

**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' BRIEF  
IN OPPOSITION TO RESPONDENT'S EXCEPTIONS**

Daniel M. Kovalik  
Senior Associate General Counsel  
United Steelworkers  
Five Gateway Center – Suite 807  
Pittsburgh, PA 15222  
Phone: 412.562.2518  
FAX: 412.562.2574  
dkovalik@usw.org  
*Attorney for United Steel, Paper and Forestry,  
Rubber, Manufacturing, Energy Allied  
Industrial and Service Workers International  
Union and Local Union 14425*

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## **I. Introduction**

This is a case involving employees who literally work in the salt mines. Specifically, these employees work in an underground salt mine located in Cote Blanche, Louisiana (ALJD at p. 3, lines 25-26). The ALJ relates that “[t]he mining levels can extend down into the earth’s surface for thousands of feet. Respondent is currently mining its third mine level; which is 1300 feet below sea level. . . . The majority of the bargaining unit employees work below the surface, leaving only a few employees working above ground. Because of the unique layering of the salt deposit, the salt is a very strong conductor of heat causing the temperature in the mine to be approximately 95 degrees.” (ALJD at p. 3, lines 29-40). As the company in this case itself admits, its workers are “constantly tired and worn out,” and this condition of fatigue poses “a safety hazard to them.” (Respondent’s Exceptions To Decision By Administrative Law Judge (hereinafter, “Resp. Brief” ) at p. 8).

In short, the employees work in hot, dangerous and trying conditions. If this were not bad enough, the record evidence in this case demonstrates that their employer engaged in a course of conduct in this case to frustrate at every turn the efforts of the employees’ union, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC and USW, Local 14425 (“USW” or “Union”), to negotiate a fair labor agreement on their behalf. Thus, the employer, Carey Salt Company (“Company” or “Respondent”) entered negotiations with the intent, not to reach an agreement with the Union, but in fact to prevent an agreement from being reached and to break the Union.

The Company’s scheme worked, in the Company’s own words as revealed in internal communications, “*as planned*” pursuant to its “**Game Plan/End Game**,” at least in so far as its machinations to derail bargaining forced the 100 unit employees out on strike and then prolonged

the strike once it started. The Company then permanently replaced all of the unit employees. However, the ALJ quite correctly concluded that the employees had been engaged in an unfair labor practice strike, provoked and prolonged as it was by the Company's blatant bad faith bargaining, and that the Company's permanent replacement of them was and is unlawful.

In response to the ALJ's details findings and conclusions in this regard, the Company has filed half-hearted and scant exceptions due to the fact that it has little to no defense to the allegations alleged and found. As we demonstrate below, the Company, again with little to say in its defense, has actually failed to file exceptions to large swaths of the ALJ's findings and conclusions, thereby waiving any objections to these and requiring the Board to adopt these findings and conclusions. And, to the extent the Company has raised exceptions, it has utterly failed to overcome the overwhelming record evidence and case law against it. As a result, the Board should adopt the Decision and recommended Remedy & Order of the ALJ, Margaret G. Brakebusch, and bring justice, jobs and back pay to the salt mine employees at issue in this case.

## **II. Respondent Has Waived Objections To A Number of ALJ Findings & Conclusions**

It is well-settled that, under Section 102.46(b)(2) of the Board's Rules & Regulations, a party's failure to properly raise an exception to a finding or conclusion of an ALJ constitutes a waiver to object to said finding or conclusion, and that finding or conclusion must be adopted by the Board. *See, e.g., Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB No. 25, slip op. at p. 3, fn. 12 (2011); *citing, Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), *enfd.* 456 F.3d 265 (1st Cir. 2006). In this case, the Respondent fails to raise an exception to numerous findings and conclusions of the ALJ. These waivers prove fatal to its case.

**A. Respondent Raises No Exception to The ALJ's findings and conclusions that it unlawfully conditioned bargaining from March 31, 2010 to April 30, 2010 on the Union's concessions to Respondent's bargaining demands.**

The ALJ made specific findings and conclusions that the Company conditioned bargaining from March 31, 2010 to April 30, 2010, upon the Union's acceptance of the Company's bargaining proposals. (ALJD at ps. 21-23). The ALJ based these findings, in part, upon Respondent negotiator Heider's own statement to the Union that "there is no reason to meet again unless you are willing to accept the pending final offer." (ALJD at p. 21, lines 41-43; p. 33 at lines 41-45). The ALJ concluded that "Respondent's insistence that there would be no further bargaining unless the Union accepted Respondent's pending final offer is *also* a violation of Section 8(a)(5) of the Act as alleged in complaint paragraph 18(b)." (ALJD at p. 23, lines 23-26) (emphasis added). The ALJ found that this was "also" a violation in addition to the separate violation of the Respondent's general refusal to bargain during this period (ALJD at 21-23).

While Respondent, in its Exception 2, makes (a quite cursory) exception to the ALJ's findings and conclusions that Respondent "refused to meet with the Union during the month of April 2010" (Resp. Brief at p. 19), Respondent utterly fails to raise an exception to the findings and conclusions that it unlawfully conditioned bargaining on the Union's assent to its bargaining demands. The Respondent's failure to raise an exception to these findings and conclusions – findings and conclusions separate and independent from the ALJ's findings and conclusions that the Company generally refused to meet during this period – constitutes a waiver of the right to object to these findings and conclusions, and these findings and conclusions must be adopted by the Board. *See, e.g., Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB No. 25, slip op. at p. 3, fn. 12 (2011); *citing, Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), *enfd.* 456 F.3d 265 (1st Cir. 2006).

**B. Respondent Failed To Raise A Proper Exception To the ALJ's Findings and Conclusions That It Unlawfully Changed Terms and Conditions of Employment on May 22, 2010, In The Absence of An Impasse.**

The ALJ made detailed findings and conclusions related to the Respondent's implementing of new operating procedures on May 22, 2010 (ALJD at ps. 25-27). Thus, the ALJ found that these new operating procedures changed the terms and conditions of employment for striking employees in a number of significant ways – specifically, it stripped employees of their seniority, allowing the Company to demote, fill vacancies, layoff and recall (including from the strike) employees “based upon merit” (ALJD at p. 25, lines 38-50); it incorporated mine and safety rules, including one which made the hitherto voluntary Safety Track safety program mandatory (ALJD at p. 26, lines 1-9); and it incorporated a new no-fault attendance policy (ALJD, p. 26, lines 11-21).

And, while the Respondent attempted to claim at hearing that these changes applied only to the time the employees were striking, the ALJD rejected this claim, finding that

The changes included in the May 22, 2010 operating procedures did not just relate to temporary changes in attendance that were necessitated by the strike situation. The record also reflects that the operating procedures contained significant changes in the employees' seniority rights that were applied to returning strikers and not just the replacements. Additionally, the unilateral changes included in the operating procedures remained in place after the strike and until they were displaced by another unilateral implementation on June 27, 2010.

(ALJD at p. 27, lines 8-15).

In addition, the ALJ further found that the implementation was unlawful, *regardless as to whether the procedures applied after the strike or not*, in light of the fact that it “clearly undermined the Union's ability to represent the unit employees.” (ALJD at p. 27, lines 1-10).

The ALJ also concluded that the unilateral implementation of the new operating procedures constituted a violation of Section 8(a)(5) of the Act in light of the fact that “there is

no claim that the parties were at impasse concerning these issues.<sup>1</sup> There is, in fact, no evidence that Respondent notified the Union of the intended implementation in advance of the implementation or even following the implementation.” (ALJD at p. 26, lines 35-39; at p. 27, lines 14-17).

In response to all of these findings and conclusions, the Respondent proffers a total of two sentences, with no citation to the record or to case law,<sup>2</sup> and without even referring to the pages or lines of the ALJ’s Decision to which it is excepting. Thus, the Respondent simply states that

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.

(Resp. Brief at p. 20). These two sentences do not amount to an argument against the ALJ’s findings and conclusions, and do not even purport to address a number of the findings and conclusions underlying the ALJ’s decision on this issue. In light of this, the Respondent has effectively waived its right to object to these findings and conclusions. *See, Publix Super Mkts.*, 347 NLRB 1434, 1435 (2005) (Board adopting “findings in the absence of argument.”); *ACS, LLC & UFCW*, 345 NLRB 1080, 1080 fn. 3 (2005) (while respondent raised broad, blanket exception to the ALJ’s findings and conclusions, there was “only [one] substantive portion of the

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<sup>1</sup>Respondent not only fails to contest this finding of no impasse in fact, but indeed expressly concedes in its exceptions to the Board that any impasse which allegedly existed as of March 31, 2010, was “**broken shortly after . . . by the Union’s strike**” on April 7 (Resp. Brief at p. 17). **Nowhere in its exceptions does Respondent claim that any impasse had ever been reached after this point.**

<sup>2</sup>The NLRB Regulations make it clear that to perfect a proper exception, a party “shall designate by precise citation of page the portions of the record relied upon. NLRB Regulations, Sec. 102.46 (b)(1)(iii). Here, the Respondent cites to no parts of the record.

judge's decision to which it specifically excepted and about which it supplied any argument"; therefore, exceptions to the remainder of the decision were deemed waived).

**C. The Respondent Failed To Raise An Exception to the ALJ's Findings & Conclusions That The Company Bargained In Bad Faith From May 25, 2010 to and through May 27, 2010, by, *inter alia*, Approaching Bargaining With The Intent Not To Reach An Agreement.**

Respondent challenges two portions of the ALJ's decision regarding its bargaining conduct of May 25 through May 27, 2010 (Resp. Brief, Exceptions 5 & 6 at ps. 20-25). Specifically, Respondent challenges (1) "the Judge's Conclusion that the Company's May 25, 2010 Bargaining Proposal violated the Act [sic.] of the Date of its Offer," specifically, the conclusion that it was "regressive"; and (2) "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.'" (*Id.*).

However, Respondent does not even purport to file an exception to the ALJ's findings and conclusions that the Respondent's *course of bargaining* during this period was in bad faith, or to the ALJ's specific findings and conclusions that Respondent bargained with the specific intent not to reach agreement with the Union. Thus, Respondent does not make any argument as to these findings and conclusions, and does not even cite to the pages and lines of the ALJD upon which these findings and conclusions are located. Therefore, the ALJ's conclusion that "certain undisputed facts in this case" support the finding that the Company's "entire pattern of conduct is such as to warrant the conclusion that it is seeking to avoid an agreement rather than reach one" (ALJD at p. 30, lines 4-9) must stand. *See, e.g., ACS, LLC & UFCW*, 345 NLRB 1080, 1080 fn. 3 (2005); *see also, Northwest Graphics, Inc.*, 342 NLRB No. 1288, 1288 (2004) (where respondent, in its exceptions and supporting brief, refers to one set of violations but not

others, it waived the exceptions to those latter set of violations even where it did “generally except to the judge’s conclusions of law,” which included both sets of violations).

Also left undisturbed are the ALJ’s factual findings that Respondent, during this time period, “upped the ante and knowingly added more demands that would not be acceptable to the Union. When she presented the proposal to the Union, Heider’s statements revealed that this was expectation. Whereas Respondent had three core or ‘must have’ provisions when it implemented its final offer on March 31, 2010, Respondent had now increased the number of core issues to seven.” (ALJD at p. 29, lines 46-51). The ALJ made it clear that Heider presented the additional four core issues to the Union on May 27, 2010 (ALJD at p. 29, lines 14-20). And, Respondent has absolutely nothing to say about this date of bargaining, much less does it challenge the ALJ’s findings and conclusions as to its intentions with regard to making these proposals. Again, Respondent does not even reference these sections of the ALJ’s Decision whatsoever. Similarly, Respondent does not even reference, much less challenge, the portion of the ALJ’s Decision in which she sets forth in details the evidence, including internal Company communications, showing that **the Union’s refusal of the Company’s proposals went “as planned” by the Company in advance** (ALJD at p. 30, lines 33-50). Therefore, these underlying findings must stand. *See, e.g., ACS, LLC & UFCW*, 345 NLRB 1080, 1080 fn. 3 (2005).

These waivers are devastating to Respondent’s case as the parties have stipulated that if its bargaining was unlawful during this time period, the strike was prolonged by this unfair labor practice. (ALJD at p. 3, lines 7-9).

**D. The Respondent Proffers No Exceptions To The ALJ's Findings & Conclusions That The Company Unlawfully Implemented Changes To Terms and Conditions of Employment on June 27, 2010.**

In her decision, the ALJ made detailed findings and conclusions that the Respondent had implemented numerous new terms and conditions of employment in the absence of a valid impasse in violation of Section 8(a)(5) of the Act (ALJD at ps. 37-41). In response to these findings and conclusions, the Respondent raises not one single exception; it doesn't even purport to. As a result, any objections to these findings and conclusions are waived, and this Board must adopt them in their entirety. *See, e.g., Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB No. 25, slip op. at p. 3, fn. 12 (2011).<sup>3</sup>

**E. The Respondent Failed To File Exceptions To The ALJ's Findings & Conclusions That the Company Unlawfully Threatened Strikers.**

The ALJ made findings and conclusions that, on at least two occasions during negotiations, the Company, through its representative Victoria Heider, threatened to permanently replace unfair labor practice strikers in violation of Section 8(a)(1) of the Act (ALJD at p. 41, lines 20-42). The Respondent has filed absolutely no exceptions to these findings and conclusions. As such, they must be adopted by the Board.<sup>4</sup>

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<sup>3</sup>While nothing more need be said about this issue, the Union notes that the Company cannot try to salvage any objection to these findings and conclusions by resting on its other objections challenging at least some of the bad faith bargaining leading up to the implementation of June 27, 2010. This is so because the ALJ did not rely solely on this bad faith bargaining for her finding that there was no valid impasse to justify implementation on June 27 – rather, she also found that there was not an impasse in fact in light of “the fact that the bargaining period was only seven days and there was no evidence that there was a contemporaneous understanding of the parties . . . .” (ALJD at p. 38, lines 25-28). Again, the Company raises no exceptions to these findings.

<sup>4</sup>This is so even though the Company excepted, *at least to some extent*, to the underlying findings and conclusions that it violated Section 8(a)(5) by implementing terms and conditions of employment, thereby provoking and prolonging the strike. *See, Northwest Graphics, Inc.*, 342 NLRB No. 1288, 1288 (2004) (where respondent, in its exceptions and supporting brief, “specifically refers to the Section 8(a)(5) violations found by the judge, but does not specifically

**F. The Respondent Failed To File Proper Exceptions To The ALJ's Findings & Conclusions That The 28 Strikers Who Resigned Their Employment, Either Before or After Receiving Offers of Reinstatement, Be Included In The Reinstatement Order.**

In her decision, the ALJ found that “28 strikers who resigned their employment *either before or after* receiving offers of reinstatement” should nonetheless be included in her recommended reinstatement order (ALJD at ps. 43-44) (emphasis added). In response, the Employer has attempted to assert a one-sentence exception stating that “[t]o the Judge’s Consideration in this Proceeding of the Issue of the Reinstatement of Employees who Resigned before being offered Reinstatement . . . [t]his issue was not raised in the pleadings and is appropriate only for the compliance stage of the case, if necessary.” (Resp. Brief at p. 29). First of all, as indicated above, the ALJ considered the situation of employees who resigned both before and after being offered reinstatement; the Company does not even purport to address the latter situation. But even more importantly, the Company is wrong that the consideration of this matter was somehow procedurally improper at this stage of the proceedings, and it offers no cases in support of this proposition. This is because the case law actually goes the other way. *See, LB&B Associates, Inc.*, 346 NLRB 1025, 1029 (2006) (Board deciding, at the initial stage of the case on the merits, that striker had not resigned from job and therefore was entitled to reinstatement); *citing, Harowe Servo Controls, Inc.*, 250 NLRB 958, 964 (1980); *Augusta Bakery Corp.*, 298 NLRB 58, 59 (1990) (finding at initial stage of the proceedings that striking employees had not severed jobs by applying for pensions), *enf’d*, 957 F.2d 1467 (7<sup>th</sup> Cir. 1992).

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refer to any of the Section 8(a)(1) violations,” it waived the exceptions to those latter set of violations even where it did “generally except to the judge’s conclusions of law,” which included both sets of violations).

Therefore, we are left with the Company utterly failing to offer any exceptions to the merits of the ALJ's findings and conclusions in this regard, and these findings and conclusions must therefore be adopted by the Board.

**III. The Respondent Failed To Raise a Meritorious Challenge To The ALJ's Findings & Conclusions That The Parties Were Not At An Impasse as of March 31, 2010, and That The Implementation As of That Date Was Unlawful.**

The chief part of the ALJ's decision, and of the Respondent's challenge to that decision, relates to the issue of whether the parties reached an impasse prior to about 10:00 p.m. on March 31, 2010, when the Company implemented its contract offer (ALJD at p. 13, lines 10-25). This issue is critically important because if, as the ALJ found, the parties were not at an impasse as of this time, then the Company's implementation of its offer was unlawful; as the Company has stipulated, the Union's strike was an unfair labor practice from its inception (ALJD at p. 3, lines 5-8); and the permanent replacement of these employees was necessarily unlawful.

Despite this issue being so critical, the Company raises a faint challenge to the ALJ's findings and conclusions on this issue. As we demonstrate below, the Company fails to except to a number of key factual findings of the ALJ on this score, thereby waiving any objection to these findings, and mandating adoption of these findings by the Board. In addition, to the extent the Company has properly challenged the ALJ's findings and conclusions, the Company's challenges are without merit.

**A. Respondent Has Failed To Except To A Number of The ALJ's Factual Findings**

The ALJ made a number of findings critical to its impasse analysis which Respondent fails to challenge through exceptions. These unchallenged findings are as follows:

\*On March 10, the Union offered to accept the Company's proposed shift schedule, provided that there was "a 1-year trial period, after which either party could serve notice

to revert to the previous schedule,” and the Respondent incorporated this proposal into its own counterproposal (ALJD at ps. 5-6).<sup>5</sup>

\*By March 11, 2010, the Union’s open issues in negotiations had been reduced from 15 issues to 10, and the parties had 17 tentative agreements and 14 additional items settled or withdrawn (ALJD at p. 6, lines 17-19);

\*The parties did not discuss wages until March 18, 2010 (ALJD at p. 6, lines 30-32; p. 7 at lines 15-20) – i.e., until the last negotiation session before the Company presented its “final offer” the next day.

\*On March 19, 2011, the employer moved its initial wage offer from zero percent to 2.5 percent (ALJD at p. 7, lines 15-20 and lines 35-40).

\*Company mine manager and negotiator, Gord Bull, admitted that, in the Company’s “final offer” of March 19, 2011, “Respondent deleted the Union’s suggestions that had earlier been incorporated into Respondent’s proposals. He also admitted that by doing so, he was aware that Respondent was making the proposal less attractive and harder for the Union’s negotiating committee to present to the membership.” (ALJD at p. 8, lines 5-10).

\*On March 23, 2010, the day the membership considered and voted down the Company’s “final offer,” the Union informed the Company of the membership’s vote rejecting its offer, but explained “that the Union was prepared to get back to the bargaining table at Respondent’s convenience,” and that it “was willing to continue working under the existing collective-bargaining agreement.” (ALJD at p. 8, lines 30-34).

\*On March 23, 2010, the parties agreed to meet again on March 31, 2010, and agreed to extend the existing contract in full force and effect until that date (ALJD at p. 8, lines 33-40).

\*The Company, as expressed in an internal memo entitled, “CB Game Plan/End Game,” devised a plan to begin the March 31, 2010 bargaining session at 9:00 a.m. and to declare impasse in negotiations by 11:00 a.m. if the Union did not agree in full to its “final offer” by then (ALJD at p. 9, lines 1-35 & fn. 4).<sup>6</sup>

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<sup>5</sup>While the Company disputes the significance of this proposal, and vehemently denies that it ever agreed to it, Respondent concedes that this proposal was in fact made (Resp. Brief at ps. 15-16). In addition, it never disputes that it did in fact incorporate this proposal into its own counterproposal as the ALJ found. And indeed, it would be impossible to deny this as this proposal is indeed incorporated into Respondent’s counterproposal as demonstrated by its own exhibit at hearing. *See*, R-6 (in bottom text box).

<sup>6</sup>Far from excepting to the finding that the Company, as evidenced in its written memo, had a plan to establish an impasse, the Company expressly concedes this finding (Resp. Brief at

\*On March 31, 2010, the Union verbally informed the Company several times that it had open issues it wanted to discuss; that it was working on a proposal which would make movement toward the Company's position; that a Federal Mediator was on his way, upon the invitation of the Union, to help with negotiations; and that the parties were not at an impasse (ALJD at ps. 10-11).<sup>7</sup>

\*In response to these overtures, Company Vice President and chief negotiator, Victoria Heider, repeatedly told the Union that "final means final" and that if the Union wasn't willing to accept the Company's "final offer," the parties were at an impasse and the Company had nothing more to discuss (ALJD at ps. 10-11).<sup>8</sup>

\*Ms. Heider then left the negotiating table for the airport by about 12:30 p.m. to make a flight she had previously scheduled for 2:30 p.m. (ALJD at p. 8, lines 45-47; ps. 11-12).

\*Still on March 31, 2010, the Union, unable to talk directly to the Company negotiators, sent "a number of emails" to the Company, stating that "[t]he Union is preparing a new proposal that will significantly move toward the Company's position on the scheduling issue. The Union's new proposal will make additional movement toward the Company's position on other issues. The Union remains flexible on all other open issues. The Union is available to bargain over its new proposal this afternoon or in the morning." (ALJD at ps. 11-12).

\*In response, Company negotiator Victoria Heider maintained the position that "final means final," and that if the bargaining unit employees do not ratify the Company's "final offer," then the parties are at an impasse and the Company will proceed to implement that offer immediately (ALJD at ps. 12-13).

\*On March 31, 2010, after the membership voted down the Company's "final offer," but before the Company implemented its proposal, the Union again told the Company via email that "the parties were not at an impasse and that the Union had a new proposal 'that moves in meaningful way toward the Company's position on scheduling and other open issues.'" (ALJD at p. 13, lines 14-22).

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ps. 5, 16). Thus, the Company, while arguing over the import of its strategy, concedes that "one of the Company's goals on March 31 was to establish impasse . . ." (*Id.* at p. 16).

<sup>7</sup>Again, rather than excepting to the finding that the Union had made it clear to the Company that it had "room to move," the Company expressly concedes this fact (Resp. Brief at ps. 9, 18-19). The Company only claims that such willingness to move "was irrelevant given the Company's decision to stand on its final offer." (*Id.* at p. 18). As we demonstrate below, the Company is simply wrong in this legal assertion.

<sup>8</sup>Indeed, the Company goes so far as to admit in its Brief that, on March 31, "the only question [for the Union] is acceptance of the final offer, year or nay," and that the Company's mantra was that "final means final" (Resp. Brief at ps. 11, 12).

\*The Company implemented its “final offer” after this communication (ALJD at p. 13, lines 23-26).

In light of the Company’s utter failure to challenge these findings through exceptions – indeed, going so far as to expressly assent to a number of these findings -- these findings must be adopted by the Board. *See, e.g., Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB No. 25, slip op. at p. 3, fn. 12 (2011); *citing, Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), *enfd.* 456 F.3d 265 (1st Cir. 2006).

As we demonstrate below, these unchallenged findings are fatal to the Company’s claim that there was a bargaining impasse as of the time it implemented its “final offer” on March 31, 2010.

**B. The Company’s Exceptions To The ALJ’s Conclusion That There Was Not A Valid Impasse Which Permitted The March 31, 2010 Implementation Are Without Merit**

Given the facts in this case which are left unchallenged and undisputed, the ALJ’s conclusion that there was no valid impasse at the time of the Company’s March 31, 2010 implementation must stand.

The Company’s chief argument against impasse, though it is a bit muddled at times, is that it had wanted for some time to change the shift schedule of unit employees, that this was the “[t]he principal underlying labor dispute” that it wanted resolved in negotiations, and that the parties could not reach agreement on such a change (Resp. Brief at ps. 2, 4-6, 14-16). Citing *Cal Mat Co.*, 331 NLRB 1084 (2000), the Company argues that “[i]t is permissible to implement a final proposal . . . 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.’” (*Id.* at 14). And, the Company argues that the shift schedule dispute was just such an issue.<sup>9</sup>

The problem with the Company’s argument is that ignores the remaining holding of the Board in *Cal Mat Co.*, *supra.*, which greatly undercuts the Company’s case. Thus, the Board in *Cal Mat Co.*, noted that it is an extraordinary situation which would have to occur for the parties’ inability to reach agreement on one issue could lead to a finding of overall impasse in negotiations. As the Board explained:

‘The Board has long distinguished between an impasse on a single issue that would not ordinarily suspend the duty to bargain on other issues and the situation in which impasse on a single critical issue creates a complete breakdown in the entire negotiations. Only in the latter context where there has been a complete breakdown in the entire negotiations, is the employer free to implement its last, best, and final offer.’

Thus, a party that maintains that a single, critical issue justified its implementing all of its bargaining proposals must demonstrate three things: first, the actual existence of a good-faith impasse; second, that the issue to which the parties are at impasse is a critical issue; third, that the impasse on this critical issue led to a complete breakdown in negotiations – in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved.

*Calmat Co.*, 331 NLRB at 1097 (citing, *Sacramento Union*, 291 NLRB 552, 554 (1988); *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871, 881 (9<sup>th</sup> Cir. 1978)). And, as the Board related in *Calmat*, “[i]n establishing that the bargaining parties have reached impasse, the burden of proof lies with the party asserting that an impasse exists.” *Id.* at 1097-1098.

The Company simply cannot shoulder this burden in this case as demonstrated by the undisputed facts of this case. Thus, it is undisputed that, at the time the Company declared

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<sup>9</sup>The Company cites two other issues – overtime distribution and cross assignment – as two other issues the parties were struggling to resolve in negotiations, but it portrays these as subsidiary to, or even a subset of, the “single most important issue of shift schedules” (Resp. Brief at ps. 6-7).

impasse and implemented its offer, the parties had been making progress in negotiations, with the Union reducing its open issues from 15 to 10, the parties reaching 17 tentative agreements and settling or withdrawing 14 others, and with *the Union actually offering to accept the Company's proposed shift schedule on a 1-year trial basis*; the parties did not even begin discussing wages until March 18, and the Company, on March 19 --*the penultimate bargaining session before the implementation* – actually moved its wage proposal from zero percent to 2.5 percent; before and during the March 31 bargaining session, the Union repeatedly told the Company that it had open issues it wanted to discuss, that it was working on a proposal which would make movement to the Company, *including on the scheduling issue*, and that it was “flexible on all open issues”; and the Union invited a federal mediator to assist with bargaining on March 31.

These facts show, first of all, that the Company cannot even sustain its burden of showing that the parties had reached impasse on the albeit critical issue of scheduling, for the Union continued to offer to move on that subject even up to the point the Company implemented its proposal. The only obstacle to presenting this offer, along with other concessionary offers by the Union, was the Company's refusal to accept any offers or proposals by the Union on March 31 unless the Union accepted the Company's entire “final offer.” While this refusal goes to the issue of the Company's good faith bargaining, an issue we will address below, the point here is that the Union's willingness to make movement, even on the issue the Company deemed so critical, was never tested by the Company. Similarly, the Union's offer of a federal mediator to assist was likely rebuked, but nonetheless is evidence that further discussions could have borne fruit even up to the time of implementation. Moreover, the Company simply ignores the fact that no breakdown in overall negotiations can be shown in light of the fact that, at the time it

implemented its offer, the parties had only just begun to discuss wages, and, to the extent they had discussed them, the Company itself had made significant movement on this just before the March 31 bargaining session. Again, this proves that bargaining on other open issues, such as wages, was far from futile. In the end, then, these facts prevent the Company from sustaining the first and third prongs of its burden under *Calmat Co., supra*.

A very helpful case on this score was very recently decided by the Board. That case is *Erie Brush & Manufacturing Corp.*, 357 NLRB No. 46 (August 9, 2011). In that case, the employer also argued, as here, that impasse had been reached as a result of impasse on a critical issue: in that case, it was the issue of union security. In *Erie Brush*, the Board held that, “[a]lthough the parties were having difficulty resolving that issue, that alone does not establish impasse.” *Id.* at 2. In finding that the employer did not even establish the first prong of its burden of showing impasse on the issue of union security, the Board explained,

Impasse occurs when there is ‘no realistic possibility that continuation of discussion at the time would have been fruitful.’ . . . The perceived deadlock, moreover, must be mutual. ‘Both parties must believe that they are at the end of their rope.’

*Id.*

In *Erie Brush*, the Board found that such an impasse could not be established in light of the fact that, as here, the union negotiator “suggested that they seek a mediator’s assistance on those issues.” 357 NLRB No. 46, slip op. at 2. As the Board explained, “[t]hat suggestion shows that he did not believe that further bargaining over either issue [union security or arbitration] would be futile.” *Id.* at 2-3 (citing, *Grinnell Fire Protection Systems*, 328 NLRB 585, 585 (1999), *enfd*, 236 F.3d 187 (4<sup>th</sup> Cir. 2000)(union “showed [its] willingness to bargain by raising the possibility of Federal Mediation”). As the Board opined, “[s]imply stated, Bridgemon [the union negotiator] was not at the end of his rope.” *Id.* at p. 3. The same can be

said here of Union negotiator Fuselier who not only suggested federal mediation on March 31, but actually summoned a federal mediator who was on his way to the negotiations to assist the parties in bargaining. The Company simply did not stay around long enough for the mediator to get there.

Also relevant to this case, the Board in *Erie Brush* found a lack of impasse from the fact that the Union had expressed “new flexibility” regarding issues important to the employer; and in light of the fact that the parties had yet to commence negotiations over economic items, “and such bargaining could have proved fruitful.” 357 NLRB No. 46, *slip op.* at p. 3-4 and fns. 4 & 8 (citing, *Newcor Bay City Division*, 345 NLRB at 1239, 1238 (2005) (finding no impasse “even though the Union had not yet offered specific additional concessions, but only declared its intention to be flexible and continue bargaining.”). Given this, the Board found that the employer neither sustained its burden of showing an impasse over union security, nor that overall negotiations had broken down. *Id.* at 3-4.

In words applicable here, the Board concluded:

Had negotiations continued, it is entirely possible that Bridgemon [the union negotiator] would have obtained some flexibility on union security, too, especially with the assistance of a mediator. The parties also might have moved closer to an agreement had the Respondent agreed to discuss economic issues, which in turn might have altered the Union’s position on union security. The Respondent, however, unilaterally cut off those possibilities by its refusal to meet and bargain with the Union.

*Erie Brush*, 357 NLRB No. 46, *slip op.* at 4. Similarly, in the instant case, there was more than sufficient record evidence to support the ALJ’s finding of no impasse where the Union also showed that it could have obtained some flexibility on the shift schedule, especially with the assistance of a mediator who was on his way to assist. Indeed, while Respondent takes issue with the ALJ’s finding that the parties were coming closer to a deal on the crucial issue of the

shift schedule when the Company implemented its proposal (Resp. Brief at p. 15-16), it does not dispute the fact that the Union was making movement in its direction. Thus, Respondent does not challenge the fact that the Union had offered a one-year trial period of the Respondent's shift schedule, nor does it dispute the fact that it actually incorporated this proposal into its own counterproposal just days before the unilateral implementation (*Id.*). Further, Respondent does not dispute the fact that the Union, had Respondent allowed it to, was prepared to offer an 18-month trial period (*Id.* at p. 14 & fn. 7; at 15). And, while Respondent discounts the significance of this demonstrated flexibility on the part of the Union, arguing that the Union was simply not willing to go far enough, this does not undermine the finding that no impasse had been reached. *See, e.g., Grinnel Fire Systems, Inc.*, 328 NLRB 585, 586, 598 (1999) (no genuine impasse existed where union made movement toward employer, "although in its view not enough") (*citing, Wycoff Steel*, 303 NLRB 517, 523 (1991); *Towne Plaza Hotel*, 258 NLRB 69, 78 (1981)).

And again, a finding of impasse is especially unwarranted in this case where the parties, while having discussed wages, had just started to do so just before implementation, and where the Company itself showed flexibility on this issue by moving from a proposal with no wage increase to one which included a 2.5 percent increase shortly before the March 31 implementation. Clearly, there was a lot of room for compromise on this crucial economic item, again if the Company was only willing to continue negotiations to allow for it. But, like the employer in *Erie Brush*, it "unilaterally cut off those possibilities by its refusal to meet and bargain with the Union" even as the Union was begging it do so. *See also, Grinnel Fire Systems, Inc.*, 328 NLRB 585, 586, 598 (1999) (no genuine impasse existed where union showed flexibility, but employer was "unwilling to put [the union negotiator's] . . . flexibility to the test

since he was unwilling to agree to its final proposal.”); *Talbert Manufacturing, Inc.*, 250 NLRB 174, 178 (1980) (no impasse in negotiations, despite the fact that “[i]t is clear that the Company was endeavoring to establish an impasse,” where union “made it clear that it sought to continue the bargaining . . . in the hope of reaching an agreement.”).

This brings us to another aspect of the Company’s burden – its showing of “good faith” in the negotiations leading up to implementation. *See, Calmat Co., supra.*, 331 NLRB at p. 1097 (party asserting defense of impasse must show “the actual existence of a **good-faith** bargaining impasse”)(emphasis added); *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967) (impasse only occurs “**after good-faith negotiations** have exhausted the prospects of concluding an agreement.”) (emphasis added). Again, the case of *Erie Brush* illustrates why the ALJ properly found in this case that the Company failed to bargain in good faith during the negotiations leading up to its declaration of impasse and implementation (ALJD at ps. 15-16). Thus, in *Erie Brush*, the Board found that the employer violated the Act in refusing to meet and bargain with the Union, and in suspending negotiations, in the face of the Union’s continued stated desire to bargain, its promise of “flexibility” on key items, its invitation to bargain with the help of a mediator, and the open issue of economics which had yet to be explored. 357 NLRB No. 46, *slip op.* at 4. The Board found that the employer unlawfully “unilaterally cut off those possibilities [presented by the Union] by its refusal to meet and bargain with the Union.” *Id.*

The same, and indeed much worse, can be said here. Quite similar to the respondent in *Erie Brush*, the Company in this case refused to talk any further with the Union despite the Union’s stated willingness to make movement on key issues, its offer to bring in a federal mediator and despite the fact that the parties had just begun to negotiate over wages. What makes the instant case worse, however, is that the Company in this case had hatched a scheme

prior to the March 31, 2010 negotiation session to abruptly cut off discussions with the Union by about 11:00 a.m. The Company then stuck to this plan, reciting its mantra to the Union – even upon the news that the federal mediator was on his way to assist -- that the Union had the Company’s “final offer” and that “final means final.” And, the Company, illustrating its contempt for the Union and for the collective bargaining process even now, continues to flaunt this strategy in its brief to the Board. Thus, the Company, analogizing the collective bargaining process to the purchase of a house or car, brazenly states, “[f]aced 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, year or nay.” (Resp. Brief at p. 11). And again, the Company, in defending its declaration of impasse on March 31, 2010, argues, that any further negotiations “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.” (*Id.* at 18). In making this argument, the Company shows either a fundamental misunderstanding of labor law or an utter disregard for it. *See, e.g., Grinnel Fire Systems, Inc.*, 328 NLRB 585, 586, 598 (1999) (no genuine impasse existed where union showed flexibility, but employer was “unwilling to put [the union negotiator’s] . . . flexibility to the test since he was unwilling to agree to its final proposal.”).

The Company, grasping at straws, attempts to justify its actions in this regard by claiming that the Union’s request for the Company to present a last, best and final offer which it could take to its membership for a vote somehow gave the right to the Company to then stand on that offer even once it was voted down by the membership (Resp. Br. at ps. 10-11). However, the Company is mistaken.

The Company relies upon two cases for this argument which are distinguishable from this one. First, the Company relies upon *Industrial Electric Reels, Inc.*, 310 NLRB 1069, 1072 (1993). That case actually shows why impasse was not reached in this case and why the Company's actions in this case were violative of the Company's duty to bargain in good faith. Thus, in *Industrial Electric*, the union asked the employer for its best offer on July 1, and the employer gave the union such an offer to present to the membership for a vote. *Id.* However -- unlike the Company here which, upon the membership's rejection of its proposal, then refused to budge from that offer or even to discuss other proposals upon the invitation of the union -- the employer in *Industrial Electric* was the party that offered to continue meeting after the union membership voted down its offer. *Id.* And, it was the union in *Industrial Electric* which refused the employer's offer to bargain through the weekend to try to reach an agreement, and instead decided to strike before even meeting again with the employer. *Id.* at 1072, 1082. In this case, in contrast, it was the union that aggressively pursued negotiations after the membership voted down the Company's "final offer," and it was the Company which shut those negotiations down. In this way, the case of *Industrial Electric* bears little resemblance to this one.

The other case relied upon by the Company -- *Presto Casting Co.*, 262 NLRB 346 (1982) -- is even more off point. Thus, in *Presto*, it was the employer that asked the union for its "bottom line proposal" in the penultimate bargaining session before the employer ultimately implemented its own offer *Id.* at 349. However, more importantly, when the parties met again and the Company then declared impasse and threatened to implement its offer, the union's response was to urge its membership to strike, and strike they did. *Id.* at p. 350. Again, this is at great variance with the instant case where the Union, up to and through the time of the

Company's implementation, was urging the Company to come back to the bargaining table and to hear the proposals it had to make with the help of a mediator.

A case more helpful here is that of *Friedrich & Dimmock* which is the subject of a General Counsel's Memo, 2004 NLRB GCM Lexis 4 (Case No. 4-CA-32225) (January 30, 2004) (attached hereto as Ex. A). In that case, the General Counsel found that there was no impasse despite the fact that the union asked the employer for a best and final offer and though the membership then proceeded to vote down that offer. (*Id.* at p. 2, 4). Applicable to the instant case, the General Counsel concluded that the union's continued signal of flexibility undermined any finding of impasse. As the General Counsel explained, "[a]t the Union's insistence, the Employer submitted a final offer, which included a 20% contribution in insurance premiums. However, the Union told the Employer that if the employees rejected the offer, the Union would come back to the table with the reasons for the rejection. That signaled that the Union believed that additional discussions would be fruitful." *Id.* at p. 4 (emphasis added). The very same can be said of the Union's overtures in this case.<sup>10</sup>

#### **IV. Respondent Has Failed To Except To The ALJ's Finding That Any Alleged Impasse That Existed Was Broken By The Time of The March 31, 2010 Implementation**

While the Company raised some exceptions to the ALJ's finding that the parties never reached an impasse which would have privileged its implementation, the Respondent has utterly failed to except to the ALJ's alternative finding that any alleged implementation would have been broken in advance of the March 31, 2010 implementation. Thus, the ALJ explained,

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<sup>10</sup>Another case of some utility is *American Meat Packing Corp.*, 301 NLRB 835 (1991). In that case, as here, a union also "asked for the Company's final offer" in advance of a ratification vote. *Id.* at 858. While the Board did not discuss the import of this request, the fact that it was made certainly was not found to privilege the Company's take-it-or-leave-it approach to bargaining – an approach which the Board found amounted to bad faith bargaining. *Id.* at 864-865.

Furthermore, even if there had been an impasse at 11:00 a.m. as planned by Respondent, the impasse would have been broken by the Union's response throughout the day on March 31, 2010. . . . Thus, any alleged impasse would have been quickly broken by the later communications and events on March 31, 2010.

(ALJD at p. 19). The ALJ further concluded that this was an alternative basis for finding that the Company violated the Act by implementing its "final offer" on March 31, 2010 (*Id.*).

The Company raises absolutely no exceptions to these findings and conclusions, and therefore, these findings and conclusions must be adopted by the Board. And, this is critical, for, as we have already discussed, the Company has stipulated that if its implementation of March 31, 2010 was unlawful, then the Union's strike was an unfair labor practice strike from its inception, and that the Company violated the Act by permanently replacing the strikers.

#### **V. Conclusion**

For the foregoing reasons, the Company's exceptions to the ALJ's Decision must fail, and the Board should adopt the findings, conclusions, remedy and order of the ALJ.

Date: September 29, 2011

Respectfully submitted,

s/ Daniel M. Kovalik  
Daniel M. Kovalik  
Senior Associate General Counsel  
United Steelworkers  
Five Gateway Center – Suite 807  
Pittsburgh, PA 15222  
Phone: 412.562.2518  
FAX: 412.562.2574  
dkovalik@usw.org

# Exhibit A



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NATIONAL LABOR RELATIONS BOARD  
OFFICE OF GENERAL COUNSEL

Case No. 4-CA-32225

*2004 NLRB GCM LEXIS 4*

January 30, 2004

**SUBJECT:** [\*1] Friedrich & Dimmock

**REQUESTBY:** Dorothy L. Moore-Duncan, Regional Director, Region 4

**OPINION:**

This case was submitted for advice as to whether the Employer violated Section 8(a)(5) by unlawfully bargaining to impasse on the non-mandatory subject of removing its quality control positions from the bargaining unit. We conclude that the parties never reached impasse as to mandatory subjects of bargaining and, since the Union never made clear during negotiations that it would not negotiate over the Employer's quality control proposal, that the Employer also did not insist to impasse on that proposal.

**FACTS**

Friedrich & Dimmock (the Employer) manufactures scientific glass products and fiber optic cable at its Millville, New Jersey plant. The Employer and the Glass & Pottery Workers, Local 219 (the Union) have had a bargaining relationship for 30 years. As of May 1, 2003, the bargaining unit consisted of 21 employees, which included three quality control positions. As required by the parties' most recent contract, which was due to expire on May 5, the Union gave the Employer 60-day notice that it wanted to bargain for a successor contract.

On May 1, the parties held their first bargaining session. The Employer [\*2] proposed deleting the quality control job classification from the bargaining unit. It also proposed deleting the "supervisor" clause (which prohibited supervisors from doing bargaining unit work), increasing the employee contribution for health insurance premiums from 10% to 30% and for dental insurance premiums from 0% to 30%, deleting union dues check-off, removing the union security clause, and cutting wage rates for two years. In response to the Employer's proposal, the Union asked why the Employer sought to have the quality control positions removed from the unit, and told the Employer that its proposals "weren't going to fly." The parties ended the session by agreeing to meet the following day.

During the next session on May 2, the Union presented the Employer with a counter-proposal. The session included discussions about supervisors doing unit work and the amount of insurance premiums to be paid by the employees.

At a morning session on May 5, the Employer presented the Union with a new proposal which continued to include the removal of the quality control positions from the unit, the supervisor work clause, and other provisions that the Union had indicated would be unacceptable. [\*3] The Employer stated that its proposals were based on a need for cost

reduction and flexibility. The Union told the Employer that the issue of removing the quality control positions from the unit was a permissive subject of bargaining and that the Employer could not bargain to impasse over it. The Employer did not respond to that statement.

After taking time to review the Employer's latest proposal, the Union presented the Employer with a counter-proposal that modified its position on such things as wages, retirement and the 401(k) plan. The Union also made an alternative offer to extend the current contract. At that time, the Union told the Employer that it felt strongly about its positions on the quality control issue, union security and check-off, and supervisors performing unit work, and the Employer responded that it would get back to the Union on those issues. Thereafter, the Employer presented the Union with a counter-proposal agreeing to dues check-off, reducing the employees' insurance contribution by 10% from its initial proposal (i.e., employees would pay 20% of premium) and rescinding its regressive wage proposal. The Employer continued to include the removal of the quality [\*4] control positions from the unit as part of its proposal and stated that it needed the positions removed from the unit and supervisors doing unit work in order to increase flexibility and reduce costs. The Union then offered a counter-proposal which, among other things, included increasing the employee insurance contribution to 15%. The Union also offered to withdraw its severance pay proposal if the Employer would withdraw its proposal to remove the quality control positions from the unit. The parties ended that day of negotiations by agreeing to extend the current contract by one day to May 6, and agreed that the next meeting would be on May 6.

On May 6, the Employer presented the Union with a counter-proposal agreeing to include the Union's union security clause if the Employer's supervisor work proposal was accepted. The Union continued to ask the Employer for an explanation as to why it needed the quality control and supervisor work provisions, stating that it "could not go to the membership and just say 'the company wants it.'" The Union presented the Employer with a counter-proposal, which withdrew its severance pay proposal entirely but did not make any other changes from its [\*5] previous proposal. The Union then asked the Employer for a final offer because it felt that negotiations weren't progressing adequately. The Employer then provided a final offer, which included movement in its position regarding union security, work breaks, and wages. In response, the Union asked again for an explanation of the Employer's stated need to remove the quality control positions from the unit. The Employer did not answer. Regarding the issue of supervisors doing unit work, the Union suggested that it be limited to allowing them to work as a way of keeping their skill levels current, allowing them to work when it was necessary to meet a deadline, or allowing them to work only in particular parts of the plant. The Employer acknowledged these suggestions but there was no further discussion about the issue. The parties ended the session by extending the contract until noon on May 7. The Union agreed that it would take a ratification vote and said, "if the people accept this offer, we have a contract. If they vote no, we will find out why, so we can bring those reasons back to you."

On May 7, the Union presented the employees with the Employer's final offer and with a ballot [\*6] that had only two choices, to accept the company's offer or to reject it and strike. The Union explained that if the employees did not accept the offer, they would be on strike as of noon that day. The employees rejected the offer, and told the Union that they did so because of the removal of the quality control positions, the supervisory performance of unit work, and the increase in insurance premiums.

The Union later met with the Employer and explained the results of the ratification vote. The Union stated that the parties were at an impasse, and since the Employer was still insisting on removal of the quality control positions from the unit this would "probably result in a ULP." The Employer stated that when the parties met again, they would be starting from scratch with the whole contract. The Union's response was that it was ready to meet to talk about the three "strike issues," as the parties had agreed to all other issues. At noon on May 7, the Union began a strike. n1

n1 The parties eventually reached an agreement on a new contract several days after the strike began. The new contract included provisions that removed the quality control positions from the unit, set the employees' portion of their insurance premiums at 20%, and allowed supervisors to do production work. Regarding the

quality control positions, the parties agreed that once a new job description was written for the position, the current quality control employees would be offered the new non-bargaining unit positions.

[\*7]

#### ACTION

We conclude that the parties never reached impasse as to mandatory subjects of bargaining and that the Union never made clear during negotiations that it would not negotiate over the Employer's nonmandatory quality control proposal, and therefore the Employer did not insist to impasse on that proposal.

In determining whether a bargaining impasse exists, the Board considers bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations. n2 The Board also considers whether parties demonstrated flexibility and willingness to compromise in an effort to reach agreement. n3 Thus, the Board will find a genuine impasse in negotiations exists only when the parties are warranted in assuming that further bargaining would be futile, or when there is "no realistic possibility that continuation of discussion at that time would have been fruitful." n4 In short, the Board requires that *both* parties must believe that they are at the "end of their rope." n5

n2 *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enfd. sub nom. AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

[\*8]

n3 *Cotter & Co.*, 331 NLRB 787, 787 (2000), *enf. denied sub nom. TruServ v. NLRB*, 254 F.3d 1105 (D.C. Cir. 2001), *cert. denied sub nom. Teamsters, Local 293 v. TruServ*, 534 U.S. 1130 (2002); *Wycoff Steel*, 303 NLRB 517, 523 (1991).

n4 *Cotter & Co.*, above, 331 NLRB at 787.

n5 *Grinnell Fire Protection Systems Co.*, 328 NLRB 585, 585 (1999) and cases cited there; *Larsdale, Inc.*, 310 NLRB 1317, 1318 (1993), citing *PRC Recording Co.*, 280 NLRB 615, 635 (1986), *enfd. 836 F.2d 289* (7th Cir. 1987).

A party to a collective-bargaining agreement may propose to bargain over the scope of the unit, a non-mandatory subject, but may not insist to impasse on that subject. n6 To insist to impasse on a non-mandatory subject is "in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining." n7 However, [\*9] parties may voluntarily and lawfully discuss and agree to permissive subjects. n8 Any party "has the right to present, even repeatedly, a demand concerning a non-mandatory subject of bargaining, so long as it [does] not posit the matter as an ultimatum." n9

n6 *Taft Broadcasting Co.*, 274 NLRB 260, 261 (1985) ("parties are free to set forth proposals concerning non-mandatory subjects of bargaining, but may not insist on those proposals to impasse").

n7 *Detroit Newspapers*, 327 NLRB 799, 800 (1999), quoting *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958), *enf. denied*, 216 F.3d 109 (D.C. Cir. 2000)). See *Taft Broadcasting Co.*, 274 NLRB 260, 261 (1985) ("in evaluating whether parties have insisted to impasse on a particular non-mandatory subject of bargaining, the

Board [has] looked to whether agreement on the mandatory subjects of bargaining are conditioned on agreement on the non-mandatory subject of bargaining"). See also *Don Lee Distributor, Inc.*, 322 NLRB 470, 471 (1996), enf'd 145 F.3d 834 (6th Cir. 1998), cert. denied, 525 U.S. 1102 (1999); *Walnut Creek Assoc.*, 316 NLRB 139, 139 n.1 (1995); *Westvaco Corp.*, 289 NLRB 301, 306 (1988).

[\*10]

n8 See generally, *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971); *Detroit Newspapers*, 327 NLRB at 800, citing *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958) (statutory duty to bargain in good faith extends only to "wages, hours and other terms and condition of employment"). Inserted after subjects

n9 *Detroit Newspapers*, 327 NLRB at 800. See also *Taft Broadcasting Co.*, 274 NLRB 260, 261 (1985).

Here, it is clear from an examination of the negotiations that the parties never reached impasse on mandatory subjects of bargaining, including the issues of insurance premiums and supervisory performance of unit work. With regard to the insurance issue, in its initial proposal the Employer sought to increase the employees' portion of the insurance premiums to 30%. The Employer later proposed to increase the employees' portion to only 20%, which led to the Union's counter-proposal of a 15% contribution. At the Union's [\*11] insistence, the Employer submitted a final offer, which included the 20% contribution in insurance premiums. However, the Union told the Employer that if the employees rejected the offer, the Union would come back to the table with the reasons for the rejection. This signaled that the Union believed that additional discussions would be fruitful.

Moreover, although the Union used the term "impasse" during the May 7 discussion of the ratification vote with the Employer, the Union also stated that it was ready to meet to talk about the three remaining issues, which included the insurance and supervisory work issues. Thus, the Union did not clearly indicate that it believed the parties had reached the "end of their rope" regarding these issues.

Additionally, the Employer never gave an "ultimatum" that any contract would have to include the quality control proposal. Nor did it continue to insist on that proposal in the face of a clear Union rejection of the proposal. Thus, the Union never made clear, during negotiations, that it would not accept a contract containing the quality control proposal. Rather, from the beginning of the bargaining process until the last session, the Union appeared [\*12] willing to at least discuss the removal of the quality control positions. Although the Union stated that it disliked the proposal, it continued to negotiate about the issue by seeking justification from the Employer as to why the Employer needed the positions removed so that the Union could justify the proposal to the employees. This conduct sent an unclear signal regarding whether further negotiations on the issue were off limits. We note that even after deciding to strike and declaring the existence of impasse, the Union told the Employer that it was still willing to discuss the "strike issues," which included the quality control proposal. In sum, the Union never made clear that it would not accept a collective-bargaining contract that included this proposal.

Accordingly, we conclude that this allegation should be dismissed, absent withdrawal.

Barry J. Kearney, Associate General Counsel, Division of Advice

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law  
 Collective Bargaining & Labor Relations  
 Impasse Resolution  
 Labor & Employment Law  
 Collective Bargaining & Labor Relations  
 Subjects of Bargaining  
 Labor & Employment Law  
 Collective Bargaining & Labor Relations  
 Unfair Labor Practices  
 Organizing & Voting

**CERTIFICATE OF SERVICE**

I hereby certify that on the 29th day of September, 2011, Charging Party Unions' Brief in Opposition to Respondent's Exceptions was e-mailed to:

Stephen C. Bensinger, T.A.  
Andrew T. Miragliotta  
National Labor Relations Board, Region 15  
600 South Maestri Place, 7th Floor  
New Orleans, LA 70130  
stephen.bensinger@nlrb.gov  
andrew.miragliotta@nlrb.gov  
*Attorneys for Petitioner*

Stanley E. Craven  
Shawn M. Ford  
Spencer Fane Britt & Browne LLP  
9401 Indian Creek Parkway, Suite 700  
Overland Park, KS 66210  
scraven@spencerfane.com  
sford@spencerfane.com  
*Attorneys for Respondent*

*s/ Daniel M. Kovalik*  
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Daniel M. Kovalik