

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CAREY SALT COMPANY, a subsidiary of *
COMPASS MINERALS INTERNATIONAL, INC. *
Respondent *
*
and *
* Case Nos. 15-CA-19704
* 15-CA-19738
*
UNITED STEEL, PAPER AND FORESTRY, *
RUBBER, MANUFACTURING, ENERGY, *
ALLIED INDUSTRIAL AND SERVICE WORKERS *
INTERNATIONAL UNION, and LOCAL 14425 *
Charging Parties *
*

COUNSEL FOR THE ACTING GENERAL COUNSEL'S
CROSS-EXCEPTIONS TO DECISION BY ADMINISTRATIVE LAW JUDGE

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Counsel for the Acting General Counsel (counsel for the GC) respectfully submits these Cross-Exceptions to limited portions of the Administrative Law Judge's Decision (decision or ALJD)¹ in conformance with the Board's Rules and Regulations Section 102.46:

1. Counsel for the GC excepts 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, 2010² 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 Unit employees' decision to commence the April 7 ulp strike as alleged in complaint paragraph 9. AJJD: 23 ln 29 through 24 ln 17; and 41 ln 45 through 46 ln 7.³

The Judge 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. Additionally, the Judge also found Respondent's

¹ The Honorable Administrative Law Judge Margaret G. Brakebusch (Judge) issued a comprehensive August 1, 2011 ALJD conscientiously and diligently setting forth both the appropriate findings of facts and conclusions of law in regard to the underlying consolidated complaint (complaint.) These Cross-Exceptions primarily focus upon augmenting the Judge's decision for potential subsequent enforcement and clarification of certain remedial issues.

² All dates are in 2010, unless otherwise noted.

³ Reference to the Exhibits of the General Counsel and Respondent will be designated as "GC- #", and "R- #," respectively, with the appropriate number(s) for those exhibits. References to the hearing transcript are designated as "Tr:" with an Arabic numeral(s) referencing to a specific page(s) of the transcript; an Arabic numeral(s) following "ln" references a specific line(s) of the transcript page(s) cited. References to the August 1, 2011 decision or ALJD are designated "ALJD:" with an Arabic numeral(s) referencing to a specific page(s) of the decision; an Arabic numeral(s) following "ln" references a specific line(s) of the decision page(s) cited.

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: 23 ln 21-27. GC-1(j) and (m); and GC-17(a) – (l). 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 ulp strike. GC-1(m).

Appropriately, in her decision, the Judge concludes, inter alia, that the record as a whole reflects that Respondent's unilateral March 31 unilateral implementation (GC-17(h)) was a significant factor in the employees' decision to go on strike April 7. GC-25; stipulation 5. Thus, the Judge correctly found merit to complaint paragraph 9 that the strike was an unfair labor practice strike. ALJD: 24 ln 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 ulp strike. As it is possible the Board's order could be reviewed by a U. S. Court of Appeals, it is respectfully urged that the Board make its decision clear that these additional violations of Section 8(a)(1) and (5) also caused the April 7 ulp strike, as alleged in complaint paragraph 9. Further, it would augment the precedential value of the Board's decision in this matter to make it clear that in similar circumstances the Board would find an unfair labor practice strike based upon conduct by an employer similar to Respondent's conduct as alleged at complaint paragraphs 16 or 18(b).

In her findings regarding the April 7 strike vote, the Judge correctly found that Union International Representative Gary Fuselier expressly told the Union's employee membership that Respondent had refused to continue to bargain – nothing could be more

true. ALJD: 23 ln 33- 35. Of note, nothing in the Judge's decision finds or suggests that the Respondent's unfair labor practices as alleged at complaint paragraphs 16 and 18(b)) were not a factor in causing the ulp strike. Rather, the record is abundantly clear that Respondent's refusal to continue to bargain (complaint paragraphs 16 and 18(b)) was a significant factor in the Unit employees commencing the ulp strike. Just as the Judge found in her decision, in the course of the April 7 strike vote meeting, the Union leadership explained to the bargaining Unit employees that the Union had met with the Respondent on March 31, but that Respondent did not want to continue to bargain. There is abundant record evidence that Respondent's refusal to bargain caused the ulp strike. 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.) Although Respondent did not actually concede that its complaint paragraph 16 and 18(b) unfair labor practices caused the April 7 strike, there is no real issue that Respondent's refusal to meet and bargain with the Union, including Respondent conditioning bargaining on the Union's acceptance of the Respondent's bargaining demands, was a significant factor in causing the April 7 ulp strike.

In view of the above, 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 ulp strike. *Page Litho., Inc.*, 311 NLRB 881, 891 (1993); *Domsey Trading Corp.*, 310 NLRB 777, 791 (1993); and *R & H Coal Co.*, 309 NLRB 28, 28 (1992).

2. Counsel for the GC excepts to the Administrative Law Judge's inadvertent error as referring to the start of the ulp strike as "June" 7, 2010.

ALJD: 41 ln 38.

It is undisputed the strike began April 7, 2011. Tr: 294 ln 22 through 295 ln 3; 299 ln 10 through 300 ln 2. As to the correct start date of the April 7 strike, please see the Judge's discussion, finding and conclusions in regard to the strike at ALJD: 23 ln 29 through 24 ln 17. The Judge's subsequent reference to a June 7 start of the strike at page 41 of the ALJD is only in advertent error, but should be corrected in order to avoid any confusion when the Board issues its decision.

3. Counsel for the GC excepts to the extent that the Administrative Law Judge's decision does not clearly find that Respondent's twice (as opposed to only once) unlawfully threatened employees. ALJD: 41 ln 38-41.

The Judge correctly observed that the complaint, as amended at hearing, alleged Respondent twice unlawfully threatened to permanently replace unfair labor practice strikers. In this regard, the Judge found that Respondent Vice President of Human Resources Victoria Heider testified to threatening employees on April 30 (Tr: 1118-1119), and that additionally Respondent stipulated to a second threat to employees by Heider on June 3. GC-25, stipulation #2; ALJD: 41 ln 22-36. The Judge found that the Respondent's "threat" to fill the unfair labor practice strikers' jobs with permanent replacements constitutes an unlawful threat to discharge the strikers in violation of the Act. ALJD: 41 ln 37 -38.

Clearly it was (or should have been) the Judge's intent to expressly find both independent unlawful threats in violation of Section 8(a)(1) of the Act, but to the extent the Judge's conclusions refer to a "threat" (as opposed to threats), counsel for the GC urges the Board to clarify the Judge's decision to make it clear that both threats were found to be individual violations of Section 8(a)(1) of the Act. In addition to the authority cited by the Judge (ALJD: 41 ln 40 -41), *Decker Coal Co.*, 301 NLRB 729, 748 – 749 (1991) also provides that an employer may **not** threaten permanent replacement if a strike was caused at least in part by an employer's unfair labor practices.

Moreover, the finding of each violation is important as Respondent's egregious threats should not be minimize where, as here, its Unit employees were subjected to a variety of substantial unfair labor practices that in effect forced them into the status of ulp strikers. When Respondent flagrantly twice threatened its employees, already enduring the stress of Respondent's unfair labor practices and the ulp strike, Respondent's repeated threats must have caused its employees to question if they had any protection under the Act. Further, of note, Respondent's April and June threats were made in the midst of Respondent's plan to actually prolong the strike. In this regard, Heider revealed in a May 18 internal email that Respondent was proposing late May bargaining dates to the Union in the hope of actually forestalling the Union from calling off the then ongoing strike. GC-10, p 6. It is apparent that Respondent's April and June threats to its Unit employees were admissions against its interest as to its plan to seize upon the strike as a vehicle to actively discriminate against the strikers in violation of the Act; and, more importantly, as discussed below in the next Cross-Exception, the threats were part of Respondent's actions to knowingly provoke and prolong the ulp strike. In this regard, the Judge

appropriately found that the undisputed facts in this case suggest that Respondent's objective was the continuation of the strike and the avoidance of reaching an agreement. ALJD: 30 ln 10 – 12. Thus, it is most important for the Board to expressly find each independent violation of Section 8(a)(1) of the Act.

4. Counsel for the GC excepts to the extent that the Administrative Law Judge's decision does not clearly find that Respondent's unlawful April and June threats as alleged in complaint paragraphs 7(a) and (b) (as amended at hearing) were sufficient to prolong the strike as alleged in complaint paragraph 9. ALJD: 41: ln 20-35; 41 ln 45 through 46 ln 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 violated Section 8(a)(1) of the Act. However, the Judge's analysis does not expressly consider if the Respondent's unlawful threatening of its Unit employees prolonged the ulp strike as alleged in complaint paragraph 9. GC-1(m). Where, as here, Respondent engaged in clear 8(a)(1) threats that went to the heart of its employees' right to strike (Tr: 1118-1119; GC-25, stipulation #2), it is clearly important for the Board to expressly consider and find that these serious threats at formal bargaining sessions by a high level Respondent Vice President and Respondent's chief spokesperson were part of not only Respondent's efforts to eviscerate its employees Section 7 rights but to prolong the ulp strike -- as Respondent undeniably sought to do. 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 ulp strike. *Heritage Container*, 334 NLRB 455, 460 – 461 (2001) (economic strike converted to “ulp” strike based upon unlawful independent 8(a)(1) statements.)

5. Counsel for the GC excepts to the extent the Administrative Law Judge's decision suggests that the striker replacements were permanent replacements; (ALJD: 25 ln 11; 34 ln 3-19; 42 ln 39; and 45 ln 37.); to the Judge's failure to expressly consider and conclude that the striker replacements were not permanent replacements; (ALJD 41 ln 43 through 47 ln 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.

Although counsel for the GC is generally highly supportive of the Judge's finding and conclusions as to the ulp strikers, the Judge's decision does not expressly consider whether Respondent met its burden of establishing if striker replacements were permanent. Although the Judge clearly did not conclude that the replacement workers were permanent, the decision does reflect that at times that Respondent referred to the replacements as permanent. ALJD: 25 ln 11; 34 ln 3-19; 42 ln 39; and 45 ln 37. For the purposes of clarifying the record and in the event Respondent should continue in its attempt to challenge the ulp striker status of its Unit employees, it is important for the Board to make clear findings and conclusions that the striker replacements were **not** “permanent” replacement workers.

Counsel for the GC 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. Toyla Charles, Respondent's Human Resources Representative at the mine, who handled much of Respondent's replacement hiring (Tr: 538 -539), conceded Respondent had no written records regarding whether applicant hired for replacement positions during the strike were informed if they were either a temporary or permanent replacement employee. Tr: 541 In 9-23. Although Respondent may have hoped that Charles' testimony would establish at hearing that Respondent told replacement workers that they were permanent hires, on re-direct examination Charles admitted that she just assumed that full-time and permanent meant the same. Tr: 1050 In 19-23. She again admitted her confusion about the status of the replacement employees on subsequent cross-examination. Tr: 1051. Charles further called her testimony and recollection as to the hiring of replacement workers into

doubt by explaining that during the strike she was busy, her job was “hectic” and that she worked seven days a week. Tr: 1050 In 1- 4. Further, 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 In 25 through 540 In 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. Two of these apparent Respondent witnesses were not at the hearing: Jack Leunig and G. O. Young. Tr. 539-25. 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. *Advocate South Suburban Hospital v. NLRB*, 468 F.3d. 1038, 1048 and fn. 8 (7th Cir. 2006); *Parkside Group*, 354 NLRB No. 90, slip op 5 (2009);⁴ and *Martin Luther King, Sr. Nursing Home Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977). 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 by showing that there was a mutual understanding between Respondent and the replacement workers about the nature

⁴ (a “two Member” case.)

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, Respondent's own understanding of "permanent" status was impeached both by Charles' admitted confusion about the status of permanent verses full time employees, and Respondent's failure to call necessary witnesses – resulting in an adverse inference against Respondent. 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 (as in this case), are entitled to immediate reinstatement unless the employer has hired permanent replacements for the strikers to continue business operations during the strike. *Mackay Radio v. NLRB*, 304 U.S. 333, 345-46 91938.) Accordingly, the Board should thus 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, that upon the strikers' June 15 unconditional offer to return to work that they were entitled to reinstatement replacing Respondent's temporary replacements.

6. Counsel for the GC excepts to the Administrative Law Judge's apparent inadvertent failure to include traditional "upon request" language in the "Remedy" and "Order" portions of the decision regarding Respondent restoring the terms and conditions of employment of Unit employees as they existed prior to March 31.

ALJD: 49 ln 32- 41; 51 ln 15 – 18.

The Judge appropriately included traditional “upon request” language in the Notice to Employees (Appendix to the decision) at page two of the Notice (in the Notice’s penultimate paragraph) regarding Respondent rescinding any and/or all terms that it unilaterally imposed beginning on March 31, 2010. ALJD: Appendix page 2.⁵ The Board is respectfully urged to clarify both the Remedy and Order to include traditional “upon request” language for the purpose of minimizing any unintended confusion, issue or dispute as to the Remedy and Order during the administration and/or subsequent litigation of the Board’s order.

7. Counsel for the GC 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: 51 ln 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: 49 ln 33- 40. The Remedy’s broad make whole language was most prudent given the number and great variety of Respondent’s unlawful unilateral changes. Most likely inadvertently, the

⁵ As the Board is aware, the Appendix (Notice to Employees) does not include line numbers, and thus it is not possible to specifically cite to a line(s) number(s) as to Appendix pages one or two.

Judge provided narrower language in the Order, “Make the unit employees whole by reimbursing them for any loss of benefits and additional expenses. . . .” ALJD: 51 In 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.

Similar to the immediately preceding Cross-Exception, 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 make whole remedy for Unit employees necessary to remedy Respondent’s unlawful unilateral changes. 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 In 33- 40), as opposed to the narrower language the Judge used in the Order. ALJD: 51 In 15 – 18. In addition, in order for the Notice to effectively communicate the Board’s remedy to the Unit employees, it is most important that the Notice to Employees include the broad remedial make whole language regarding the Board-ordered remedy of the Respondent’s sweeping unilateral changes.

8. Counsel for the GC 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: 49 ln 32- 41; 51 ln 15 – 18; and Appendix page 2, penultimate paragraph.

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: 49 ln 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.

9. Counsel for the GC excepts to the Administrative Law Judge’s decision to the extent that it is not more clearly delineated in the decision’s Remedy, Order and Notice to Employees that for each of the multitude of the Respondent’s Section 8(a)(1) and (5) violations as listed in paragraphs 9, 13, 17, 18, 19, 20, 21, and 22 of the decision’s Conclusions of Law (ALJD: 48 ln 39 through 49 ln 25) that Respondent is ordered to provide each of the requisite remedies (including, but not limited to, the remedies (i) that upon the Union’s request Respondent will rescind its

actions changing terms and conditions of employment, (ii) broad make whole language for affected Unit employees and (iii) reinstatement for those Unit employees that lost their employment as a result of the Respondent's Section 8(a)(1) and (5) violations and their effects.) ALJD: 49 ln 32- 41; 51 ln 15 – 18; and Appendix page 2, penultimate paragraph.

The number and scope of Respondent's Section 8(a)(1) and (5) violations require great care to craft a Remedy, Order and Notice to Employees that provides comprehensive remedies effectively communicated to Unit employees. Equally important, the ordered remedies and Notice to Employees should minimize any unintended confusion, issue or dispute as to requisite remedies for Respondent's unfair labor practices. Accordingly, counsel for the GC urges the Board to clarify the Remedy, Order and Notice to Employees to clearly provide the requisite remedies for each of Respondent's Section 8(a)(1) and (5) violations listed in paragraphs 9, 13, 17, 18, 19, 20, 21, and 22 of the decision's Conclusions of Law. ALJD: 48 ln 39 through 49 ln 25. As the Board is well aware, carefully crafted and detailed remedies in its orders best effectuate the Act, facilitate settlement, expedite the resolution of cases, and serve to

minimize the delay caused by litigation in supplemental proceedings and subsequent enforcement litigation of supplemental proceedings. Thus, counsel for the GC urges the Board to carefully consider and grant each of the above Cross-Exceptions regarding remedial issues.

September 29, 2011

Respectfully submitted,

/S/

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2011, I caused to be E-filed the foregoing Counsel for the Acting General Counsel's Cross-Exceptions to Decision by Administrative Law Judge and caused to be served by electronic mail (email) copies to the following counsel to Respondent and the Charging Parties:

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