

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

CAREY SALT COMPANY, A SUBSIDIARY OF
COMPASS MINERALS INTERNATIONAL, INC.

and

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY ALLIED
INDUSTRIAL AND SERVICE WORKERS
INTERNATIONAL UNION AND LOCAL UNION
14425

Case Nos. 15-CA-19704
15-CA-19738

**RESPONDENT'S EXCEPTIONS TO DECISION
BY ADMINISTRATIVE LAW JUDGE**

Respondent excepts to the Decision in the respects, and for the reasons, set forth below.

1. **To the Judge's Findings and Conclusions that there was not a Valid Bargaining Impasse on March 31, 2010.** (ALJ pps. 4-21).
 - a. **To her misapplication of the standards of Taft Broadcasting to the uncontroverted facts of the case.** (ALJ p. 14, line 15 – p. 19, line 3).
 - b. **To her reliance on thoughts and intentions of the Union's negotiator that were never communicated to Respondent.** (ALJ p. 6, lines 46-47; ALJ p. 7, lines 39-50).
 - c. **To her reliance on the alleged, and clearly erroneous, fact with respect to the shift schedule issue that the Company had agreed to the Union's proposal for the inclusion of a one year trial period with an escape clause.** (ALJ p. 5, line 46 – p. 6, line 2; ALJ p. 7, lines 41-44; ALJ p. 8, lines 5-8).
 - d. **To her incorrect and deficient analysis of an employer's right to have impasse as a goal after it becomes clear that a union will not accept a proposed change in a term or condition.** (ALJ p. 15, lines 11-40).
 - e. **To her failure to recognize the importance of the fact that the Union never made a specific proposal to break impasse, and, more particularly, that it is not a sufficient proposal to that end for a union merely to assert, as was done here, that it would "move in a meaningful way towards the Company's position."** (ALJ p. 12, lines 30-33).

- f. *To her omission of any reference to the undelivered written proposal prepared by the Union on March 31, 2010 that demonstrated the Union was not willing to move towards the Company's position in any meaningful way.*
- g. *To her failure to recognize the significance of the Union's request for a Final Offer and of the Company's decision to give, and thereafter stand, on such offer.*
- h. *To her erroneous acceptance of General Counsel's argument "that Respondent's bargaining committee did not approach the bargaining table on March 31, 2010, with any desire to reach an agreement".* (ALJ, p. 15, lines 41-47 – p. 16, line 7).

GROUNDS FOR EXCEPTION 1

The principal underlying labor dispute in this case revolves around the Company's effort to change the regular week work schedule for unit employees from five, eight-hour days Monday through Friday (with overtime being paid for any hour worked outside that schedule) to a new schedule for production employees of four, eleven hour shifts with overtime only after forty hours worked (and for certain maintenance employees a schedule of five, eight hour days that included Saturday or Sunday work without an overtime premium). Everyone agrees the old schedules were antithetical to productivity in an underground mine where each shift involves nearly two hours of unproductive pre-shift or post-shift activity, and all agree the 35% absentee and 45% overtime rates resulting from those schedules were hugely negative consequences. Nevertheless, a majority of the bargaining unit for many years had steadfastly rejected any changes in regular schedules because of the resulting loss of opportunities for overtime pay.

The principles of labor law permit an employer in such circumstances unilaterally to modify work schedules after having discussed and reached impasse on such issue with the bargaining representative. In this regard, the Board has explained:

“An 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. Indeed, an impasse may be brought about intentionally by

one or both parties as a device to further, rather than destroy, the bargaining process. Suspension of the process as a result of an impasse may provide time for reflection and a cooling of tempers; it may be used to demonstrate the depth of a party's commitment to a position taken in the bargaining; or it may increase economic pressure on one or both sides, and thus increase the desire for agreement. For example, impasse permits the employer to place into effect those [changes] it has theretofore offered, an action (or the possibility of it) which may substantially shift the bargaining positions of the parties. In these and other possible uses of impasse as a bargaining tactic, the emphasis is toward achieving agreement rather than causing a permanent disruption of the relation."

Charles D. Bonanno Linen Service, Inc., 243 NLRB 1093, 1094 (1979).

The foregoing principles were quoted with approval and affirmed by the Supreme Court in *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 412 (1981) and later reaffirmed by the Board in *McClatchey Newspapers*, 321 NLRB 1386, 1389 (1996).

The Company, therefore, in this case did nothing more than what has been expressly approved by the Board and the Supreme Court as a legitimate part of the collective bargaining process, as we will show more specifically below.

General Counsel contends, and the Judge found, that the parties were not at a bargaining impasse as of the time of the Company's implementation of its final offer on March 31, 2010. The decision on this issue, in turn, controls several other issues of the Complaint, including whether the subsequent implementation was unlawful, whether the strike was an unfair labor practice strike, whether Company statements about hiring permanent replacements were unlawful threats, whether strikers were properly offered recall, and whether subsequent bargaining was tainted by such earlier conduct.

In *Taft Broadcasting Co.*, the seminal, still leading and oft-quoted authority defining "impasse," the Board stated that impasse occurs "after good-faith negotiations have exhausted

the prospects of concluding an agreement,” and enumerated the key considerations in making such a determination:

The 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, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists, AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

It may be noted in passing that other circumstances have been held to prevent parties from reaching a good faith impasse, for example, surface or bad faith bargaining, insisting to impasse on a non-mandatory subject or having failed to provide relevant information. None of these, or any other indicia of bad faith, are alleged in connection with the impasse here.

As shown below, each indicia of impasse identified in *Taft Broadcasting* clearly points to the existence of a good faith bargaining impasse as of March 31, 2010. For this reason, and because all the changes subsequently implemented after this impasse were reasonably encompassed within the Company’s twice rejected final offer, such implementation was lawful. *Western Newspaper Publishing Co.*, 269 NLRB 355.

A. *The Bargaining History*

The parties here have a long history of successful good faith dealing with each other. This was not a first contract where every proposal by both sides was a new proposal or where there had been a history of unfair labor practices or Board involvement in their relationships. There had been successive contracts agreed to without a work stoppage since at least the early 1970’s. There had been six or seven negotiating sessions in 2004 and fewer than that in 2007, so the sixteen sessions in 2010 prior to impasse were many more than in the past. Also, here, there had been substantial previous discussions between the parties over the key issue of shift schedule

changes during the two year period preceding the start of negotiations, including formal meetings in April 2008, further sessions in July 2008 and then, in September 2009, the Company's retention of a shift scheduling specialist to canvass and explain to the employees and Union the need for, and benefits of, alternative shifts to the ones in place. (Tr. 1057-59; R. 1).¹ Everything in the bargaining history militates in favor of a finding of impasse.

The Judge erroneously accepted General Counsel's argument that Respondent's bargaining committee did not approach the bargaining table on March 31 with any desire to reach an agreement. Yet, the CEO's memo gives as its first instruction for the Company bargainers to do just that – to get the Union to agree to the then pending Final Offer.

The Judge ignored the entire history of good faith dealings between the parties prior to the March 31, 2010 meeting, both historically and in these negotiations, and, instead, deemed the Company guilty of bad faith because it was committed to not moving from the Final Offer it had previously presented at the Union's insistence. The Complaint did not even go that far since no such bad faith was alleged. To the contrary, as a matter of law, the Company was entirely warranted in standing on such prior final offer and its failure to move therefrom is not evidence of a violation, nor is it something that augers against the finding of impasse under the "bargaining history" prong of the *Taft Broadcasting* standard.

B. *The Good Faith of the Parties in Negotiations*

As stated above, there is no assertion in the Complaint of any bad faith conduct, or, in fact, any violative conduct, in connection with these negotiations up to the point of impasse on March 31. It is entirely undisputed that the Company at all such times bargained in good faith

¹ The report of the shift schedule expert was introduced as evidence of the pre-negotiation effort by the employer to engage the Union on the importance of the issue, something relevant to at least four of the *Taft Broadcasting* criteria. It was not introduced to show the purported "reasonableness" of the Company's proposal as that is of no proper concern of the Board.

with the goal of reaching a contract. The Board regularly uses the “totality of circumstances” to bring other offending conduct into the analysis of “good faith”; in this case, the absence of any other offending conduct is a factor unequivocally pointing in the Company’s favor.

Here, the Judge deemed it bad faith for the Company to have come to the March 31 session without a plan to compromise from its final offer. She criticized management for having a plan to deal with impasse, yet asserted “there was nothing in [the CEO’s] instructions to address how the Respondent’s committee would deal with reaching an agreement”; and she further noted that the Company’s negotiator “even admitted that she had no expectation that the Union would accept Respondent’s proposal”. (ALJ p. 15, line 45 – p. 16, line 7). Neither of these alleged management “offenses” would have been evidence of bad faith on the first day of a negotiation. They most certainly are not evidence of such after several months of good faith negotiations and the delivery of a final offer.

C. *The Length of the Negotiations*

The negotiations prior to impasse were exhaustive, consisting of mostly all-day bargaining on February 8, 9, 10, 11, 12, 15, 17, 19 and 20 and March 9, 10, 11, 12, 18 and 19, all for a contract that was in large part then being left as it was in the predecessor agreement. As to the single most important issue of shift schedules, as noted above, the negotiations on those had been ongoing, literally, for years. The problem was that the parties fundamentally disagreed over whether there should be a change, not that they needed more time to discuss their respective positions. (The Judge’s rejoinder is that several of the meetings were short in time spent.)

The Company’s only three significant contract initiatives were the three repeatedly referenced at the hearing and in all the negotiating documents: Overtime Distribution, Shift Schedules, and the Cross Assignment Letter of Understanding. The Union’s response at every

stage of the negotiations to each was, respectively, “No,” “No,” and “No,” as shown, for example, in R. 10, p. 3 and R. 11, pp. 3 and 6:

UNION RESPONSE TO COMPANY PROPOSALS

1. OVERTIME DISTRIBUTION 8.05 – REJECTED IN ITS ENTIRETY/REVERT TO CURRENT CBA
2. ALTERNATIVE SHIFT SCHEDULES – REJECT COMPANY’S PROPOSAL
3. CROSS ASSIGNMENT LOU – REJECTED IN ITS ENTIRETY

This had been the Union’s position since the beginning of negotiations, and such position never changed. It is undisputed that for the entire period covered by this proceeding, the Union never agreed to any Company proposal. (Tr. 1062). (To be clear, the Company recognizes the Union’s right under labor law to hold firm on any issue the Union deems important. What is objectionable is when the Union and General Counsel deny that the Company has a parallel right and then suggest that further talk on March 31 reasonably could have been expected to lead to an agreement.)

D. *The Importance of the Issues as to which there is Disagreement*

Neither party will deny that the issues on which they were in disagreement were, and remain, items of critical importance. The Judge did not disagree, although she failed to describe any of the Company’s concerns, as were explained in detail at the hearing. Under the then existing shift schedules, many employees had been working seven days a week during the prior two years, sometimes with multiple 16 hour shifts during the seven-day work week. (Tr. 215, 226, 818). Overtime was as much as 45% of regular time and absence rates were 35%, and employees, understandably, were being worn down. (R. 2; Tr. 472, 818). Yet production was not increasing as it should with modern equipment because too much of an eight hour shift, on a percentage basis, was being spent on preliminary and post-production activities. (Tr. 813-15).

Moreover, for underground miners, being constantly tired and worn out was regarded as a safety hazard. (Tr. 818). All this was discussed repeatedly and in depth during the February negotiations before Gary Fuslier entered upon the scene (Tr. 820-21), as well as thereafter (Tr. 472). The Judge did not deem these facts sufficiently important to even mention in passing.

The Union and General Counsel seem to believe that it is suspicious that highest management should be interested in putting an end to the foregoing, completely untenable work regimen at the earliest opportunity and converting employees to the more reasonable schedule of four eleven hour days with three days off each week. Respondent submits that it would have been grossly irresponsible for such management to have done any less. Sure, there were many employees who liked the huge amounts of overtime they were able to earn, and the Union was free to exercise its right to free speech at the bargaining table and to make the argument, as it did, that the old shift schedule supposedly “had worked for forty years” and did not need to be changed now. (Tr. 214; R. 30, p. 6). But management has a responsibility to do what it deems best for all stakeholders, and that is what it was committed to doing here. As Ms. Heider explained: “management wanted to fix the problem and absent an agreement, we were going to fix the problem.” (Tr. 1178).²

Similarly, the other two Company contract issues were important initiatives for increasing productivity and had been exhaustively discussed in the negotiations, although not to the extent of the scheduling issue. As with work schedules, each party fully understood the

² What management would not understand the imperative to rectify at the earliest opportunity a situation where, on average, employees were missing three and a half work days out of every ten scheduled, yet were getting overtime pay for four and half days for every ten straight-time days actually worked. It is not surprising that the Company was pushing for the quickest possible fix, while the majority of the employee group was perfectly willing to talk about it indefinitely, as they had been for years, so long as they incurred no change while they were talking.

position of the other; one simply believed the proposals “gutted” union work rules and the other viewed them as essential to the health of the business.³

E. *The Contemporaneous Understanding of the Parties*

As to this consideration, General Counsel contended there can be no impasse unless both parties agree that there is an impasse, a standard that represents an overstatement of the so-called “both parties must be at the end of their rope” test. Accordingly, so long as the Union indicated that it “had things to talk about” and “room to move,” at least under the claim being pursued in this case, the parties could never be at impasse and the Company could never exercise the main economic leverage accorded to it by law, the right ultimately to implement changes deemed necessary after contract expiration and bargaining to impasse over the proposed changes.

There are at least three reasons General Counsel’s theory is without merit. First, although “end of the rope” arguments may be relevant to the “contemporaneous understanding” prong of the *Taft Broadcasting* standard, and in some circumstances it could be, and has been, determinative, the legal standard remains that of *Taft Broadcasting*. Second, the application of an “end-of-the-rope” test by itself is completely nonsensical. Here the Union could have moved piece by piece “towards” the Company’s position literally for years without ever agreeing to any of the Company’s positions. Third, the facts of this case show that the Union was, in fact, at the

³ The Company takes issue with General Counsel’s point in opening statement to the effect that the Union could not be expected to have accepted the Company’s March 19, 2010 final offer because:

“The employer’s proposal was completely one-sided, and the employees knew [that] successfully negotiated contracts considered two parties’ needs.” (Tr. 68).

When General Counsel resorts to manifestly bogus assertions such as that, an observer can be reasonably certain that his case on the merits is seriously lacking. When an administrative law judge accepts the argument by finding the employer was required to have a plan to modify its final offer to address union concerns, one can be confident her legal analysis is defective.

end of its rope in that it requested a final offer and at all times, both before and after that offer, was committed to not accepting any of the three key demands of the Company. Further, the reason given by the Union for requesting the final offer on the afternoon of March 18 was that the negotiations were “not going anywhere” (Heider recollection, Tr. 1077) or “not going forward” (Bull recollection, Tr. 831), an obvious recognition that the Company had not moved on any significant issue on March 11, March 12 or earlier on March 18.⁴ (Tr. 449-51, 830).

The request for the final offer, therefore, by itself, is the most compelling evidence of the “contemporaneous understanding” of the parties as to the status of negotiations. Recognizing that final offers, by definition, signal the conclusion of negotiations, General Counsel argues, unconvincingly, that the Union “asked the employer to provide a final offer, not a last, best effort, but a final offer before the then current CBA expired.” (Tr. 68). Not even a partisan union negotiator could swallow that line of argument. Gary Fuslier testified:

Q: And then have you heard people use the terms, final offer, last and final, or last, best and final?

A: Yes.

Q: And you’ve heard all three of those. Is that right?

A: Yes.

Q: And is it true that all three of those, in the parlance of labor negotiations, mean exactly the same thing?

A: Yes.

(Tr. 426, lines 2-9).

⁴ Fuslier denied that he ever gave the absence of progress as a reason for requesting a final offer (Tr. 461), although he acknowledged that, in fact, there had been no such progress (Tr. 462). None of the other members of the Union’s negotiating committee were called to address the events of March 18. Further, Fuslier in his affidavit conceded that the Company’s unwillingness to move further on the major issues was a reason for requesting a final offer (R. 30, p. 13), which is really just another way of saying that negotiating progress had stopped. Finally, Fuslier’s lack of recollection as to other events of March 18 (*e.g.*, his misrecollections as to there having been only an afternoon meeting and no passing of proposals across the table) otherwise was at variance with undisputed facts.

Respondent's search of the law has found no case in the history of the NLRA where it has been alleged by General Counsel or found by the Board that the parties were not at impasse after an employer was asked to give, thereafter gave, and then stuck to, a final offer. The closest case discussing this consideration is *Presto Castings Co.*, 262 NLRB 346 (1982), where the Board found impasse after only two bargaining sessions where each side pushed the other to a final offer. Relevant here, the Board observed:

“The Union pushed Respondent to the limit, and is not in a position now to complain that Respondent acted in bad faith by not giving up the fight.”

(262 NLRB at 354).

See also *Industrial Electric Reels, Inc.*, 310 NLRB 1069, 1072, wherein the Board appears to accept as a given that a request for a final offer permits an employer to give, and to stand on, such offer.

Attaching particular significance to a request for a final offer, makes perfect sense. When a prospective “purchaser” of something, whether it be a car, a house or a new three year labor contract, reaches the point in negotiations of asking the “seller” to provide a “final offer”, and the seller does so, the only remaining issue in negotiations is whether the buyer will, or will not, accept the final offer. Faced with the seller's bottom line offer, it becomes irrelevant thereafter whether the buyer is willing to increase his offer or to continue talking about the issues; the only question is acceptance of the final offer, yea or nay.⁵

In this case, the Company's goal, and the first instruction to Heider from top management, was to try to secure the Union's agreement to a contract based on the Company's final offer. The only way to determine whether the parties were close was to meet again after the

⁵ This, of course, is entirely consistent with Mr. Fuslier's explanation as to why he, as a union representative, would never give a final offer. (Tr. 428).

initial rejection of the final offer. It could have been that some minor movement, perhaps on some unrelated issue, would have carried the day, *e.g.*, the Union would accept the final offer for a two or four year contract rather than the proffered three. Heider listened for that, yet, instead was told that each of the three Company proposals was rejected as amounting to a “gutting”, or such, of fundamental employee rights and benefits. (Tr. 475; R. 30, p. 16).

In the context of the house purchase analogy, it is as if the buyer had requested and received the seller’s final offer of a \$100,000 purchase price, rejected it as being entirely unreasonable and then demanded that the seller remain in negotiations to hear a repeat of all the buyer’s previous arguments as to why the seller should instead accept \$70,000. The seller, however, having in good faith set \$100,000 as its final offer at the buyer’s request, and having the right to hold to that number, would never be required by any concept of “good faith” to continue negotiations when the seller’s only response would be “final means final”.

The foregoing is not to argue that labor negotiations are the equivalent of buying or selling a house. If they were, the Company would need not have spent, literally, years trying to get the Union to accept a different shift schedule. The Company would need not have offered outsized economic incentives to achieve that end. The Company would need not have extended the contract and returned to the table on March 31 to listen to the same Union complaints about its contract proposals.

As well, this is not to denigrate the bargaining strategy of obtaining the other side’s final offer and then seeking to bargain to a point better than such offer. These were labor negotiations. This was bargaining, and the Board does not sit in judgment on bargaining strategies. As Fuslier recognized, he was taking a risk that the Union would not be able to force

improvements in the final offer as given and that the Company might choose to stand on such offer, exactly the outcome here. (Tr. 458-60).⁶

As to the Union's statement to the employer on March 31 that it "still had room to move," the Board has held that such a statement is not sufficient to forestall impasse. In *ACF Industries*, 347 NLRB 1040, 1042, a very close case factually, which we ask the reader to review in full, the Board held:

"[The] Respondent engaged in good faith negotiations at all times in these negotiations. In these circumstances, the evidence of impasse cannot be ignored merely because of the Union's last minute statement – without any specifics – that it had new proposals. Otherwise, virtually any assertion of new proposals ... could be sufficient to defeat a claim of impasse."

Please also review footnote 4 in *ACF Industries* on the same page (1042), wherein the majority pointed out that it was more appropriate to ask whether the parties were warranted in thinking further negotiations at that time would have been futile, rather than asking "whether each was at the end of their rope." See also *Civic Motor Inns*, 300 NLRB 774, 776 for the proposition that an employer need not continue meeting based on vague union statements about having "flexibility" and "new proposals".

Respondent also refers the reader to *GATX Logistics*, 325 NLRB 413, 419 wherein even Members Liebman and Fox found impasse on substantially identical facts to those of the case at hand; and to *Industrial Electric Reels, Inc.*, 310 NLRB 1069, which involved an impasse reached after a single economic offer, along with other facts in common with the case at hand.

⁶ Nor does the Company take issue with the Union's effort to play "good cop" to its membership's "bad cop" by admitting that the Committee had exhausted its arguments but that now those same arguments were somehow new because they would be coming from the membership instead of the Bargaining Committee, all as if the Bargaining Committee had been representing someone else during past sessions. (Tr. 478). The concept of "union representation" would be changed forever if it were held that negotiations must first be held with the Union bargaining committee and then repeated so the employer could then "negotiate with the membership."

The Board has held that an impasse may exist even where the parties are not at impasse on every issue, and that such “impasse is a defense to the charge of unilateral change.” *North Star Steel Co.*, 305 U.S. 45 (1991); *Serramonte Oldsmobile, Inc.*, 318 NLRB 80, 97 (1995). It is permissible to implement a final proposal in such a circumstance, when the parties are unable to reconcile a “single critical issue,” resulting in “a complete breakdown in negotiations and an overall impasse between the parties.” *CalMat Co.*, 331 NLRB 1084, 1097 (2000) (quoting *Sacramento Union*, 291 NLRB 552, 554 (1988), *enfd. sub nom. Sierra Publishing Co. v. NLRB*, 888 F.2d 1394 (9th Cir. 1989)); *see also Laurel Bay Health & Rehabilitation Ctr.*, 353 NLRB No. 24, 2008 WL 4492577, 2 (2008) (“Impasse over a single issue may create an overall bargaining impasse that privileges unilateral action if the issue is “of such overriding importance” that it frustrates the progress of further negotiations.”).

Lastly on the “contemporaneous understanding” prong of the *Taft Broadcasting* standard, it should be noted that in his affidavit filed in support of the Union’s charge, Mr. Fuslier averred that at the March 31, 2010 bargaining session he had with him a written proposal that Ms. Heider refused even to read. (R. 30, p. 17). General Counsel referenced such alleged conduct by Ms. Heider in his Opening Statement (“The employer refused ... to even read a new proposal from the Union.” (Tr. 71)). Yet, it turns out that Mr. Fuslier had no written proposal of any kind with him on March 31 and that what he had represented to the Region as such was something actually prepared after the meeting. (Tr. 481).⁷

⁷ This “intended proposal” was never given to the Company. However, it demonstrates beyond question that the Union was not ready to accept any of the three Company initiatives, and, with respect to shift schedules, it did no more than to offer a longer trial period before the Union could require a return to the old system, something that had been categorically rejected by the Company. Therefore, although no doubt intended by the Union to create a “record”, what the document actually does is prove that what the Union “had in mind” on March 31 was of no significance.

Of more importance on the impasse issue, however, is the accuracy of Fuslier's testimony about the parties allegedly being "close" to agreement on the issue of shift schedules during and after the bargaining session of March 10. In this regard, Fuslier claimed that the Company and Union had come to an agreement during the March 10 negotiating session that there would be a one year trial period for the eleven hour shift schedules, after which the Union could opt out. Fuslier testified that as of March 18 "with the escape clause and trial period ... we were close." (Tr. 254). This claim is material on the issue of impasse because if the parties were "close" with a one year trial period and a Union opt out option, General Counsel could argue that the Union's undelivered, subsequently prepared proposal for an eighteen month trial period with Union opt out would have put the parties even closer on March 31, 2010, when the fact is that the Company already had unequivocally rejected any trial period that would permit a Union option to return to the offending schedule. (Tr. 468).

Although the Judge accepted Fuslier's claim as to the foregoing, Respondent asks that the reader to review Fuslier's testimony concerning the March 10 negotiations beginning at page 228, line 3 through page 230, line 9; then read Fuslier's alleged conclusion as to where bargaining over shift schedules stood as of March 18 at page 254, lines 9-12; and then his supposed "surprise" that the previously "agreed to" proposal for the one year trial period with union opt out was not included in the final offer. (Tr. 263-64).⁸

It is blatantly misleading for Fuslier and the Judge to suggest the "trial period and Union opt out" were ever agreed to by the Company; and it was further misleading to suggest the parties were "close" on the shift schedule issue as of March 18. To the contrary, and particularly

⁸ Fuslier had similarly claimed in his Board affidavit that Heider had accepted his proposal as to a trial period with a union opt out, conveniently not mentioning that Heider's alternative upon opt out was the four-shift schedule. (R. 30, p. 7; Tr. 443).

contrary to Fuslier's claim that the Company accepted his pre-lunch proposal when the parties returned from lunch on March 10, the record shows that the only way the Company ever suggested that it would agree to a trial period was if the "opt out" alternative was a "four-shift schedule," something Fuslier acknowledged would be the most unpopular of all possible shift schedules. (See G.C. Exh. 5, pp. 12, 13, 18 and 19; R. 6; Tr. 435). As to Fuslier's claim that the parties were "close" on March 18 on the shift schedule issue, please see the Union's various responses on such issue dated March 11, 12 and 18, where the Union unequivocally declared every time that it "Rejected Company Proposal in its Entirety." (R. 9, 10, 11).

In the end Fuslier was forced on cross examination to distance himself from his direct testimony:

Q: Did the company ever, ever make a proposal that would have allowed the union the option, over the company's objection, to go back to the old shift schedule?

A: No, no.

Q: Okay. And then my question is: Is it correct that Mr. Bull and Ms. Heider made it clear to you that a trial period would never be acceptable if there were a possibility that the union could force a return to the prior shift schedule?

A: Yes.

(Tr. 468, lines 8-16).

Yet, without a mention of any of the foregoing, the Judge credits the reverse of what Fuslier actually testified to and found Fuslier's trial period proposal to have been tentatively agreed to. This shows that she did not pay attention at the hearing and ignored the record of the hearing.

The Intra-Company E-Mails

To the extent the Judge found that one of the Company's goals on March 31 was to establish impasse, our response is that it is not a violation to have that as a goal. *Charles D.*

Bonanno Linen Service v. NLRB, 454 U.S. 404, 412 (1981) (quoted both *supra* and below given its overriding significances). To the contrary, having bargained in good faith throughout to obtain a contract, every reasonable employer will always seek to avoid the circumstance of having to continue negotiations indefinitely, especially where there are problems with existing terms and conditions that need to be fixed. Here, the most significant take-away from the e-mails surrounding March 31 is that the “prime directive” from highest management to Ms. Heider was for her to try to get the Union to agree to the Company’s final offer, hardly the stuff of a violation.

Gary Fuslier made it clear that he has never, in his view, seen a bargaining impasse; and, strategically, as a union representative, it is no doubt a good strategy to seek to avoid an impasse because by so doing a union can deprive an employer of its right to place a proposal into effect. To the extent an employer is seeking something the union opposes, such a strategy operates to forestall the unwelcome consequences of change.

Yet, the Supreme Court has held that a bargaining impasse is not at all unusual and is an important part of the on-going bargaining process:

As a recurring feature of 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. Indeed, an impasse may be brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process.”

Charles D. Bonanno Linen Service v. NLRB, 454 U.S. 404, 412 (1981).

Here, the impasse was, in fact, broken shortly after implementation by the union’s strike, the parties resumed bargaining, and they have continued to bargain to date.

There having been a bargaining impasse as of the time of the Company’s implementation of its final offer following the second ratification rejection the evening of March 31, it follows

that the subsequent implementation was not a violation, the strike was not an unfair labor practice strike as of April 7 and Heider's statements about hiring permanent replacements were not violations.

The Board recently issued a decision in an impasse case that supports the Company's position and merits some mention. *Sutter West Bay Hospitals*, 356 NLRB No. 159 (May 25, 2011). In particular, note the Board's reliance on the union's failure to propose anything of substance in the response to an impasse declaration by the employer.

Additionally, note the discussion by the administrative law judge as to *Taft Broadcasting*, as well as to whether both parties were warranted in thinking further negotiations at that time would have been futile. The "warranted in thinking" test has been referenced from time to time in Board cases as an objective "reasonable person" test, one element of which is the "end of the rope" factor that General Counsel here is claiming takes precedence over all else. *See ACF Industries*, 347 NLRB 1040, 1042 at fn. 4.

As relevant to the case at hand, it is clear that as of March 31, 2010, after the Company gave its final offer and announced an intention to stand on that offer, and the Union stated its position that all three major components of that offer were unacceptable, any reasonable person would necessarily conclude that sitting in negotiations and repeating those positions would have been an exercise in futility. And that was so even though the Union said it still had room to move because any such movement was irrelevant given the Company's decision to stand on its final offer.

Obviously, there is overlap between the *Taft Broadcasting* standard and the "futility of further bargaining" test, but they are not inconsistent and both support the Company here. What

both show, however, is that there is no separate “end of the rope” test whereby a union can forestall impasse merely by claiming it has “room to move” on some issue.

2. **To the Judge’s Findings and Conclusions to the Effect that the Respondent refused to meet with the Union during the month of April 2010.** (ALJ p. 21, line 19 – p. 23, line 25).

GROUND FOR EXCEPTION 2

This contention had no record support, except to the extent Heider admittedly declined to meet for more than a couple of hours on March 31 and would not meet on April 1. (She had returned to Kansas and everyone else was in Louisiana.) It is not a violation, however, for a party to decline to meet on particular days, nor is it ever a violation to decline mediation services. (R. 26). General Counsel’s witness Fuslier specifically acknowledged that Heider did not refuse to meet upon request at any time following the commencement of the strike on April 7. (Tr. 489). The Company promptly agreed to further negotiations and such were scheduled at the first opportunity based upon the schedules of the parties.

3. **To the Conclusion that the Strike was an Unfair Labor Practice Strike as a result of the Absence of a Good Faith Impasse at the time of the Unilateral Implementation announced on March 31, 2010.**

GROUND FOR EXCEPTION 3

As noted by the Judge, Respondent admitted that if the impasse were unlawful, the unilateral implementation, therefore, was unlawful and the strike was an unfair labor practice strike from the beginning as it was the unilateral implementation of the offer that caused the strike. For the reasons stated above in connection with Exception 1, Respondent excepts to the underlying findings and conclusions on the nature of the impasse and legality of the implementation.

4. **To the Judge's Findings and Conclusions that the Adoption of the May 22, 2010 Operating Procedures Constituted a Violation.**

GROUNDS FOR EXCEPTION 4

The document on its face was applicable only during the period of the strike, and, by its terms, expired when the strike ended on June 15, 2010. Strikers were not recalled by seniority, not as a result of this document, but as a result of the bargaining between the Company and Union over the issue of the order of recall.

5. **To the Judge's Conclusion that the Company's May 25, 2010 Bargaining Proposal violated the Act of the Date of its Offer.** (ALJ p. 30, line 10 – p. 32, line 30).
6. **To the Judge's Finding and Conclusion that the Company's May 25 proposal "when viewed as a whole, would leave the Union and the employees with substantially fewer rights and less protection than provided by law without a contract."** (ALJ p. 32, lines 24-31).
7. **To the Judge's Finding and Conclusion that Respondent engaged in Illegal Bargaining on June 3, 2010.** (ALJ p. 36, line 36 – p. 37, line 40).

GROUNDS FOR EXCEPTIONS 5, 6 AND 7

It should be apparent that this allegation runs counter to the Supreme Court's admonition that the Board may not "either directly or indirectly ... sit in judgment upon the substantive terms of a collective bargaining agreements." *American National Insurance*, 343 U.S. 395, 403 (1952). There are cases, of course, holding that insistence on an offer as of the end of negotiations that leaves the union worse off than if there were no contract can be evidence of bad faith bargaining, but none that assess a bargaining violation to the mere making of an offer. Parties are allowed to make the most ridiculous offers without government intervention, for example, the Union's offer in this case that each employee should receive a \$30,000 production bonus each year of the contract. This is bargaining; and exaggeration and posturing is not only legitimate, it is to be expected, something both parties here clearly recognized. (Tr. 448).

Moreover, contrary to General Counsel's allegations, the Company's proposals on May 25, 2010, although "regressive" in the sense that they were newly added to the negotiations after the strike, were made in complete accord with well established principles of labor law and case precedent. *Eg., Hickinbotham Bros.*, 254 NLRB 96; *Reliable Tool*, 268 NLRB 101; *Barry-Wehmiller*, 271 NLRB 471.

In *Hickinbotham*, it was explained:

"It is not illegal for an employer who has weathered a strike to capitalize upon its new found strength to secure contract terms it desires. *O'Malley Lumber Company*, 234 NLRB 1171 (1978); *World Publishing Company*, 220 NLRB 1065 (1975). A strike is a two-edged sword. Depending upon how it affects the employer's operations, the strikers may gain concessions or they may lose concessions previously obtained.

(254 NLRB at 102).

Here, the additional proposals were offered only after the Company had successfully weathered eight weeks of a strike. More particularly, mine supervisors, led by Mine Manager, Gord Bull, performed a comprehensive review of the prior bargaining agreement and developed numerous revisions they wanted to have changed. (Tr. 1092-93). The changes developed by the management team were given to the Company's lead negotiator, Victoria Heider, who was charged with obtaining as many as possible, and especially seven critical or "core" proposals, in a new four or five year collective bargaining agreement.

The following factors have been relied upon by the Board as negating an inference of bad faith in circumstances of regressive bargaining.

1. "A the time the Respondent made its new proposal package, negotiations had been at a standstill for over two months because of a temporary impasse ... Respondent, therefore, did not "sidetrack" a forward-moving process by introducing new elements into the negotiations." *Reliable Tool*, 268 NLRB 101.

2. “The proposals themselves, although found by the Judge to be, taken together, substantially more unfavorable to the Union than the positions taken by the Respondent previously, are not so “harsh, vindictive or unreasonable” that they warrant the presumption that they were offered in bad faith.” *Reliable Tool*, 268 NLRB 101, citing *Chevron Chemical Company*, 261 NLRB 44, 46.

3. “The Union refrained from continuing negotiations over the subjects on which it claims the Respondent regressed in its new package, preferring instead to resolve the legitimacy of the Respondent’s bargaining conduct by litigating” *Reliable Tool*, 268 NLRB 102.

4. “Respondent had specific reasons for [its new proposals] It is immaterial whether the Union, the General Counsel or I find these reasons totally persuasive. What is important ... is these reasons are not so illogical as to warrant an inference that [Respondent was seeking to avoid an agreement.]” *Hickinbotham Bros.*, 254 NLRB 103.

5. “The parties have continued to maintain an ongoing bargaining relationship. The record reflects no refusal by the Respondent to meet and confer or provide information during the protracted negotiations.” *Barry-Wehmiller*, 271 NLRB 472.

6. “No other unfair labor practices are involved here, and the record reflects no conduct by Respondent away from the bargaining table which would suggest that its negotiating positions were taken in bad faith.” *Chevron Chemical Company*, 261 NLRB 44, 47.

* * *

In the Company’s May 25 proposal, some of the highlights include:

1. The maximum union security provisions allowed by law, including dues check off, without any change from the prior bargaining agreement
2. A standard, not unduly broad, management rights clause
3. Arbitration of all disputes

4. Wage increases of 2.5% per year in a time of a global recession and zero inflation
5. Vacation allowances of five weeks per year after twenty years
6. Health insurance
7. 13 holidays per year
8. 401(k)
9. Union leave
10. Jury duty pay
11. Severance pay and other fringe benefits

Any claim by the Union that the Company's newly proffered merit, shared work or contracting proposals are inherently harsh, oppressive and vindictive is manifestly ridiculous. The merit proposal simply calls for competitive employee selections to be made based on merit factors rather than seniority. However, the Company's proposal also requires that there must be a "discernible difference" between the relative merit of employees before merit factors control; and the Company's decision would always be subject to review by an independent arbitrator.

Nowhere in any case has it ever been suggested, let alone found, that it is unduly "harsh and vindictive" for an employer to reward merit, to have supervisors be able to assist with unit work or to retain the right to subcontract in the event employees price themselves too far above market rates. Each of these proposed provisions still provided greater rights to bargaining unit employees than those of unrepresented workers, and General Counsel cannot claim otherwise.

A review of "regressive bargaining cases" reflects that usually the dispute centers on the decision by the employer to cancel a prior "tentative agreement" on one or more bargaining issues and on whether such cancellation was justified in the circumstance. In the case at hand, the Company at no point sought to cancel tentative agreements previously made during the

course of negotiations. The Company continued to respect every prior tentative agreement from the earlier negotiations including every wage and benefit increase; the “regressive” proposals were simply additional items that the Company originally chose not to address in this round of bargaining.

In *Hendrick Manufacturing Co.*, 287 NLRB 310, the Board noted the legality of the employer’s action there, with words precisely applicable to the facts at hand:

“Through the successful weathering of the strike the Respondent was able to improve its bargaining position and to “raise the stakes” in its bargaining with the Union. ... We conclude that the Respondent met its bargaining obligation by meeting regularly with the Union, by presenting numerous written proposals, by explaining its position to the Union negotiators, by agreeing to the presence of Federal mediators, and otherwise meeting its procedural obligations.”

(287 NLRB 311).

To be sure, there is oftentimes a visceral disapproval reaction to anything “regressive,” including regressive bargaining. While he was Chairman of the NLRB, the pre-eminent labor scholar, William P. Gould, addressed this perception head on in *White Cap, Inc.*, 325 NLRB 1166, 1171-72 (1998), wherein he wrote:

“I wish to emphasize, however, the lawfulness of so-called “regressive bargaining” when it is not undertaken in the general context of an intent to evade coming to an agreement.”

* * *

“In sum, this case clearly indicates the compatibility of the Respondent’s simultaneous possession of a clear intention to reach an agreement with the Union and the wielding of harsh regressive tactics against the Union. Applying pressure to the Union by such tactics may seem, to those uninitiated to the world of “hard ball bargaining,” overwhelming evidence of a bad-faith intent. But, collective bargaining is wide open and rough and tumble where both parties use their resources and economic strength as best they can.”

The bottom line in the bargaining at issue here is that the Union side assumed that its strike would bring the Company to heel as threats of such action had done in times past. But the pressures of survival in the modern economy no longer permit employers to give as in the past, *e.g.*, no regular time work on Saturdays, promotions by seniority without regard to merit, and work “ownership” by job classification. And after taking the Union’s best shot, the Company figured out that it had the ability to change the dynamic, and it took that opportunity. That does not violate either the letter or the spirit of the law. To the contrary, it is a fundamental part of how labor law is designed to work.

As to the finding of a June 3 bargaining violation, the reader is first asked to review Fuslier’s affidavit testimony as to how the June 3 meeting ended because it is clear therefrom that Fuslier’s complaint was that Heider was telling him what was needed “in order to get a CBA”. (R. 31, p. 21). In that regard, Heider listed the Company’s three proposals from the earlier negotiations and the four items deemed “core” from the May 25 proposal. And then the parties agreed to meet again on June 22. (R. 31, p. 21). There was no “conditioning” of bargaining on June 3, only a bargaining statement as to what the Company deemed essential if there were to be an agreement. This kind of tough talk and posturing is not a violation. *Logemann Bros. Co.*, 298 NLRB 1018, 1021. *See also Industrial Electric Reels*, 310 NLRB 1069, 1072 wherein it was noted that:

[T]he Board is careful not to “throw back in a party’s face remarks made in the give-and-take atmosphere of collective bargaining,” because to do so would frustrate the Act’s policy of encouraging free and open communications between the parties. (Citing *Sage Development Company*, 301 NLRB 1173, 1176).

Furthermore, in the interim between meetings, Heider by e-mail floated the idea that the Company would drop all its other May 25 proposals for change if the Union were to accept at least some of the Company’s core issues and bargain from that point. The reader is requested to

review that e-mail. (G.C. 33(b)). Clearly, as of June 3 and, thereafter, the Company was seeking agreement on its core issues and trying to figure out a way to convince the Union accordingly; but that is what collective bargaining is all about. This is not a situation where the Company refused to bargain; it is one where the Company fully bargained by developing a complete proposal, by putting it in writing, by explaining the reasons for each proposal and by providing all information requested by the Union.

After the Union objected to Heider's e-mail suggestion as to how the scheduled June 22 bargaining should proceed, the Company changed tactics and, instead, came to the June 22 bargaining with modifications in its May 25 proposal as to non-core issues, and it presented those as the first order of business for discussion on June 22. (Tr. 31, p. 26; Tr. 843, 1096). Unquestionably, therefore, there was no unlawful conditioning of bargaining from June 3 through June 22 because on June 22 the Company itself was initiating discussion on non-core items, as well as modifying its own proposals on those issues in an effort to get the Union to respond with something other than the claim that regressive bargaining was per se illegal.

8. **To the Judge's Findings and Conclusions Ignoring the Bargaining between the Parties over the Order of Striker Reinstatement and requiring such Reinstatement to be in accord with the Expired Contract.** (ALJ p. 34, lines 22-46; p. 45, lines 3-26).

GROUND FOR EXCEPTION 8

The Company notified the Union well in advance of the end of the strike and sought to bargain over the method of striker recall (R. 20). Later, when circumstances developed so that the previously anticipated issue became a real issue, the Company once again notified the Union, proposed its solution and offered to bargain. (R. 20, p. 3). In response to the first notice the Union did nothing. In response to the second, the Union claimed that the only method it would approve was seniority, and it threatened an unfair labor practice charge if the Company did not

agree. In neither case did the Union request further bargaining, yet on these facts, it is the Company that is alleged to have refused to bargain. The rhetorical point is what more could Respondent have done with respect to such a time-critical issue?

As to whether a Union has the right to insist on seniority as the basis for recall order, the law is clear that it does not. *Lone Star Industries, Inc.*, 298 NLRB 1075, 1076-77, wherein the Board stated:

“We take no issue with the proposition that employees have no right to recall in order of seniority.”

Here, the Company offered to bargain the issue and the Union declined. The Company was not required to use seniority, the prior contract did not have a provision dealing with striker reinstatement, and to the extent there was any ambiguity in the practice, the Company sought to bargain the issue.

9. ***To the Judge’s Findings and Conclusions Prohibiting the Company from following through on Hiring Commitments made before the End of the Strike.*** (ALJ p. 46, lines 14-23).

GROUND FOR EXCEPTION 9

The Judge found the strike to have been an unfair labor practice strike and, accordingly, found that replacements should have been discharged to make room for returning strikers. Respondent has excepted to such finding and conclusion as to the nature of the strike. This issue, therefore, turns on the categorization of the strike.

10. *To the Judge's Findings and Conclusions that "as of June 23, 2010, Respondent had continued to insist on bargaining proposals that left the Union without any representational rights and left employees in a worse position than if they had no collective-bargaining representative at all".* (ALJ p. 39, lines 1-13).

GROUNDS FOR EXCEPTION 10

Respondent adopts its prior argument with respect to the lawfulness of its May 25 proposal and submits that the Board has no authority to stand in judgment on the reasonableness of such proposal. The assertion by General Counsel and the Judge that the proposal deprived the Union of any representational rights and placed the employees in worse shape than unrepresented employees is breathtakingly erroneous, something that can easily be seen by simply reviewing the entire contract offer in question. (R. 19).

11. *To the Judge's Failure to Find and Conclude that:*
- a. *the parties were at impasse on March 31, 2010;*
 - b. *the Respondent lawfully implemented its Final Offer;*
 - c. *the strike was not an unfair labor practice strike at its inception;*
 - d. *the strike was never converted to an unfair labor practice strike;*
 - e. *the Respondent was entitled to keep replacement employees ahead of returning strikers;*
 - f. *replacement employees included individuals to whom offers had been made and acceptances received prior to the end of the strike; and*
 - g. *the absence control plan changes constituted a day-to-day change that did not require an overall impasse in bargaining prior to being put into effect.*

GROUNDS FOR EXCEPTION 11

In support, Respondent adopts its argument in connection with the preceding Exceptions.

12. **To the Judge's Conclusions of Law, Remedy and Proposed Order in connection with the foregoing Exceptions.** (ALJ p. 47, line 45 – p. 52, line 9).

GROUNDS FOR EXCEPTION 12

In support, Respondent adopts its argument in connection with the preceding Exceptions.

13. **To the Judge's Consideration in this Proceeding of the Issue of the Reinstatement of Employees who Resigned before being offered Reinstatement.** (ALJ p. 43, line 33 – p. 44, line 41).

GROUNDS FOR EXCEPTION 13

This issue was not raised in the pleadings and is appropriate only for the compliance stage of the case, if necessary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of August, 2011, Respondent's Exceptions to Decision by Administrative Law Judge was e-mailed, to:

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