UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

COUNSEL FOR THE ACTING GENERAL COUNSEL'S
ANWERING BRIEF TO RESPONDENT'S EXCEPTIOINS TO
DECISION BY ADMINSTRATIVE LAW JUDGE

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Subject Index

Table of Cases and Other Authorities Cited

I. Preliminary Statement

The Honorable Administrative Law Judge Margaret G. Brakebusch (Judge) issued a comprehensive August 1, 2011 decision (or ALJD) conscientiously and diligently setting forth both the appropriate findings of facts and conclusions of law in regard to the underlying consolidated complaint (complaint.) Counsel for the Acting General Counsel (counsel for the GC) urges careful review, consideration and adoption of the ALJD, as practically speaking a more carefully crafted and better reasoned decision is likely not possible.[1] Accordingly, counsel for the GC respectfully urges the Board to reject Respondent Carey Salt Company, a Subsidiary of Compass Minerals International, Inc.'s Exceptions in their entirety.

Review of Respondent's Exceptions reveals that Respondent does not except to many of the Judge's findings and conclusions. Significantly, the Board's Rules and Regulations (Board's Rules) at Section 102.46(b)(2) clearly provide that any exception to a ruling, finding, conclusion or recommendation which is not specifically urged shall be deemed to have been waived. Thus, Respondent concedes the accuracy of much of the ALJD, including a substantial portion of the Judge's factual findings.

Respondent's 13 numbered Exceptions as a whole constitute a total of about 26 de facto individual Exceptions/issues, and of these (typically vague) 26 de facto Respondent Exceptions at most only about 9 appear to assert that they dispute the Judge's factual findings: 1, 1(c) and (f), 2, (arguably 4, 6, 7 8), and 10. Even of these 9 de facto

[1] Counsel for the GC has filed very limited Cross-Exception primarily focusing upon augmenting the Judge's decision for potential subsequent enforcement and clarification of certain remedial issues.

Respondent Exceptions arguably disputing facts, a significant portion are only pro forma Exceptions as to the facts found by the Judge in her ALJD, and instead primarily focus upon the Judge's well-supported conclusions. Further, often Respondent's discussion of the facts or argument in support of its Exceptions fails to discuss with any specificity the Judge's factual findings or to provide the Board with any specificity as to the evidence that Respondent urges the Board to rely upon. Thus, again, few of the facts found by the Judge are before the Board as a result of Respondent's Exceptions, at least not in any meaningful manner. Accordingly, Respondent's Exceptions as to the Judge's conclusions must be considered in the context that generally the Judge's findings of fact are not often disputed by Respondent. Furthermore, of course, the Board is respectfully urged to follow its established policy not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces it that they are incorrect. ***Standard Dry Wall Products***, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

Respondent's limited effort to dispute the Judge's finding of facts is appropriate, given the accuracy of the Judge's findings, that many of the facts in the case were not in dispute and that a number of the facts found by the Judge are based upon documents, often Respondent's own documents.[2] Significantly, Respondent's email (both internal (GC-10)[3] and public (GC-17) (both discussed in the ALJD and in this brief)), constitute

[2] Similarly, Counsel for the GC's Cross-Exceptions dispute very few of the facts found by the Judge.

[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,

blatant admissions against Respondent's interest making it undeniably clear that at least from March 30, 2010,[4] Respondent tirelessly implemented its decision **to relentlessly evade its bargaining obligation.**

In the following pages, this brief includes the following three segments. First, a motion to expedite the Board's consideration of this matter. Second, a motion to strike a portion of Respondent's Exceptions that clearly fail to comply with the Board's Rules. Third, responses to Respondent's Exceptions. Fourth, a brief summary conclusion.

II. Motion to Expedite The Board's Consideration of the Matter.

Given the decisive ALJD issued by the Judge, counsel for the GC respectfully urges the Board to exercise all expedition that its resources will allow to issue a prompt decision, as this matter presents issues of significant import to the affected Unit employees. Further, this case greatly impacts upon the collective bargaining relationship between Respondent and the Charging Parties, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union and Local Union 14425 (the Union.) The Union joins this motion for the Board to expedite consideration of this matter.[5]

III. Motion to Strike Respondent's Exceptions 1(f) and (g), 3, 4, 9, 11 (a) through g), 12 and 13.

Based upon Respondent's failure to comply with the clear language of the Board's Rules at Section 102.46 (b)(1)(i)(ii) and (iii), Counsel for the GC moves for the

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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.

[4] All dates are in 2010, unless otherwise noted.

[5] About September 26, 2011, Counsel for the GC inquired if Respondent would join a motion to expedite; Respondent promptly apprised it opposes such a motion.

Board to immediately strike Respondent Exceptions 1(f) and (g), 3, 4, 9, 11 (a) through (g), 12 and 13.

As to exceptions, the Board's Rules clearly provide at Section 102.46(b)(1) that exceptions shall (a) specifically set forth the questions of procedure, fact, law, or policy to which exception is taken; (b) identify that part of the administrative law judge's decision to which objection is made and (c) shall designate by precise citation of page the portions of the record relied on:

> (b)(1) Each exception (i) **shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken**; (ii) **shall identify that part of the administrative law judge's decision to which objection is made**; (iii) **shall designate by precise citation of page the portions of the record relied on;** and (iv) shall concisely state the grounds for the exception. If a supporting brief is filed the exceptions document shall not contain any argument or citation of authority in support of the exceptions, but such matters shall be set forth only in the brief. If no supporting brief is filed the exceptions document shall also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document shall be subject to the 50-page limit as for briefs set forth in section 102.46(j).
>
> (Bolding supplied.)

In light of Section 102.46(b)(2) providing that any exception which fails to comply with the foregoing requirements of Section 102.46(b)(1) may be disregarded, Counsel for the GC urges the Board to disregard and immediately strike:

(i) Respondent Exception 12 because of Respondent's failure to comply with Section 102.46(b)(1)**(i)** and **(iii);**

(ii) Respondent Exceptions 3, 4 and 11(a) through (g) because of Respondent's failure to comply with Section 102.46(b)(1)**(ii) and (iii);**

(iii) Respondent Exceptions 1(f) and (g), because of Respondent's failure to comply with Section 102.46(b)(1) and **(ii);** and

(iv) Respondent Exceptions 9 and 13 because of Respondent's failure to comply with Section 102.46(b)(1)**(iii)**.

Although each of the above-identified Respondent Exceptions should be rejected in light of Respondent's failure to comply with the Board's Rules, it is noteworthy that Respondent Exception 12 is so extraordinarily vague, ambiguous and lacking of specificity, as to be incomprehensible and devoid of any discernable meaning.

Immediately striking Respondent's deficient Exceptions will appropriately narrow the issues before the Board, conserve the Board's resources and expedite the consideration of this case -- by rejecting these Respondent Exceptions failing to comply with the Board's Rules the Board can best effectuate the Act.

IV. Why Each Respondent Exception Must Be Denied.

Respondent, of course, attempts, at least to some extent, to marshal its alleged facts and to urge the consideration of certain authority. Fortunately for the Unit employees subjected to Respondent's unfair labor practices and for the effectuation of the Act, there are no facts that can overcome Respondent's startling admissions against interest (GC-10) and GC-17). Similarly, Respondent, represented by skilled counsel, can make extensive legal arguments, but there are no cases where a respondent records its plan to commit unfair labor practices to writing (email) and then prevails at trial. In other words, it's impossible for a Respondent to successfully argue it was bargaining in good

faith, when at the time of its unfair labor practices it was sending contemporaneous email boasting of its refusal to bargain.

A. Respondent Exception 2

In Exception 2,[6] Respondent excepts to the Judge's findings and conclusions to the effect that the Respondent refused to meet with the Union during the month of April 2010. This Respondent Exception corresponds to complaint paragraph 16 to the effect that the Respondent failed and refused to bargain from about March 31, to about April 30. Of note, Respondent Exception 2 **does not address complaint paragraph 18(b)** that from about March 31 to about April 30, "Respondent conditioned bargaining over mandatory subjects of bargaining on the Union's concession to Respondent's bargaining demands." Both complaint paragraph 16 and 18(b) are of import in this case, because Respondent conduct was a significant cause of the April 7 unfair labor practice strike (ulp strike.)[7] Complaint paragraphs 16 and 18(b) are also of import because Respondent refused to bargain and conditioned bargaining on the Union's concession to Respondent's bargaining demands before it unlawful, late night, March 31 implementation as alleged at complaint paragraphs 18(a) and 20.

It is undisputed that on March 23, the Parties agreed to return to the bargaining table on March 31. (ALJD 8: 30-39.) By March 30, Respondent reduced to writing its internal plan that after meeting with the Union for only two hours on March 31, it would: (a) declare impasse; (b) provide the Union with a letter "confirming impasse **and that**

[6] As Respondent's unfair labor practice that is the subject of Respondent Exception 2 is part of the predicate to the impasse issue disputed in Respondent's Exception 1, counsel for the GC's response to Respondent Exception 1 follows the response to Respondent Exception 2.

[7] That issue is discussed in counsel for the Acting General Counsel's Cross-Exceptions at Cross-Exception 1.

there [would]l be no further negotiations[;]" and (c) communicate with all supervisor/managers that **"NO ONE is to negotiate anything.**" GC-10, pg 1; ALJD 9:ln 5-17; bolding supplied.)

The Judge's finding regarding complaint paragraphs 15 and 25 that the Union requested bargaining on March 31, are not disputed by Respondent. ALJD 20: ln 1-5. Further, Respondent does not dispute the Judge's findings that the Union made repeated March 31 requests for bargaining. ALJD 10 ln 8 through 13 ln 21. It is also factually undisputed that Respondent continued and emphasized its refusal to bargain on April 1. ALJD 21: ln 28-43. It is also undisputed that the Parties did not meet for bargaining until April 30 (ALJD 21: 45.)[8]

In addition to rejecting the Union's March 31 repeated direct requests for bargaining, Respondent also refused to bargain when the Union enlisted the assistance of the mediator to facilitate bargaining on March 31. Tr: 92-93. Respondent's Vice President of Human Resources and chief spokesperson Victoria Heider refused the mediator's request that the Parties resume bargaining on March 31. In fact, Heider admitted before the Judge at the hearing that she (a) could not recall a pressing schedule conflict that would have prevented March 31 bargaining, (b) did not want to know the Union's proposals and (c) made no effort to get back to the mediator to schedule bargaining the following week or the week after that week (Tr: 93):

3 Q And this may not be your exact wording, but you declined
4 to return to the bargaining table to meet with the union that
5 day.
6 A Yes. I told them I was going back to Kansas City.

[8] About April 20, the Parties did have discussions; no negotiations were held; and there was no discussion of resuming negotiations – again this is undisputed. (ALJD 21:46 – 22:7.)

7 Q All right. **Did you have something pressing** that you had
8 to do in Kansas City that day or the next day or --
9 A **I really can't remember.**
10 Q Okay. Well, let me ask you this. I do appreciate you
11 have a schedule with other responsibilities. **Did you get back**
12 **to Mr. Bolden and suggest that maybe you could meet the**
13 following week or the week after that or something like that?
14 **A No, I did not.**
15 Q Well, given that the mediator had represented to you that
16 the union had proposals, **didn't you want to know what the**
17 proposals were?
18 A **At that time, no.**

Tr: 93; bolding supplied.

In fairness to witness Heider, what else could her testimony be? As Heider's March 31 to April 1 email chain with the Union made unequivocally clear (GC-17(a) – (l), Respondent adamantly refused to bargain with the Union and conditioned bargaining upon the Union's concession to Respondent's bargaining demands. It is difficult to imagine a fact pattern where an employer "CEO" (GC-10, pg 1) and an employer chief spokesperson were more determined in refusing to bargain with a labor organization. In brief, Respondent's second Exception is completely baseless and must be denied.

Bargaining did not resume until April 30, which was after both (1) the commencement of the April 7 ulp strike and (2) the mediator contacting Respondent and the Union to resume bargaining. Tr: 305-306.

B. Respondent Exception 1

In Exception 1, which includes Exceptions 1(a) through (h), Respondent, excepts to the Judge's finding and conclusions that there was not a valid impasse on March 31. What's much more important to note, is that Respondent's Exception 1 and the Exceptions that follow, **do not except to the Judge's conclusion that Respondent unlawfully implemented on March 31**. ALJD: 19 ln 52; 20 ln 10

through 21 ln 21; and 88 ln 26 -28. In other words, although asserted "impasse" was an important issue during the litigation before the Judge, that was primarily the case because impasse was Respondent's defense for its March 31 unlawful implementation, complaint paragraphs 18(a) and 20. As Respondent does **not** except to the conclusions that it unlawfully implemented on March 31, the issue of impasse on March 31 is mostly moot.

To the extent March 31 impasse is considered (it is not really necessary now), for the purposes of Respondent's late night March 31, 10:11 p.m. unlawful implementation (GC-17(h), as set forth above a most salient point is that Respondent began and continued to unlawfully refuse to bargain the morning of March 31, before Respondent's unlawful implementation. In other words, Respondent cannot successfully raise the shield of asserted impasse as a defense to its late night March 31 unlawful implementation, when before the implementation it had already refused to bargain as found by the Judge in regard to complaint paragraphs 16 and 18(b) – it was not possible to be at a valid impasse when the Respondent was unlawfully refusing to bargain. Particularly, where as here, Respondent has also not excepted (as discussed above) to the violation found in regard to complaint paragraph 18(b) that from about March 31 to about April 30, "Respondent conditioned bargaining over mandatory subjects of bargaining on the Union's concession to Respondent's bargaining demands."

Although Respondent generally excepts to the Judge's findings and conclusions that there was not a valid bargaining impasse on March 31, 2010, Respondent does **not** specifically except to the Judge specific finding and conclusion that even if there had been an impasse at 11 a.m. on March 31 as planned (GC-1, p 1) and asserted by

Respondent, the impasse would have been broken by the Union's response throughout the day on March 31, 2010:

> Furthermore, **even if there had been an impasse at 11 a.m. as planned by Respondent, the impasse would have been broken by the Union's response throughout the day on March 31, 2010.** The Union not only brought in the Federal mediator on March 31, 2010, but confirmed that it had additional proposals to make if only the parties could resume their negotiations. Heider admits that when she spoke with the mediator, he told her that the Union had additional proposals [for movement.] [Tr: 92 (Heider after reviewing affidavit.)] Heider and Bull ignored both the Union and the mediator and followed the CEO's plan and instructions. [Tr: 93.] Historically, the Board has not required major changes in circumstances to find that an impasse has been broken. ***Airflow Research & Mfg. Corp***., 320 NLRB 861 (1996). The Court of Appeals for the Fifth Circuit, in enforcing the Board's finding that impasse had been broken, explained, "Anything that creates a new possibility of fruitful discussion (even if it does not create a likelihood of agreement) breaks an impasse." The court went on to suggest that even implied bargaining concessions would be sufficient to break the impasse. ***Gulf States Mfg. v. NLRB***, 704 F.2d 1390, 1393 (5th Cir. 1983). Thus, any alleged impasse would have been quickly broken by the later communications and events on March 31, 2010. Having applied the ***Taft*** analysis and reviewing the evidence as a whole, I find that Respondent implemented its final offer on March 31, 2010, in the absence of impasse and as alleged in complaint paragraph 18(a).

(ALJD 19: 32- 46)

None of parts (a) through (h) of Respondent's Exception 1 attempt to except to the Judge's findings and conclusions that the Union's repeated request for bargaining on March 31 (a scheduled day of bargaining at which Respondent fled the scene) broke the impasse, if an impasse existed at any time on March 31. Thus, aside from the fact that Respondent is precluded from raising the impasse shield (defense) because it unlawfully refused to bargain on March 31, even if there was a March 31 morning impasse it was undisputedly broken before the late March 31 unlawful implementation.

Counsel for the GC, urges the Board to adopt and Judge's finding, analysis and conclusions regarding the March bargaining and Respondent's unfair labor practices,

including the portions of the Judge's decision at ALJD 7 ln 35 through 21 ln 16. Briefly, in support of the Judge, the record reflects that in the March bargaining, as found by the Judge, the Parties made progress on disputed issues such as hazard pay Tr: 221, 251, and the Respondent incorporating into its proposals the Union's suggestions on scheduling. Tr: 229; R-6 (see text box at bottom of document.) At the March 18 bargaining session, Respondent, for the first time, informed the Union that Respondent "had to have" the Union accept Respondent's three proposals, what came to be called core issues. Tr: 256-258. On March 19, Respondent provided the Union's bargaining committee with a full contract proposal (GC-9); the Union noticed that Respondent had removed items favorable to the Union that would have made agreement more likely. Omissions included the trial period and escape clause for the alternative shift schedule and the additions to the roster of positions eligible for hazard pay. The Union asked Respondent if the absence of those agreed-upon proposals was an accident, and Respondent said it was intentional. Tr: 263. Respondent had clearly moved away from agreement (without explanation), as it had a better package on the table on March 18 than it offered the Union on March 19. It is noteworthy that Respondent admits the March 19 omissions made the March 19 package less attractive and harder for the Union to present to its membership. Tr: 897-98. In other words, assert what it will now, Respondent (mine manager Bull) admitted before the Judge that it understood that on March 19 it had regressed, move away from agreement, making agreement less likely.

The Parties did not meet again until March 31, the morning, afternoon and night of which, as discussed above, Respondent repeatedly refused to bargain; the night of which Respondent unlawfully implemented. In brief, it's impossible for Respondent to

assert it presented a regressive package on March 19 (moving away from agreement), did not meet again until March 31, refused to bargain on March 31 (even when it did briefly meet), and then somehow after regressing and refusing to bargain declared an allegedly valid impasse that would have allowed an implementation the night of March 31.

Much of Respondent's response to the Judge's findings and conclusions and the above is Respondent's mere speculation in one form or another as to what would or would not have happened if the Respondent had bargained on March 31 and in April 2010. Obviously, the more Respondent concedes the need to now speculate to the Board in 2011 as to what would have happened if it had not refused to bargain in 2010, the more Respondent implicitly concedes to the Board that Respondent should have bargained on March 31 and thereafter. It is because Respondent did not want to know the Union's proposals in 2010 (Heider's above testimony), that Respondent is now so focused upon its ineffective attempts to discount the Union's proposals that the Respondent refused to hear on March 31, and in April 2010.

Respondent's initial arguments to the Board regarding Respondent Exception 1 begin with its failure to understand the issues being litigated; Respondent asserts, "The principal underlying labor dispute is this case revolves around the [Respondent's effort to change the regular work schedule for [U]nit employees . . . " Rather, the principal issues in this dispute are Respondent's unfair labor practices, as found by the Judge, that have prevented collective-bargaining and dramatically prevented the exercise of employee Section 7 rights. Further, Respondent even concedes when citing ***Bonanno***[9] that when negotiators use impasse as a bargaining tactic the "emphasis is toward achieving

[9] **Charles D. Bonanno Linen Services, Inc.**, 243 NLRB 1093, 1094 (1979).

agreement rather than causing a permanent disruption of the relation." By contrast, Respondent in this fact pattern has only used impasse in an effort to shield its unlawful disruption of its collective bargaining relationship with the Union.

For the reasons set forth by the Judge, the Board is respectfully urged to find that there was no impasse on March 31, and, just as the Judge found and Respondent failed to except to, even if there was a brief impasse it was broken the morning of March 31. Accordingly, Respondent Exception 1 must be denied in its entirety.

C. Respondent Exception 3

In Exception 3, Respondent excepts to the Judge's conclusion that the April 7 strike was an unfair labor practice strike as a result of the absence of a good faith impasse at the time of the late night March 31 unilateral implementation. Respondent candidly admits that the Judge correctly found that Respondent admitted that if the March 31 unilateral implementation was an unfair labor practice then the April 7 strike was an unfair labor practice strike. As noted above, Respondent has **not** excepted to the Judge concluding that the March 31 implementation was unlawful as alleged in the complaint. Of note, Respondent Exception 3 does not address the other Respondent unfair labor practices, as alleged in complaint paragraph 9 (GC-1(m)), that caused and prolonged the April 7 unfair labor practice strike.

D. Respondent Exception 4

In Exception 4, Respondent excepts to the Judge's findings and conclusions that Respondent's [unilateral implementation] of its May 22, 2010 Operating Procedures constituted a violation of the Act. In its grounds for Exception 4, Respondent makes the most limited (or narrow) argument that the document on its face was applicable only

during the period of the strike, and by its terms expired when the strike ended – apparently Respondent is actually referring to a cover memo announcing the May 22 Operating Procedures. It is true that in Respondent's May 22 announcement memorandum (GC-53(b) (implementing the Operating Procedures) that Respondent states that the May 22 Operating Procedures will be followed during the strike, but this same memorandum provides **no** indication as to a termination date for the May 22 Operating Procedures – as such, the memorandum is of no help to Respondent's defense. At the March 2011 hearing, Respondent offered no documents suggesting that Respondent announced the termination of the May 22 Operating Procedures at the end of the strike – evidence discussed below reveals the May 22 Operating Procedures continued in effect after the ulp strike ended.

Respondent's Exception 4 makes no effort to suggest that any of the record testimony supports its Exception ,[10] nor does Respondent specifically except to any of the Judge's findings of fact as to the testimony regarding Respondent's essentially covert (Tr: 377) implementation of the May 22 Operating Procedures. Relying primarily on the testimony of Respondent mine manager Gord Bull, the Judge found, without any Respondent Exception to the specific factual findings, that there were terms of employment in the May 22 Operating Procedures (GC-53(a)) clearly different from the terms included in Respondent's already unlawful March 31 implementation. Among other things, unlike Respondent's March 31 unilateral implementation, the May 22 Operating Procedures provided that with respect to demotions, filling vacancies, layoffs,

[10] In the motion to strike, Counsel for the GC moved to strike Respondent Exception 4 in its entirety as the Exception fails to identify that part of the Judge's decision to which exception is made and similarly fails to designate by precise citation of page the portions of the record relied upon by Respondent.

and recall, Respondent would select employees based upon merit. The May 22 implementation incorporated mine and safety rules, and with this implementation the formerly voluntary Safe Track safety program became mandatory for Unit employees. Of note, the May 22 Operating Procedures also included a new no-fault attendance policy. As noted above, the unilateral changes included in the May 22 Operating Procedures remained in place after the strike ended. ALJD: 25 ln 31 through 27 ln 18; Tr: 156 – 157; 154; 157. Again, although Respondent submits to the Board a narrow and vague Exception 4 premised upon the wording of the May 22 Operating Procedures (or more accurately a cover memo), Respondent made no effort to specifically except to the Judge's factual findings and conclusions based upon the record testimony. Thus, the Judge's facts and conclusions are not in dispute.

In rejecting Respondent Exception 4, counsel for the GC urges the Board to adopt the Judge's legal analysis and conclusions (which Respondent does not specifically except to) that Respondent violated Section 8(a)(1) and (5) by implementing the May 22 Operating Procedures. ALJD: 27 ln 1 – 17.

E. Respondent Exceptions 5, 6 and 7

Respondent Exception 5 essentially disputes the Judge's conclusion that about May 25, Respondent presented the Union a regressive contract proposal as alleged in complaint paragraph 18(c); Respondent Exception 6 essentially disputes the Judge's finding and conclusion that since about May 25, Respondent insisted on bargaining proposals that left the Union without any representational rights and employees in a worse position than if they did not have the Union as their collective-bargaining representative (as alleged in complaint paragraph 18(d).) ALJD: 32 ln 31. Respondent

Exception 7 essentially disputes the Judge's finding and conclusion that Respondent engaged in unlawful bargaining on June 3, and is essentially in regard to complaint paragraph 18(e) that since June 3, Respondent conditioned bargaining on the Union's concession to the Respondent's bargaining demands. These Exceptions are in fact related, because Respondent's violations of the Act as alleged at complaint paragraphs 18(c) and (d) help establish how Respondent violated the Act as alleged at complaint paragraph 18(e).

In essence, none of these three Respondent Exceptions expressly except to the Judge's underlying factual findings with any meaningful specificity that the Board could consider, but instead just focus upon the Judge's conclusions. In this regard, Respondent's grounds for Exceptions 5 – 7, at pages 20 through 26, do not clearly cite disputes with the Judge's factual findings.

In regard to Exceptions 5 and 6 (complaint paragraphs 18 (c) and (d)), counsel for the GC, urges the Board to adopt the factual findings, legal analysis and conclusions of the Judge's decision. ALJD: 27 ln 23 through 29 ln 21; and 29 ln 24 through 32 ln 31.

Of note, Respondent's regressive proposal on May 25, was preceded by Heider's April 30 threat to the Union's negotiating committee that if the Union did not accept Respondent's April 30 offer, Respondent would step up the hiring of permanent replacement workers and also reevaluate Respondent's proposals in their entirety." Tr: 1118-19. After the April 30 bargaining, the Union membership voted to reject Respondent's April 30 offer – in other words, the Unit employees exercised their Section 7 rights by continuing the ulp strike. Tr: 319. Thereafter, as foreshadowed by Respondent's threats, when the Parties met again on May 25, the Respondent's new

package was in fact "regressive;" "fifty-five pages of take away items," Tr: 325. Respondent's package included, among other things: removing employees from the bargaining Unit (Tr: 328); providing management more rights (Tr: 330); taking away union bulletin boards (Tr: 330); requiring employees to learn every job within newly formed job "grades" or otherwise face demotion (Tr: 331); the right for Respondent to contract out work at any time (Tr: 334); drastic changes to the shift schedule and overtime distribution (Tr: 335); limiting Respondent's liability for backpay in arbitrations (Tr: 338-39); and a sweeping change from "seniority" to relative "merit." Tr: 339. Additionally, Respondent informed the Union's bargaining committee that while Respondent previously had three core issues, on which it would not move whatsoever, Respondent now had seven core issues. Tr: 355. In summary, Respondent's May 25 proposal was a broadly regressive package.

Clearly, in the context of Respondent's previous unfair labor practices, Respondent's May 25 regressive proposal evidenced an intent to further frustrate bargaining. Moreover, Heider's May 27 email report to Respondent perhaps best and most unambiguously demonstrates that Respondent's May 25 proposal was made specifically with the intent of frustrating bargaining. GC-10, p. 9-10. The email detailed the status of negotiations between May 25 and May 27; and notes that after the second day of late May bargaining (May 26), Respondent's negotiating committee was instructed to "try to move [the Union] along a little quicker by trying to force them to focus on five key issues, **on which [Respondent] knew they could not agree but on which, without agreement, there could be no contract.**" (Bolding supplied.). At a minimum, that Respondent admission against interest by Hedier clearly demonstrates the unlawful

motive behind Respondent's May bargaining with the Union, including the May 25 regressive proposal as alleged in complaint paragraph 18(c). According to the same email, Respondent's CEO "gave the okay" to use Respondent's unlawful tactic; and on May 27, as Heider reported in her email, "it worked as expected." In summary, Heider's email is a startling Respondent admission against interest that its regressive May bargaining (the May 25 proposal) was calculated to frustrate bargaining, as further exhibited by Respondent creating and executing a plan in which it would condition an agreement upon proposals to which it knew the Union could never agree.

In regard to Complaint paragraph 18(d), it is clear that Respondent's May 25 proposal essentially insisted on unilateral control to change virtually all significant terms and conditions of employment of Unit employees during the life of the contract. ***Public Service Co.,*** 334 NLRB 487, 489 (2001), *enfd.* 318 F.3d 1173 (10th Cir. 2003). Respondent insisted on extensive management rights, including the broad clause that the Company "may take all steps necessary to maintain efficient and profitable operation not inconsistent with this Agreement's expressed provisions." GC-46, p. 8. Respondent required management to have the unfettered "right to establish, eliminate and change work week schedules." GC-46, p. 12. The new proposal also gave management the sole discretion to "establish, eliminate, and change overtime." GC-46, p 13.

While the Parties' previous collective bargaining agreement substantially restricted Respondent's right to contract out work performed by bargaining Unit members, in its May 25 proposal, Respondent gave itself "the right to contract work as it deems appropriate." GC-46 p. 31. Respondent also completely eliminated its previous restrictions on cross-assignment, thereby allowing Respondent complete discretion to

move and assign Unit work to supervisors and non-represented employees. GC-46, pp. 49-50.

Further, Respondent effectively eliminated the role of seniority in employment decisions. Respondent proposed all "matters related to promotions, demotions, filling of vacancies, lay-offs, and recall from layoff" would be based upon Respondent's discretion, characterized as "relative merit." This vague clause noted "qualifications, ability, and dependability" were controlling, and only if there was "no discernible difference between competing employees" should seniority even be considered. GC-46, 18-19.

In addition, while Respondent's regressive May 25 proposal left the previous collective bargaining agreement's no-strike clause unchanged, noting that "any disputes or differences shall be taken up under the grievance and arbitration procedure of this Agreement," Respondent made substantial changes and added limitations to the arbitration procedure. Respondent unilaterally added language restricting the breadth of issues an arbitrator could consider, and put new restrictions on potential back pay awarded by an arbitrator.GC-46 pp. 15-18.

In ***Wright Motors, Inc.***, the Board drew a distinction between proposals that might be considered "hard-bargaining", and unlawful proposals which "put the employees in a far worse position with the Union than without it," and "damage[] the [u]nion's ability to function as the employees' bargaining representative." 237 NLRB 570, 575-76 (1978). In ***Public Service Co.***, the Board analyzed a company's "final proposal" and found that the proposal, "required the Union to cede substantially all of its representational function, and would have so damaged the union's ability to function as

the employees' bargaining representative that the Respondent could not seriously have expected meaningful collective bargaining." 334 NLRB at 489. The employer's proposal in ***Public Service Co***. featured nearly identical changes to those made here by Respondent in its regressive proposal of May 25, 2010.

The employer's proposal in ***Public Service Co***. gave management the exclusive right to "schedule employees, their work times, locations and assignments," "set and change performance criteria…, and based on such employment evaluation, assign, promote, demote, transfer, or lay off employees," "assign supervisors or other non-classified employees to perform any bargaining unit work as deem[ed] necessary," "transfer, contract, or subcontract work… without restriction," and substantially impinged upon the role of the arbitrator compared to previous agreements. ***Id***. at 488-89. Here, as described above, and exactly like the employer in ***Public Service Co.,*** in Respondent's May 25 regressive proposal, Respondent also gave itself the sole discretion to "schedule employees, their work times, locations and assignments," use merit, instead of seniority, to "assign, promote, demote, transfer, or lay off employees," assign work to supervisors as deemed necessary, "transfer, contract, or subcontract work… without restriction," and unilaterally limited the role of the arbitrator compared to previous agreements.

In ***Public Service Co.***, the Board held that such a proposal, "if accepted, would have left the Union and the employees with substantially fewer rights and protection than they would have had without any contract at all." ***Id***. at 489. The Board reasoned that without a contract, the union in that case would have at least "retained the statutory right to prior notice and bargaining over changes or modifications in terms and conditions of

employment, and it would have retained the right to strike in protest of such actions." ***Id.*** The Board found, therefore, that the union could do just as well with no contract at all, and that such a proposal therefore demonstrates bad faith. ***Id.*** Here, too, since Respondent's proposal matches that of the employer in ***Public Service Co.***, the bargaining Unit employees would have fewer rights and protections based on Respondent's May 25 regressive proposal. Thus, the Board should adopt the Judge's findings and conclusions that Respondent violated Section 8(a)(1) and (5) of the Act, as alleged in complaint paragraph 18(d.) That Respondent later told the Union's bargaining committee that it had to accept this proposal or there would be no contract, and then unlawfully implemented the proposal only makes Respondent's bad faith bargaining even more apparent and egregious.

As to Exception 7, Respondent's unlawful bargaining as found in regard to complaint paragraphs 18 (c) and (d)) serves to help establish the violation alleged at complaint paragraph 18(e) that since June 3 Respondent conditioned bargaining upon the Union's concessions. Thus, again counsel for the GC urges the Board to adopt the factual findings, legal analysis and conclusions of the Judge's decision in regard to complaint paragraphs 18(c) and (d). ALJD: 27 ln 23 through 29 ln 21; and 29 ln 24 through 32 ln 31. Counsel for the GC also urges the Board to adopt the factual findings, legal analysis and conclusions of the Judge's decision in regard to complaint paragraphs 18(e). ALJD: 36 ln 35 through 37 ln 41.

Regarding the May 27 email, Heider admitted that Respondent repeatedly said in May, "We just want a contract on our terms." GC-10, p. 9. The Parties set June 2 and 3 as the next bargaining sessions. Tr: 359. During the afternoon of June 2 bargaining session,

the Union addressed Respondent's May 25 regressive package and responded with its own proposals on all of the issues. Tr: 361; GC-30(b). After the Union finished explaining its proposals, Respondent characterized the proposals as "inconsistent" and was "not agreeable to them," but could not explain why or how the proposals were inconsistent. Tr: 370. In brief, Respondent maintained that its package proposal "was the contract that the company wants." Tr: 370. Respondent rejected all of the Union's proposals and ended the session after only a few hours. Tr: 371-72.

The Parties met again on June 3. Tr: 372. At the start of that session, Respondent made its approach to the bargaining clear to the Union by stating "if our proposals are not met, there will not be a contract." Tr: 373. Respondent stated the Union had to accept Respondent's seven core issues or there would not be a contract, and moreover, Respondent was holding firm on every other issue. Tr: 373. After a break, the Union sought to make sure it understood Respondent's position, and confirmed Respondent was rejecting every one of the Union's proposals, and absolutely refused to talk about any other issue unless the Union accepted the main seven parts of Respondent's package. Tr: 380. The Parties then scheduled further meetings for June 22 and 23, and ended the session. Tr: 382.

At the June 22 bargaining session, Respondent provided the Union with a fourth final offer, although it was only a slightly modified version of Respondent's May 25 proposal. Tr: 393-94. There was **no** significant movement. Tr: 394. At the June 23 bargaining session, Respondent again repeated that unless the Union capitulated to seven sweeping changes to the contract, Respondent would not enter into any agreement, and Respondent would not address any other of the Union's issues. Tr: 401. Even

Respondent (Heider) at least admits that near the end of the June 23 bargaining session, Heider told the Union's bargaining committee that unless they were willing to accept three of Respondent's bargaining demands, the negotiation session would be over. Tr: 1140.

On June 26, Respondent notified the Union that it intended to unilaterally implement the terms and conditions of its expired June 25 proposal on June 27, 2010. On June 27, the Union e-mailed Respondent and requested to continue bargaining over all mandatory bargaining subjects. GC-10, p. 15. Respondent decided that unless the Union agreed to Respondent's seven core bargaining demands, Respondent would not even meet for bargaining sessions. GC-10, pp. 15-16.

In summary, Respondent put seven core demands on the table and flatly refused to bargain about anything else unless the Union capitulated to those demands. In doing so, Respondent unlawfully "held future negotiations hostage to unilaterally imposed demands." ***Caribe Staple Co., Inc.***, 313 NLRB 887, 888. While the Union attempted to engage in bargaining and made proposals with significant movement, Respondent could not identify any movement it had made in its proposal (because, in fact, Respondent had not made any movement). Respondent made it clear that it had no desire to reach ultimate agreement. Thus, Respondent Exception 7 must be denied.

In support of its Exceptions 5, 6 and 7, Respondent particularly cites ***Hickinbotham Bros.***, 254 NLRB 96, 102 (1981) for the proposition that it is not unlawful for an employer who has weathered [an economic] strike to capitalize upon its new found strength. At least as to the reason cited by Respondent, Respondent's asserted reliance upon ***Hickinbotham,*** is completely irrelevant to Respondent's Exceptions. The

employer in ***Hickinbotham*** had not engaged in a variety of unfair labor practices directly causing an ulp strike before it changed its bargaining proposals. Similarly equally irrelevant is Respondent's great reliance upon ***Hendrick Manufacturing Co.***, 287 NLRB 310 (1987), which again involved an employer that bargained in good faith despite facing an economic strike; not an employer such as Respondent that forced its employees into an unfair labor practice strike.

Respondent makes another irrelevant argument by placing substantial reliance upon a limited portion of the concurring opinion of then Chairman Gould in ***White Cap, Inc***., 325 NLRB 1166, 1171-72 (1998) wherein he wrote "I wish to emphasize, how ever, the lawfulness of so-called 'regressive bargaining" when it is **not** undertaken in the general context of an **intent to evade coming to an agreement**." (Bolding supplied.) In the case now before the Board, Respondent's conduct was (as admitted in its own email) focused upon evading coming to an agreement. GC-10, pg 1, pg 6 (May 18 17:58:15 email), pg 9 ("proposed we try to move them along a little quicker by trying to force them to focus on five key issues, on which we knew they could not agree" (mid page)), pg 15 ("We do not respond. The bargaining is over and everything now goes through NLRB process" (top of the page)), p 16 ("Because we were so aggressive with little movement on other issues, we stuck to the 'core' as fundamental. Stan [first name of counsel] will make his case that we would have moved on 90-95% of those non core issues – And no one can disprove this."); and GC-17(a) – (l). In this context, 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. (Respondent did not specifically except to this factual finding.) Accordingly, Respondent Exceptions 5, 6 and 7 must be denied.

F. Respondent Exception 8

In Respondent Exception 8, Respondent excepts to the findings and conclusions of the Judge "ignoring the bargaining between the Parties over the order of striker reinstatement and requiring such reinstatement to be in accord with the expired contract." Exception 8 relates to Respondent's unfair labor practices as found by the Judge in regard to complaint paragraph 18(f) and 21. ALJD: 45 ln 18-26.

Respondent's real issue with the Judge's finding violations based upon complaint paragraphs 18(f) and 21 is not the Judge "ignoring the bargaining." Instead the issue for Respondent is that the Judge very carefully focused upon the bargaining and conscientiously analyzed the fact pattern. ALJD: 44 ln 44 through 45 ln 26. The Judge correctly observed that in Respondent amended answer it acknowledged that the 2007-2010 collective-bargaining agreement provided for recall by seniority and that Respondent also acknowledged that in years past, Respondent has used seniority to recall employees. The Judge also noted that Respondent admits that it did not recall strikers by seniority and that it unilaterally **changed** the seniority based recall procedure for Unit employees. Although Respondent had unlawfully implemented many changes on March 31, it did not at that point in March implement a change altering its reliance upon seniority for recall. In effect, despite Respondent's March 31 unlawful unilateral changes to term and condition of employment, the expired collective-bargaining agreement's reliance upon seniority for recall should have been utilized by Respondent in June 2010. Thus, the Judge's careful review of the history of bargaining, contract language and past

practice resulted in the inevitable conclusion that Respondent violated the Act in regard to complaint paragraphs 18(f) and 21.

In support of Exception 8, Respondent poses the rhetorical question of what more could Respondent have done with respect to such a time-critical issue. In response, Respondent could have substantially facilitated bargaining by refraining from its series of unfair labor practices that began about March 31, which included its repeated violations of Section 8(1) and (5) of the Act and its unlawful threats to retaliate against ulp strikers. Respondent could have further facilitated bargaining by acknowledging that the ulp strikers were entitled to immediate reinstatement, and Respondent could have abandoned its unsubstantiated assertion that the replacement workers were permanent replacements.[11] Each and all of those actions would have facilitated and assisted bargaining regarding returning strikers to work. Instead, Respondent had so poisoned the well that real bargaining was not possible.

G. Respondent Exception 9

In Respondent Exception 9, Respondent excepts to the Judge's findings and conclusions "prohibiting [Respondent] from following through on hiring commitments made before the end of the strike." Exception 9 relates to Respondent's unfair labor practices as found by the Judge in regard to complaint paragraphs 18(g) and (i). ALJD: 46 ln 20-23.

Respondent does not dispute any of the facts found by the Judge or any of the conduct attributed to Respondent. Further, even in Respondent's view, as articulated in

[11] The Judge did not expressly rule on the question of whether the replacement workers were or were not permanent (or temporary) replacements, and that issue is before the Board on the Acting GC's Cross-Exceptions.

Respondent's grounds for Exception 9, if the Board affirms the Judge in concluding that the April 7 strike was a "ulp strike," then Respondent in effect concedes that replacement workers should have been discharged to "make room for returning" ulp "strikers."[12] As it is abundantly clear that the April 7 strike was an unfair labor practice strike, it is respectfully submitted that Respondent Exception 9 can only be denied and thus warrants no further consideration.

H. Respondent Exception 10

In Respondent Exception 10, Respondent narrowly excepts to the Judge's finding and conclusions that as of June 23, Respondent had continued to insist on bargaining proposals that left the Union without any representational rights and left employees in a worse position than if they had no collective-bargaining representative.

Respondent Exception 10 prompts the question, why? Respondent does not except to the Judge's conclusion that the record evidence does **not** support a finding of a valid impasse on June 23, 2010 (ALJD: 39 ln 11-12), which is the primary focus and purpose of that portion of the ALJD. Similarly, Respondent does **not** except to the violations of Section 8(a) (1) and (5) alleged at complaint paragraphs 18(h) and 22 regarding Respondent's unlawful June 27 implementation. Thus, at first glance Respondent Exception 10 seems to have no purpose.

In fairness, Respondent Exception 10 appears to again essentially dispute the Judge's conclusion that since about May 25 Respondent insisted on bargaining proposals that left the Union without any representational rights and employees in a worse position

[12] In light of the Acting GC's Cross-Exceptions, Counsel for the GC also notes that upon a conclusion by Board that the replacement workers were "temporary" (not permanent), the temporary replacement workers should have been displaced to make room for returning strikers.

than if they did not have the Union as their collective-bargaining representative as alleged in complaint paragraph 18(d). In other words, Exception 10 is something of a repetition of Exception 6 above.

In that context, counsel for the GC relies upon the facts and arguments submitted in response to Exception 6 and the related Exceptions 5 and 7, including the portions of the ALJD previously called to the Board's attention.

I. Respondent Exception 11

In Respondent Exception 11, Respondent excepts to what it characterizes as the Judge's failure to find and conclude approximately seven issues favorable to Respondent. As urged above, Counsel for the GC moves to strike Respondent Exception 11 in its entirety, as Respondent Exception 11 fails to identify that part of the Judge's decision to which exception is made and similarly fails to designate by precise citation of page the portions of the record relied upon by Respondent. Respondent provides no grounds for Exception 11, except to vaguely assert that Respondent adopts the argument in connection with the preceding Exceptions. It's most decidedly unclear what Respondent is attempting to argue before the Board, other than apparently Exception 11 is at best redundant and fails to add anything new for the Board's consideration.

As Exception 11 fails to conform to Section 102.46 (b)(1) of the Board's Rules, is vague beyond comprehension, and is at most redundant, the Board is respectfully urged to reject Exception 11 in its entirety.

J. Respondent Exception 12

In Respondent Exception 12, Respondent excepts to the Judge's conclusions of law, remedy and proposed order in connection with its foregoing Exceptions. As

stated above, it is noteworthy that Respondent Exception 12 is so extraordinarily, vague, ambiguous and lacking of specificity, as to be incomprehensible and devoid of any discernable meaning. Accordingly, the Board should disregard this Respondent Exception.

Further, based upon Respondent's stated grounds for Exception 12 that Respondent adopts its argument in connection with its preceding Exceptions, it would appear that Respondent contends that Exception 12 rises or fall with Respondent Exceptions 1 through 11. As Respondent Exceptions 1 through 11 must be rejected, so must Exception 12.

K. Respondent Exception 13

In Respondent Exception 13, Respondent excepts to the Judge's consideration in this proceeding of the issue of the reinstatement of employees of who "resigned" before being offered Reinstatement. Respondent's Exception 13 make no effort to identify with specificity, which specific employees are the subject of its Exception. Thus, it is impossible for the Board to consider Exception 13, and it must be denied.

In this Exception, Respondent makes no effort to allege that the substance of the Judge's factual findings and legal conclusions are in error. In stead, Respondent only argues that this issue was not raised in the pleadings and is only appropriate for the compliance stage of the case. Respondent cites no legal authority.

As Exception 13 does not disclose the identity of the specific strikers that are the subject of the Exception, it is difficult to address any asserted deficiency in the pleadings. However, what is undisputed is that the Complaint's six-page Attachment A identified to the extent possible each of the alleged discriminatees known to the Acting General

Counsel, and the Complaint's paragraph 10 included the appropriate "as well as employees currently unknown to" language. (GC-1(j).) It is difficult to imagine that Respondent could have any superior notice from the pleadings. Moreover, just as the Judge noted in the ALJD, almost 30 or so of the employees/ulp strikers Respondent discriminated against testified at the ulp hearing (ALJD 43: ln 33-34.) The testimony of each witness speaks for itself, but generally, as the Judge summarized, these ulp strikers, victimized by Respondent's refusal to bargain, its unilateral changes, and Respondent's other unfair labor practices, resigned their employment either before or after receiving offers of reinstatement – Counsel for the Acting GC does **not** imply these were valid and adequate offers of reinstatement. Although the Judge conducted the ulp hearing in a very efficient manner, this striker testimony consumed a good portion of one day of hearing (most of 200 pages of transcript beginning at Tr: 562.) Respondent is represented by highly competent and experienced labor counsel, even if the pleadings were deficient (they were not), Respondent was fully on notice as to the issues litigated and the testimony presented. In that regard, a matter not pleaded matter may support an unfair labor practice finding if it is closely connected to the subject matter of the complaint and has been fully litigated. ***Pergament United Sales***, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990); and ***Meisner Electric, Inc.***, 316 NLRB 597, 597 (1995), affd. mem. 83 F.3d 436 (11th Cir. 1996). In this instance, clearly the rights of all the strikers are covered by the complaint allegations, and even if they were not the matter was sufficiently related to the complaint litigated to allow the Judge's findings and conclusions.

Of note, at the March 2011 unfair labor practice hearing, the Respondent had much more notice and information as to the issues and evidence likely to arise than a typical respondent, as much of the ulp complaint, including the striker reinstatement issue, was the subject of the then ongoing Section 10(j) petition in ***McKinney v. Carey Salt Co., a subsidiary of Compass Minerals International, Inc***., Case No., 6: Il-cv—00287. Given that Respondent Exception 13 is baseless it should not be necessary, but to the extent helpful counsel for the GC urges the Board to take official notice of the pleadings in the above-mentioned Section 10(j) litigation as additional evidence that Respondent was well aware of the striker reinstatement issues.

V. Conclusion:

Motion to Expedite; Motion to Strike; Rejection of Respondent's Exceptions

Counsel for the GC, as joined by the Union, respectfully urges the Board to expedite its consideration of this matter – it is now for the Board to restore to the Unit employees their Section 7 rights.

Counsel for the GC urges the Board to immediately grant the motion to strike certain of the Respondent's Exception, as requested above, as this will serve to expedite the consideration of this case.

Of course, the Board is respectfully urged to deny each and every of Respondent's Exceptions, for to allow Respondent to make repeated contemporaneous admissions against interest of its refusal to bargain without finding Respondent unlawfully refused to bargain and discriminated against the ulp strikers would unavoidably create inappropriate precedent ("bad law") precluding the future effective administration of the Act.

Respectfully submitted,

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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 Answering Brief to Respondent's 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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