

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

-----))	
DAYCON PRODUCTS COMPANY, INC.,)	
)	
Respondent,)	
)	Case Nos.:
And)	5-CA-35738
)	5-CA-35687
DRIVERS, CHAUFFEURS AND HELPERS LOCAL)	5-CA-35965
UNION NO. 639 A/W INTERNATIONAL)	5-CA-35994
BROTHERHOOD OF TEAMSTERS,)	
)	
Charging Party.)	
-----))	

**CHARGING PARTY'S BRIEF IN OPPOSITION TO RESPONDENT'S BRIEF IN SUPPORT OF
ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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Pursuant to the Rules and Regulations of the National Labor Relations Board (“NLRB” or “Board”), Charging Party, Drivers, Chauffeurs and Helpers Local Union No. 639, affiliated with the International Brotherhood of Teamsters (“the Union” or “Local 639”), by its attorneys, Mooney, Green, Saindon, Murphy & Welch, P.C., hereby submits its brief in opposition to the brief filed by the Respondent Daycon Products Company, Inc. (“Daycon” or “the Employer”) in support of its Exceptions to the Decision rendered by the Administrative Law Judge in this matter.

Although there is scant agreement between Local 639 and the Respondent on any material issue in this matter, the Union concurs that there are two primary issues presented in the case. First, the Board must consider whether the Employer carried its heavy burden in establishing that a bona fide impasse in bargaining existed on April 22, 2010 when the Employer declared impasse and subsequently unilaterally implemented bargaining proposals. Second, assuming that the Administrative Law Judge was correct in determining that no legitimate impasse occurred on April 22 and that the unilateral actions taken on April 23 were illegal, did the evidence of record establish that the strike that commenced on April 26 was caused, at least in part, by the Employer's unlawful conduct? The record evidence more than supports the decision made by the Administrative Law Judge on both of these issues.

In support of its Exceptions, the Employer apparently falls victim to its own rhetoric and continues to claim that it was Local 639 that acted improperly during the course of negotiations and that the Union thwarted collective bargaining. Stripped of the various invectives and modifiers, the Employer's position can be simplified to several contentions. First, it suggests that the Union had no sincere interest in bargaining and that

the process had ground to a halt on April 22. Second, it suggests that the Union misled its own members when it commenced the strike on April 26. Finally, it claims that the Union's communications in July 2010 improperly demanded that the Employer rescind the alleged unfair labor practice conduct and that the scope of the recommended remedy is inappropriate. As shown below, each of these contentions is erroneous.

I. RELEVANT FACTUAL SUMMARY.

A. Bargaining in the Spring of 2010.

By early spring of 2010, the parties had met a number of times for a successor collective bargaining agreement, the prior contract having expired at the end of January 2010. See GC Exh. 2.¹ By the time of the February 18, 2010 bargaining session, the parties were still exchanging proposals and modifying their positions.² During that meeting, the Employer submitted several documents outlining its then current bargaining position, GC Exhs. 24, 25, including its wage proposal as well as a provision known as the "economic distress" clause; a proposal that contained a trigger for the abatement of negotiated wage increases in the event that the Employer experienced a certain percentage decline in its business revenue. In response to these proposals, the Union modified and withdrew some of its own proposals. Tr. 117 – 19; GC Exhs. 23, 28. After rejecting the Union's suggestions, the Employer stated that it had made its best offer. Tr. 122 – 25; GC Exh. 27. After the Union refused to accept that proposal and in recognition of the fact that numerous issues were outstanding, Local 639 stated it would

¹ Consistent with the position taken below, in recognition of the fact that the Acting General Counsel will submit a comprehensive review of the factual record developed at the hearing, Local 639 will focus on specific facts. Similarly, the Union's submission will focus on specific legal issues.

² For an abbreviated summary of the various bargaining sessions, see GC Exh. 41. See also Er. Exh. 10.

contact the Federal Mediation and Conciliation Service. Tr. 123, 616.³ On or about February 27, 2010, the Union met with the membership to discuss the status of the bargaining. At this time, the Union explained that it was bringing the FMCS into the negotiations and also took a strike vote. Tr. 127 – 128. Local 639 will often use a strike vote as a tool to support its bargaining positions with an employer. No strike activity or preparation was taken and there were no plans to initiate strike activity at that time.

The Union continued to bargain after the strike vote and contacted federal mediator Gary Eder to arrange for the participation of a mediator at the next session that was held on March 17, 2010. That meeting was unproductive. Tr. 135 – 41, 277 – 78; GC. Exh. 32 – 34.

In late March, 2010, Daycon contacted Union President Tommy Ratliff and requested the parties convene for an off the record meeting. GC Exh. 56. Ratliff, Secretary-Treasurer John Gibson, and Business Agent Doug Webber met with Employer President John Poole, Attorney Jay Krupin and his colleague, Paul Rosenberg, at the Monocle in Washington DC on April 1, 2010.⁴ At that meeting, the Union stated it was open to a four-year agreement in which a four-year catch-up wage progression mechanism would be included. Tr. 146 – 47. In response, Daycon suggested an alternative that would essentially recognize two categories of employees for purposes of rate progression. This concept would create a “substandard” or artificial top rate for certain employees. Although this was not the progression sought by the Union, it was a

³ Although the Employer has maintained that it made its best offer on February 18, it admitted at the hearing that it had not yet reached its bottom line at that, or any subsequent, point. Tr. 709. Indeed, the Employer anticipated an economic package valued at up to 4% and its February 18 proposal was only valued at 3%. Tr. 710. In other words, it still had money in its pocket and room to negotiate.

⁴ During the course of the Region’s investigation of the charges filed by Local 639 as well as the numerous unfair bargaining charges filed by Daycon, the Employer had contended that the Union initiated the April 1 meeting; it conceded at the hearing that it was responsible for arranging the meeting. Tr. 629-707.

variation on the same theme. After caucusing, the Union suggested a five-year agreement in which a five-year catch-up progression mechanism would be included. Tr. 149, 204 – 05, 432, 525 – 26. The meeting ended when Krupin stated that the Employer would need to “crunch the numbers” before responding to the Union. Daycon did not reject or otherwise refuse to consider the Union's proposal. Indeed, Employer President John Poole admitted the meeting ended with “Jay [Krupin] saying he would get back to them, that he would get in touch with them the following Tuesday.” Tr. 634. See also Tr. 714.⁵ Notwithstanding the commitment to respond to the Union, the Employer never communicated with the Union after the meeting. Tr.153 – 54, 206, 433. Through the scheduling efforts of the federal mediator, another bargaining session was scheduled for April 22, 2010. Tr. 635.

B. The Meeting of April 22.

The bargaining session was held at the FMCS offices in Hanover, Maryland on April 22, 2010. Inasmuch as the Union had not heard from Daycon after the April 1 meeting, it came to the April 22 session expecting a response from Daycon regarding the topics discussed at the April 1, 2010 off-the-record meeting. Tr. 434 – 35.

The face-to-face part of the meeting opened with Union President Ratliff stating that the Employer had committed to responding to the Union after “crunching numbers.” Tr. 714; see also Tr. 155. The Union again stated it was willing to have a five-year agreement with a five-year progression and the Union was officially making such a proposal. Daycon asked if it was necessary that a catch-up progression be included in the contract, to which the Union responded in the affirmative. Tr. 155, 636. It did not,

⁵ The Union left this meeting with a positive feeling and belief that an agreement was possible. Tr. 151, 433, 525 – 26.

however, require that the progression be in any specific form or occur over any specific time. Daycon then indicated it was going to evaluate the Union's proposal and "crunch numbers." Tr. 155, 435.⁶ At that time, it was the Union's expectation that bargaining would continue when the Employer returned from its caucus. Tr. 207. As far as the Union bargaining team was concerned, it was prepared to bargain all day long to get a contract. Tr. 211, 566. In particular, the Union was prepared to modify or withdraw its pension proposal depending on the Employer's response. Tr. 209 – 10.⁷

After waiting for some time, Union discovered that Daycon had left the bargaining session without any notice, response or communication whatsoever. The federal mediator informed the Union that the Employer had left without informing him and that the session was over. Tr. 156 – 57, 209 – 11, 436 – 37, 567, 637, 699 – 700. Later that afternoon, Daycon faxed a letter to the Union's headquarters declaring impasse and stating that it would proceed accordingly. GC Exh. 58. In immediate response, the Union contested the assertion of a bargaining impasse and reiterated that, had bargaining proceeded, Union movement was possible. GC Exh. 39. The Union also reiterated that the Employer had indicated that it needed an opportunity to evaluate Union's most recent

⁶ In correspondence sent to the Employer later that afternoon, the Union stated:

"Finally, when we left the meeting earlier today, the company said it needed to "crunch numbers" in order to respond to the comments that the Union made. We have not received any response at this point." GC Exh.39. At the hearing, Employer President John Poole admitted that the Employer never communicated any denial or refutation of the statements contained in the Union's letter. Tr. 719.

⁷ Under the expired agreement, Daycon provided only a 401(k) arrangement for its bargaining unit employees and only a minimal number of employees participated in the plan. Employer participation in the Taft-Hartley fund would have required an hourly contribution on behalf of all bargaining unit employees and generated an increase in the overall employee expense. Tr. 210 – 11. Anticipating that the Employer could have responded by claiming that the Union economic proposal was too expensive, Local 639 anticipated adjusting its pension proposal. Id.

proposals and that the Union was awaiting a response regarding the Company's analysis.
Id.⁸

C. The Unlawful Declaration of Impasse and Unfair Labor Practice Strike.

Daycon implemented its purported final offer on Friday, April 23, 2010 in a meeting with bargaining unit members. Tr. 568 – 69, 639 – 40. It informed the bargaining unit members that “we are implementing the terms of the final offer to your bargaining committee... We will also be implementing the terms that were tentatively agreed upon during negotiation.” Er. Exh. 22. The Employer's “final offer” included the so-called “economic distress” clause. Tr. 117 – 19, GC Exh. 27.

The bargaining unit members reported the contents of the meeting to Webber who was shocked and surprised by the Employer's action. Tr. 161 – 64. As far as he and the rest of the Union bargaining team were concerned, they were still in the process of negotiations. On that day, Webber met with Union President Ratliff and Secretary-Treasurer Gibson and informed them of the unilateral action. They were also surprised and upset. Tr. 161 – 163, 439, 527. Indeed, Ratliff stated that the Employer's actions basically left the Union with no option other than initiating a strike to protest its conduct. Tr. 162, 440, 453 – 55, 527 - 28. The Union directed the filing of an unfair labor practice charge, claiming that Daycon had violated the Act by failing to bargain in good faith and unilaterally implementing its proposal in an unlawful manner, and also started strike preparations. Tr. 164.

On Monday, April 26, 2010, the Union initiated the strike at Daycon in direct response to the Employer's unlawful implementation of its putative final offer. Tr. 164 –

⁸ In his letter of April 26, 2010, Union President Tommy Ratliff again stated that at the last bargaining session, “the company told was that it would need to ‘crunch numbers’ in order to respond to the suggestions that the Union made. We still have not received any response at this point.” GC Exh. 57.

65, 503, 572. This was the reason for calling the strike and the Union informed the employees they needed to protest the unfair labor practices committed by the Employer. Tr. 165 – 66, 350, 395, 572. The picket signs displayed since the inception of the strike have always specifically stated that the strike was in response to the Employer’s unfair labor practice conduct, GC Exh. 37, Tr. 572, and numerous post strike communications sent by the Union have consistently stated that the strike was called in response to the Employer’s unfair labor practices. See, e.g., GC Exh.46 (“Since the beginning of the strike in April 2010, we have contended that our strike was in response to Daycon’s unlawful conduct and that continues to be our position.”); GC Exh. 59 (“Having caused the strike because of its illegal declaration of impasse and unilateral implementation, Daycon is seeking to reap the benefit of its unlawful conduct by forcing the Union to accept its February proposal.”); Er. Exh. 8 (“... our members at Daycon who are now entering their seventh week on strike for various unfair labor practice infractions and bad faith bargaining by the company.”); Er. Exh. 9 (“In fact, the company’s stonewalling at the negotiation table and its plan to improperly implement its demands without further bargaining with its workers has forced the company’s workforce out on an unfair labor practice strike.”); Er. Exh. 10 (“It then unilaterally implemented its offer on April 26, 2010. In response, the Union and our members initiated an unfair labor practice strike to protest the Company’s illegal conduct.”).

D. The Unconditional Offer to Return to Work and Subsequent Bargaining.

Subsequent to the commencement of the unfair labor practice strike, Local 639 requested that Daycon return to the bargaining table. On Friday, July 2, Local 639 made an unconditional offer to return on behalf of all striking employees and requested that the parties meet to continue bargaining. Tr. 171, GC Exh. 42. Webber read this e-mail to the members on the picket line on the afternoon of July 2. Tr. 172 – 73, 397 – 98. Daycon, asserting that the strike was economic in nature, refused to reinstate the striking employees. GC Exh. 44, Tr. 572 – 73.

On July 13, the parties met at the Washington DC offices of the FMCS. At that meeting, although the Union again conveyed its willingness to explore a variety of options to reach an agreement, Daycon refused to engage in any discussions and continued to insist on acceptance of its February 2010 proposal. Tr. 175 – 78. Specifically, Local 639 proposed a five-year contract with a five-year progression schedule, modified its proposal regarding participation in the Local 639 Pension Plan and reduced its hourly wage demand. GC Exh. 45. Daycon's response came after about a five-minute caucus and was a complete rejection of the Union's modified proposal without any counterproposal. Tr. 178. After Daycon's rejection of its bargaining proposal, the Union suspended bargaining while it considered how to proceed. Subsequently, by letter of July 23, 2010, Local 639 demanded that Daycon rescind the unilateral changes it made on April 23 and restore the terms and conditions in effect prior to its illegal declaration of impasse. GC Exh. 59. In its response of July 27, the Employer reiterated that it was not going to alter its bargaining position. Er. Exh. 32.

As of this date, Daycon has refused to reinstate all of the striking employees and has maintained its intransigent position regarding its bargaining proposals.

II. ARGUMENT.

A. The Employer Cannot Establish That There Was an Impasse in Bargaining.

Only upon reaching impasse, after good-faith negotiations have exhausted the prospects of concluding an agreement, can an employer make changes that are reasonably comprehended within its pre-impasse proposals. N.L.R.B. v. Intracoastal Terminal, Inc., 286 F.2d 954 (5th Cir. 1961). When, as here, the “parties are engaged in negotiations for a collective-bargaining agreement,” the employer’s obligation to refrain from unilateral changes regarding mandatory subjects “extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter; rather it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole.” Register-Guard, 339 NLRB 353, 354 (2003), quoting RBE Electronics of S.D., Inc., 320 NLRB 80, 81 (1995); Bottom Line Enterprises, 302 NLRB 373, 374 (1991), enfd. sub nom., Master Window Cleaning v. NLRB, 15 F.3d 1087 (9th Cir. 1994) (Table). The employer’s obligation to refrain from such changes survives the expiration of the contract, and failure to meet that obligation is a violation of Sections 8(a)(5) and (1) of the Act. Newcor Bay City Division, 345 NLRB 1229, 1237 (2005); Made 4 Film, Inc., 337 NLRB 1152 (2002).

The Board defines bargaining impasse as the “situation where ‘good-faith negotiations have exhausted the prospects of concluding an agreement.’” Royal Motor Sales, 329 NLRB 760, 761 (1999), enfd. sub nom., Anderson Enterprises v. NLRB, 2 Fed. Appx. 1 (D.C. Cir. 2001), quoting Taft Broadcasting, 163 NLRB 475, 478 (1967),

enfd. sub nom., Television Artists, AFTRA v. NLRB, 395 F.2d 622 (D.C. Cir. 1968). It is “the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile ‘Both parties must believe that they are at the end of their rope.’” AMF Bowling Co., 314 NLRB 969, 978 (1994), enf. denied, 63 F.3d 1293 (4th Cir. 1995), quoting PRC Recording Co., 280 NLRB 615, 635 (1986), enfd., 836 F.2d 289 (7th Cir. 1987); Patrick & Co., 248 NLRB 390, 393 (1980), enfd., 644 F.2d 889 (9th Cir. 1981) (Table). By definition, an impasse occurs whenever negotiations reach that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless. Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 543 (1988). . . . “A genuine impasse in negotiations is synonymous with a deadlock; the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position.” Hi-Way Billboards, Inc., 206 NLRB 22, 23 (1973). Impasse is reached at “the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile.” A.M.F. Bowling Co., 314 NLRB at 978. See also Area Trade Bindery Company, 352 NLRB 172, 175 (2008); Atlas Refinery, Inc., 354 NLRB No. 120, 210 NLRB LEXIS 61, *74 (2010).

The question of whether a valid impasse exists is a “matter of judgment” and among the relevant considerations are “[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations.” Taft Broadcasting, 163 NLRB at 478.

Finally, a party asserting impasse has the burden of establishing that impasse existed. L.W.D., Inc., 342 NLRB 965 (2004); CalMat Co., 331 NLRB 1084, 1097 – 98 (2000), Outboard Marine Corp., 307 NLRB 1333, 1363 (1992), enfd., 9 F.3d 113 (7th Cir. 1993) (Table). “The burden of proving that an impasse exists is on the party asserting the impasse.” Naperville Ready Mix, Inc., 329 NLRB 174, 183 (1999); Serramonte Oldsmobile, 318 NLRB 80, 97 (1995). The party asserting impasse as a defense to unilateral action bears the burden of proof on the issue. North Star Steel Co., 305 NLRB 45 (1991), enfd., 974 F.2d 68 (8th Cir. 1992). Moreover, “the Board does not lightly infer the existence of an impasse...” Naperville Ready Mix, Inc., 329 NLRB at 183.

As recognized by the Administrative Law Judge, Daycon cannot carry its burden and demonstrate that the parties were at impasse and that continued bargaining was futile. ALJD at 16. As of April 22, the date Daycon declared impasse, there were numerous issues still on the bargaining table. In recognition of the fact that there was clearly no impasse on issues across the board, the Employer puts singular focus on the progression rate issue and claims that that issue was deadlocked between the parties. The evidence of record, however, is quite to the contrary. Although the Union had indicated that progression was an item that it sought to have in the final agreement, it was also still actively engaged in the negotiation process and proposed a five-year approach to the contract term and progression rate on April 22. Rather than rejecting or otherwise responding to the Union's proposal, Daycon left the bargaining table with the comment that it needed to “crunch numbers” in order to respond. Tr. 149, 204 – 05, 714. If the parties were truly at impasse, there was no need to “crunch,” review or otherwise evaluate the Union proposal. Moreover, if the Employer had deigned to return to the bargaining

table with any type of response, it would have afforded the Union an opportunity to modify or adjust its own position. Instead of fulfilling its legal obligation to return to the table, Daycon simply walked away leaving the Union and the federal mediator waiting for its response. ALJD at 16. It never "crunched" any numbers, conveyed any counterproposal or even its rejection of the Union's bargaining proposal. Rather than make any movement towards responding to the Union's proposals, the Employer abruptly terminated the bargaining process and implemented its last offer.

Given the record evidence, there can be little doubt that the declaration of impasse was improper and that the unilateral implementation of Daycon's final offer was illegal.

B. The Daycon Employees Engaged in an Unfair Labor Practice Strike.

It is undisputed that the Employer has refused to reinstate all of the striking employees despite the unconditional offer to return made on July 2, 2010 and it is equally undisputed that the law requires an employer to reinstate unfair labor practice strikers upon making an unconditional offer to return to work. NLRB v. International Van Lines, 409 U.S. 48, 50 - 51 (1972). As recognized by the Administrative Law Judge, the record evidence established that the strike that started on April 26 was called in response to Daycon's actions of April 22 and 23. ALJD at 16. In its brief, Daycon offers no plausible alternative explanation.

To determine whether a strike is an unfair labor practice strike, the Board's test is whether the strike has been caused in whole or in part by an unfair labor practice committed by the employer. Precision Concrete, 337 NLRB 211, 212 - 13 (2001); Child Development Council of Northeast Pennsylvania, 316 NLRB 1145 (1995) ; Citizens

National Bank of Willmar, 245 NLRB 389, 391 (1979) enf'd. mem., 644 F.2d 39 (D.C. Cir. 1981).⁹

Daycon suggests that the April 26 strike was economic in nature, as authorized by the February 2010 strike vote, and that no other strike vote was ever taken. In the first instance, unions, in the exercise of their representational role, often either direct the membership to strike, or the members follow the Union official's advice on striking. In Teamsters Local Union No. 515 v. NLRB, 906 F.2d 719 (D.C. Cir. 1990) cert. denied, 498 U.S. 1053 (1991), the court held that the strike was an unfair labor practice strike. The employer had insisted to impasse on a no-access provision, and the court found that this was illegal, and was a contributing cause of the strike. The union president, at a meeting with employees, explained that this provision would make the contract meaningless, and urged employees to go out on strike. The NLRB had concluded that, "in the absence of any evidence that the strikers even knew about the [Company's] proposal regarding a waiver of access to the Board, we are unwilling to infer from the record evidence in this case that one of the reasons for the strike was the strikers' desire to protest that particular proposal." *Id.* at 725. The court rejected this argument:

The obvious flaw in the Board's reasoning is that it simply ignores the evidence that proves the point on causation. The dispositive criterion in a case of this sort is the "real and actuating motivation" for the strike. NLRB v. Pope Maintenance Corp., 573 F.2d 898, 906 (5th Cir. 1978); see also NLRB v. Colonial Haven Nursing Home, Inc., 542 F.2d 691, 705-06 (7th Cir. 1976) (looking beyond statements of testifying employees to discern true reason for strike). In this case, because the matter of the no-access provision was not specifically discussed at the strike meeting, it is crucial to inquire whether the Union's reasons for recommending a strike can be imputed to the employees who voted for the strike.

⁹ A strike which is motivated or prolonged, even in part, by an employer's unfair labor practices is an unfair labor practice strike. C-Line Express, 292 NLRB 638 (1989); Tall Pines Inn, 268 NLRB 1392, 1411 (1984); Golden Stevedoring Co., 335 NLRB 410, 411 (2001). As long as an unfair labor practice has "anything to do with" causing a strike, it will be considered an unfair labor practice strike. NLRB v. East Optics Corp., 458 F. 2d 398, 407 (3d Cir.), cert. denied, 419 U.S. 850 (1972).

That inquiry is relatively easy on this record, for it is unrefuted that the employees voted to strike solely pursuant to the Union President's recommendations.

906 F.2d at 724.

The court also explained: “[e]mployees may formally cede authority to a Union agent to call a strike; they can also achieve the same result by simply endorsing a Union agent's judgment that a strike is necessary. In either case, the union representative's reasons for calling or recommending a strike may provide the basis for determining causation. Here the employees followed their union leader's recommendation to strike, in part because of his view that the provisions of the no-strike clause were outrageous. In so voting, the employees ratified the Union leader's judgment that they should strike because of the Company's demand for a no-access provision.” Id. at 725-26 (footnotes omitted). Similarly, in Scof, Inc., 1991 NLRB LEXIS 937 (1991), no vote had been taken by the employees on whether to picket or strike -- nor were they consulted on the issue. The picket line was established solely by direction of the union business agent. The Administrative Law Judge found that there was a sufficient nexus between the occurrence of the strike, its object, and the company's unfair labor practices to create an unfair labor practice strike regardless of the Union's failure to call a vote among unit employees establishing the strike, the picket line or its object. Id. at *1.¹⁰

The record reflects that on April 23, after learning of the unilateral implementation, Union President Ratliff that made the decision to strike Daycon. That was the sole and exclusive cause of the strike. Union officials communicated this to the employees on the morning of April 26. The employees acted consistent with the direction from the Union.

¹⁰ The alleged unfair labor practice need not be the subject of a vote. For example, in Gas Spring Co., 296 NLRB 84, 87-88 (1989), the Board concluded that the strike was an unfair labor practice strike, despite the fact that there was only one vote, on whether or not to accept the company's last proposal, and despite the fact that picket signs did not refer to an unfair labor practice, but only that the Union was on strike for job security, working conditions, and equality.

Union Business Agent Webber arrived at the Employer's facility at 5:30 a.m. with the picket signs and informed arriving employees of the Union's position - that they were on strike to protest the unfair labor practice committed by Daycon in declaring impasse and implementing the changes on April 23. (Tr. 165 - 166, 350, 395, 572). Union President Ratliff and Secretary Treasurer Gibson also spoke to the employees, telling them that they were on strike because the Union believed Respondent violated federal labor laws on April 22 and 23. (Tr. 166 - 167, 440 - 44). Employees started a picket line in front of Daycon's facility wearing picket signs that expressly stated they were on strike because of Daycon's unfair labor practices. GC Exh.37. After the decision to commence the strike was made on April 23, the Union conveyed the reasons for the strike to the members starting on April 26. Union Bargaining Committee member Eugene Brown, a Shop Steward at Daycon, confirmed that the reason for the strike was "because they [Daycon] called and implemented their last and final..." Tr. 572. ¹¹ It is simply beyond peradventure that the strike was not caused in immediate and direct response to the Employer's declaration of impasse and unilateral implementation of its bargaining offer. An additional vote was not required and the Union expressly informed bargaining unit members of the reasons for the strike simultaneous with the establishment of the picket line. The timing of the strike alone demonstrates the causal nexus.

As for Daycon's suggestion that the strike was an economic strike camouflaged in unfair labor practice garb, it cannot escape the fact that the strike was called only after it engaged in illegal activities. Moreover, that a strike may also have economic objectives

¹¹ Starting on April 26 Webber communicated to the employees "that the strike was based on the actions that the Company demonstrated on April 22nd and 23rd, that they didn't leave us any alternative. We felt they violated labor law and they declared an impasse and implemented a contract..." Tr. 166. Later that morning, Union President Tommy Ratliff and Secretary-Treasurer John Gibson arrived at the picket line and made similar statements, Tr. 166 - 67, 441.

does not change its status from an unfair labor practice strike to an economic strike. Central Management Co., 314 NLRB 763, 768 (1994). The employer's unfair labor practice does not have to be the sole cause or even the major cause or aggravating cause for the strike; it is sufficient if the unfair labor practice is a contributing factor, and the dispositive question is whether the decision to strike was motivated in part by the unfair labor practices not whether without that motivation the Union might have struck for another reason. Teamsters Local Union No. 515, 906 F.2d at 723; ¹² East Buffet & Restaurant, Inc., 352 NLRB 975, 999 (2008) ("An unfair labor practice strike occurs even when the employer's unfair labor practice is not the sole or major cause or aggravating factor; it need only be a contributing factor." RCG (USA) Mineral Sands, Inc., 332 NLRB 1633, 1633 (2001).").

As recognized by the Administrative Law Judge, the evidence of record more than established that the Union called the strike in direct response to the unilateral imposition of the Employer's putative final offer. There was no other intervening event or cause and no hiatus between the Company's illegal conduct and the initiation of the strike and the Union called the strike to protest the unfair labor practices.¹³ Nevertheless, assuming, arguendo, that the strike had some economic component, it would nonetheless still be deemed an unfair labor practice strike because the declaration of impasse and unilateral implementation was undoubtedly "a contributing factor" to the strike. The best evidence

¹² See also NLRB v. Crystal Springs Shirt Corp., 637 F.2d 399, 404 (5th Cir. 1981) ("Multiple motivation does not deprive the employees of their status as unfair labor practice strikers so long as the employer's unfair labor practice was a contributing cause."); General Drivers & Helpers Union, Local 662 v. NLRB, 302 F.2d 908, 911 (D.C. Cir.) ("If an unfair labor practice had anything to do with causing the strike, it was an unfair labor practice strike."), cert. denied, 371 U.S. 827 (1962).

¹³ Although there is more than ample direct evidence of the reason for the April 26 strike, even in the absence of direct evidence, "[i]t is well established that a causal connection between the Respondent's unlawful conduct and the strike may be inferred from the record as a whole." Child Development Council, 316 NLRB at 1145.

that the Union would not have otherwise struck is the fact that it had continued to bargain, and the employees had continued to work, throughout February, March and most of April 2010, almost 3 months after the expiration of the prior contract. There should be no question that the strike was properly deemed an unfair labor practice strike and no other conclusion but that the Employer violated the Act by reason of its failure and refusal to reinstate the striking employees despite their unconditional offer to return to work.

C. Local 639 Refused to Allow Daycon to Reap the Benefits of Its Illegal Conduct.

In its submission, Daycon also contends that the Union acted improperly after insisting that the Employer rescind and remedy its unfair labor practice conduct before continuing with collective-bargaining and that the Union's position rendered the offer to return to work conditional. (Br. 45 - 46). As aptly demonstrated by the bargaining session of July 13, the Employer refused to engage in good faith collective-bargaining. On July 13, the parties met at FMCS' office in Washington, D.C. with federal mediator Eder. (Tr. 176-80, 445 - 48, 528 - 31). At this meeting, Local 639 proposed several modifications to its proposal from the parties' April 22 meeting. Specifically, the Union: (a) a five-year contract with a five-year progression mechanism; (b) a \$.10 per hour reduction in the employees' annual wage increase (to \$.55/hour); and (c) that Respondent begin participating in the Union's pension fund in the fourth year of the contract, rather than the first year. (Id., GC Exh. 45). Daycon completely rejected the Union's proposal and did not modify its proposal from the parties' February 18 session. The Employer also indicated that it would not allow all the employees to return to their jobs. (Id.). Since that time, Daycon has maintained its unilateral changes and has refused to rescind them. (GC Exh. 48, Tr. 183, 448 - 49).

In direct response to the Employer's intransigent bargaining position, the Union corresponded with Daycon by letter of July 23 and demanded that Respondent rescind its unilateral changes. Union President Ratliff stated:

Nevertheless, the Company seems completely undeterred and continues to attempt to exploit the situation. Having caused the strike because of its illegal declaration of impasse and unilateral implementation, Daycon is seeking to reap the benefit of its unlawful conduct by forcing the Union to accept its February proposal. You apparently believe that, because of your illegal conduct, your leverage has increased over the Union and, consequently, have no interest in engaging in meaningful bargaining. It has become apparent to us that good faith collective-bargaining is essentially impossible while you continue to hold a hammer over us by reason of your illegal conduct. Consequently, we demand that Daycon rescind the unilateral changes it made on April 23 and restore the terms and conditions in effect prior to your illegal declaration of impasse. Until that is done, you have demonstrated that bargaining is futile.

As we told you last week, Local 639 is ready and willing to engage in bargaining to resolve the outstanding issues. We indicated to you the areas that we are open to discussing and made movements designed to bring us further to a conclusion. In response, Daycon adamantly refused to engage in any bargaining. We are not eager to have this unfair labor practice strike continue. It has caused our members, the Company and your customers needless problems and difficulties. It is time for us to resume bargaining and work out a fair contract. Undo the unlawful conduct and let's get back to the table.

GC Exh. 59.

Notwithstanding Daycon's protest, a Union has a right to link resumption of bargaining to an employer's restoration of unilateral changes. Storer Communications, Inc., 294 NLRB 1056, 1058 (1989); Petroleum Maintenance Co., 290 NLRB 462, 468 (1988); Southwest Forest Industries, 278 NLRB 228, 228 (1986); Little Rock Downtowner, 168 NLRB 107, 108 (1967). In these cases, the Board held that a Union may walk away from bargaining altogether while an employer's 8(a)(5) violation goes unremedied. Under these circumstances, the employer may not point to the union's refusal to bargain during the interim as a waiver of bargaining. Storer Communications, 294 NLRB at 1058. Nor may an employer claim a good-faith impasse. Petroleum Maintenance, 290 NLRB at 468; Little Rock Downtowner, 168 NLRB at 108. These

authorities stand for the simple proposition that an employer that violates the law may not use the leverage obtained by its illegal conduct to further its bargaining position. As recognized by President Ratliff, to do so would allow Daycon to "reap the benefit" of its illegal action. The Union's bargaining position, however, in no way undermines the unconditional offer to return to work. The offer was clearly unconditional when made and the Employer's subsequent correspondence reflects its recognition of the fact that the offer was unconditional. See, e.g., GC Exh. 44 ("Upon receipt of your unconditional offer to return to work,..."); GC Exh. 51 ("In light of your union's unconditional offer on your behalf to return to work, in accordance with applicable laws we are recalling you to work."); GC Exh. 54 (same). Given the fact that the Union's bargaining position was well grounded in settled legal precedent, it could hardly be the grounds for determining that the offer to return to work was tainted.

As the record demonstrated, the employees were ready, willing and able to return to work on July 6 and Daycon refused to reinstate them. The parties did not meet for bargaining, to the extent the exchange that day can be labeled bargaining, until July 13 and President Ratliff's correspondence was not sent until July 23, more than three weeks after the offer to return to work and only after Daycon refused to engage in any good-faith bargaining on July 13. Notwithstanding the propriety of the Union's position as reflected in the July 23 letter, it in no way renders the July 2 offer to return to work conditional.

D. The Recommended Remedy Is Consistent with Established Law.

Daycon also objects to the recommended remedy concerning the scope of rescission. (Br. 49 - 50). In apparent pursuit of maintaining its ability to undermine Local

639 and the collective-bargaining process, it alleges that the remedy provides the Union with a "cafeteria plan." (Br. 50). The recommended remedy, however, is entirely consistent with established Board precedent. In such unilateral change cases, the Union has the right to choose not to require rescission of any beneficial changes. Fresno Bee, 339 NLRB 1214, 1214 n.6 (2003) ("Because some of the Respondent's unilateral changes may be perceived as beneficial to employees, we will order the rescission of these changes only at the request of the Union."); CJC Holdings, Inc., 320 NLRB 1041, 1047 (1996), affd., 110 F.3d 794 (5th Cir. 1997) ("However, with regard to the unilateral change involving wages, since this change involved the granting of a benefit, this Order will require rescission of the beneficial change only if the Union seeks such rescission."); Bellingham Frozen Foods, 237 NLRB 1450, 1469 (1978), enfd. in relevant part, 626 F.2d 674 (9th Cir. 1980). The typical posting and Order in such cases provides that the employer must rescind unilateral changes at the request of the union. That is precisely the remedy recommended here. ALJD at 18. See also Overnite Transportation Company, 329 NLRB 990, 992 (1999) ("Such unlawful wage increases have a particularly long lasting effect because the Board's traditional remedies do not require that an employer rescind its wage increase ..." (quoting ALJ)); Color Tech Corp., 286 NLRB 476, 477 (1987); Koons Ford of Annapolis, 282 NLRB 506, 508 (1986), enf'd mem., 833 F.2d 310 (4th Cir. 1987).¹⁴

¹⁴ In fact, the Board has held that the unilateral rescission of a wage increase – even one which was granted in an unlawful, unilateral manner – violates the Act. In Southside Electric Cooperative, 247 NLRB 705 (1980), the employer implemented unilateral wage and benefit increases, in violation of an outstanding Section 10(j) injunction and Sections 8(a)(1) and (5). The employer subsequently rescinded the increase after the Union objected to the unilateral character of the employer's action. The Board, upholding the Administrative Law Judge, held that both the implementation of the increase and its rescission violated the Act:

III. CONCLUSION

For all of the foregoing reasons, Local 639 requests that Board reject the Employer's Exceptions and adopt the findings and remedy recommended by the Administrative Law Judge.

Respectfully submitted,

/s/

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Dated: March 29, 2010

... Both the unilaterally awarded raise and the effort to box the Union in were transparent efforts to undermine the Union's standing among Respondent's employees and a continuation of Respondent's efforts to avoid good faith bargaining and oust the Union, and both violated Section 8(a)(5) and (1) of the Act, as did the raise rescission.

247 NLRB at 707 (emphasis added). Cf. Standard Generator Service Co., 90 NLRB 790 (1950), enf'd, 186 F.2d 607 (8th Cir. 1951)(employer acted unlawfully by rescinding, day after Union election victory, wage increase implemented prior to election).

CERTIFICATE OF SERVICE

I hereby certify that on the 29th of March, 2011, I caused a true and correct copy of the Charging Party's Brief in Opposition to Respondent's Brief in Support of Its Exceptions to the Decision of the Administrative Law Judge to be served via electronic mail upon the following:

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