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Beacon Sales Acquisition, Inc. d/b/a Quality Roofing Supply Company and International Union of Operating Engineers Local 542, AFL-CIO.
Cases 4-CA-36852 and 4-CA-36879

August 26, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND PEARCE

On July 29, 2010, Administrative Law Judge David I. Goldman issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

The Board has considered the judge's decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.²

1. We adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing health insurance premium increases for its union-represented employees on or about January 3, 2009. We agree with the judge that the Union did not "clearly and unmistakably" waive its right to file a charge challenging the unilateral change when it entered into a February 2009 non-Board settlement agreement with the Respondent that provided, among other things, that "[t]he Union will inform the Region and/or National Labor Relations Board that the Union and its members are withdrawing all unfair labor practice charges or appeals . . . with prejudice." See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (waivers of statutorily protected rights must be "clear and unmistakable"). The Union's unilateral-change charge was not pending at the time of the parties' non-Board settlement, and that charge involved different unlawful conduct from any of the unfair labor practice charges that the Union withdrew

¹ The Respondent has requested oral argument. The request is denied, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

² In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we modify the judge's remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis. We also modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010).

as part of the settlement. In these circumstances, we agree with the judge, for the reasons he stated, that the non-Board settlement did not "clearly and unmistakably" cover the Union's subsequently filed unilateral-change charge. Compare *Septix Waste, Inc.*, 346 NLRB 494, 495 (2006) (agreement stating union "resigns all claims made or that could have been made to this date") (emphasis added).

Further, there is no merit in the Respondent's argument, based on *Stone Container Corp.*, 313 NLRB 336 (1993), that it was privileged to implement the health insurance premium increases because a bargaining impasse had been reached on that issue. The employer in *Stone Container* had an established practice of conducting an annual wage and benefit survey and implementing an increase, if appropriate, each April. *Id.* at 336. In the instant case, the Respondent has not established that an increase in employees' health insurance premiums was a discrete, annually recurring event—a necessary requirement under *Stone Container*. Finally, in adopting the judge's finding of this violation, we do not rely on his dicta regarding the Board's decisions in *Auto Bus, Inc.*, 293 NLRB 855 (1989), and *Septix Waste*, *supra*.

2. We also adopt the judge's finding, for the reasons set out in his decision, that the Respondent violated Section 8(a)(5) and (1) by refusing to meet and bargain with the Union from July 9 to August 10, 2009 without the presence of a Federal mediator. Even assuming that the Union's refusal to continue bargaining with a mediator constituted a breach—or even a total repudiation—of the ground rules established by the parties' January 22, 2009 "Interim Agreement," and even assuming that such conduct amounted to a violation of the Union's duty to bargain in good faith, the Respondent's own duty to meet and bargain in good faith remained intact. See *Plumbers Local 457 (Bomat Plumbing & Heating)*, 131 NLRB 1243, 1246 (1961), *enfd.* 299 F.2d 497 (2d Cir. 1962) ("One unfair labor practice does not excuse another."). Consequently, the Respondent's refusal to meet and bargain with the Union was unlawful.³ We note that the

³ Chairman Liebman would find that the Respondent did not unlawfully refuse to bargain with the Union while the latter was violating the parties' signed agreement "to utilize the FMCS mediator during their negotiations." This case implicates the Board's "proper role in supervising the process of bargaining and ensuring that the parties live up to their undertakings." *Detroit Newspapers*, 326 NLRB 700, 725 (1998) (Member Liebman, concurring in part and dissenting in part), *enfd.* denied sub nom. *Detroit Typographical Union No. 18 v. NLRB*, 216 F.3d 109 (D.C. Cir. 2000). "National labor policy favors the honoring of voluntary agreements reached between employers and labor organizations." *Verizon Information Systems*, 335 NLRB 558, 559 (2001), quoting *Pall Biomedical Products Corp.*, 331 NLRB 1674, 1677 (2000). Here, the Union and the Respondent agreed to bargaining meeting logistics and to use a Federal mediator. Although the agree-

remedy being imposed here is a cease-and-desist order that will encourage parties in future cases to continue to meet and talk under parallel circumstances.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Beacon Sales Acquisition, Inc. d/b/a Quality Roofing Supply Co., North Wales, Eddystone, York, and Yeadon, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order as modified.

1. Substitute the following for paragraph 2(e).

“Within 14 days after service by the Region, post at its facilities in North Wales, Eddystone, York, and Yeadon, Pennsylvania, copies of the attached notice marked “Appendix.”¹⁸ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 3, 2009.”

Dated, Washington, D.C. August 26, 2011

ment allowed either party to cancel it upon 30-days’ notice, which the Union gave, nothing in the agreement permitted the Union to refuse to bargain without a mediator during the notice period. Thus, whatever may be said of the Respondent’s conduct, the fact is that the *Union*, too, resorted to self-help during the notice period. In those circumstances, the Chairman would not find that the Respondent’s suspension of bargaining for 1 month violated the Act. The question in *Plumbers Local 457*, cited above, was whether a union’s unlawful secondary activity was excused by an unlawful provision in a contractor’s agreement to supply nonunion labor. 131 NLRB at 1245. This case is more closely analogous to *Dunn Packing Co.*, 143 NLRB 1149, 1152 (1963), where the Board dismissed a refusal-to-bargain charge against an employer because both it and the union were “equally dilatory.” *Dunn Packing* recognizes that collective bargaining is uniquely a bilateral process that depends on the good-faith efforts of both sides to be successful.

Wilma B. Liebman, Chairman

Craig Becker, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Jennifer Roddy Spector, Esq., for the General Counsel.

Ross D. Cooper, Esq. (Beacon Sales Acquisition, Inc.), of Bethesda, Maryland, for the Respondent.

Frank Bankard (IUOE Local 542), of Fort Washington, Pennsylvania, for the Charging Party.

DECISION

INTRODUCTION

DAVID I. GOLDMAN, Administrative Law Judge. These cases involve an employer engaged in first-contract negotiations. The union was certified as the employees’ representative in 2007. The bargaining took place in the context of numerous unfair labor practice charges filed by the union. Many of these unfair labor practice charges were the subject of a formal settlement between the National Labor Relations Board (Board) and the employer in February 2009, and others, the subject of a non-Board settlement between the employer and union, also in February 2009.

The instant cases involve two discrete outstanding claims against the employer. Both the claims and the defense are narrowly framed.

First, in Case 4–CA–36852, the government alleges that the employer’s January 3, 2009 increase in the health insurance premiums paid by bargaining unit employees, implemented in the midst of negotiations for a first collective-bargaining agreement, was unlawful, as this unilateral change in a mandatory subject of bargaining was undertaken without affording the Union sufficient opportunity to bargain, and without reaching an overall good-faith bargaining impasse. The employer admits this characterization of its actions. However, it contends that this allegation was the subject of a pending unfair labor practice charge that was withdrawn by the union “with prejudice” pursuant to its February 2009 settlement with the employer. In other words, the employer contends this claim was waived.

Second, in Case 4–CA–36879, the government alleges that from July 9 through August 10, 2009, the employer unlawfully refused to meet with the union to collectively bargain. This occurred after and because the union announced that it was no longer willing to bargain with the participation of a Federal mediator. The employer admits the alleged conduct. However, the employer maintains that its refusal to meet was privileged

because, it asserts, the ground rules for negotiations agreed to between the employer and the union in January 2009, in an "Interim Agreement," mandated the presence of a Federal mediator at each bargaining session.

STATEMENT OF THE CASE

On June 19, 2009, the International Union of Operating Engineers Local 542, AFL-CIO (Union) filed an unfair labor practice charge against Quality Roofing Supply Co. Inc. (Quality Roofing), docketed by Region 4 of the Board as Case 4-CA-36852. On July 8, 2009, the Union filed another unfair labor practice charge against Quality Roofing, docketed by Region 4 of the Board as Case 4-CA-36879. By Order issued December 23, 2009, the Board's General Counsel, by the Region 4 Regional Director, consolidated the two cases and issued a consolidated complaint alleging that Quality Roofing had violated the National Labor Relations Act (Act). The Regional Director amended the consolidated complaint on January 5, 2010, and again on May 18, 2010. One of the amendments, offered in response to assertions by the Respondent that it had been improperly named in the complaint, was to correct the name of the Respondent to Beacon Sales Acquisition, Inc., d/b/a Quality Roofing Supply Co. (Quality Roofing).

The matter was scheduled to be heard May 26, 2010. On May 24, 2010, the General Counsel and the Respondent filed a stipulation of facts and exhibits, with a request to waive the hearing and decide the case on the stipulated facts and exhibits. The Union wrote a letter objecting to waiver of the hearing. By Order dated May 25, 2010, I postponed the hearing indefinitely, set a schedule for briefing, and received the stipulation of facts and exhibits into evidence, as well as the Union's objections. The parties filed briefs by July 1, 2010. On the entire record, I make the following findings, conclusions of law, and recommendations.¹

Jurisdiction

The complaint alleges, Quality Roofing admits, and I find that at all material times Quality Roofing has been engaged, inter alia, in the wholesale distribution of roofing and building materials to construction industry contractors at its facilities in North Wales, Eddystone, York, and Yeadon, Pennsylvania.² The complaint alleges, Quality Roofing admits, and I find, that during the past year, Quality Roofing, in conducting its business operations, has purchased and received at the North Wales, Eddystone, York, and Yeadon, Pennsylvania facilities good valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania. The complaint further alleges, Quality Roofing admits, and I find, that at all material

¹ I hereby grant the General Counsel and the Respondent's motion to waive the hearing in this matter and overrule the Union's objections as moot. Given my resolution of the dispute, which is based solely on the stipulations agreed to by the Respondent, and received into evidence, there is no reason to further address the Union's demand for a hearing.

² The North Wales facility is located at 1256 Welsh Road, North Wales, Pennsylvania. The Eddystone facility is located at 2000 Industrial Highway, Eddystone, Pennsylvania. The York facility is located at 3336 Concord Road, York, Pennsylvania. The Yeadon facility is located at 6250 Baltimore Pike, Yeadon, Pennsylvania.

times, Quality Roofing has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The General Counsel alleges, Quality Roofing stipulates, and I find, based on the record evidence, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of these cases, pursuant to Section 10(a) of the Act.

Statement of Facts

Background

At various dates in November and December 2007, the Union was certified by the Board as the exclusive collective-bargaining representative of four bargaining units composed of the Respondent's employees. Each bargaining unit was comprised of employees employed at one of the Respondent's facilities, described above, located in North Wales, Eddystone, York, or Yeadon, Pennsylvania. At all times since the dates of certification, the Union has been the exclusive collective-bargaining representative of these bargaining unit employees.³

Numerous unfair labor practice charges and amended charges (at least 52, including amended charges) were filed against Quality Roofing between November 6, 2007 and December 12, 2008. These included charges that resulted in a February 2009 formal settlement agreement (discussed below) requiring that Quality Roofing cease and desist from a wide range of misconduct. This misconduct included failing or refusing to bargain collectively and in good faith, discontinuing bonuses or reducing overtime hours in order to discourage membership in the Union, and other alleged improprieties.⁴

Events Between October 2008 and March 2009

On October 23, 2008, Quality Roofing sent the Union a letter indicating that, effective January 1, 2009, it intended to make certain benefit changes for its employees, including those represented by the Union. These changes included, inter alia, an increase in health insurance premiums for employees.

On December 29, 2008, the Union filed an unfair labor practice charge with Region 4, docketed as Case 4-CA-36509. The charge alleged that Quality Roofing had violated Section 8(a)(1) and (5) of the Act, and as the basis for the charge stated:

On or about December 22nd 2008[,] Quality Roofing declared impasse on health [c]are, without providing requested information, adequate time and information to

³ The bargaining unit at each of the four facilities is composed of the following:

All full-time truck drivers and warehouse employees, excluding all other employees, counter persons, sales representatives, fleet managers, clericals, managers, professionals, guards and supervisors as defined in the Act.

⁴ The settlement agreement included a nonadmissions clause, pursuant to which "[i]t is understood that by signing the Settlement Stipulation, Respondent does not admit that it has violated the Act." Accordingly, one should not, and I do not, make any assumption that the Respondent violated the Act with regard to the charges and cases that were the subject of this settlement agreement.

formulate intelligent proposals and a bargaining room on December 12 which was not strategically adequate for the Union bargaining team.

On or about December 2008 Quality [R]oofing would not afford the Union the opportunity to have appropriate representatives for its bargaining teams to bargain over the matter of health [c]are and mandated unlawful requirements to members to travel for bargaining if they desired to be part of the union[']s negotiating team.

Effective January 3, 2009, Quality Roofing implemented the health insurance premium increases described in its previous letter to the Union, resulting in increased premiums for union-represented employees.

Quality Roofing and the government stipulate that the premiums paid by these employees are a mandatory subject of bargaining and that Quality Roofing implemented these premium increases without affording the Union sufficient opportunity to bargain regarding them, and that the Union did not consent to these changes before they were implemented. The Respondent and the government further stipulate that, although Quality Roofing was engaged in collective bargaining for initial labor agreements with the Union on January 3, 2009, an overall bargaining impasse had not been reached as of the date of the implementation of the premium increases.

On January 22, 2009, Quality Roofing and the Union signed an "Interim Agreement" for the stated "purpose of handling certain issues that may arise during the period the parties are engaged in collective bargaining for a collective-bargaining agreement." (Jt. Exh. 21). The parties agreed upon a process for layoffs, the provision of notice and bargaining over discipline of unit employees and a process of "logistics for "bargaining meeting[s]." This provision, which was the first (of five) numbered paragraphs of the Interim Agreement, stated:

Bargaining Meeting Logistics. The parties agree to meet at FMCS in Philadelphia during business hours (9 AM to 5 PM), unless the parties mutually agree to extend or shorten the time based on progress of the negotiations. The parties agree to utilize the FMCS mediator during their negotiations. The Company will arrange for Jeff Metz to be present for bargaining sessions. The parties agree to discuss all four unionized branches at the bargaining sessions and bargain for one collective-bargaining agreement which will apply to all four unionized branches (except for separate wage schedules).⁵

The Interim Agreement's fifth and final paragraph is headed "Duration of this Interim Agreement." It states:

This Agreement shall expire upon the earlier of (1) the parties executing a collective-bargaining agreement or (2) either party providing the other party 30 days written notice of its intent to terminate this Agreement.

Quality Roofing and the Union executed a non-Board Settlement Agreement on February 4, 2009 (signed by the Union) and February 6, 2009 (signed by the Respondent). The settlement covered a variety of matters. It provided for Quality

Roofing to take action with regard to rehiring, pay rates, payment of bonus, and other matters for six designated employees, as well as to clarify/rewrite certain handbook policies. The parties agreed to bargain at the upcoming February 10 bargaining session "over the manner in which changes in lunch policies, subcontracting and discipline will be handled pending execution of a collective-bargaining agreement," and agreed "to handle the matters in approximately the same manner as set forth in the Interim Agreement whereby Jeff Metz and Mike Grant will discuss such matters prior to implementation." The settlement included an agreement to have the Union cease and reverse its previous efforts to discourage customers from purchasing products from Quality Roofing.

The settlement also provided:

The Union will inform the Region and/or National Labor Relations Board that the Union and its members are withdrawing all unfair labor practices charges and/or appeals, including those relating to the layoff of Mr. Brown and Mr. Valentine and the discharges [of] Mr. Durst, Mr. Harris and Mr. Taliaferro, with prejudice.

This settlement was executed by Ross Cooper, senior vice president and general counsel of Quality Roofing, and Frank Bankard, an organizer for the Union. (Jt. Exh. 6.)

On February 4, union organizer Bankard, in an email to Region 4 attorney Edward Bonett, that also included as recipients other representatives of Region 4 and the Respondent, requested that Bonnet "please withdraw, with prejudice, all Charges and Appeals in relation[] to Quality Roofing as per the Settlement attached along with the Board Settlement discussed and presented and modified by the Company."

In response, by letter dated February 5, 2009, the Region 4 Regional Director approved the Union's request to withdraw the charges in three pending cases, including Case 4-CA-36509.

These three were not the only outstanding charges. As referenced above, there were numerous other charges and cases pending against Quality. In all, 23 cases were resolved as part of a formal settlement agreement that the Union, Quality Roofing and Region 4 were negotiating in January and February 2009. A consolidated complaint involving these cases issued January 26, 2009. The Formal Settlement Stipulation was executed by the Union and Quality Roofing on February 17, 2009, and signed by the Regional Director of Region 4 on March 3, 2009. The settlement provided, subject to the Board's approval, for the entry of a consent order by the Board and a consent judgment by an appropriate United States Court of Appeals. The Board approved the settlement, and issued its decision and order based on the Formal Settlement Stipulation on March 26, 2009. The Third Circuit Court of Appeals entered a judgment enforcing the Board's Order on September 23, 2009.

Subsequent Events: the Summer of 2009

On June 19, 2009, the Union filed an unfair labor practice charge, docketed as Case 4-CA-36852, and a subject of the consolidated complaint issued in this dispute. The charge stated as its basis, in relevant part:

⁵ Jeff Metz is an assistant vice president of Quality Roofing and an agent of the Respondent within Section 2(13) of the Act.

On or about December 26, 2008 the above Employer implemented an [i]ncrease to [e]mployee health [c]are [c]ontributions without bargaining and providing information to the below [c]ertified Union.

At a bargaining session on July 7, 2009, the Union announced that it was no longer willing to meet with the participation of a Federal mediator. The next day, July 8, the Union, through Frank Bankard, sent Quality Roofing a letter directed to Ross Cooper.

This letter expressed frustration with the course of bargaining on health benefits and with the information provided to the Union. It requested additional information. In addition, the letter stated:

We further believe that Federal Mediation has not been useful and Mediator[‘s] time can be better served in other matters, hence we will not be bargaining with Federal Mediation going forward.

The Union offered to meet for bargaining “for N. Wales” the week of July 20.

The Respondent replied by letter dated the next day, July 8, 2009. In the letter to Bankard, Cooper responded to many of the issues explicitly and implicitly raised by Bankard’s letter. Cooper declared that the parties were at impasse, as they were unable to agree on a gap in the parties’ positions over health care costs. Despite declaring impasse, Ross added that “I want to make clear that we remain willing to meet, as we truly desire to reach agreement. However, Board law is quite clear that we do not have to meet simply to meet, after legitimate impasse has been reached.”

Cooper added:

As for meeting logistics and timing, pursuant to the first paragraph of the January 22, 2009 Interim Agreement (attached), the union is bound contractually at this time to meet at FMCS in Philadelphia before the Federal mediator. As we mentioned yesterday, we are not available the week of July 20, but will hold August 5, 2009.

Turning to the issue raised in Bankard’s letter about the January 2009 increase in health care contributions, Cooper wrote:

As to the 2009 health care contributions, the union filed a charge on that issue on December 29, 2008 (attached). The union was required to withdraw that charge ‘with prejudice’ in paragraph 4 of the February 4, 2009 settlement agreement (attached). The charge was dismissed by the Board on February 5, 2009 (attached). Thus, despite that we believe we bargained to impasse late last year on that issue, we do not believe that the union may re-raise this claim. This issue already is before the Board in any event. If you think I am missing something with respect to the withdrawal of that charge, please feel free to clarify.

Bankard responded by email, the next day July 9. His letter defended the Union’s proposals, and rejected the claim of impasse on, stating, “I want to put emphasis that in no way do we believe we are at impasse on any matter.” With regard to

health care, Bankard asserted that “we have not even discussed your [h]ealth care plan because information remains absent [that is] needed to bargain.”

Bankard’s letter also stated that the Employer should “accept this notice, as written notice,” from the Union “to terminate the Interim Agreement. . . . Also we feel as stated, written and verbally, being force[d] to meet with a Mediator is an Unfair Labor Practice.”

Analysis

Based on the stipulations received from the Respondent and the General Counsel, these cases raise two issues for resolution.

First, in Case 4–CA–36852, the Respondent defends against the General Counsel’s claim that it unlawfully and unilaterally raised health care premiums on January 3, 2009, with the contention that the Union waived the right to file a charge on this matter. In making this claim, the Respondent contends that the charge filed by the Union on December 29, 2008—alleging that Quality Roofing had prematurely declared impasse on the subject of health care and without providing requested information (Case 4–CA–36509)—was withdrawn with prejudice pursuant to the non-Board settlement agreement between the Union and Quality Roofing. According to the Respondent, the withdrawal of this charge precluded the Union from filing a later charge over the Respondent’s unilateral implementation of changes in health care premiums.

Second, in Case 4–CA–36879, the Respondent defends against the General Counsel’s claim that it unlawfully refused to bargain with the Union from July 9 to August 10, 2009, with the contention that the Union’s declaration that it would no longer meet with the Federal mediator privileged its refusal to meet. In asserting this defense, the Respondent relies solely on the terms of the Interim Agreement executed between the Union and Quality, which provided for the parties to utilize a Federal mediator in their negotiations. The Respondent contends that the Interim Agreement privileged its refusal to meet, in the absence of a Federal mediator, until 30 days after the Union provided notice of an intent to terminate the Interim Agreement, in accordance with the agreement’s termination provision.

1. The unilateral implementation

It is undisputed that, effective January 3, 2009, Quality Roofing implemented a unilateral change, without providing the Union appropriate notice and opportunity to bargain, and without the union’s consent, in a mandatory subject of bargaining, specifically, the premium paid by employees for health insurance. Quality Roofing further concedes that when it implemented the health care premium increases, the Union and Quality Roofing had not reached an overall bargaining impasse in their collective-bargaining negotiations.

Such a unilateral implementation is an elementary, and straightforward violation of Section 8(a)(5) of the Act. “[F]or it is a circumvention of the duty to negotiate which frustrates the objectives of §8(a)(5) much as does a flat refusal.” *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *United Cerebral Palsy of New*

York City, 347 NLRB 603, 606 (2006).⁶ Subject to some exceptions not relevant here,

when, as here, the parties are engaged in negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole.

Bottom Line Enterprises, 302 NLRB 373, 374 (1991) (footnote omitted), enfd. mem. 15 F.3d 1087 (9th Cir. 1994). Accord *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995); *Intermountain Rural Electronics, Inc.*, 305 NLRB 783, 786 (1991), enfd. 984 F.2d 1562 (10th Cir. 1993).

Quality Roofing offers the following affirmative defense: Quality Roofing asserts that the General Counsel is barred from prosecuting this violation because, in the Union and Employer's February 2009 non-Board settlement agreement, the Union agreed that it would "inform" the Region that it was "withdrawing all unfair labor practice charges . . . with prejudice." The Union, which, in fact, cannot inform the Regional Director that it is withdrawing pending charges, but needs the Regional Director's permission to withdraw pending charges, made such a request on February 4, 2009, requesting that the Region "withdraw, with prejudice, all [c]harges and [a]ppeals in relation[] to Quality Roofing as per the Settlement Agreement." By letter dated February 5, 2009, the Regional Director advised the Respondent's counsel that "the Charging Party's request to withdraw the charges in the subject cases has been approved." One of the withdrawn charges, Case 4-CA-36509, filed December 29, 2008, alleged that Quality Roofing had, in violation of the Act, "declared impasse on health care" on or about December 22, 2008.

The Respondent asserts that the Union's withdrawal of the charge in Case 4-CA-36509, as part of the Employer-Union non-Board settlement, bars prosecution by the General Counsel of Quality Roofing's subsequent unilateral change in health care premiums, based on a new charge filed by the Union.

In *Auto Bus, Inc.*, 293 NLRB 855, 856 (1989), the Board reaffirmed its longstanding view that a non-Board settlement between a charging party and a respondent does not limit the Regional Director's discretion to prosecute based on a new charge filed by the same charging party, even when the new charge alleges the same misconduct by the same respondent. "In the absence of a Regional Director signing or approving a settlement agreement, any such agreement between a charging party and a respondent which resulted in the withdrawal of the charge is viewed by the Board as a private arrangement which does not estop the Regional Director from proceeding on any new charges alleging the same conduct as the withdrawn charges." Id.; *Quinn Co.*, 273 NLRB 795, 799; *John F. Cuneo*

⁶ It is also, derivatively, a Sec. 8(a)(1) violation, "the rationale therefore being that an employer's refusal to bargain with the representative of his employees necessarily discourages and otherwise impedes the employees in their effort to bargain through their representative." *Tennessee Coach Co.*, 115 NLRB 677, 679 (1956), enfd. 237 F.2d 907 (6th Cir. 1956). See, *ABF Freight System*, 325 NLRB 546 fn. 3 (1998).

Co., 152 NLRB 929, 931, fn. 4 (1965). These cases would seem to dictate the outcome here.⁷

However, in *Septix Waste, Inc.*, 346 NLRB 494 (2006), a Board majority agreed that a union's stipulation with an employer that the union "resigns all claims made or that could have been made to this date," waived 8(a)(1) allegations based on a subsequent amended charge filed by the union which included 8(a)(1) allegations based on facts existing as of the date of the stipulation. Citing the Board's longstanding policy to favor private agreements, the Board declined to countenance what it viewed as an effort by the union to "attempt[] to circumvent" its agreement by advancing allegations that it had stipulated it had "resigned". The Board ruled that the parties' stipulated settlement met the standards for Board approval set forth in *Independent Stave Co.*, 287 NLRB 740, 741 (1987), and dismissed the complaint allegations.

The Board majority in *Septix* asserted that the precedent represented by *Auto Bus*, was not being overruled or ignored, but "inapposite." According to the majority,

[t]hose cases . . . simply hold that the General Counsel's approval of a request to withdraw a charge, which request is based on a private party settlement, does not estop the General Counsel from later prosecuting those same matters under the aegis of a new charge. However, these cases do not resolve the separate issue of whether the Board should honor the settlement under *Independent Stave*.

I am unsure where this leaves Board precedent on the issue. *Septix* appears to state that it is discretionary, but preferable, for the Board chooses to dismiss allegations pled by the General Counsel that were covered or waived by a private settlement agreement between the charging party and the respondent. The Board in *Septix* appears to characterize *Auto Bus* (and the consistent line of cases it represents) as holding simply that the General Counsel may proceed to issue a complaint notwithstanding a private settlement of the same charges. The Board in *Septix* seems to divest *Auto Bus* of its (clear, to my mind,) substantive implications that once such allegations are pled by the General Counsel they *should* be considered on their merits

⁷ Quality Roofing points to the Region's involvement in crafting some of the terms of the non-Board settlement and contends that this rendered the non-Board settlement "approved" by the Region. In *Auto Bus*, the Board considered and rejected just such an argument. The Board found that such cooperation and consultation with the Region does not constitute "approval" of the non-Board settlement and is "immaterial" to the Region's right to prosecute refiled charges. Id. at 856 (Board agent's "involve[ment] in the settlement negotiations that led to the withdrawal off the charge . . . is immaterial"). A non-Board private party settlement is an alternative to a settlement to which the Region is a party. Non-Board private settlements typically contain terms that would not be (or lacks terms that would preclude the settlement from being) approved by the Regional Director. Still, most parties are willing to negotiate with the Region's representatives for assurances that the Region will permit withdrawal of the pending allegations as part of the non-Board settlement. This is no small matter but the Region is not a party to and cannot enforce the terms of a non-Board settlement. Conversely, and reasonably, the Region is not bound by a non-Board settlement.

by the Board, without regard to whether the same allegations were the subject of a private party settlement.

However, this problem need not be resolved here. Under either *Septix or Auto Bus*, the issue does not arise unless the allegation on which the General Counsel is proceeding was waived by the parties' private settlement. Here, the Respondent claims that is the case, but it is not.

In the non-Board settlement, the Union agreed, effectively, to withdraw "with prejudice" all pending unfair labor practice charges. This included one alleging that the Employer violated Section 8(a)(5) of the Act because "[o]n or about December 22, 2008" the Respondent "declared impasse on health care," even though it had not provided the union "requested information," or "adequate time and information to formulate intelligent proposals," or provided an adequate room for the Union bargaining team on December 12.

In other words, the charge alleged that on or about December 22 there was a declaration of impasse on health care by the Respondent, and that it was false and, under the circumstances, a violation of its bargaining obligation under the Act.

Accepting, arguendo, that to withdraw such a charge "with prejudice" is to withdraw the charge "in a way that finally disposes of a party's claim and bars any future action on that claim,"⁸ the Union agreed in the settlement not to refile a subsequent unfair labor practice charge alleging as its basis a false declaration of impasse on health care on or about December 22, 2008.

But the Union's subsequent charge, the basis of the complaint allegations herein, did not assert that a false claim of impasse—on health care, or as to negotiations overall—was made on or about December 22, 2008, or any other date. Rather, the new charge alleged that "[o]n or about December 26, 2008," the Respondent unlawfully "implemented an increase" in health care premium contributions, in violation of its bargaining obligations. To be sure, the current charge, like the withdrawn charge concerned the subject of health care, and alleged a bargaining violation. But waivers do not sweep so broadly or vaguely in Board precedent. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) ("we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated'. More succinctly, the waiver must be clear and unmistakable").⁹

The current claim is a different one from the withdrawn claim, involving different facts and elements of proof. The

withdrawn charge contained no claim of an unlawful unilateral change in health care, or any other subject, and is alleged to have occurred four days earlier, and what is more, the resulting complaint allegation and the stipulated facts demonstrate that the unilateral change actually occurred on January 3, 2009, more than one week after the facts alleged in the withdrawn and settled charge. On its face, the claim that the Respondent made an unlawful unilateral change is a different claim than the claim that the Respondent falsely claimed impasse on health care.

The Respondent argues that, having been withdrawn with prejudice, we must analyze the validity of the new charge as if the allegations of the withdrawn charge had been conclusively adjudicated in the Respondent's favor. Assuming arguendo, this is a correct mode of analysis, it does not advance the Respondent's position.

Under the Respondent's contention, we must analyze the current charge by accepting that there was no declaration of impasse regarding health care on or about December 22, or that there was but it was not false, but rather, a true reflection of the parties' bargaining. In any event, the Respondent contends that there was no illegality. But none of these suppositions undermines the current charge or complaint allegation at issue. Certainly, if there was no declaration of impasse on health care on or about December 22, the withdrawn charge is an irrelevancy. But even if there was an impasse regarding health care on or about December 22, and even if Quality Roofing accurately declared that there was one then, such findings would not queer the current complaint allegations.

First, under the rule of *Bottom Line Enterprises*, supra, an impasse on the issue of health care does not justify the implementation of a unilateral change in health care premiums. A lawful unilateral implementation requires that "an overall impasse has been reached on bargaining for the agreement as a whole" (*Bottom Line Enterprises*, supra). The Respondent has stipulated that when it unilaterally implemented the premium changes, the parties "had not reached an overall impasse in bargaining." There are limited exceptions to the *Bottom Line* rule, but the Respondent does not contend, and there is no evidence to support the contention if it did, that any exception applies here.

Second, even as to the alleged December 22 impasse on health care—itsself insufficient to justify a unilateral implementation—there is no evidence that this limited impasse was in effect on January 3, 2009, the date of the unilateral implementation. The Respondent admits that effective January 3, 2009, "it implemented these [health care premium increases] without affording the Union sufficient opportunity to bargain them, and that the Union did not consent to these changes before they were implemented on January 3, 2009." That does not sound like an impasse, even as to the limited subject of health care. The most that can be said on this record and accepting the Respondent's assumptions, is that when the Respondent unilaterally implemented, the parties had once been at impasse on health care, but it has not been shown that they were still at impasse on health care on January 3, 2009 when the premiums

⁸ Black's Law Dictionary 1633 (8th Ed. 2004).

⁹ "To meet the 'clear and unmistakable' standard, the contract language must be specific, or it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter." *Allison Corp.*, 330 NLRB 1363, 1365 (2000); *Georgia Power Co.*, 325 NLRB 420, 420-421 (1998) ("either the contract language relied on must be specific or the employer must show that the issue was fully discussed and consciously explored and that the union consciously yielded or clearly and unmistakably waived its interest in the matter"), enf'd. 176 F.3d 494 (11th Cir.), cert. denied, 528 U.S. 1061 (1999); *Leas Sieglar, Inc.*, 293 NLRB 446, 447 (1989) (waivers of employee rights must, however, be explicitly stated, clear and unmistakable).

were implemented. The withdrawn charge provides no cover for the January 3, 2009 implementation.¹⁰

Based on the record admissions, stipulations, and the withdrawal of the prior charge with prejudice, the most that can be said is that at the time of the unilateral implementation, there had recently been an impasse on the limited subject of health care. But by the Respondent's own admission, at the time of the unilateral implementation, the parties were not at an overall impasse, and had not sufficiently bargained over the health care proposals that were the subject of the implementation. Such an implementation is a violation of the Act.

I would add that this outcome reflects not a technical application of the parties' admissions and stipulations, but the recognition that there was, in fact, a violation of the Act here. And there is no grounds for the Board to strain to broaden the scope of an alleged waiver of the right to use the Board's processes to sweep any broader than it reads. At most, the Union waived the right to file a charge alleging that the Respondent falsely declared impasse as to health care on December 22. Nothing more can be read into the Union's withdrawal of that charge "with prejudice."

2. The refusal to meet July 9 to August 10, 2009

Section 8(a)(5) of the Act provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." 29 U.S.C. § 158(a)(5). Section 8(d) of the Act defines the duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."

The refusal to meet and bargain is a "per se" violation of the Act, and proof of "bad faith" or other subjective intent is unnecessary. As the Supreme Court explained in the seminal case of *NLRB v. Katz*, supra at 742-743, Section 8(a)(5), as defined in Section 8(d), "clearly . . . may be violated without a general failure of subjective good faith; for there is no occasion to con-

¹⁰ Notably, although we are dealing with something of a legal fiction, at least with regard to the alleged health care impasse on December 22, a change from impasse to no impasse is not unusual. "As a recurring feature in the bargaining process, impasse is only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken, through either a change of mind or the application of economic force.'" *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 412 (1982), quoting, *Charles D. Bonanno Linen Service*, 243 NLRB 1093-1094 (1979). Notably, even where implementation is lawful because the parties are at an overall bargaining impasse, once the impasse ceases to exist, the duty to bargain and the prohibition on unilateral implementation are revived. *Richmond Electrical Services*, 348 NLRB 1001, 1003-1004 (2006) ("A bargaining impasse merely suspends, rather than obviates, the duty to bargain, however, and a proposal that breaks a bargaining impasse revives the parties' duty to bargain. Therefore, if the Union broke the bargaining impasse after the Respondent's December 30 declaration, the Respondent's January 12, 2004 unilateral implementation of its bargaining proposals would have been unlawful") (citation omitted); *Jano Graphics, Inc.*, 339 NLRB 251 (2003) (unilateral implementation violates Section 8(a)(5) even when the parties have reached impasse, if at the time of implementation the impasse no longer exists).

sider the issue of good faith if a party has refused even to negotiate *in fact*—'to meet * * * and confer'—about any of the mandatory subjects." (Court's emphasis and asterisks).

The General Counsel alleges that Quality Roofing unlawfully refused to bargain between July 9 and August 10, 2009. It is undisputed that Quality Roofing and the Union were under a duty to bargain collectively during this period. It is undisputed that the Union offered to meet to bargain, and that Quality Roofing refused to meet to bargain during this period. Quality Roofing's refusal was based on the Union's refusal to meet with a mediator present.

Of course, it is settled that, as a general rule, the presence of a mediator is not required for the duty to bargain to be in effect. Indeed, the demand that a mediator be utilized in negotiations is a permissive subject of bargaining and may not be insisted upon as a condition of bargaining or justify a refusal to meet.¹¹

But while no party can insist on the presence of a mediator as a condition of bargaining, as with other permissive subjects of bargaining, the parties are free to bargain about and reach agreements regarding the use of a mediator in negotiations. Quality Roofing contends that there was an agreement by the parties to bargain *exclusively* with a mediator for the term of the Interim Agreement. In other words, a contractual promise that encompassed an agreement to bargain with a mediator *and* an agreement not to negotiate without one, as long as the Interim Agreement was in effect. The Interim Agreement, by its terms, was terminable by either party upon 30 days notice.

The first point to be made is that the General Counsel's response to the Respondent's position is unsatisfactory. The three "unlawful-insistence-on-the-use-of-a-mediator" cases relied upon by the General Counsel¹² stand only for the proposition that use of a mediator in negotiations is a permissive subject of bargaining and, therefore, as a general matter, a party violates the Act if it refuses to bargain in the absence of a mediator. Contrary to the suggestion of the General Counsel, none of these cases (*Success Village Apartments*, supra; *Kurdziel Iron*, supra; *Riverside Cement Co.*, supra), involve an agreement by the parties not to negotiate in the absence of a mediator for a defined period of time. Nor do these cases stand for the proposition that an agreement to bargain only with a mediator may be breached with impunity, leaving the other party without recourse in bargaining.

The General Counsel advances precisely this latter claim. Relying on the Supreme Court's decision in *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185-188 (1971), the General Counsel takes the view

¹¹ *Success Village Apartments*, 347 NLRB 1065, 1068 (2006) (Although parties may voluntarily agree to engage in mediation as a means of collective bargaining, the use of mediation as a bargaining process is a permissive subject of bargaining, and a party may not insist on mediation, much less on a particular mediation format, to the point of impasse); *Kurdziel Iron of Wauseon*, 327 NLRB 155, 162 (1998) (respondent's insistence on the presence of a mediator at bargaining sessions constituted a refusal to meet and bargain), enf. 208 F.3d 214 (6th Cir. 2000); *Riverside Cement Co.*, 305 NLRB 815, 818-819 (1991), enf. mem. 976 F.2d 731 (5th Cir. 1992).

¹² *Success Village Apartments*, supra; *Kurdziel Iron*, supra; *Riverside Cement Co.*, supra.

that a party that has entered into agreements on ground rules for bargaining is free (as far as the Board and the Act are concerned) to flout them for any reason at any time for any motive or purpose. It sounds too wrong to be true, and it is.

In *Pittsburgh Plate Glass*, the Supreme Court refused to enforce a Board order finding that an employer's change in benefits for current retirees, although in violation of contractual agreement, was violation of Section 8(a)(5) of the Act. The Court held that because benefits for current retirees is a permissive subject of bargaining, an employer's unilateral change—in essence, its breach of contract—was not remediable under the Act. Since the Court's ruling in *Pittsburgh Plate Glass*, the Board has consistently held that “[a]lthough it may well be a breach of contract actionable under Section 301 of the Labor Management Relations Act, it is not a violation of Section 8(a)(5) to refuse to comply with a provision in a collective-bargaining agreement that concerns a permissive subject of bargaining.” *Supervalve Inc.*, 351 NLRB 948, 950 (2007) citing, *Pittsburgh Plate Glass Co.*, supra; *KFMB Stations*, 343 NLRB 748, 752 (2004) (“In [*Pittsburgh Plate Glass*], the Supreme Court specifically held that parties to a collective-bargaining agreement can unilaterally rescind permissive terms of the contract at any time without violating Section 8(a)(5) of the Act”).

But the issue here is not whether the Union has violated Section 8(a)(5) of the Act by breaching the Interim Agreement. The issue is whether the duty to bargain has been limited to a duty to meet only with a mediator and, if so, whether a party (here, the employer) can adhere to the ground rules and refuse to bargain without one. It seems to me that governing the process of collective bargaining is a key function of the Board—arguably, the key function—and I reject the General Counsel's essential contention that the Board simply has no interest in a party's flouting of bargaining ground rules because the subject is permissive. That is why, in prior cases, whether a party can require the other party to abide by ground rules, and refuse to bargain if they do not, depends. It depends on the totality of the circumstances and whether permissive agreements that made sense for bargaining when entered into, have come to thwart or become a stranglehold on the bargaining process at a later date.¹³

¹³ *Adrian Daily Telegram*, 214 NLRB 1103 (1974) (adherence to negotiating “ground rules” may not be insisted upon to the point that it undermines the negotiating process or is relied upon by one party to justify bad faith bargaining); *Detroit Newspapers*, 326 NLRB 700, 704, fn. 11 (1998) (dismissing allegation that employer violated Section 8(a)(5) by failing to adhere to parties' agreement to reserve certain bargaining issues for joint bargaining, as Board is committed to “providing parties with the flexibility to enter into and deviate from new bargaining formats without the risk of being found to have violated their obligation to bargain in good-faith” as this “facilitates effective bargaining and encourages productive experimentation”).

However, other cases, viewing the matter in the full context of negotiations, have found that a party's refusal to adhere to ground rules provides an indicia of unlawful bad faith bargaining. *Harowe Servo Controls*, 250 NLRB 958, 959 (1980) (Board finds that “[r]epudiating the agreement to bargain about and settle noneconomic matters before negotiating the economic provisions of a collective-bargaining agreement” is an indicia of bad faith bargaining); *Natico, Inc.*, 302 NLRB

The Board's interest in setting a policy that permits flexibility in the bargaining process is clear. An absolute rule that ground rules once agreed to, must be adhered to no matter what, makes no more sense than the position taken by the General Counsel here that adherence to ground rules is an irrelevancy to the Board because they are permissive.

However, in this case, I do not think it is necessary to determine whether a failure to adhere to ground rules developed by the parties justified a refusal to bargain by the employer. It is not necessary to treat with these issues, as there is a threshold problem with the Respondent's defense.

The Respondent has (with the concurrence of the General Counsel and over the objection of the Union), based its defense *solely* on the terms of the Interim Agreement. As stated in the stipulation of facts (numbered par. 22):

From July 9, 2009 through August 10, 2009, Respondent, relying exclusively on the terms set forth in paragraphs 1 and 5 of the Joint Exhibit 21 [the Interim Agreement], refused to meet with the Charging [P]arty without the participation of a federal mediator.

Contrary to the assertions of the Respondent, the terms of the Interim Agreement are not sufficient to evidence that the Union waived the statutory right it otherwise had to demand bargaining without presence of a federal mediator.

First, it is important to reiterate that the Board's waiver standard is the appropriate lens through which to view this issue. The issue is whether, through signing the Interim Agreement, the Union has agreed to limit the scope of its statutory right to demand that the Respondent meet with it to collectively bargain, specifically, limited that right to the right to meet only with a Federal mediator present. A union certainly could waive

668 (1991) (parties' agreement to implement an incentive wage proposal for a trial period in order to enable both parties to determine whether it should be included in the collective-bargaining agreement was an agreement by the parties on how to proceed with negotiations that was not subject to repudiation); *Central Maine Morning Sentinel*, 295 NLRB 376 (1989) (employer unlawfully unilaterally eliminated established wage increase where “the parties had agreed on ground rules under which bargaining over economic issues would be postponed until after noneconomic issues were resolved, and the Respondent did not seek to bargain over a change in those ground rules”).

In addition, the Board holds that a union's failure to abide by an agreement to submit a collectively-bargained agreement to ratification—a permissive subject of bargaining—is a defense to 8(a)(5) charges alleging an employer's refusal to execute an agreed-upon contract. *Hertz Corp.*, 304 NLRB 469 fn. 4 (1991) (“It is true that ratification is only a permissive subject of bargaining, and that under the authority of [*Pittsburgh Plate Glass*], the Union's breach of an agreement to obtain employee ratification may not be an unfair labor practice. However, it does not follow that the Respondent violated Section 8(a)(5) by thereafter insisting on compliance with the ratification agreement” and refusing to execute the contract without ratification); *Beatrice/Hunt Wesson, Inc.*, 302 NLRB 224, 225 (1991) (“where there is evidence that the union voluntarily submitted to negotiation, and the parties reached ‘express’ agreement on, any of the details of ratification[, u]ntil such time as the union conducts a ratification vote in accordance with the parties' agreement, an employer is not obligated under Section 8(d) to execute the contract”) (Chairman Stephens Concurring).

or limit its statutory rights to bargain in that manner. But, as noted, above, in order to find an agreement to waive a statutory right, the Board requires that the contractual language at issue—or other evidence—demonstrates a “clear and unmistakable” waiver of statutory rights. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (“we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is ‘explicitly stated’. More succinctly, the waiver must be clear and unmistakable”).

Proof of a contractual waiver is an affirmative defense and it is the Respondent’s burden to show that the contractual waiver is explicitly stated, clear and unmistakable. *AlliedSignal Aerospace*, 330 NLRB 1216, 1228 (2000), review denied, 253 F.3d 125 (2001); *General Electric*, 296 NLRB 844, 857 (1989), enfd. mem. 915 F.2d 738 (D.C. Cir. 1990).

In this case the Respondent, by stipulation with the General Counsel, has limited the evidence in support of its claim to the terms of the Interim Agreement. Any “clear and unmistakable” waiver of the Union’s right to demand bargaining must be found therein.

The relevant portion of the Interim Agreement states:

Bargaining Meeting Logistics. The parties agree to meet at FMCS in Philadelphia during business hours (9 AM to 5 PM), unless the parties mutually agree to extend or shorten the time based on progress of the negotiations. The parties agree to utilize the FMCS mediator during their negotiations. The Company will arrange for Jeff Metz to be present for bargaining sessions. The parties agree to discuss all four unionized branches at the bargaining sessions and bargain for one collective-bargaining agreement which will apply to all four unionized branches (except for separate wage schedules).

These are entirely reasonable logistics. But the language of the agreement at issue in this case—“The parties agree to utilize the FMCS mediator during negotiations”—is extremely limited in its force as a basis for finding the scope of waiver advanced by the Respondent. This sentence says nothing about *only* meeting in the presence of the FMCS mediator. It says nothing about requiring the parties to use a mediator to conduct each and every bargaining session. The operative phrase says that the parties agree to utilize the FMCS mediator during negotiations. They did. The mediator was “utilized” frequently during the negotiations, but there is no explicit requirement that he be at every bargaining session, or that the parties are not bound to bargain in his absence. Such an explicit and unmistakable agreement is not found in this language. I fully accept that the Respondent’s contention could conceivably be gleaned from or read into the Interim Agreement with supporting parol evidence, however it is not explicit and it is not clear and unmistakable based solely on the language of the Interim Agreement. That is what would be required to find in the Respondent’s favor.

Accordingly, based on the evidence that the General Counsel and the Respondent stipulate is the only evidence to which I must look, the Respondent has failed to prove that the Union

waived its right to demand bargaining sessions without a mediator present.¹⁴

I find that the Respondent unlawfully refused to bargain with the Union from July 9 through August 10, 2009.

Finally, I address the Respondent’s contention that this matter is de minimus, involving a refusal to bargain for only a few weeks, most of which the Respondent was claiming unavailability for bargaining, in any event. The Respondent’s contention has an initial, superficial appeal. After all, the parties resumed bargaining August 10, 2009, less than a week after the August 5 date that the Respondent says would have been the first time it was available to bargain. There have been no claims by the General Counsel that the Respondent has subsequently refused to bargain. Yet, the matter is not trivial. For one, the short duration of the refusal to bargain occurred only because the Union acceded to the Employer’s demand to terminate the Agreement. Had the Union stood on principle, as the Employer did, the refusal to bargain might be continuing to this day. Moreover, the dispute involves a significant issue of Board precedent regarding the effect, import, and interpretation of bargaining ground rules and parties’ negotiating conduct. The parties and the public should have guidance from the Board on such matters so that in future negotiations the parties will be able to avoid this kind of dispute.¹⁵

CONCLUSIONS OF LAW

1. The Respondent Beacon Sales Acquisition, Inc., d/b/a Quality Roofing Supply Co., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party International Union of Operating Engineers Local 542, AFL-CIO (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times the Union has been the designated exclusive collective-bargaining representative of four bargaining units of the Respondent’s employees, one located at each of its North Wales, Eddystone, York, and Yeadon, Pennsylvania facilities, and composed of the following employees at each location:

¹⁴ I note, but do not find probative, the fact that when confronted with Quality Roofing’s refusal to bargain without a mediator as long as the Interim Agreement was in effect, the Union then moved to provide the 30-day notice to terminate the Interim Agreement. I find, contrary to the arguments of the Respondent, that the Union’s conduct was not an admission or even evidence in favor of Quality Roofing’s position. Rather, faced with Quality Roofing’s refusal to bargain, and given that the unfair labor practice proceedings are now, a year later, far from complete, the Union’s notice of termination is reasonably understood as an accommodation to the Respondent’s (unlawful) position lest, consistent with its position, the Respondent would still be refusing to bargain to this day.

¹⁵ I decline the Respondent’s invitation to limit the finding of a refusal to bargain to begin August 5, the first date that the Respondent says it would have been available to bargain had it not been refusing to bargain as of that date. Regardless of the speculative effects that other logistical and scheduling issues might have had on the course of bargaining, the fact is that as of July 9, the Respondent was making clear that it refused to bargain without the mediator present. This unlawful conduct began July 9, ended August 10, and the order should reflect it.

All full-time truck drivers and warehouse employees, excluding all other employees, counter persons, sales representatives, fleet managers, clericals, managers, professionals, guards and supervisors as defined in the Act.

4. The Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally implementing health insurance premium increases for its union-represented employees on or about January 3, 2009, during collective bargaining for a labor agreement, without the consent of the Union and without first bargaining to a lawful overall impasse in negotiations.

5. The Respondent violated Section 8(a)(1) and (5) of the Act by refusing to meet to collectively bargain with the Union without a mediator present, from July 9, 2009 to August 10, 2009.

6. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent shall reinstate and make available to employees the health care insurance premiums it maintained for employees prior to January 3, 2009. The Respondent shall make whole the unit employees for any losses they may have suffered as a result of the Respondent's unilateral change in health insurance premiums in the manner prescribed *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall reimburse unit employees for any expenses resulting from the Respondent's unilateral change to their health insurance premiums, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), *affd.* 661 F.2d 940 (9th Cir. 1981), with interest as set forth in *New Horizons for the Retarded*, *supra*.¹⁶

The Respondent shall bargain with the Union in the bargaining units described below, with respect to wages, hours, and other terms and conditions of employment, without regard to whether a mediator is present in bargaining sessions.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Respondent's facilities or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. When the notice is is-

¹⁶ The General Counsel contends that the Board should drop its practice of assessing simple interest on monetary remedies in favor of compound interest computed on a quarterly basis. The Board has repeatedly considered this proposition in recent cases and repeatedly declared that "we are not prepared at this time to deviate from our current practice of assessing simple interest." *Kane Steel Co.*, 355 NLRB No. 49, slip op. at 3, fn. 2 (2010); *International Services*, 355 NLRB No. 47, slip op. at 2, fn. 4 (2010). Given these, and many other recent such pronouncements, I am not inclined at this juncture to depart from the Board's traditional interest formula with regard to computation of backpay in this matter.

sued to the Respondent, it shall sign it or otherwise notify Region 4 of the Board what action it will take with respect to this decision. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 3, 2009.

The Respondent shall, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁷

ORDER

The Respondent Beacon Sales Acquisition, Inc., d/b/a/ Quality Roofing Supply Co., North Wales, Eddystone, York, and Yeadon, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing or failing to bargain with the Union, in the absence of a mediator in bargaining sessions, as the exclusive representative of employees in the following units, concerning terms and conditions of employment:

a unit at each of Respondent's North Wales, Eddystone, York, and Yeadon, Pennsylvania facilities composed of

All full-time truck drivers and warehouse employees, excluding all other employees, counter persons, sales representatives, fleet managers, clericals, managers, professionals, guards and supervisors as defined in the Act.

(b) Unilaterally implementing health insurance premium changes for its union-represented employees during collective bargaining for a labor agreement, without the consent of the Union or without first bargaining to a lawful overall impasse in negotiations.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act.

(a) Reinstate and make available to employees the health care insurance premiums maintained for and available to employees immediately prior to January 3, 2009.

(b) Make all affected employees whole, with interest, in the manner set forth in the remedy section of this Decision and Order, for any losses they suffered or expenses they incurred as

¹⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

a result of the Respondent's unilateral change in its health care insurance premiums.

(c) Meet and bargain, upon request, with the Union as the exclusive bargaining representative for its union-represented employees in the bargaining units described above, regarding terms and conditions of employment, without regard to the participation or presence of a mediator at bargaining sessions.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, make available at a reasonable place designated by the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in North Wales, Eddystone, York, and Yeadon, Pennsylvania, copies of the attached notice marked "Appendix."¹⁸ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at that facility at any time since January 3, 2009.

(f) Within 21 days after service by the Region, file with the Regional Director of Region 4 a sworn certification of a re-

¹⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

sponsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply with the provisions of this Order.

Dated, Washington, D.C. July 29, 2010

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally implement changes to your health insurance premiums during collective bargaining without the consent of the Union or without bargaining to an overall bargaining impasse.

WE WILL NOT fail or refuse to bargain with the Union because a mediator is not present in bargaining sessions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Federal law.

WE WILL reinstate the health insurance premiums that were maintained and available to you immediately before January 3, 2009.

WE WILL make you whole, with interest, for any losses you suffered or expenses you incurred as a result of our unilateral change in health care insurance premiums.

WE WILL bargain with the Union without insisting or conditioning bargaining on the presence of a mediator.

BEACON SALES ACQUISITION, INC. D/B/A QUALITY
ROOFING SUPPLY COMPANY