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**Smurfit-Stone Container Enterprises and Teamsters
District Council No. 2, Local 388-M, affiliated
with International Brotherhood of Teamsters.
Cases 32–CA–24480 and 32–CA–24725**

December 22, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

The primary issue in this case is whether the Respondent violated Section 8(a)(5) and (1) of the Act by conditioning a plant closure effects agreement on the Union's consent to mid-term cancellation of the parties' collective-bargaining agreement. Absent an applicable reopener provision, mid-term modification of a collective-bargaining agreement is a nonmandatory subject of bargaining, and as such it cannot be insisted on as a condition for reaching agreement on mandatory subjects. The judge recommended dismissal of the complaint, however, concluding that, under the circumstances presented here, the Respondent's mid-term contract termination proposal was sufficiently intertwined with other, mandatory subjects so as to become a mandatory bargaining subject. Alternatively, applying the impasse factors set forth in *Taft Broadcasting Co.*,¹ the judge found that, even assuming mid-term contract termination remained a permissive subject, the Respondent did not insist on it to impasse.²

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs,³ and has decided to affirm the judge's rulings,

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

² On April 5, 2010, Administrative Law Judge Jay R. Pollack issued the attached decision. The General Counsel and the Charging Party each filed exceptions and a supporting brief, the Respondent filed a brief answering both sets of exceptions, and the General Counsel filed a reply brief.

³ In its answering brief, the Respondent moves to strike the General Counsel's and the Union's exceptions in their entirety for failure to comply with the Board's Rules and Regulations. Alternatively, the Respondent moves to strike them to the extent they fail to comply with the Board's Rules and Regulations.

Both sets of exceptions substantially comply with the Board's requirements. See Sec. 102.46(b) of the Board's Rules and Regulations. The motion to strike the exceptions in their entirety is therefore denied. See, e.g., *Lee's Industries*, 355 NLRB No. 206, slip op. at 1 fn. 1 (2010). However, we find merit in the Respondent's motion to the extent that it addresses those parts of the Union's exceptions and brief that go beyond the General Counsel's theory of the case and are unsupported by record evidence. Accordingly, consistent with the Respon-

findings, and conclusions only to the extent consistent with this Decision and Order.

In disagreement with the judge, we find that the Respondent's contract termination proposal was a nonmandatory subject, and that the *Taft Broadcasting* impasse factors are inapplicable here. Accordingly, the Respondent's conditioning its acceptance of the parties' plant-closure effects agreement on the mid-term cancellation of their collective-bargaining agreement constituted a failure to bargain in good faith about the effects of the plant closure—a mandatory subject of bargaining—and thereby violated Section 8(a)(5) and (1).

Background

The Respondent manufactures and distributes corrugated boxes. It operates a number of plants in California, and the Union represents employees at many of them. The facility involved in the present case was located in Fresno, where the Union had represented production and maintenance employees for about 40 years. The parties' last collective-bargaining agreement covering the plant dated from March 1, 2005, and was to expire by its terms on February 28, 2011. The Respondent closed the Fresno plant in September 2009 for economic reasons. As explained below, negotiations for a plant closure effects agreement took place but were unsuccessful.

Two earlier negotiations between the Respondent and the Union are relevant here. In 2004, the parties reached an effects agreement concerning the closure of the Respondent's plant in San Jose. In that agreement, the Respondent agreed to severance payments and an extension of medical benefits for the bargaining unit employees in exchange for the Union's consent on two matters: the immediate suspension of unit seniority and cancellation of the existing collective-bargaining agreement when the plant closed or after the last employee was laid off, whichever occurred later.

Also in 2004, the Respondent and the Union engaged in successor contract negotiations for the Fresno unit (among others), which resulted in the parties' 2005–2011 collective-bargaining agreement.⁴ During bargaining, the Union proposed a specific severance-pay formula in the event that the Fresno plant were to close. The Respondent countered with a two-part offer. First, it proposed contract language recognizing the Union's right to discuss severance pay in the event of a Fresno closing. Second, it proposed that, in a separate memorandum of

dent's alternative motion, we will strike union exceptions 1 and 3, and items 1, 3, 4, and 5 at pp. 3–5 of its exceptions brief. See, e.g., *ATC/Forsythe & Associates*, 341 NLRB 501, 501 fn. 1 (2004).

⁴ The parties engaged in multilocation bargaining in 2004, resulting in several successor collective-bargaining agreements in addition to the one at Fresno.

agreement, it would promise to offer the Union a severance pay formula for the Fresno employees not inconsistent with the San Jose closure settlement. The Union accepted this proposal and dropped its severance formula demand.

In September 2008, the Respondent announced that the Fresno plant would begin winding down operations and permanently laying off unit employees in late November. The Respondent estimated that the plant closure would be final within a year. Subsequently, the Respondent informed the Union that some unit employees might continue working in the warehouse department after the rest of the facility terminated operations.

As more fully detailed in the judge's decision, between late September 2008 and early May 2009, the Respondent and the Union met six times for closure effects negotiations.⁵ The Respondent's offer was, in essence, severance pay and an extension of medical benefits for unit employees, in exchange for the immediate suspension of unit seniority and cancellation of the 2005–2011 bargaining agreement when the number of remaining unit employees fell to a specified cutoff.⁶

The Respondent's insistence on mid-term cancellation of the agreement was the primary point of dispute throughout those negotiations. The Union's response to each of the Respondent's early-termination proposals was that the contract must remain effective until its 2011 expiration date. The Union was willing, however, to consider a mid-term cancellation that specifically reflected the contract termination language in the 2004 San Jose settlement—i.e., when the plant closed or after the last employee was laid off, whichever occurred later. But it adamantly opposed termination of the Fresno contract while any unit employee remained working.

When the Union did not agree to the Respondent's "last, best and final" closure effects offer, the Respondent withdrew it on May 5, 2009. There were no effects negotiations after that date. On September 1, 2009, the plant closed and the last four unit employees were laid off.⁷ The Fresno property was sold a week later.

Discussion

When an employer decides to close a facility solely for economic reasons, it is not obliged to bargain over that

⁵ The parties did not bargain about the Respondent's decision to close the facility, and it is not an issue in this case.

⁶ Initially, the Respondent proposed that the contract terminate when there were five or fewer employees. By the last bargaining session, the Respondent's position was contract termination when there was "one or fewer" employees.

⁷ There were 92 employees in the bargaining unit when the Respondent announced that it was initiating the closure process. By March 24, 2009, only four unit employees were still working at the plant.

decision, but it is required to negotiate with its unit employees' bargaining representative concerning the effects of its decision.⁸ If, at that time, the employer and union are parties to a collective-bargaining agreement, either party may propose to modify a provision of that agreement—such as its duration clause—and the other party is free to consent. But absent a reopener provision covering the proposal, under Section 8(d) of the Act the other party is under no obligation to consent to the modification or even to discuss it.⁹ The mid-term modification proposal is accordingly a nonmandatory subject of bargaining.¹⁰ It is a violation of Section 8(a)(5) for an employer to insist on a union's consent to a nonmandatory proposal as a condition of reaching agreement on mandatory bargaining subjects. See, e.g., *Borg-Warner Corp. v. NLRB*, 356 U.S. 342, 347–349 (1958).¹¹

In the present case, the Respondent did not dispute that a proposal to terminate a collective-bargaining agreement prior to its expiration date is normally a nonmandatory subject of bargaining.¹² But the Respondent claimed, and the judge agreed, that the relevant circumstances of the parties' negotiation over the effects of the Fresno plant closing served to "convert" the Respondent's proposal for mid-term contract cancellation into a mandatory subject.

1. The judge's primary rationale: a permissive subject became mandatory

The judge found that the subject of early contract termination was part of a package proposal in the Fresno effects bargaining. The package also included suspension of seniority rights, severance pay, and continuation of medical benefits. In the judge's view, these four components fulfilled the Respondent's promise in the 2004 successor-contract negotiations to make a severance offer consistent with the parties' San Jose closure settlement in

⁸ *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681–682, 686 (1981); see also *Willamette Tug & Barge Co.*, 300 NLRB 282, 284 (1990).

⁹ See, e.g., *Boeing Co.*, 337 NLRB 758, 762–763 (2002), and cases cited there.

¹⁰ See, e.g., *New Seasons, Inc.*, 346 NLRB 610, 617–618 (2006); *Chesapeake Plywood*, 294 NLRB 201, 211–212 (1989), *enfd. mem.* 917 F.2d 22 (4th Cir. 1990).

¹¹ Accord: *Westvaco Corp.*, 289 NLRB 301, 306 (1988). See also *Vanguard Fire & Security Systems*, 345 NLRB 1016, 1017, 1043 (2005), *enfd.* 468 F.3d 952 (6th Cir. 2006); *Timken Co.*, 301 NLRB 610, 614–615 (1991); *Latrobe Steel Co.*, 244 NLRB 528, 531–532 (1979), *enfd. in relevant part* 630 F.2d 171 (3d Cir. 1980), *cert. denied* 454 U.S. 821 (1981).

¹² Of course, contract duration is a mandatory subject when negotiating for a new collective-bargaining agreement. See, e.g., *ServiceNet, Inc.*, 340 NLRB 1245, 1247 (2003); *Steelworkers, Local 2140 (United States Pipe)*, 129 NLRB 357, 360 (1960), *petition for review denied* 298 F.2d 873 (5th Cir. 1962), *cert. denied* 370 U.S. 919 (1962).

the event that the Fresno plant closed. The judge further found that contract cancellation and suspension of seniority amounted to consideration for the Respondent's severance pay and medical benefits offer. He concluded, therefore, that cancellation of the contract, and seniority suspension as well, "took on the characteristics of the mandatory subjects" in the overall proposal.¹³ Because (as he saw it) mid-term contract cancellation had effectively become a mandatory subject, the judge concluded that the Respondent's insistence that the contract terminate before its expiration date was lawful bargaining conduct.

In three prior cases, the Board has considered circumstances where a bargaining subject usually considered nonmandatory may "become" mandatory based on the nature of its relationship with mandatory subjects under negotiation. In *Sea Bay Manor Home For Adults*, 253 NLRB 739 (1980), *enfd. mem.* 685 F.2d 425 (2d Cir. 1982), the Board found that the employer violated Section 8(a)(5) by repudiating an agreement that all outstanding issues in the parties' current negotiations would be settled by interest arbitration. The Board concluded that the parties' interest-arbitration agreement—normally a nonmandatory matter related to future negotiations—"was so intertwined with and inseparable from the mandatory terms and conditions for the contract currently being negotiated as to take on the characteristics of the mandatory subjects themselves."¹⁴ The Board repeatedly characterized the parties' bargaining situation as "unique."¹⁵

In two subsequent cases—both involving layoff-effects bargaining—the Board considered whether a proposal that employees sign a release of the employer's legal liability constituted a mandatory subject in light of a severance-pay proposal also under negotiation. The Board's decisions turned on whether the liability release was "general," and thus lacking a "sufficient nexus" with severance pay, a mandatory subject,¹⁶ or sufficiently specific to the employer's potential liability arising out of the layoffs that a cost/benefit linkage with severance pay was evident.¹⁷

¹³ It is undisputed that the Respondent's offers regarding severance pay and medical benefits concerned mandatory bargaining subjects. Unit seniority was covered by the collective-bargaining agreement and thus, like the contract's duration, was presumptively a nonmandatory subject for the term of the contract. However, the bargaining-subject status of seniority rights is not at issue in this case.

¹⁴ 253 NLRB at 740.

¹⁵ *Id.* at 740, 741 fn. 9.

¹⁶ *Borden, Inc.*, 279 NLRB 396, 399 (1986) (finding liability release proposal nonmandatory).

¹⁷ *Regal Cinemas*, 334 NLRB 304, 305–306 (2001) (finding liability release proposal effectively a mandatory subject), *enfd.* 317 F.3d 300 (D.C. Cir. 2003).

What those cases teach is that a bargaining subject otherwise considered nonmandatory constitutes a mandatory subject if it has a "sufficient nexus"¹⁸ to mandatory subjects under negotiation. To establish the requisite nexus, the subjects must be "intertwined" and "inseparable,"¹⁹ perhaps demonstrating a connection with "reciprocal [cost/benefit] effects."²⁰ Such cases are rare,²¹ and this case is not one of them.

Here, the Respondent did not attempt to demonstrate, and the judge did not find, a sufficient nexus. Rather, the judge found only that early contract termination was one of four components of the Respondent's overall closure-effects proposal, and that it was part of the consideration requested in exchange for the Respondent's offer of severance pay and extended medical benefits. To the extent that early contract termination was sought as a "quid pro quo" for severance pay and continued medical coverage, that is insufficient, standing alone, to establish the requisite nexus.²² Otherwise, "a permissive subject of bargaining would become mandatory whenever it was presented together with a mandatory subject,"²³ and pairing the two would become "a device to circumvent the general rule that one may not insist on [a permissive subject] to impasse."²⁴

Accordingly, we reject the judge's analysis. We find no sufficient nexus between early contract termination and either severance pay or extended medical benefits, or both, that would convert the Respondent's early-termination proposal into a mandatory bargaining subject under the precedent cited above. Consequently, it is unnecessary for us to address the question of whether a nexus with mandatory subjects can ever be sufficient to avoid the *Borg-Warner* rule when the bargaining proposal involves the mid-term modification of a collective-bargaining agreement that does not include a reopener provision.²⁵

¹⁸ *Borden*, *supra* at 399.

¹⁹ *Id.*

²⁰ *Regal Cinemas*, *supra* at 305.

²¹ *Sea Bay Manor*, *supra* at 740.

²² Compare *Regal Cinemas*, *supra* at 305–306 (quid-pro-quo nature of the employer's proposal only one factor in the analysis).

²³ *Borden*, *supra* at 399.

²⁴ *Dependable Storage, Inc.*, 328 NLRB 44, 50 (1999).

²⁵ Compare, e.g., *New Seasons, Inc.*, *supra* at 618 fn. 9 (contract subjects not encompassed by reopener provision cannot be bargained to lawful impasse regardless of their relationship with subjects within the reopener provision).

Member Hayes concurs in finding that the Respondent failed to prove a reasonably necessary nexus between the customarily permissive subject of mid-term contract termination and the mandatory bargaining subjects in its effects bargaining proposal. The only apparent basis for arguing that these must be negotiated as an all or none package—that the parties had previously negotiated a similar agreement for the San Jose facility—is clearly insufficient. Member Hayes expresses

2. The Respondent's alternative analysis: union waiver

In its answering brief, the Respondent presents an alternative rationale for finding its early termination proposal a mandatory bargaining subject. The Respondent contends that the “very essence” of the linkage between early termination and the other three parts of its closure-effects offer is that the Union had agreed in advance that these four concepts—early contract termination and seniority suspension, in exchange for severance pay and extended medical coverage—would be the basis of any effects settlement if Fresno closed. In other words, by its purported, earlier agreement, the Union waived its 8(d) right to withhold consent to a mid-term modification of the contract's duration.

In his reply brief, the General Counsel observes, correctly, that a waiver of a statutory right under the Act must be demonstrated with clear and unmistakable evidence,²⁶ and that it is the Respondent's burden to prove waiver under this exacting standard.²⁷ A reopener clause covering contract duration would provide evidence of such a waiver.²⁸ However, there is no relevant reopener provision in the parties' 2005–2011 collective-bargaining agreement.

The Respondent contends that the Union agreed to the four-part framework, including early contract termination, during the 2004 bargaining for a successor contract at Fresno. The record does not support this claim. As set forth in the background section above, in the 2004 negotiations, the Union abandoned its demand for a specific severance pay formula in exchange for contractual language recognizing the Union's right to discuss severance pay in the event of a plant closure, plus a memorandum of agreement stating

the Company's intent in future plant closures, if any, to bargain a severance/impact bargaining formula that is not inconsistent with its severance/impact bargaining agreement[s] at San Jose . . .

Stated otherwise, in the event Fresno closed, the Respondent committed to an “intent” to follow a bargaining formula “not inconsistent” with the San Jose closure-effects settlement. In response, the Union agreed to drop its severance-pay formula demand; it committed to nothing regarding future closure effects negotiations.

no view beyond the circumstances of this case as to when the relationship between permissive and mandatory bargaining subjects requires bargaining to agreement or impasse as to all.

²⁶ See, e.g., *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

²⁷ See, e.g., *Wayne Memorial Hospital Assn.*, 322 NLRB 100, 104 (1996).

²⁸ See *Speedrack, Inc.*, 293 NLRB 1054, 1054–1055 (1989).

But even assuming the Union's acceptance of the Respondent's statement of intent implied a reciprocal intent to apply the San Jose framework at Fresno, the parties differed in their views of what that framework entailed.²⁹ The parties' 2008–2009 effects bargaining discloses a mutual understanding that the four part San Jose closure agreement provided a model for an effects settlement at Fresno. Regarding early contract termination in particular, however, the parties had crucially different understandings of what the San Jose agreement represented. To the Respondent, it meant early cancellation of the collective-bargaining agreement, specifics to be determined but not excluding the option of terminating the contract while at least one unit employee remained employed. To the Union, it meant early termination of the contract in exactly the way the issue was resolved at San Jose: when the plant closed or when *all* unit employees had been laid off, whichever occurred later. The parties never bridged this gap.

In sum, the evidence shows that the Union engaged in *voluntary* discussion of a subject covered by the current contract.³⁰ The parties explored what it would take for the Union to consent to modify the contract's expiration date. The Respondent has not proved, however, that there was any prior agreement requiring the Union to discuss modification of the contract's term in plant closure bargaining, which in effect would have “reopened” the contract's duration clause and restored its status as a mandatory subject.³¹

3. The judge's alternative rationale: the Respondent did not bargain to impasse

We conclude that mid-term contract cancellation was, and remained, a nonmandatory subject during the parties' effects negotiations. In an alternative finding, the judge determined that, even if this were so, the Respondent did not bargain to impasse over its contract termination position, and therefore did not violate Section 8(a)(5) under *Borg-Warner*, supra at 342. In so finding, the judge applied the impasse factors set forth in *Taft Broadcasting Co.*³² But *Taft Broadcasting* does not apply here.

The *Taft* factors are appropriately applied to determine whether a bargaining impasse has been reached when parties have bargained in good faith. However, condi-

²⁹ Member Hayes does not rely on this portion of the waiver analysis.

³⁰ See, e.g., *Boeing Co.*, supra at 762–763.

³¹ Given its failure to prove such an agreement, we find it unnecessary to consider whether the Respondent would have been required to satisfy the notice requirements of Sec. 8(d) concerning the Fresno effects negotiations. See, e.g., *Speedrack*, supra at 1055.

³² 163 NLRB 475 (1967), affd. sub nom. *American Federation of Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

tioning agreement regarding mandatory subjects on acceptance of a nonmandatory proposal is not good-faith bargaining.³³ In short, a party *precludes* good-faith impasse when it insists on such a proposal as the price of an agreement.³⁴

The proper legal test in this case for unlawful insistence under *Borg-Warner* is “whether agreement on the mandatory subjects of bargaining [was] conditioned on agreement on the nonmandatory subject of bargaining.”³⁵ That is precisely what the Respondent did here. The judge found, and we agree, that the Respondent “was offering the continuation of medical benefits and severance pay only on the condition that the Union agree[d] to early termination of the contract.” No later than the second bargaining session on November 21, 2008, and for the remainder of the closure effects negotiations, the Respondent conditioned any final effects agreement on mid-term cancellation of the parties’ contract while unit employees—whether as many as five or as few as one—were still working at the plant. When the Union rejected the Respondent’s proposals and refused to agree to early contract termination, as it was entitled to do, the Respondent withdrew its “last, best, and final” closure-effects offer and ceased bargaining. Thus, the Respondent began its unlawful insistence in November 2008 and persisted in it at all times thereafter.

Accordingly, we find that, as of November 21, 2008,³⁶ the Respondent was violating Section 8(a)(5) under

³³ See *American Commercial Barge Line Co. v. NLRB*, 918 F.2d 1299, 1307–1310 (7th Cir. 1990); *Latrobe Steel Co. v. NLRB*, 630 F.2d 171, 179 (3d Cir. 1980) (“We have grave doubts . . . as to the usefulness of the concept of ‘impasse’ as a level of disagreement over a single issue where that issue is a non-mandatory subject of bargaining. As *Borg-Warner* makes clear, there can be no adverse consequence from a party’s failure to agree or even his failure to bargain about a nonmandatory subject of bargaining. What *Borg-Warner* prohibits is insistence upon a nonmandatory subject as a condition precedent to entering an agreement [citation omitted]. This is the standard which must guide the inquiry.”).

³⁴ See *Inland Tugs*, supra at 1310.

³⁵ *Tafti Broadcasting Co.*, 274 NLRB 260, 261 (1985).

³⁶ The complaint alleged that the Respondent’s unlawful conduct occurred between March 24 and May 4, 2009. We have varied from this allegation to find the violation as of November 21, 2008. The Respondent is not thereby prejudiced, however, as the violation found is closely related to the complaint’s allegations and was fully litigated. *Pergament United Sales*, 296 NLRB 333, 334–335 (1989), enf. 920 F.2d 130 (2d Cir. 1990). Scrupulous adherence to dates alleged in a complaint is not necessarily required, see *Salon/Spa at Boro, Inc.*, 356 NLRB No. 69, slip op. at 18–19 (2010), and to do so here would elevate form over substance. The Respondent has never disputed that it did, in fact, condition agreement on early contract termination. On the contrary, it has consistently acknowledged doing so, contending that its insistence was lawful either because early termination was a mandatory subject or the Union waived its right to withhold consent. Thus, when it began to insist on early termination has never been material to the theory of the Respondent’s defense. The record shows that the insis-

Borg-Warner by conditioning any agreement concerning the effects of the Fresno closure on the Union’s consent to a nonmandatory subject: mid-term cancellation of the parties’ 2005–2011 contract.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has failed and refused to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act by demanding, as a condition of reaching an agreement on the effects of its decision to close its Fresno facility, that the Union consent to mid-term cancellation of the parties’ 2005–2011 collective-bargaining agreement.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In *Borg-Warner*, the Court stated that unlawfully conditioning a bargaining agreement on consent to a nonmandatory proposal “is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining.”³⁷ In the present case, the Respondent unlawfully conditioned an effects agreement on early contract termination, a nonmandatory subject. Accordingly, it has refused to bargain in good faith concerning the effects of the Fresno plant closure, a matter of mandatory bargaining. Therefore, we shall order the Respondent to bargain, at the Union’s request, concerning the effects of the Fresno plant closure without conditioning agreement on the Union’s consent to a nonmandatory bargaining subject.

When an employer has refused to bargain over the effects of a plant closure, the Board typically orders a *Transmarine*³⁸ remedy to restore some measure of economic strength to the union.³⁹ In his exceptions brief, the General Counsel renews the complaint’s request for a *Transmarine* limited backpay remedy for the last four unit employees laid off when the Fresno plant closed in

tence began in November 2008, and it does not appear that the Respondent would have litigated the matter any differently had the unlawful conduct at issue in this case been alleged as beginning when it did, in fact, begin.

³⁷ 356 U.S. at 349.

³⁸ *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

³⁹ See generally *Rochester Gas & Electric Corp.*, 355 NLRB No. 86, slip op. 2 (2010) (discussing *Transmarine* remedy).

September 2009.⁴⁰ The Union requests a *Transmarine* remedy for all 92 unit employees who were terminated because of the decision to close the plant. We find merit in the Union's request. The record establishes that in their negotiations, the parties intended to address the impact of the Fresno closure on all 92 employees.⁴¹ However, as found above, because of its unlawful conduct the Respondent never satisfied its duty to engage in meaningful, good-faith effects bargaining. All 92 terminated employees have been denied the benefit of collective-bargaining representation concerning the effects of the Fresno closure. Accordingly, we will provide a *Transmarine* remedy for all 92 unit employees.⁴²

More specifically, although we will order the Respondent to bargain, meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union, thus recreating a measure of balanced bargaining power. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practice committed.

In order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, we deem it necessary to accompany our bargaining order with a limited backpay remedy designed to make whole the employees for losses suffered as a result of the Respondent's failure to bargain in good faith about the effects of its plant-closure decision, and to recreate in some practicable manner a situation in which the parties' bargaining positions are not entirely devoid of economic consequences

⁴⁰ The complaint did not request this limited *Transmarine* order as the exclusive remedy for the Respondent's misconduct. The General Counsel requested "all other relief as may be just and proper to remedy the unfair labor practices alleged."

⁴¹ We observe that all five of the Respondent's closure-effects proposals make this clear.

⁴² The complaint separately alleged that the Respondent unlawfully failed to engage in effects bargaining concerning the last four employees terminated when it closed down the facility. We find it unnecessary to address this second unfair labor practice allegation, since the violation we have found encompasses and supersedes it.

Our dissenting colleague would limit the *Transmarine* remedy to the last four employees laid off, consistent with that second allegation, the General Counsel's primary requested remedy, and the General Counsel's contingent request for administrative expenses in a collateral bankruptcy proceeding, where the General Counsel did not address the other 88 employees. None of these circumstances warrant denying relief to those 88 employees. "[W]hether counsel for the General Counsel seeks a backpay remedy is immaterial since we have full authority over the remedial aspects of our decisions" to effectuate the purposes of the Act. *Schnadig Corp.*, 265 NLRB 147 (1982) (case citations omitted). Accord: *Williamette Industries*, 341 NLRB 560, 564 (2004). In addition, we observe that the Charging Party requested a *Transmarine* remedy for all 92 unit employees at the beginning of the unfair labor practice hearing. Therefore, the Respondent was on notice of the potential remedial consequences if the *Borg-Warner* violation were found.

for the Respondent. We shall do so by ordering the Respondent to pay backpay to the 92 terminated employees in a manner similar to that required in *Transmarine Navigation Corp.*, supra, as clarified by *Melody Toyota*, 325 NLRB 846 (1998).

Thus, the Respondent shall pay these 92 employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closure on the 92 unit employees; (2) the parties reach a bona fide impasse in bargaining; (3) the Union fails to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union subsequently fails to bargain in good faith.

In no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which they were terminated to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings that the terminated employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

ORDER

The National Labor Relations Board orders that the Respondent, Smurfit-Stone Container Enterprises, Fresno, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with Teamsters District Council No. 2, Local 388-M, affiliated with International Brotherhood of Teamsters, by demanding, as a condition of reaching an agreement on the effects of its decision to close the Fresno facility, that the Union consent to a nonmandatory bargaining proposal.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, which is set forth in section 2 of the parties' 2005–2011 collective-bargaining agreement, with respect to the effects of the decision to permanently close the Fresno plant and terminate the unit employees, and reduce to writing and sign any agreement reached as a result of such bargaining.

(b) Pay the terminated unit employees their normal wages for the period set forth in the remedy section of this decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, the Respondent shall duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix"⁴³ to the Union and to all unit employees who were employed by the Respondent at any time since November 21, 2008.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 22, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting in part.

I dissent only from my colleagues' determination that the violation found warrants a *Transmarine* remedy for 92 unit employees, rather than just the four employees terminated when the Respondent's Fresno facility closed on September 1, 2009. Specifically, I disagree with their view of the complaint's allegations and the remedy appropriate for each. Paragraph 9 of the consolidated complaint alleged a separate violation for the Respondent's insistence during effects bargaining until May 4, 2009, on a proposal including the permissive subject of early contract termination. For reasons previously stated, I concur in finding this violation. However, the appropriate remedy for the violation would not entail a *Transmarine* remedy.

Paragraph 10 of the consolidated complaint alleged a separate violation for terminating the final four employees when closing the facility on September 1, 2009, without first fulfilling its obligation to bargain about the effects of the closure. Admittedly, the General Counsel could have pursued a remedy under this allegation for more than the four employees terminated on September 1, but he did not do so. The complaint specifically requests, as a remedy for the unfair labor practices alleged in paragraph 10, a make whole *Transmarine* remedy for unit employees employed at the time of the facility closure. I note that counsel for the General Counsel repeated this limitation on the violation alleged and remedy requested clearly in a "Request for Administrative Expenses Contingent Upon NLRB Proceeding" filed on August 10, 2010, several months after issuance of the judge's decision in this case, in Chapter 11 bankruptcy proceedings before the United States Bankruptcy Court for the District of Delaware.

Under these circumstances, the Respondent had no notice that the alleged effects bargaining violation involved more than four employees. Contrary to my colleagues, I would find this separate violation and provide the requested limited remedy for it.¹

Dated, Washington, D.C. December 22, 2011

Brian E. Hayes, Member

⁴³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹ In accordance with my dissenting view in *Kadouri International Foods, Inc.*, 356 NLRB No. 148, slip op. at 1 fn. 1 (2011), I would delete the portion of the *Transmarine* remedy requiring that the minimum backpay due employees should not be less than 2 weeks' pay, without regard to actual losses incurred, and would limit the remedy only to those employees who were adversely affected by the Respondent's unlawful action.

NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES
MAILED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to mail and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union
Choose representatives to bargain with us on
your behalf
Act together with other employees for your
benefit and protection
Choose not to engage in any of these protected
activities.

WE WILL NOT refuse to bargain collectively with the Union, Teamsters District Council No. 2, Local 388-M, affiliated with International Brotherhood of Teamsters, by demanding, as a condition of reaching an agreement on the effects of our decision to close our Fresno facility, that the Union consent to a nonmandatory bargaining proposal.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above, which are guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union with respect to the effects of our decision to permanently close the Fresno plant and terminate the unit employees, and WE WILL reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL pay the 92 terminated unit employees their normal wages for the period, with interest.

SMURFIT-STONE CONTAINER ENTERPRISES

Gary M. Connaughton, Esq., for the General Counsel.
Lawrence H. Stone, Esq. (Jackson Lewis), of Los Angeles, California, and *Robert J. Scheer*, Labor Relations Counsel, for the Respondent.
David Grabhorn, Vice President (Teamsters District Council No. 2), of Fullerton, California, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Oakland, California, on January 14, 2010. On April 20, 2009, District Council No. 2, Local No. 388-M, affil-

ated with the International Brotherhood of Teamsters (the Union) filed the charge in Case 32-CA-24480 against Smurfit-Stone Container Enterprises, Inc. (the Respondent). On September 16, 2009, the Union filed the charge in Case 32-CA-24725. On October 29, 2009, the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(5) and (1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Delaware corporation with an office and principal place of business in Fresno, California, where it has been engaged in the manufacture and non-retail distribution of corrugated boxes. In the 12 months prior to issuance of the complaint, Respondent, in conducting its business operations, sold and shipped goods valued in excess of \$50,000 directly to customers who themselves meet one of the Board's jurisdictional standards, other than the indirect inflow or indirect outflow standards. Accordingly, Respondent admits, and I find that, Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find that, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent was engaged in the manufacture and nonretail distribution of corrugated boxes at its Fresno, California facility. The Union has represented production and maintenance employees at this facility for many years. The most recent collective-bargaining agreement between the parties was effective by its terms from March 1, 2005, to February 28, 2011. As of September 28, 2008, Respondent employed 92 employees in the bargaining unit.

On September 25, 2008, Respondent notified the Union that it intended to cease production and lay off all bargaining unit employees commencing on or after November 28, 2008. Between September 26, 2008, and May 4, 2009, the Union and Respondent engaged in bargaining over the effects of Respondent's decision to permanently close its facility and lay off bargaining unit employees. At the first bargaining session, on September 26, 2008, Respondent informed the Union that October 2009 was the target date for closing of the plant and laying off all employees. At the second bargaining session, on November 21, 2008, Respondent informed the Union that, although October 2009 was still the closing date, some bargaining unit employees might continue to work in the warehouse beyond that date.

The parties met on six occasions: September 26, November 21, and December 10 2008, and January 6, March 24, and April

1, 2009. As background, the parties had negotiated a closure agreement for Respondent's San Jose facility in 2004. That closure agreement featured four fundamental concepts: (1) the collective bargaining agreement would terminate before its actual termination date; (2) seniority would be suspended in exchange for; (3) Respondent would provide severance pay for employees; and (4) Respondent would continue medical benefits for employees. The provision providing for early termination of the contract stated:

The Current Collective Bargaining Agreement dated June 16, 1998-June 15, 2004 between the parties shall remain in full force and effect under terms of this Termination Agreement until all operations cease and the Plant closes or no bargaining unit employee remains, whichever is later at which time the Collective Bargaining Agreement will be considered null and void at this facility.

In the March 2005 collective-bargaining agreement for the Fresno facility, the Union sought a formula for severance pay. Respondent rejected that proposal. Instead, Respondent recognized "the right of the Union to discuss severance pay in case of permanent plant closing for economic reasons and not for reasons such as labor disputes, Acts of God, War, etc." The parties agreed that Respondent would "bargain a severance/impact bargaining formula that is not inconsistent with its severance/impact bargaining agreement at San Jose (January 2003)."

Throughout the bargaining sessions regarding closure of the Fresno facility, Respondent proposed that the current bargaining agreement terminate if, and when the unit was reduced to a certain number of employees. Respondent originally proposed that the bargaining agreement terminate if, and when the number of employees reached five. Respondent later reduced that number to three and, finally to one (1) or fewer in its last offer of April 1, 2009. The Union maintained that it would not agree to terminate the bargaining agreement while any employees were still employed at the facility. Respondent, through its spokesman, indicated that there would be no severance agreement without early termination of the contract.

At the first bargaining session, held on September 26, 2008, Respondent proposed that seniority be suspended effective the date of the supplemental agreement. It also proposed a severance formula, consistent with the San Jose Agreement, of 1 week for each full year of service. Respondent proposed continuance of medical benefits for 4 months and then COBRA continuation. Finally, Respondent proposed early termination of the collective-bargaining agreement if, and when the remaining bargaining unit employees numbered five (5) or fewer. Respondent made it clear that the number of employees required to effect termination of the bargaining agreement was variable and subject to improvement.

On November 21, 2008, the Union made its proposal which called for the following: two weeks of severance pay for each year of service, four additional months of payments of health insurance, and the continuation, rather than suspension of seniority. The Union proposed that the Bargaining Agreement continue until its expiration date. Respondent changed its proposed closing date to January 31, 2009.

On December 10, 2008, the parties again bargained over the effects of the plant closure. The Union reduced its demand for severance pay from 2 weeks to 1 week for each year of service. The Union announced that it would not agree to early termination of the bargaining agreement, and that it would file unfair labor practice charges.

On January 6, 2009, Respondent proposed early termination of the bargaining agreement when the number of bargaining unit employees reached three or fewer. Prior to the parties' next meeting, Respondent filed for bankruptcy. On January 23, 2009, the Union proposed that Respondent implement the San Jose closure agreement.

On March 24, 2009, Respondent proposed that "certain warehouse employees, presently four in number, will continue to work. . . but this is not to be misconstrued as a guarantee of either crew size or duration of employment." Respondent proposed that the bargaining agreement terminate when the number of unit employees reached three or fewer. Respondent indicated that it was "flexible about the number of employees involved when the workforce is reduced to three employees, but insisted that the current agreement expire while there were still some employees working." The Union rejected Respondent's proposal.

The Union asked for Respondent's last, best, and final offer on April 1, 2009. On April 1, Respondent presented its last, best, and final offer, which included early termination of the contract when the number of bargaining unit employees reached one or fewer. On April 17, the Union sent Respondent a counter proposal, which consisted of Respondent's last, best, and final offer with all the provisions the Union did not accept, lined out, including the early termination proposal. On April 23, Respondent rejected the Union's proposal and again offered its last proposal. On May 5, Respondent withdrew its final proposal. The Union did not request further bargaining. No further bargaining took place and on September 1, 2009, the Fresno plant was closed and the remaining four employees were laid off.

Within this factual framework, the General Counsel alleges that Respondent unlawfully insisted to impasse on a permissive subject of bargaining. Respondent denies that the parties reached impasse. Further, Respondent argues that the permissive subject of bargaining was inextricably linked to mandatory subjects of bargaining.

III. ANALYSIS AND CONCLUSIONS

An employer is entitled to close its business purely for economic reasons without having a duty to bargain over the decision under the Act. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 686 (1981). An employer, however, must provide the union the opportunity to bargain over the "effects" of the decision.

The General Counsel contends that Respondent insisted to impasse on a permissive subject of bargaining. In order for a subject of bargaining to be considered mandatory, the issue must bare a "direct, significant relationship to . . . terms or conditions of employment," rather than a "remote or incidental relationship." *NLRB v. Massachusetts Nurses Association*, 557 F.2d 894, 898 (1st Cir. 1977). With respect to mandatory sub-

jects, neither party is legally obligated to yield” but with respect to permissive subjects “each party is free to bargain or not to bargain, and to agree or not to agree.” *Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Accompanying this distinction is the principle that “neither a union nor an employer is permitted to force a bargaining deadlock over the inclusion of a term covering a permissive subject of bargaining.” *Inland Tugs v. NLRB*, 918 F.2d 1299, 1308 (7th Cir. 1990), citing *Borg-Warner Corp.*, 356 U.S. 342 (1958). Insisting upon acceptance of a permissive or nonmandatory subject to the point of impasse constitutes a violation of Section 8(a)(5) and (1) of the Act. *Pleasant View Nursing Home Inc.*, 351 F.3d 747 (6th Cir. 2003).

Respondent’s proposal for early termination of the contract was a permissive subject of bargaining. Respondent sought to modify the existing term of the collective bargaining agreement. The Union did not have to bargain over that proposal and Respondent could not insist to impasse on that subject.

Respondent contends that the proposal for early termination of the bargaining agreement was inextricably intertwined with, and inseparable from the other proposals in the closing agreement. Under certain circumstances a permissive subject can be as “intertwined with and inseparable from the mandatory terms and conditions . . . as to take on the characteristics of the mandatory subjects themselves.” *Sea Bay Manor Home for Adults*, 253 NLRB 739, 740 (1980), *enfd.*, 685 F.2d 425 (2d Cir. 1982).

In *Dependable Storage Inc.*, 328 NLRB 44 (1999), the Judge, with Board approval, found that there was no legal impediment to the linking of mandatory and nonmandatory, or permissive subjects of bargaining, so long as the inclusion of the permissive subject was not a device to circumvent the general rule that one may not insist on such a provision to impasse.¹ In the instant case, Respondent was offering the continuation of medical benefits and severance pay only on the condition that the Union agrees to early termination of the contract. The early termination of the collective-bargaining agreement was part of a package that included continuation of medical benefits, severance pay, suspension of seniority, and early termination of the contract. Respondent would not grant the benefits if employees retained recall rights. This principle was part-and-parcel of the San Jose closure agreement. At the time the collective-bargaining agreement was reached, the parties agreed that Respondent would not act inconsistent with the San Jose agreement, if there was to be a plant closure. In the instant case, early termination of the collective-bargaining agreement and suspension of seniority were consideration for severance pay and continued medical benefits. These proposals were part of a package and took on the characteristics of the mandatory subjects. Therefore, I find no violation in Respondent’s linking of these proposals.

Should reviewing authority disagree, I next treat the question of impasse. Impasse has been defined as “that point at which the parties have exhausted the prospects of concluding an agreement and further discussion would be fruitless.” *Laborers Health and Welfare Trust Fund for Northern California V.*

¹ The judge cited *Nordstrom, Inc.*, 229 NLRB 601 (1977), and *Torington Industries*, 307 NLRB 809, 812 (1992).

Advanced Lightweight Concrete Co., 484 U.S. 539, 543 (1988). In *Taft Broadcasting Co.*, 163 NLRB 475 (1967), the Board stated:

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiation, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Here, the importance of the issue of early termination of the contract would point to impasse. However, Respondent had made concessions on this point. While the Union was taking the position that the parties were at impasse, Respondent did not take such a position. Respondent was always willing to bargain. For impasse to occur, neither side must be willing to compromise. *Grinnell Fire Protection Systems Co.*, 328 NLRB 585 (1999), *enfd.*, 236 F.3d 187 (4th Cir. 2000), citing *PCR Recording Co.*, 280 NLRB 615, 640 (1986), *enfd.* 836 F.2d 289 (7th Cir. 1987). Based on the history of the bargaining, and Respondent’s concessions and willingness to bargain, I find impasse had not yet been reached.

Under all of the circumstances, I find that Respondent did not insist to impasse on a nonmandatory subject of bargaining.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent did not violate Section 8(a)(5) and (1) of the Act within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.²

ORDER

The complaint should be dismissed in its entirety.

Dated, Washington, D.C., April 5, 2010

² If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.