UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

AND

Cases 15-CA-19704
15-CA-19738

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

CHARGING PARTY UNIONS' CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Now Come, Charging Parties United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC and United Steelworkers, Local 14425 (collectively referred to herein as "USW" or "Union"), and do hereby respectfully submit these Cross-Exceptions to limited portions of the Administrative Law Judge's Decision (decision or ALJD) in accordance with the Board's Rules and Regulations Section 102.46:

1. The Unions except to the extent that the Administrative Law Judge's decision does not clearly find that the Respondent's unlawful refusal to bargain as alleged at complaint paragraphs 16 and 18(b) caused the April 7, 2010 unfair labor practice strike (ulp strike); the Board is urged to expressly find that Respondent's refusal to bargain (complaint paragraphs 16 and 18(b)) was a significant factor in the employees' decision to commence the April 7 strike as alleged in complaint paragraph 9. ALJD at p. 23, line 29 through p. 24, line 17; and p. 41, line 45 through p. 46 line 7.

The ALJ correctly found that the Respondent refused to bargain in good faith in violation of Section 8(a)(1) and (5) of the Act, from March 31, to about April 30, as alleged in complaint paragraph 16. In addition, the ALJ found Respondent's insistence that there would be no further bargaining unless the Union accepted Respondent's "final offer" is also a violation of Section 8(a)(5) of the Act, as alleged in Complaint, ¶ 18(b). (ALJD at p. 23, lines 21-27). The complaint's erratum clearly alleges that Respondent's unfair labor practices as alleged in complaint paragraphs 16 and 18(b) caused the April 7 unfair labor practice strike. GC-1(m).

In her decision, the ALJ correctly concludes that the record as a whole reflects that Respondent's unilateral March 31 unilateral implementation was a significant factor in the employees' decision to go on strike April 7. And, the Judge accordingly found merit to complaint paragraph 9 that the strike was an unfair labor practice strike. ALJD at p. 24, lines 9 – 17. However, the Judge's conclusion was not clear that she relied upon Respondent's refusal to bargain (complaint paragraphs 16 and 18(b)) as also causing the unfair labor practice strike. Meanwhile, such a finding is strongly supported by the record evidence.

Thus, in her findings regarding the April 7 strike vote, the Judge correctly found that Union Staff Representative Gary Fuselier expressly told the Union's employee membership that Respondent had refused to continue to bargain. ALJD at p. 23, lines 33-35. There is other abundant record evidence that Respondent's refusal to bargain caused the ulp strike. *See*, Tr: 295 ln 18; 298 ln 9 – 24; 534 ln 23 through 535 ln 3; 765; GC 19; GC-21; GC-22, paragraph 4; GC-58 pg 2; GC 57 (contemporaneous picket line newscast reflecting picket/Local Vice President Robertson (speaker stipulated at Tr: 756) noting Respondent refused to return to the table.)

In view of the above, and consistent with complaint paragraph 9 (GC-1(m)), the Board is respectfully urged to clarify the Judge's decision to make it clear that Respondent's refusal to bargain as alleged at complaint paragraphs 16 and 18(b) caused the April 7 unfair labor practice strike.[1] *See, e.g., Page Litho., Inc.*, 311 NLRB 881, 891

[1]And, in light of the fact that, as we demonstrate at p. 3 of the "Charging Party Unions' Brief in Opposition to Respondent's Exceptions," the Company did not properly except to the ALJ's finding that it unlawfully conditioned bargaining during this period upon the Union's acceptance of its "final offer," a finding that the bad faith bargaining

(1993); *Domsey Trading Corp.*, 310 NLRB 777, 791 (1993); and *R & H Coal Co.*, 309 NLRB 28, 28 (1992).

And, in light of the fact that, as we demonstrate at p. 3 of the "Union's Opposition to the Exceptions of Respondent," the Company did not properly except to the ALJ's finding that it unlawfully conditioned bargaining during this period upon the Union's acceptance of its "final offer," a finding that the bad faith bargaining during this period caused the unfair labor practice strike would be fatal to the Company's failure to recall the striking employees.

2. Charging Party Union excepts to the extent that the Administrative Law Judge's decision does not clearly find that Respondent's unlawful April and June threats were sufficient to prolong the strike as alleged in Complaint, ¶9. ALJD at p. 41, lines 20-35; and p. 41 line 45 through 46 line 7.

As discussed above, the Judge appropriately found that the strike commencing April 7 was an unfair labor practice strike. Additionally, the Judge appropriately found that by threatening its Unit employees to fill the strikers' jobs with permanent replacements, Respondent engaged in a separate and independent violation of Section 8(a)(1) of the Act. And, as we note at p. 4 of our brief in opposition to the Company's Exceptions, the Company has not excepted to this finding of a violation, and therefore, it must be adopted by the Board.

At the same time, the Judge's analysis does not expressly consider if the Respondent's unlawful threatening of its Unit employees prolonged the unfair labor

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during this period caused the unfair labor practice strike would be fatal to the Company's attempt to justify its refusal to return the striking employees.

practice strike as alleged in complaint paragraph 9. GC-1(m). Where, as in the instant case, Respondent engaged in clear Section 8(a)(1) violations that went to the heart of its employees' right to strike (Tr: 1118-1119; GC-25, stipulation #2) -- violations which are unchallenged by exceptions -- it is important for the Board to expressly consider and find that these serious violations prolonged the unfair labor practice strike. GC-10 p 6. Accordingly, the Board is urged to expressly consider and find that Respondent's threats through its Vice President and chief spokesperson prolonged the unfair labor practice strike.

3. The Charging Party Union excepts to the extent the Administrative Law Judge's decision suggests that the striker replacements were permanent replacements; (ALJD at p. 25, line 11; 34, lines 3-19; 42, line 39; and 45, line 37.); to the Judge's failure to expressly consider and conclude that the striker replacements were <u>not</u> permanent replacements; (ALJD at p. 41, line 43 through 47, line 43.); and to the Judge's failure to expressly make an alternative conclusion that upon the strikers' June 15 unconditional offer to return to work that they were entitled to reinstatement replacing Respondent's temporary replacements.

In her decision, the ALJ does not expressly consider whether Respondent met its burden of establishing if striker replacements were permanent. Although the ALJ clearly did not conclude that the replacement workers were permanent, the decision does reflect that at times the Respondent referred to the replacements as permanent. ALJD at p. 25, line 11; 34, lines 3-19; 42, line 39; and at p. 45, line 37. For the purposes of clarifying the record and in the event Respondent should continue in its attempt to challenge the unfair labor practice striker status of its Unit employees, it is important for

the Board to make clear findings and conclusions that the striker replacements were **not** in fact "permanent" replacement workers.

The Charging Party Union urges the Board to conclude that during the strike Respondent's replacement workers were temporary (not permanent) replacements. Critically, an employer "bears the burden of proving the permanent status of the replacements." *Consol. Delivery & Logistics,* 337 NLRB 524, 526 (2002), *enforced,* 63 Fed. Appx. 520 (D.C. Cir. 2003). An employer's burden requires a showing of "a mutual understanding" between both the employer and the replacements of the permanent nature of their employment; the employer's own intent is insufficient. *Hansen Bros. Enters.,* 279 NLRB 741, 741 (1986), *enforced* 812 F.2d 1443 (D.C. Cir. 1987), *cert. denied,* 484 U.S. 845 (1987). The record here reflects no reliable evidence to suggest that there was a "mutual understanding" between Respondent and the replacement workers that their employment would be permanent.

Furthermore, Respondent failed to establish its own intent that the strike replacements were hired as permanent replacements. Indeed, Toyla Charles, Respondent's Human Resources Representative at the mine who handled much of Respondent's replacement hiring (Tr: 538 -539), conceded that Respondent had no written records regarding whether applicants hired for replacement positions during the strike were informed if they were in fact temporary or permanent replacement employees. (Tr: 541, lines 9-23). Moreover, Charles admitted that she just assumed that full-time and permanent meant the same. (Tr: 1050, lines 19-23). She again admitted her confusion about the status of the replacement employees on subsequent cross-examination. (Tr: 1051). Charles' testimony and recollection as to the hiring of

replacement workers was indeed shaky, with Charles admitting that that during the strike she was busy, her job was "hectic" and that she worked seven days a week. (Tr: 1050 ln 1- 4). In addition, and quite significantly, Respondent's local newspaper advertising for replacement workers did not mention "permanent" status – only "full time" work. (GC-61(a)-(l)).

Although Charles identified other management members that hired replacement workers (Tr: 539 ln 25 through 540 ln 11), Respondent failed to call any of these potential witnesses to establish that either Respondent or the replacement workers understood that they would be permanent replacements. In the absence of their testimony, the Board should properly conclude that their testimony would have been adverse to Respondent and would have established that the replacement workers were temporary, not permanent employees. *See, e.g., Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977) (Board endorsing the "missing witness" rule which states that, "where relevant evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and he fails to do so, without satisfactory explanation, the [trier of fact] may draw an inference that such evidence would have been unfavorable to him," and holding that "[i]nasmuch as the Respondent has offered no explanation as to why its supervisors did not testify at the hearing, we find the drawing of an adverse inference against the Respondent . . .was proper.") (citing, 29 Am. Jur. 2d § 178; *Avon Convalescent Center, Inc* ., 219 NLRB 1210 (1975); *Bricklayers Local Union No, 1 of Missouri, Bricklayers, Masons and Plasterers International Union, AFL-CIO (St. Louis Home Insulators, Inc.),* 209 NLRB 1072 (1974)).

Similarly, although some replacement workers still work at the mine (GC-37), Respondent did not call any of these individuals to testify as to their understanding of their temporary or permanent replacement status. Thus, again, the Board should draw an adverse inference against Respondent that the testimony of the replacement workers would have established that the replacement workers were temporary, not permanent.

In summary, Respondent did not meet its burden of showing that there was a mutual understanding between Respondent and the replacement workers about the nature of the employment of the replacement workers. Respondent only attempted to offer its own asserted understanding of the status of the replacement workers, which is insufficient under Board law. *Hansen*, 279 NLRB at 741. Moreover, as we demonstrate above, its own asserted understanding in this regard is in great doubt. Therefore, the Board should expressly find that the replacement workers were only temporary replacements.

As the Board is well aware, strikers, upon an unconditional offer to return to work, are entitled to immediate reinstatement unless the employer has hired permanent replacements for the strikers to continue business operations during the strike. *Mackay Radio,* 304 U.S. at 345-46. Accordingly, the Board should make an alternative finding and conclusion that, even if a reviewing court were to find that the strike was not an unfair labor practice strike, upon the strikers' June 15 unconditional offer to return to work, they were entitled to reinstatement replacing Respondent's temporary replacements.

4. Charging Party Union excepts to the Administrative Law Judge's apparent inadvertent failure to include in the Order and Notice to Employees the broader language she included in the Remedy portion of the decision regarding making Unit employees whole "for all losses they may have suffered as a result" of Respondent's unlawful unilateral implementations of terms and conditions of employment. ALJD at 51, lines 15 – 18; Appendix page 2.

The Judge appropriately included broad remedial make-whole language in the Remedy portion of the decision providing for Unit employees to be made whole "for all losses they may have suffered as a result" of Respondent's unlawful unilateral implementations of terms and conditions of employment. (ALJD at p. 49, lines 33- 40). The Remedy's broad make-whole language was appropriate given the number and great variety of Respondent's unlawful unilateral changes. Most likely inadvertently, the Judge provided narrower language in the Order, directing Respondent to "Make the unit employees whole by reimbursing them for any loss of benefits and additional expenses . . . ." (ALJD at p. 51, lines 15 – 18). Also apparently inadvertently, the Judge did not include in the Notice to Employees make whole language for the Unit employees as to Respondent's unilateral changes. Appendix: page 2.

The Board is respectfully urged to modify both the Order and Notice to Employees to comport with the broader make whole-language in the Remedy for the purpose of minimizing any unintended confusion as to the remedy for Unit employees. Thus, in order to ensure an adequate and complete make-whole remedy to Unit employees, the Order and Notice to Employees should include the broader language the

Judge used in the Remedy (ALJD: 49 ln 33- 40), as opposed to the narrower language the Judge used in the Order (ALJD at p. 51, lines 15 – 18).

5. Charging Party Union excepts to the Administrative Law Judge's apparent inadvertent failure to articulate more clearly in the Remedy and to expressly include in the Order and Notice to Employees full and immediate reinstatement language for any and all Unit employees that lost their employment with Respondent as a result of any of Respondent's unlawful unilateral changes or their effects. ALJD at p. 49 lines 32- 41; 51 lines 15 – 18; and Appendix page 2.

As noted above in the preceding Cross-Exception, the Judge appropriately included broad remedial make whole language in the Remedy portion of the decision providing for Unit employees to be made whole "for all losses they may have suffered as a result" of Respondent's unlawful unilateral implementations of terms and conditions of employment. (ALJD at p. 49 lines 33- 40). In the context of the myriad of Respondent's unlawful unilateral changes, this language could arguably be construed as including reinstatement for Unit employees that lost their employment as a result of Respondent's unilateral changes or their effects. However, the Board is respectfully urged to clarify the Remedy, Order and Notice to Employees to clearly and expressly provide for the reinstatement of any and all Unit employees that lost their employment as the result of one or more of the Respondent's sweeping and unlawful unilateral changes in order to

minimize any unintended confusion, issue or dispute as to reinstatement rights of Unit employees affected by Respondent's unilateral changes.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of September, 2011, Charging Party Unions' Cross-Exceptions to the Decision of the Administrative Law Judge were e-mailed to:

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