snow blowers continued to pile up in the Company's repair shop. (R 24)

In March of 2010 the repair shop was still overflowing with snow blowers. (Tr. 653) Some of the same snow blowers the Company received from customers in December remained unfixed, and customers were complaining (Tr. 653) The Company contacted Marlboro Mowers, a local distributor with whom it subcontracted work to previously. Marlboro Mowers, although having the necessary pieces in stock, wanted to perform the work in house. (Tr. 652) (Tr. 236) Accordingly, the Company subcontracted the repair of about twelve snow throwers to Marlboro Mowers. Employees working in the repair shop continued lost no overtime hours while Marlboro Mowers fixed the snow throwers. (Tr. 653)

#### **IV. ARGUMENT**

##### **A. Daycon Declared Impasse In Good Faith Based On Objectivity Established Facts Which Showed That Further Negotiations Would Be Futile**

The duty to bargain collectively is embodied in Section 8(d) of the Act. Section 8(d) requires the employer and union to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions," but explicitly "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d). See also NLRB v. American Nat. Ins. Co., 343 U.S. 395, 404 (1952) ("the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."). Because the duty to bargain collectively does not impose an obligation to agree, at some point during the bargaining process a party can conclude that further meetings and discussions will not produce an agreement and can declare that an impasse has been reached. Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.,

484 U.S. 539, 543 (1988); EAD Motors Eastern Air Devices, Inc., 246 NLRB 1060, 1071 (2006) (A party to negotiations cannot be expected to partake in fruitless marathon discussions).

Ascertaining the validity of an impasse requires a fact intensive analysis, guided by a variety of factors such as the good faith of the parties in negotiations, the importance of the issue or issues as to which there are disagreement, and the contemporaneous understanding of the parties as to the state of negotiations. See Taft Broadcasting Co., 163 NLRB 475, 478 (1967). A review of each of these factors in conjunction with the record evidence overwhelmingly confirms the Parties were at an impasse on April 22.

**B. The Parties' Dispute Over Wage Progression Resulted In An Impasse**

An impasse maybe reached on a single, critical issue where 1) a good faith bargaining impasse exists; 2) the issue resulting in a deadlock is a critical issue; and 2) the issue leads to a breakdown in negotiations. Cal Mat Co., 331 NLRB at 1084, 1097 (2000). In Cal Mat, from the start of its negotiations with the union over a new collective bargaining agreement, the employer sought to eliminate its duty to contribute to a union's pension fund according to a fixed contribution rate. The union was unwavering. It insisted that the fixed contribution rate remain intact. Because the disagreement over whether a fixed contribution rate was an issue of critical importance that resulted in a breakdown in negotiations, a *bona fide* impasse was reached. Cal Mat Co., 331 NLRB at 1097. Similarly, in Bell Transit Co., 271 NLRB 1272 (1984), the Board explained:

Under these circumstances, where the wage issue assumed critical importance, we find that the abbreviated extent of the negotiations is entirely consistent with an impasse finding. The parties need not bargain interminably over issues before an impasse is evident.

Bell Transit Co., 271 NLRB at 1273. See also H&H Pretzel Co., 277 NLRB 1327, 1333 (1985) (impasse after only three meetings as resolution of "fundamental disagreement" not in sight).

1. *The Wage Progression Concept Was Critical in Negotiations*

The facts at hand are analogous to Cal Mat and Bell Transit. One critical issue – wage progression – resulted in a total breakdown in negotiations. The expansion of the wage progression, or “catch up” concept was the “most important” issue for the Union in the negotiations. Webber testified to this (Tr. 222), as did Gibson. (Tr. 533) Likewise, the Company accurately perceived the wage progression concept as the dominant issue:

The concept of catch-up to the top rate in the contract was an overpowering financial issue for the Company. It foresaw a larger investment in the contract than had ever been made in the past, and as a result, it was difficult to deal with other financial issues when you had this 800 pound gorilla in the room called catch-up for everybody within three years.

(Tr. 597)

Throughout negotiations, the Union characterized the wage progression concept as an “absolute” requirement. (Tr. 260, 269) (GC 23) Gibson testified that the Union was “married” to the idea, and that this meant “committed.” (Tr. 541) Even in the “off the record” meeting held between the parties to try to break the stalemate, the Union insisted on its position. (Tr. 304)(Webber in NLRB affidavit admitting he told Krupin that the Union “needed progression to top rate.”) The Union “never wavered” from this position. (Tr. 306)(Tr. 206)

Despite this, the Decision describes the “catch up” issue merely as “very important” and “partially responsible” for the slow pace of negotiations. (ALJD 4:27, 16:4). As evident from the clear facts described above, this portrayal grossly understates the subject’s impact on the negotiations – this was *the* critical issue. (Tr. 615) (all other issues “subordinate to the wage and the catch-up issue”).

2. Stalemate Over Wage Progression Lead to Breakdown in Negotiations

The Union's unyielding rigidity left the Company with only two alternatives: Cave to the Union's exorbitant demands or attempt to reach a rational compromise. The Company selected the latter option, and presented several proposals specifically geared towards alleviating the Union's primary concern regarding the wage differential amongst the bargaining unit. (Tr. 604-605, 609-610) (R 3) (GC 19, 24 26, 27) The Union rejected each proposal, and never wavered from its own position. (Tr. 306) Finally, on February 18 after having modified its wage proposal on six different occasions, Daycon presented its best offer. (Tr. 612) Krupin defined the term "best offer" as meaning a deal needed to be "close" the offer's terms. (R 27 at 6) Webber countered "if close to this than **hard** to get an agreement." (Id). Thereafter, the Union never made any movement from its last proposal on February 18.

Following the February 18 meeting Webber correctly viewed negotiations as "stalled." See (GC 41, p. 2) (Webber noting "negotiations had **stalled** over the major proposals by both parties.")(emphasis added). As described below, over the subsequent three meetings nothing transpired to alter this accurate observation.

The March 17 meeting ended with the Union abruptly walking away from the bargaining table rather than listening to Poole's explanation regarding the onerous cost impact of its proposals. (Tr. 471) (Ratliff testifying "We informed the mediator, that's correct, that the Company seemed to be just stonewalling and we figured we would end the negotiation session that day.")

Four days later the Union conveyed to the employees that "talks broke down." (R 5) The Company's viewpoint towards negotiations was equally dire. Poole viewed the Parties as "deadlocked on the top rate issue," and as such, was bewildered regarding how the process was going to advance forward. (Tr. 629)

The Parties “off the record” meeting on April 1 was equally unsuccessful towards breaking the stalemate. (Tr. 292, 523, 630) At this meeting the Company suggested the “contract rate” idea. The Union reiterated it was “married” to the concept of progression. (Tr. 541) The Union’s refusal to consider the contract rate idea demonstrated the depth of its immovability. (Tr. 663-664) Presto Casting, 262 NLRB 346, 353-354 (1982) (impasse affirmed where the Union rejected a compromise offer from the employer).

The Parties met again on April 22. After Ratliff gave a brief recap of what transpired at the meeting on April 1, Krupin repeated an all too familiar question: Was the Union “wedded” to the concept of catch up by the end of the contract? (Res. 26 at 2) Webber’s response remained the same: “Yes.” (Tr. 155) Shortly thereafter, the Company left the meeting.<sup>13</sup> Poole testified the Parties were “deadlocked”) (Tr. 637) Ratliff agreed that the meeting “ended without any resolution on the *primary* issue of wage progression.” (Tr. 495)

3. *A Contemporaneous Understanding Regarding the Status of Negotiations Existed Between the Parties*

On the morning of April 22, the Union declared that negotiations were “bogged down,” that the workers had “drawn a line,” and that they “may walk off the job if there’s no significant movement soon.” (R 2) Following a third consecutive unproductive meeting, in which Webber informed the Company that the Union was still “wedded” to the concept of wage progression to top rate, on the afternoon of April 22 the Company declared an impasse. (Tr. 155)<sup>14</sup> The Company declared impasse the afternoon of April 22, noting that the Parties “are unable to bridge their ideological divide on the core issue of wages.” (GC 38)

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<sup>13</sup> Ratliff testified that “Jay was being a typical Jay. A son-of-a-bitch is a son-of-a-bitch.” (Tr. 500)

<sup>14</sup> Truly, none of the meetings were productive, considered solely from the standpoint of the Union’s movement (or more accurately, its lack thereof). Its wage proposal on December 9, 2009 differed from the same proposal on April 22 by only a dime, and continued to insist on progression to top rate.

Upon learning of this declaration, Webber wrote a response at Ratliff's direction, because according to Ratliff, the Parties "couldn't be at impasse as long as we still got open items." (Tr. 498) In Webber's letter, also sent and received on April 22, Webber admitted that a "bargaining logjam" existed between the parties. (GC 39) Webber also wrote:

You are very well aware that during the most recent discussions with the Federal Mediator, the Union made a reasonable and rational proposal to resolve the bargaining logjam. **If** you had agreed to that, there were numerous issues that **would have allowed for movement** by the Union. Instead, the Company elected to keep the same proposal on the table that has been for the last three months **so that we could not make progress.**

(GC 39) (emphasis added)

This letter accurately conveys the Union's position, namely: "if the Company agreed to the Union's proposal, that would have allowed for movement by the Union, but since the Company didn't we could not make progress." In other words, the Union was willing to make movement only "if" the Company agreed to its "reasonable and rational" proposal. Since this did not happen, the Union admits that the Parties "could not make progress." (GC 39)

Ignoring this clear evidence, the ALJ skirted around this admission by pretending that the Union "showed some flexibility" by modifying its proposal from a three-year to a five-year progression to top rate. (ALJD 16:17) In reaching this conclusion, the ALJ ignored direct evidence that this proposal was never made.

But the letter actually makes clear that the Union's supposed flexibility was contingent on the Company accepting its proposal – which is not really flexibility, is it? This "we'll move only if you first accept our proposal" mentality illustrates perfectly that neither party was willing to compromise on its position – the very definition of impasse. See Presto

Castling 262 NLRB 346 (1982) (impasse found where union representative's notes recited: "we are deadlocked"); Seattle-First Nat. Bank 267 NLRB 897, 898 (1983).

Likewise, other evidence clearly established that the Union was about as flexible as a brick. For instance, Webber's testimony that he proposed a five year progression on April 22 is irreconcilable with the record evidence. (Tr. 306) While Webber had, in the "off the record" meeting held on April 1, made "exploratory" suggestions of first a four-, and later a five-year wage progression, these were never formal proposals. (Tr. 285) The Union then made clear at the outset of the April 22 meeting that it expected only a three-year agreement and progression. (Tr. 636)

Indeed, directly contradicting his assertion that the Union had formally proposed a five-year wage progression, Webber confirmed in a letter *one week after an impasse* that the Union considered a three-year wage progression a "necessity" and was "holding" to that stance:

[T]he Union has informed Daycon on numerous occasions about **the necessity for catch-up progressions** in the terms of any new contract. Currently, new hires receive wages far less than more senior employees for performing the exact same work; in some cases, the differential can be as much as \$6.00. **The Union has proposed a three-year catch-up progression to help close the gap in this differential.** The Union **holds to the stance** that all employees should be afforded the opportunity to earn the same wage rate as the highest paid employee within the same job classification.

(GC 41) (emphasis added)<sup>15</sup>

The letter seemingly admits that only a three-year progression proposal was advanced, as it states that "the Union finds it hard to believe that a **three-year catch-up** progression is 'inconceivable,'" and that "the Union's three-year progression model was perfectly **reasonable to propose** in the scope of negotiations[.]" (GC 41, p. 2) This letter, entered into

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<sup>15</sup> On direct examination, Webber testified that this letter accurately represented the discussions that had been had for a new collective bargaining agreement during the late months of 2009 and early months of 2010. (Tr. 215-16)

evidence by the General Counsel, and the absence of any reference whatsoever to the supposed five-year proposal, completely undermines Webber's testimony to the contrary.

Webber's excuse for why his correspondence continued to refer to a three year progression when he supposedly proposed a five year progression doesn't make much sense:

Q. I thought you just told me that you proposed going to five years on April 22nd.

A. We did.

Q. Why does [the letter] say you proposed a three-year catch-up progression on April 29th?

A. Sometimes when you propose something and it's not acted on doesn't mean that something has changed. We proposed, and we were waiting for them to give us a response to it. So we didn't know if we had a five-year proposal or three-year proposal because the Company didn't respond.

(Tr. 307)

As the Union had filed its impasse ULP only two days earlier (GC 1-C), surely if the Union was uncertain regarding its proposals it would have documented its "modified" proposal for a five year progression. Instead, Webber's April 29 correspondence accomplished the exact opposite – it specifically memorializes that a three year progression remained a "necessity" to the Union. (GC 41) Furthermore, although Webber kept fairly detailed notes during negotiations, a contemporaneous record to support the supposed five year progression does not exist. (Tr. 307) (Webber admitting his "notes don't reflect that"). On the other hand, Jodie Kendall's notes explicitly set forth that Webber was very clear regarding the Union's preference to maintain a three year agreement. (Tr. 636, R 26)

The July 13 meeting is further evidence that the Union never made a five year progression proposal on April 22. Webber testified that after collaborating with the committee on July 13 he received authorization to present a proposal for a five year progression at this

meeting. (Tr. 351) This of course, begs the obvious question: If the Union had made this proposal on April 22, why did it first need the approval of its committee to present this position again on July 13? Webber's explanation again makes little sense: "we never got a response back from the Company, whether they accepted it or not, so we wanted to make clear again that we were proposing a five year agreement." (Tr. 351-352). Once again, Webber's explanation leaves much to be desired, and is unquestionably undermined by his own letter. (GC 41)<sup>16</sup>

Webber's April 22 letter demonstrates the Union's lack of flexibility in another way. Webber testified that the supposed "reasonable and rational proposal" which could have rescued the parties from the "bargaining logjam" was the alleged formal proposal of a five-year wage progression.<sup>17</sup> (Tr. 208) (Tr. 306)

This admission seals the Union's fate – for if the "reasonable and rational proposal" to which Webber referred was merely the formal proposal of the five-year progression to top rate, this merely rehashes the same concept which was entirely unacceptable to the Company – namely, the concept of progression to top rate within a contractually-defined time period. This demonstrates inflexibility – the Union's continued insistence on the very issue over which the Parties were deadlocked. Properly construed, Webber's correspondence provides devastating evidence that the Parties *were* at impasse – and combined with the Company declaration of the same date, it is clear that both parties had a clear contemporaneous understanding of the bargaining deadlock. (GC 38, 39)

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<sup>16</sup> Several rejected exhibits also undermine Webber's insistence that he proposed a five-year progression. (R 12)(May 26 article quoting Webber as stating "The problem is that their wage structure is all over the board and we're looking for equal pay for equal work, including a proposed three-year catch up for new hires."); (R 18)(May 7 article, Ratliff stating "union members hoped to negotiate a three-year progression pay scale"). These exhibits were improperly rejected. See argument, *infra*.

<sup>17</sup> As demonstrated above, this offer was never made.

This is especially so where the same letter demonstrates the issue which divided the Parties was the *concept* of a wage progression to top rate; whether it was three years or five years was immaterial, it was the *concept itself* which was unacceptable. Webber wrote:

We make no apology for wanting our members to have a realistic chance to obtain the top contractual rate in the agreement. The Company's position basically establishes an illusory top rate, because it is almost impossible to obtain. In other words, you want to keep moving the goal line.

(GC 39) (emphasis added)

Finally, the Union admits the fundamental difference – it is not whether the period proposed is three or five years; rather, it is that the Parties disagree as to whether there should be any contractually-defined period of any length in which an employee would reach the top rate. Leaving aside the negative connotation, the Union will not accept an “illusory” top rate, while the Company will not accept a concrete top rate.

Thus, even assuming *arguendo* that Webber had proposed a five-year progression at the April 22 meeting (which is an incredible leap of faith) such a proposal would not (as the ALJ found) have demonstrated any “flexibility” or movement on the core issue. (ALJD 16:11-12). The Parties’ reached an impasse because of their ideologically different viewpoints over allowing an employee to reach top rate within *any* set period of time – thus, whether the period was five years or three years was of little moment.

Once an employer makes its last offer, the union's willingness to modify its proposal without embracing the *principles* of the employer's final offer demonstrates impasse. See Detroit Typographical Union No. 18 v. NLRB, 216 F.3d 109, 119 (D.C. Cir. 2000) (impasse upheld based on a philosophical difference over how wages should be structured). For example, in Times Herald Printing Co., 223 NLRB 505 (1976), the employer viewed the abolition of

“manning” requirements as an economic necessity. Although the union appeared willing to *modify* the manning clause, it was unwilling to *eliminate* the clause, which it considered to be the “heart and soul” of the contract. *Id.* at 505, n.5. The Board found that an impasse resulted over the parties’ strong disagreement over the manning issue, in spite of the union’s willingness to compromise. *Id.*

The same is true here. Extending the time period by which employees would “catch up” does not bridge the ideological divide between the Parties; it merely means the Company is now chasing down a higher top rate. (Tr. 542-546, 482-485; 631:4-10, 723 -724) Considering the undisputed fact that the Company did not want automatic progression to any top rate, the four- and five-year progression proposals would not constitute movement towards a desired objective.

In E.I. DuPont De Nemours & Company, 268 NLRB 1075 (1984), the core issue in negotiations was job movement. In numerous bargaining sessions, “the Union indicated that the job movement proposal was one of the main items preventing an agreement.” *Id.* at 1075. While the union stated that “it might continue to make counterproposals” it made clear it “would never accede to the Company’s position.” *Id.* The company “concluded that there was no prospect of reaching an agreement due to the deadlock over job movement,” and implemented its proposal. E.I. DuPont, 268 NLRB at 1075.

The Board noted that “there need be no undue reluctance to find that an impasse existed,” and stated that “The Company’s firmness, which no one claims to have constituted bad-faith bargaining, militates toward rather than against a finding of impasse, especially in light of the Union’s indication that it would not accept the Company’s proposal.” *Id.* at 1076. In reversing the ALJ’s determination that the parties had not reached a valid impasse, the Board

noted that “the subject of job movement had become of central importance to the parties by the time the Company acted,” before holding:

Because of the overriding importance of the issue, and because after long, hard negotiations the parties were still not close to reaching agreement on critical aspects of the job movement question, **a finding of impasse is warranted irrespective of whether there was some movement in the parties’ positions prior to the Respondent’s implementation of its proposal**, or whether the deadlock was produced by differences either on one or on many significant issues.

E.I. DuPont, 268 NLRB at 1076 (emphasis added).

The same is true here – the wage progression issue was of “overriding importance,” and after long, hard negotiations the parties were still not close to reaching an agreement. No one pretends otherwise. Accordingly, the parties were at impasse on April 22. See E.I. DuPont, 268 NLRB at 1076; and Cal Mat Co., 331 NLRB at 1097.

Similarly, in United States Sugar, 169 NLRB 11 (1968), both parties assumed strong positions on critical matters which needed to be resolved for an agreement to be reached. “[E]ach side took the position at that meeting that while its last proposal was not a ‘final’ one, it would not move further unless the other side moved first; and neither side would move first.” Id. at 19. Based on these circumstances, the Board held an impasse existed, as neither party was willing to move. The situation in US Sugar is instructive:

Both parties had taken strong and opposing positions on matters which had to be resolved to reach a contract. Each party had explained its own position and had explored the opposing view. Both parties had bargained in good faith with a sincere desire to reach agreement. Each party considered that it had made considerable movement on the unresolved issues but that the last proposal of the opposing party was too far out to be within range of being reached. Each party indicated that it was in no position to make any further concession unless the other party moved first. **Each party took the position that it would not be the first one to make another move.**

United States Sugar, 169 NLRB at 19 (emphasis added).

Clearly, where neither party is willing to move, there is an impasse. The facts at hand are strikingly similar to US Sugar. Neither party was budging. – as Webber stated, without the Company accepting the Union’s “reasonable and rational proposal,” the Parties “could not make progress.” (GC 39)

Further confirming the validity of the impasse declaration, Webber testified that the alleged movement that the Union would have made if only the Company would have agreed to the Union’s “reasonable and rational” proposal (“there were numerous issues that *would have* allowed for movement by the Union”) was never actually conveyed to the Company, but only discussed during a Union caucus. (Tr. 209)(the language in the letter was based on “discussions the Union committee had had while they were down the hall crunching numbers”). In the absence of some objective indication that the Union was actually willing to move on the core issue dividing the Parties, the Company was justified in concluding that further negotiations would be futile.

Ratliff’s testimony further solidified the Union’s entrenchment on the progression concept. See Seattle-First Nat. Bank 267 NLRB at 898 (union’s assertion that it could “never accept” the employer’s proposals supported an impasse). Ratliff testified that the Union simply could not, and would not accept the Company’s proposal for a substantial wage *increase*:

- Q. And when you said that you have no other choice but to go on strike, couldn’t you have accepted the Company’s offer?
- A. **No, we couldn’t have. We couldn’t accept the Company’s offer.** The Company wanted a distress cause in the contract, and that was one of the big, major topics that **we couldn’t accept that.**
- Q. What about the Company’s wage increases, couldn’t you accept the wage increases?
- A. Again, **it was rejected by the membership.**

Q. How about the duration, from the date of ratification, couldn't you accept that?

A. Again, the Company had already took it in front of their members. **The offer was rejected.**

\* \* \* \* \*

Q. And to be clear then, you could have accepted those proposals, but they were unacceptable to you?

A. The members could have accepted, but bottom line is we take it to the members, they had given their last offer – before a strike – **well, the members could have accepted it, but they didn't. They turned it down.**

Q. And in effect the Union's response to the Company's proposals was "no?"

A. That's exactly right.

(Tr. 502-503)(emphasis added)<sup>18</sup>

Gibson confirmed the Union's intransigence, testifying that the Union never even considered accepting the Company's proposal, "because we didn't think it was fair and reasonable." (Tr. 551) In sum, a litany of statements from the Union characterizing negotiations as deadlocked establishes the depth of the intransigence, and confirms the validity of the impasse:

February 18 – "negotiations had stalled" (G. 41, p. 2)

March 17 – parties "far apart" (Tr. 277)

March 17 – Union walks out (Tr. 618)

March 21 – "talks broke down" (R 5)

April 1 – Union "married" to concept of three-year progression (Tr. 303-04, 523)

April 22 – Union "wedded" to progression (Tr. 636) (Tr. 155)

April 22 – negotiations "bogged down," employees "have drawn a line" (R 2)

April 22 – "bargaining logjam" (GC 39)

April 27 – "contract talks" with the Company "broke down last Thursday" (R 6)

April 29 – confirms three-year proposal (GC 41)

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<sup>18</sup> In a press release issued following the strike, the Union confirmed again that the Company's proposal was unacceptable to its members. The press release quoted Eugene Brown ("Brown") a Union steward and bargaining committee member, as stating that the "pay scale" system proposed by Daycon would "prevent the younger guys from ever getting to the same wage levels as the more senior guys" and that "we are not going to accept it[.]" (R. 19) Ratliff testified it was this kind of sentiment on which he had based his assertion that the unit would never agree to Daycon's proposal. (Tr. 509)

Beginning on February 18, four consecutive meetings each followed an identical script – one issue, no progress. Still, like Charlie Brown trying to kick Lucy’s football, the Company continued to explore options to reach agreement. Each time, the Union insisted on its proposed expansion of the wage progression concept, and nothing would move them off of it. As neither party blinked, they ended up at impasse. See Memorial Consultants, Inc. and Teamsters Chauffeurs and Helpers Local No., 153 NLRB 1, 19 (1965).

Employees had been waiting for wage increases since the CBA expired on January 31. (GC 2) It was clear that the Parties’ inability to resolve the wage issue rendered further bargaining an exercise in futility. (Tr. 637-639) Accordingly, shortly after the April 22 meeting the Company rather than continue to partake in useless negotiations with the Union exercised its right to declare that the Parties were at an impasse. See Richmond Electrical Services, Inc., 348 NLRB 1001, 1003 (2006) (impasse upheld where disagreement over wages led to a complete breakdown in negotiations); CalMat Co., 331 NLRB at 1097 (logjam over the critical issue of a pension plan resulted in an impasse); In re Matanuska Elec. Ass’n, Inc., 337 NLRB 680, 683-84 (2002) (“Respondent had no reason to believe that the Union would change tactics in the foreseeable future and therefore was permitted to declare impasse and implement its final offer.”); Sage Development Co., 301 NLRB 1173 (1991) (There was “was no ray of hope” of reaching an agreement until a party altered its position in a meaningful way).

4. *The Parties Conduct Post-Impasse Demonstrates Depth of Divide*

The Parties’ conduct post-impasse is telling evidence regarding the depth of their stalemate. Despite a strike which is now eleven months old, both sides have maintained their respective positions. (GC 59) (R 15, 16, 32) See Transport Co. of Texas, 175 NLRB 763 (1969) (recognizing that an impasse may be shown by a union’s willingness to strike and the employer’s willingness to weather a strike). Furthermore, the July 13 meeting was an episode of

déjà vu. The Union continued to insist on progression to top rate while the Company maintained that such progression was untenable. (Tr. 643, 646) (R 16) Charles D. Bonanno Linen Service, 229 NLRB 629, 630 (1977) (meetings following a lawful impasse were unsuccessful in breaking the impasse).

Moreover, in the months following the strike the Union still neglected to share what its supposed “reasonable and rational” proposal was. What exactly was the big secret?? Frankly, if the Union had movement to make on numerous issues, why didn’t it do so? In these circumstances, the proclamation that the Union may have had some secret plan among its own committee to make movement on its position once the Company moved *first* simply confirms the validity of the impasse. See United States Sugar, 169 NLRB at 19.

The final nail in the coffin occurred on July 23 when Ratliff took the position that unless Daycon rescinds the implemented terms further bargaining will be futile. (GC 59) In his letter, Ratliff demanded that the Company rescind its wage increase, and refused (and still refuses) to bargain until the Company does so. (GC 59) (Tr. 510-513) In essence, Ratliff demands that the Company change its bargaining position, and conditions the Union’s further bargaining on this change of position. Such a demand is unlawful unless the parties are at impasse. See The Developing Labor Law, p. 995 (BNA 5th ed., 2006)(“one party cannot condition further bargaining on the other’s willingness to modify its position unless there is a valid impasse.”); and AMF Bowling Co., 314 NLRB 969 (1994)(“in the absence of a valid bargaining impasse, the Respondent could not legitimately precondition further negotiations on the Union’s willingness to alter its bargaining stance.”).

Ratliff’s July 23 proclamation that further bargaining would be futile also served to reiterate that the same mutual understanding which existed on April 22 regarding the futility

of further bargaining remained in place three months later. AMF Bowling Co., Inc. v. N.L.R.B. 63 F.3d 1293, 1301 (4th Cir. 1995) (impasse confirmed where the union repeatedly reinforced its unwillingness to discuss wage concessions). See also Lou Stecher's Super Markets, 275 NLRB 475 (1985) (the parties contemporaneous understanding of the state of negotiations coupled with the subsequent failure to resume negotiations acknowledged further bargaining would be futile).

The GC and Union assert that an impasse was declared prematurely because the Union was waiting for Krupin to “crunch numbers” (Tr. 274) (GC 57) (Tr. 487) Putting aside the obvious - that “crunching numbers” was wholly unnecessary when the issue was progression to *any* top rate - follow the logic on Petitioner’s assertion. Assume for a moment that the Company left the room, “crunched the numbers” and then returned to confirm what it had proclaimed for six months - that the proposal was untenable. Presumably it would tell the Union “no,” (again) which is precisely what happened:

Q. And the April 22nd letter is a response, isn't it?

A. But as far as we were concerned, he shouldn't have responded like that. It was totally wrong for him to respond like that. I mean, he did what he did. You know, it was just that he didn't want to negotiate anymore. We still were negotiating, trying to reach an agreement.

Q. In effect, Mr. Ratliff, would you agree with me that the April 22nd response was “no” from the Company?

A. Yes.

Q. And that was the response that you received on April 22nd?

A. Yes.

Q. That the Company said “no.”

A. That's correct.

(Tr. 499)

As noted above, after confirming that the Union remained “wedded” to the concept of progression to top rate, the Company left the April 22 meeting. (Tr. 636-37) Seizing on this fact (while conveniently ignoring the fact that the Union walked out on the prior formal meeting between the Parties),<sup>19</sup> the ALJ determined that the Company had “foreclosed any further movement in negotiations.” (ALJD 16:21)

However, the assertion that this action on the part of the Company could somehow have “foreclosed any further movement in negotiations” on the part of the Union is preposterous. This statement has the intellectual weight of a feather – think about it: if it were true, the Parties would have been at an impasse! And yet the ALJ points to this as the primary evidence that the parties were *not* at impasse. One simple question demolishes the nonsensical premise – what prevented the Union from making a change to its position after the April 22 meeting ended? Obviously, nothing (unless you count its own unwillingness).<sup>20</sup> Thus, the silly claim that one party’s leaving a meeting forecloses any further movement in negotiations by the other party collapses on itself, and demonstrates the complete lack of logic underlying the Decision.

Even if common sense could tolerate such an assertion, the evidence of record in this case will not. The Union could have changed its proposals at any time, before or after the April 22 meeting. The Company declared impasse after leaving the April 22 meeting, in a letter sent later that afternoon. (GC 38)(Tr. 158) After discussing it for an hour, the Union responded,

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<sup>19</sup> (Tr. 283-84) (Tr. 472) (Tr. 618)

<sup>20</sup> But even impasse itself does not preclude further movement. See Hi-Way Billboards, Inc., 206 NLRB 22, 23 (1973)(“it is clear that an impasse is but one thread in the complex tapestry of collective bargaining, rather than a bolt of a different hue. In short, *a genuine impasse is not the end of collective bargaining.*”)(emphasis added). Accordingly, a party is obviously free to modify its proposals any time it chooses; indeed, that is one of the purposes behind allowing a declaration of impasse – to break a stalemate between the parties. See Bonanno Linen Service v. NLRB, 454 U.S. 404, 412 (1982)(“an impasse may be brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process.”).

denying that the parties were at impasse. (GC 39) (Tr. 159-60) However, rather than make the movement it had supposedly been discussing, the Union made clear it was *not* moving. (GC 39) (“there were numerous issues that **would have allowed for movement** by the Union.”)

Indeed, rather than respond to the Company’s assertion of impasse by merely denying the parties were at impasse, the Union could have demonstrated this fact by actually modifying its position. What stopped it? The testimony shows that Union had discussed withdrawing its pension proposal, and other potential options as well. Webber testified:

A. [W]e would have, like I said earlier, we were there prepared to bargain all day. They called the office and we were expecting them to come back, good, bad or indifferent. **We would have ... moved forward and continued bargaining.**

Q. And what, if anything, did you contemplate doing regarding the pension proposal?

A. We had discussed withdrawing.

(Tr. 211)(emphasis added)

Why were none of these supposed options advanced? Why have they still not been advanced? The fact that one meeting ended does not mean that the Union could not make its promised movement, yet it failed to do so. Plainly, the idea that the Union was willing to move is complete speculation – there is absolutely no evidence to support such an assertion.

Clearly then, the idea that the Company leaving the meeting on April 22 without first notifying the Union could mean that the impasse was declared prematurely is utterly absurd. Hypothetically, suppose that the Company, rather than leaving the meeting on April 22 went back to the bargaining table and said “we are at impasse.” The Union surely would have said “no, we’re not,” and the Parties would have had face-to-face the same fruitless conversation conveyed by their correspondence that same day. (GC 38, 39) More succinctly, the Parties

would be in the same position today – disagreeing about both progression and the validity of an impasse – regardless of whether the Union learned of the Company’s declaration of impasse in a letter or face to face. AMF Bowling Co., Inc. v. NLRB, 63 F.3d 1293, 1301 (4th Cir. 1995) (parties need not pursue negotiations simply to go through the motions when there is no objectively reasonable hope of reaching an agreement).

For the foregoing reasons, a *bona fide* impasse was reached. Having lawfully reached impasse on April 22, Daycon was entitled to implement its last offer to the Union on April 23. The Act clearly permits unilateral implementation following a *bona fide* impasse. Taft Broadcasting Co., 163 NLRB at 478.

C. **Counsel for General Counsel Failed To Show Causation Between The Alleged Unfair Labor Practice And The Strike**

The GC failed to carry its burden of demonstrating a causal connection between the unfair labor practice strike and Daycon’s alleged illegal implementation of its best offer. Brunswick Hospital Center, Inc., 265 NLRB 803, 814 (1982) (“The applicable legal principle is clear. The General Counsel has the burden of proving that the strike was caused or prolonged in whole or in part by an unfair labor practice.”).<sup>21</sup>

The fact that a strike and an unfair labor practice coincide in time is insufficient to establish a causal connection between the two. See Tufts Brothers 235 NLRB 808, 810 (1978); John Cuneo, Inc., 253 NLRB 1025, 1026 (1981) (insufficient to show that the unfair labor practice preceded the strike.) As stated by the Fourth Circuit in Pirelli Cable Corp. v. NLRB, 141 F.3d 503, 517 (4th Cir. 1998), “There must be evidence that the strike was motivated by the employees desire to vindicate their rights under the NLRA.” Here, there is simply no evidence

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<sup>21</sup> As the Respondent has met its burden of showing a valid impasse, there is no ULP here; accordingly, there can be no ULP strike as alleged by the GC. *The Developing Labor Law*, p. 1596 (BNA 5th ed., 2006)(“There must be an actual finding of an unfair labor practice in order to find an unfair labor practice strike.”).

that the employees – who voted to strike in February, based solely upon contract updates and the wage progression concept – went on strike to vindicate their rights under the Act.

While the Union officials who testified attempted to steer the strike into a ULP strike, their self-serving testimony is highly suspect. As the Pirelli court noted: “In examining the union’s characterization of the purpose of the strike, the Board and court must be wary of self-serving rhetoric of sophisticated union officials and members inconsistent with the true factual context.” Pirelli, 141 F.3d at 518.

In this case, it is clear that the Union planned to strike, if necessary to achieve its economic demands – the very morning of the last negotiation session, it said as much in a press release. (R 2) The only authorization the Union had obtained from the employees to strike was obtained in February, and was based only on economic issues. (R 1) (R 5) As stated by the Ninth Circuit: “The proper inquiry is whether the employees actually voted to strike at least in part because of the unfair labor practice.” California Acrylic Industries, Inc. v. NLRB, 150 F.3d 1095, 1102 (9th Cir. 1998). They did not.

Instead, it is clear the strike vote rested solely on economic concerns. The steward Brown testified that at the February strike vote, Webber came in and called the meeting to order before stating that “he was here to bring us up to date on what was transpiring in negotiations with Daycon and the Union.” (Tr. 561) On direct examination, Brown testified that Webber informed the employees that “for some reason Daycon was lacking in negotiations,” and that the sticking points were an economic distress clause and something else. (Tr. 561) On cross examination, Brown admitted that the two items discussed were the economic distress clause and wages before stating that the issue was “progression” for the “non-senior workers in the company.” (Tr. 574, 577) Obviously, the strike vote was premised on the concept of wage

progression, and when the members voted to strike, they did so on the basis of economic concerns, rather than any desire to vindicate their rights under the Act.<sup>22</sup>

Moreover, after the implementation of the wage increase, Brown testified that not a single employee asked a question of the Company when it was announced. (Tr. 570) Moreover, once the wage increase was implemented, no employees – were informed of the strike; instead, Ratliff himself decided to strike (Tr. 502), and the workers learned of the strike only when they appeared for work. (Tr. 374-75) Brown himself broke down on the stand when discussing how he learned when he drove to work on April 26. (Tr. 571) Another member, Redmond, testified that he was actually at work, and didn't realize the unit had gone on strike. (Tr. 394) When he walked out to the picket line, Webber gave him a sign and said he was on strike. (Tr. 394) Webber told Redmond that the Company "violated the labor practices," and Redmond replied "Well, whatever that means, I'm with you guys." (Tr. 395)

The day after the strike, in another press release, the Union noted that it had struck Daycon, and further declared that "The main sticking point is workers' frustration at being stuck at the low end of the pay grade system after years on the job." (R 6)<sup>23</sup> While Webber evasively attempted to distance the Union from the press release, he could not disavow the quote. (Tr. 319)<sup>24</sup> In addition, in a press release issued directly by the Union, the Union specifically referred other Teamster local unions and affiliates to the website of the Washington Metropolitan

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<sup>22</sup> The next month, in "preparation for any event that there is any type of a job action," Webber invited a speaker from the Metropolitan Council to speak to the members in another meeting to discuss the negotiations. (Tr. 315)(R 5)

<sup>23</sup> In a letter to Daycon customers, the Union noted that "the owners of the company refuse to share their gains with the workers." (R 9) See also (R 19) ("we are asking for equal pay for equal work" and Brown quoted as saying "we are not going to accept [the two-tier pay system]" and "the senior guys are committed to standing by the younger workers to make sure this doesn't happen."); and (R 13)(establishes that the supposed ULP is the Company's refusal to bargain fairly; not the implementation).

<sup>24</sup> Webber also admitted receiving a copy of the same article in his mailbox. (R. 33) (Tr. 758-61)

Council for “additional information on the strike[.]”<sup>25</sup> The exhibits which Webber attempted unsuccessfully to disavow, including Respondent’s 2 and 6, were each published on that site. See (R 8) (Tr. 326-27)(“We’ll stipulate[e] that the Council has published the articles.”)

Clearly here, at best the Union had a “bait and switch strike” – it secured authorization based solely on economic reasons, then labeled it a ULP strike merely to garner the protections of the Act, while simultaneously striking for economic reasons. About this, the Pirelli court has noted:

The motivation to have one’s cake and eat it too – attaining the protections of unfair labor practice strikers while striking for economic reasons – **is not motivation to vindicate one’s NLRA-protected rights and thus cannot lead to a finding of causation.** We cannot hold that an unfair labor practice was a contributing cause of the strike merely because the Union members’ votes were premised on leaders’ reassurances that the members would enjoy the protections concomitant with the designation unfair labor practice strike. **An unfair labor practice strike is a sword to be used by Union members to vindicate violations of their rights under the NLRA; it is not a shield to protect their jobs from the potential legitimate consequences of an economic strike.** Here, the Union leaders wanted the unfair labor practice charge to protect union members from the consequences of their refusal to accept their employer's demand for economic concessions.

Pirelli Cable Corp. v. NLRB, 141 F.3d at 519 (emphasis added).

In Tufts, two members of the union’s negotiating committee testified that the strike was a consequence of the union’s failure to attain satisfactory progress in negotiations, and that a strategy of “greater militancy” was decided upon at least one month prior to the commencement of the strike. See Tufts Brothers 235 NLRB at 810. In finding there was no causation between the unfair labor practice and the strike, the Board explained:

Unfair labor practices must be more than a source of dissatisfaction; they must be one of the reasons for striking. It is

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<sup>25</sup> Webber admitted the Union is a member of the Metropolitan Council. (Tr. 321)

clear that the Union locked itself into a strategy whereby progress at the negotiating table on union-security and other economic issues was the requirement for avoiding a strike.

Id. at 811.<sup>26</sup>

The following timeline demonstrates a strike was avoidable only if the Company agreed to accept the “catch up” concept central to the Union’s proposals.

- February 27: Strike vote meeting; employees instructed that “the company needs to know that you the members are willing to fight for a fair contract” (R 1) Webber testified a fair contract equals “catch up” raises. (Tr. 274) Webber notes “Company has not declared poverty” (R 1)
- March 21: At the Union’s request, individual from speaks to members about financial issues in event of strike. (Tr. 315) Included among Webber’s agenda items: “company appears to be willing to take you on,” “we must remain strong!!!!!!!!” and “request and set up picket line captains” (R 5)
- April 1: Despite its supposed “positive feelings” after meeting, immediately filed an unfair labor practice. (ALJD 1)
- April 22: In a press release prior to the Parties’ April 22 meeting, titled “Teamsters May Strike Daycon,” Webber quoted as saying workers “have drawn a line,” and “we’ve got folks who have been working 6-8 years and are still stuck at lower pay grades.” (R 2)
- April 26: Four days after saying the Union had “drawn a line” the strike commenced. Webber testified the phrase “drawing the line” referred to the Union’s insistence upon a three year wage progression. (Tr. 299).
- Post-Strike: The Union has repeatedly announced that employees are fighting for equal pay for equal work, or for more money. (Tr. 477)(when the Union refers to equal pay for equal work, it is referring to the three-year wage progression concept) (R 8) (the unit consists of drivers, warehouse and utility workers who are fighting for equal pay for equal work; (R 9) (owners of the company refuse to share their gains with the workforce) (R 19) (we are asking for equal pay for equal work)<sup>27</sup>

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<sup>26</sup> See also Mattina v. NLRB, 2008 US Dist. LEXIS 63029 at \*98 (S.D. N.Y. 2008)(“In determining what motivated the strike, it is the motivations of the strikers not the union, that is relevant.”).

<sup>27</sup> Numerous rejected exhibits establish the economic motivation behind the strike. See (R 11) (noting that workers “are protesting the company’s uneven pay scale,” and “All we want is a fair day’s pay for a fair’s day work.”); (R 12) (workers “protesting the company’s uneven pay scale.” and “Right now they don’t even have a reasonable mechanism for getting people to the top pay rate”); (R 18) (Brown quoted: “We’re fighting for equal pay for equal work” and Ratliff quoted as saying workers “are protesting the company’s uneven pay scale”). Ratliff read the quotes attributed to him in the article and stated that he “wouldn’t dispute any of it.” (Tr. 507) See also (R 34) (“All

The GC has neither alleged nor proven the existence of unfair labor practices prior to the implementation of the best offer on April 23. Instead, the weight of the evidence shows that the strike was a fait accompli if the Company refused to concede to the Union's demands. See Kingsbridge Heights Rehabilitation Center, 352 NLRB 6, 16 (2008) (causation not proven when no unfair labor practices prior to the taking of a strike vote); and NLRB v. Harding Glass Co., 80 F.3d 7 (1st Cir. 1996) (causation not established where just as likely that the employer's adherence to a proposal deemed unacceptable is what continued to fuel the union's protest). The record evidence overwhelmingly shows the General Counsel failed to meet its burden of showing there was causation between the alleged illegal implementation and the strike. As such, the strike cannot be deemed an unfair labor practice strike.

**D. The Union's Offer To Return To Work Was Not Unconditional**

If the strike is deemed to be an unfair labor practice strike, employees can be awarded backpay only if an unconditional offer was remitted to the Company. Here, such an offer was never made. In conjunction with the asserted unconditional offer to return to work on July 2, Webber proclaimed that "in addition" bargaining should resume. (GC 43)<sup>28</sup> The "additional" caveat that bargaining resume casts doubt on whether the July 2 offer was truly unconditional. Continental Industries, 264 NLRB 120 (1982); Pan American Grain Co., 343 NLRB 318, 319 (2004)(must be "unequivocally unconditional").

Subsequent correspondence from Webber and Ratliff to Krupin alleviated any doubt. On July 23 Ratliff wrote that further bargaining was contingent upon the Company rescinding the terms it implemented. (GC 59) He further testified that "unless and until"

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we want is a fair day's pay for a fair day's work, and to be treated with dignity and respect. It's time for management to start playing fair and square")

<sup>28</sup> The parties never met to bargain until July 13, and in the interim no employees attempted to return to work. While the GC has asserted that employees were prevented from returning to work; the only testimony on this point was that the workers never even tried to return to work. (Tr. 398)("Did you try and enter the facility? No.")

Daycon undid its implementation the Union would not meet with Daycon. (Tr. 512) If the Union had submitted an unconditional offer to return to work on July 2, a literal reading of Ratliff's testimony would mean that if the Employer reinstated the strikers but maintained the terms implemented, the Union would walk away (i.e. "not meet with Daycon"). If this were true the Union would have accepted the Employer's best offer (a wage increase) without initiating a strike, or at the very least accepted the offer at the July 13 meeting. It did neither. Ratliff's testimony confirms that the July 2 offer was conditional upon the Employer rescinding the terms implemented. On October 1, Webber wrote to Krupin "We asked you in late July to reinstate our members *and rescind* the unlawfully imposed terms and conditions so that we could return to the table." (GC 46) (R 13)(same sentiment on July 6)

The Union failed to treat reinstatement as a distinct remedy.<sup>29</sup> As such, the Union failed to submit a true unconditional offer to return to work. Taylor Lumber and Treating, Inc., 326 NLRB 1298, 1310 (1998), citing McCallister Bros., 312 NLRB 1121, 1122 (1993).

**E. The ALJ's Rejection Of Certain Exhibits Solely On Relevancy Grounds Was Clear Error**

Based solely on relevancy grounds, the ALJ erroneously rejected Respondent's proffer of three newspaper articles, and two more press releases as exhibits.<sup>30</sup> The rejected exhibits include: (R 11) (Tr. 333-34)("I don't see any relevance to this case."); (R 12) (Tr. 338-39)("I don't see anything relevant or helpful to me in making credibility or making any findings here"); (R 18) (Tr.507-508)("I'll reject it, not for authenticity or anything like that, relevance."); (R 33); (R 34).

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<sup>29</sup> Additional support for this argument was gleaned before the District Court, and is the subject of a previously-filed motion to reopen the record.

<sup>30</sup> The authenticity of each article was stipulated too, and no hearsay objections were ever made or ruled upon.

An unfair labor practice proceeding shall be conducted in accordance with the federal rules of evidence. See NLRB Rules and Regulations, Sec. 102.39. “Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. FRE 401. Here, each of the exhibits whose admission into evidence the ALJ rejected clearly meets this criterion.

Each of the rejected exhibits is plainly relevant to the matter before the Board. Each relates to the issues of impasse and the strike, and describes the union’s position or quotes union members or officials. For example, Respondent’s Exhibit 11 describes the strike as a protest against “the company’s uneven pay scale.” When questioned about the veracity of this description, Webber agreed it was accurate. (Tr. 333) In Respondent’s Exhibit 12 Webber is quoted as saying “The problem is that their wage structure is all over the board and we’re looking for equal pay for equal work, including a proposed three year catch up for new hires.” Webber did not deny making the statement, and agreed that he “may have said that.” (Tr. 336-37) In Respondent’s Exhibit 18 Ratliff is quoted as saying “union members hoped to negotiate a three year progression pay scale across the board[.]” At the hearing Ratliff read the statements attributed to him in the article, and stated he “wouldn’t dispute any of it.” (Tr. 507)

Clearly, each of the exhibits is relevant to the disputes at hand. Given that the only basis for the objections raised against each was relevancy, each of the exhibits should be admitted into the record.<sup>31</sup> Massilion Community Hospital, 282 NLRB 675 fn. 5 (1987); Optica Lee Borinquen, Inc., 307 NLRB 705 fn. 6 (1992)(statements arguably material should be

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<sup>31</sup> The same is true of Respondent’s exhibits 30, 33, 34, and 35. (Tr. 764) (“I mean these are interesting, but they’re not helpful to me coming up with any conclusion in this case.”) (Tr. 753) (Tr. 769) As noted on the record, Webber had received and reviewed both of the documents, and had not objected to anything in them. (Tr. 764) Moreover, the Union specifically referred interested parties to the Metropolitan Council for further information. (R 8)

received into evidence); Trump Plaza Hotel & Casino, 310 NLRB 1162, 1175 (1993) (error to reject statements arguably material); see also FiveCAP, Inc. and General Teamsters Union Local No. 406, 331 NLRB 1165 (2000) (concluding newspaper articles included accurate quotations).

**F. The Subcontracting Was Within the Company's Long-Held Contractual Rights, and the Company had No Duty to Bargain Over It**

For over twenty years Daycon has possessed the right to subcontract work in any one of the following circumstances: 1) Where all employees are working; 2) during periods of peak demand; and 3) in accordance with past practice. (GC 2) The Company has frequently relied on this right. (Tr. 649)<sup>32</sup>

A massive snow storm resulted in Daycon's repair shop becoming a "parking lot" for snow throwers. (R 24) (Tr. 368) (Tr. 380-81) The Company which supplied the parts to repair the business went out of business. (Tr. 237) Snow throwers the Company received in December remained unfixed in March. (Tr. 653) In accordance with its long established practice and contractual right, Daycon outsourced the work.

Windsor testified that the shop employees were all working full-time during this time (Tr. 379) and that he and the others were also working mandatory overtime. (Tr. 368, 379) Poole testified that the subcontracting did not take away any overtime from the shop. (Tr. 654-55) Windsor testified that the Company frequently subcontracts repair work, both for liability reasons and "parts" reasons, and that he was aware of pressure washers, propane buffers, and Tenant equipment all being subcontracted for repair work. See (Tr. 370-73) Webber also had learned that subcontracting of repair work had occurred. (Tr. 231-233)

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<sup>32</sup> The Decision credits the testimony of Moore over Poole. (ALJD 15) However, Moore hinted that his testimony was second-hand, and admitted that Daycon had spoken with his co-worker about the work, who then spoke with him. (Tr. 804) The Decision also implicitly finds that the subcontracting was a mandatory subject of bargaining. However, the reasons for the subcontracting were not amenable to collective bargaining, and did not involve labor costs, economic issues or some other reason that could be overcome through collective bargaining.

In any event, given the Company's well cemented practice of subcontracting, the relevant inquiry is not whether Daycon unilaterally subcontracted work. Rather, it is whether the subcontracting in question constituted a material and substantial change in the Company's practices. The burden to prove that such a material and substantial change exists rests with the GC. Great Western Produce, 299 NLRB 1004, 1009 fn.2 (1990). The GC failed to meet this burden.

An employer may maintain the status quo after a CBA expires. Our Lady of Lourdes Health Care Center, 306 NLRB 337, 339-340 (1992). Webber testified that the Union never proposed to change the subcontracting article during negotiations; indeed, it never even discussed the topic at the table. (Tr. 228) Accordingly, the Union waived any right it may have had to bargain about the subcontracting of the snow thrower work. Ironton Publications, 321 NLRB 1048 (1996) (a waiver of a union's right to bargain outlives the contract that contained it where that was the parties' intentions).

For the foregoing reasons the allegation pertaining to subcontracting is entirely meritless. Because the Company has repeatedly subcontracted work even during hiatus periods between contracts without any challenge from the Union, the fact that the subcontracting occurred after the CBA's expiration date is inconsequential. See Courier Journal, 342 NLRB 1093, 1094-95 (2004) (employer's unilateral changes to its health plan *during a hiatus period* between contracts were lawful because the employer had established a past practice of implementing such changes during prior hiatus periods) (emphasis added).

**G. The Remedy The ALJ Imposed Fails To Effectuate The Purpose Of The Act**

The ALJD recommends that the Respondent be ordered to rescind the changes in the terms and conditions of employment that it implemented on April 23, 2010; however, any unilateral changes that benefited the unit employees shall not be rescinded without a request



**CERTIFICATE OF SERVICE**

I hereby certify that on the date shown below, copies of the foregoing **BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE** were electronically filed and served by email upon the following:

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March 15, 2011