

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

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

and

CASES 15–CA–20035
15–CA–61694

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

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for the General Counsel.

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of Metairie, Louisiana, for the Charging Party.

DECISION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge. During collective bargaining in 2010, the Respondent declared impasse and implemented its “final offer” except for that offer’s no–strike and arbitration provisions. The Union filed unfair labor practice charges with the Board, which sought an injunction under Section 10(j) of the Act while the Board considered and decided the merits of the charges. Although Respondent’s “final offer” had included a pay raise scheduled to begin March 25, 2011, the Respondent informed employees it would not increase wages while the 10(j) petition remained pending in Federal court, and delayed implementing the increase until after the court denied the petition. Respondent thereby violated Section 8(a)(1), (4), and (5) of the Act.

Procedural History

5 This case began on June 2, 2011, when the Union, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union and its Local Union 14425, filed an unfair labor practice charge against the Respondent, Carey Salt Company, a subsidiary of Compass Minerals International, Inc. Region 15 of the National Labor Relations Board docketed this charge as Case 15–CA–20035. The Union amended this charge on July 26, 2011.

10 Also on July 26, 2011, the Union filed a separate charge against the Respondent. Region 15 docketed this charge as Case 15–CA–61694.

15 On August 31, 2011, the Regional Director for Region 15 issued a complaint and notice of hearing in Case 15–CA–20035. On October 25, 2011, the Regional Director issued a complaint and notice of hearing in Case 15–CA–61694. In doing so, the Regional Director acted for and on behalf of the Acting General Counsel of the Board (the General Counsel or the Government). Respondent filed a timely answer to each complaint.

20 On November 2, 2011, the Regional Director issued an Order consolidating Cases 15–CA–20035 and 15–CA–61694.

25 On November 14, 2011, a hearing opened before me in New Iberia, Louisiana. The parties presented evidence on that date and on November 15, 2011, when the hearing closed. Thereafter, counsel filed briefs, which I have read and considered.

Admitted Allegations

30 Respondent’s answers to the two complaints admit a number of allegations. Based on those admissions, I make the following findings: The charges were filed and served as alleged.

35 At all material times, Respondent has been a corporation with an office and place of business in Cote Blanche, Louisiana, where it operates a rock salt mine. Respondent satisfies both the statutory and discretionary standards for the Board’s exercise of jurisdiction, and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

40 At all material times, the following individuals have been Respondent’s supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act: Angelo Brisimitzakis, chief executive officer; Don Brumm, Cote Blanche Mine operations manager; Gord Bull, Cote Blanche Mine Manager; Toyla Charles, Cote Blanche Mine Human Resources Representative; Mike Giovinazzo, Cote Blanche Mine maintenance superintendent; and Victoria Heider, vice president–human resources.

45 Further, based on Respondent’s admissions, I find that the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, and its Local Union 14425, have been and are labor organizations within the meaning of Section 2(5) of the Act.

Since about March 25, 2007, the Union has been the designated exclusive bargaining representative of the following unit of employees, which is an appropriate unit for collective bargaining within the meaning of Section 9(b) of the Act:

5 All production and maintenance employees, including storeroom clerks, truckdrivers and dock employees employed at the Cote Blanche Mine.

10 Also since about March 25, 2007, Respondent has recognized the Union as the exclusive bargaining representative of this unit. This recognition has been embodied in successive collective–bargaining agreements, the most recent of which was effective from March 25, 2007 to March 24, 2010.

15 **Background**

Respondent and the Union have a longstanding bargaining relationship. On February 8, 2010, they began negotiations for a collective–bargaining agreement to replace the existing contract, which was effective during the period March 25, 2007 through March 24, 2008.

20 From February 8 to March 18, 2010, the parties met 14 times. At the bargaining session on March 19, 2010, the Union asked the Respondent to make a final offer that could be taken to its members for consideration. The next day, Respondent provided such an offer, which included a proposal for a 2.5- percent wage increase on March 25, 2010, another 2.5-percent wage increase on March 25, 2011, and another 2.5-percent increase on March 25, 2012.

25 Respondent’s proposal also included a number of terms which the Union regarded as less favorable than the provisions in the expiring contract. On March 23, 2010, the union membership voted to reject Respondent’s offer. Respondent agreed to extend the expiring agreement until March 31, 2010, and to meet with the Union again on that date.

30 When the parties met on March 31, 2010, Respondent informed the Union that its final offer was final. Respondent’s vice president – human resources, Victoria Heider, told the union representatives that the parties were at impasse and that Respondent was going to implement the terms of its final offer, except for the no–strike and arbitration provisions.

35 The union representatives insisted that the parties were not at impasse. The Union’s chief negotiator told Heider that a Federal mediator was en route to the meeting and asked her to stay until the mediator arrived. Instead, she left.

40 On March 31, 2010, Respondent’s mine manager notified the Union by email that the company was implementing its final offer, except for the arbitration and no–strike clauses. Based on this final offer, Respondent then made numerous changes in the terms and conditions of employment.

45 At a union meeting on April 7, 2010, the membership voted to engage in an unfair labor practice strike. The Union remained on strike until June 15, 2010, when it made an

unconditional offer to return to work on behalf of the strikers. The Respondent has not reinstated all of the strikers, but instead has recalled some of them based upon its own criteria.

5 The Union filed unfair labor practice charges against the Respondent which the Regional Office docketed as Cases 15–CA–19704 and 15–CA–19738. On December 30, 2010, the acting Regional Director issued an order consolidating cases, consolidated complaint and notice of hearing. In March 2011, the Honorable Margaret G. Brakebusch conducted a hearing and, on August 1, 2011, issued a decision, docketed as JD(ATL)–21–11. (The recitation of facts above draws on the findings in that decision.)

10 Judge Brakebusch’s decision concluded that Respondent had violated the Act in a number of ways, including by implementing its proposal on March 31, 2011, notwithstanding that no impasse existed between the parties. Judge Brakebusch also found that the strike was an unfair labor strike from its inception, and that Respondent unlawfully had failed to reinstate the strikers after the Union made an unconditional offer on their behalf to return to work.

15 Respondent has appealed Judge Brakebusch’s decision and that appeal pends before the Board.

20 **Disputed Allegations**

Case 15–CA–20035

Complaint Paragraphs 7(a) and (b)

25 Paragraphs 7(a) and (b) of the complaint in Case 15–CA–20035 allege that on about March 10, 2011, in a notice to employees, Respondent threatened employees that it would withhold a scheduled pay increase until it successfully resisted the Board’s efforts to seek an injunction against it, and conditioned the grant of this scheduled wage increase on Respondent being successful in defending against the petition for injunction. Respondent denies these

30 allegations.

35 The record establishes without contradiction that Respondent’s management posted a notice dated March 10, 2011, in the punch clock area of its facility. The notice stated, in part, as follows:

Cote Blanche Mine – Wage Increase Status

40 March 10, 2011

45 We expect there are some employee questions about if or when any pay increase will take effect in 2011. Wage increases historically have taken place in late March. We were planning to make a 2.5% increase (as we proposed in our final offer during the contract negotiations with the union a year ago), but that increase will not be made until we successfully resist the injunction that the National Labor Relations Board (NLRB) is seeking against us. We don’t think there is any basis for an injunction and we are vigorously resisting it. We hope to have prevailed by mid–2011 and in that case we would increase wages then.

The evidence thus establishes the allegations in complaint paragraph 7(a). Respondent’s notice to employees clearly stated that the wage increase “will not be made until we successfully resist the injunction. . .” Stating that a wage increase “will not be made” is equivalent to the language attributed to Respondent in Complaint paragraph 7(a), i.e., that it would “withhold” the pay increase. Therefore, I conclude that the General Counsel has proven the allegations in complaint paragraph 7(a).

Complaint paragraph 7(b) alleges that Respondent threatened employees that the wage increase was “conditioned on the Employer successfully winning its defense to the Board’s petition for Section 10(j) relief.” The language in Respondent’s March 10, 2011 notice to employees communicates exactly that message. The statement that the wage increase would not be made “until we *successfully resist* the injunction” (emphasis added) makes clear that payment of the wage increase was conditioned upon Respondent prevailing in the 10(j) litigation.

Respondent’s notice to employees further stated, “We hope to have prevailed by mid–2011 and in that case we would increase wages then.” The notice does not state either directly or by implication that Respondent would implement the wage increase regardless of success or failure in the 10(j) litigation. Therefore, Respondent clearly implied that it would pay the wage increase only if it won in the 10(j) proceeding. Therefore, I conclude that the General Counsel has proven the allegations in Complaint paragraph 7(b).

Do these statements violate Section 8(a)(1) of the Act, as alleged in complaint paragraph 19? Later in this decision, I conclude that Respondent’s implementation of its final proposal bound it to grant the 2.5-percent pay increase on March 25, 2011. In analyzing whether Respondent’s statement, quoted above, violates Section 8(a)(1) of the Act, I will begin by assuming that Respondent did indeed have a duty to pay the wage increase starting March 25, 2011.

The Board has long held that an employer violates Section 8(a)(1) if it informs employees that it will withhold wage increases or accrued benefits because of union activities. *Invista*, 346 NLRB 1269, 1270 (2006), citing *Centre Engineering, Inc.*, 253 NLRB 419, 421 (1980); *Earthgrains Baking Cos.*, 339 NLRB 24, 28 (2003), *enfd.* 176 LRRM 2640 (9th Cir. 2004). The same principle applies when the announced reason for withholding the benefit is the Board’s taking legal action in response to the Union’s filing of an unfair labor practice charge.

Respondent gave employees only one reason for its decision to delay the wage increase and that reason was the 10(j) lawsuit which the Board had filed. Moreover, its notice to employees clearly implied that it would not grant the raise until – and, by implication, unless – it prevailed in the lawsuit.

The Board applies an objective standard to determine whether a statement interferes with, restrains, or coerces employees in the exercise of their Section 7 rights. So, here, I consider what Respondent’s words reasonably would convey to a typical employee. They

clearly convey the message that Respondent is delaying the wage increase because of the Board’s lawsuit against it. That is not merely the plain meaning of Respondent’s words but the only meaning I can fathom from Respondent’s statement that “We were planning to make a 2.5% increase . . . but that increase will not be made until we successfully resist the injunction that the National Labor Relations Board (NLRB) is seeking against us.”

The Union’s unfair labor practice charges, of course, led to the 10(j) lawsuit as well as the underlying unfair labor practice proceedings, and there could have been no 10(j) proceeding if the Union had not filed the charges. Thus, Respondent’s statement that it would not pay the wage increase until it succeeded in the 10(j) proceeding clearly ties the delay to the employees’ concerted action through their Union. Accordingly, I conclude that Respondent violated Section 8(a)(1) by the conduct alleged in Complaint paragraphs 7(a) and (b).

As noted above, in reaching this conclusion I have assumed that Respondent had a duty to increase wages on March 25, 2011, in accordance with the provisions of the final offer it implemented. However, based upon the specific wording of Respondent’s March 10, 2011, I would find that the notice conveyed an unlawful threat even if the Respondent did not have a duty to raise pay rates.

Respondent’s March 10, 2011 notice to employees states “We were planning to make a 2.5% increase . . .” but would not do so because of the 10(j) litigation. When an employer specifically informs employees that it had been planning to confer some benefit but had decided not to do so because of activity protected by the Act, the statement clearly communicates that the employer is penalizing the employees because of the protected activity. Such a statement would be a clear-cut threat of retaliation even if the employer actually had no plan to confer the benefit. The statement informs employees that they have suffered a loss because they or their union had engaged in protected activity, and thus interferes with, restrains, or coerces employees in the exercise of Section 7 rights.

In sum, I conclude that the Government has proven the allegations in complaint paragraphs 7(a) and (b), and that this conduct violates Section 8(a)(1) of the Act.

Complaint Paragraph 7(c)

At hearing, the General Counsel orally amended the complaint to add a subparagraph 7(c), which alleges as follows:

About March 10, 2011, Respondent, by email to its employees, threatened its employees that it would withhold a scheduled pay increase until such time as it successfully resisted an injunction the Board was seeking against it and threatened its employees that their scheduled wage increase was being withheld, conditioned on the employer successfully winning its defense to the Board’s petitioned-for Section 10(j) relief.

Respondent amended its answer to deny this new allegation. It also raised the affirmative defense that this new allegation is time-barred by Section 10(b) of the Act.

5 The record establishes that on about March 10, 2011, Respondent emailed to employees the same notice, quoted above, which it had posted near the punch clock. For the same reasons discussed above, I conclude that the emailed notice violated Section 8(a)(1) in the same way the posted notice did.

With respect to Respondent’s “statute of limitations” defense, Section 10(b) of the Act provides, in part, that

10 no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be
15 computed from the day of his discharge.” 29 U.S.C. § 160(b).

The Union filed its initial charge in Case 15–CA–20035 on June 2, 2011, which is less than 3 months after the date of the conduct alleged in the new complaint subparagraph 7(c). Moreover, the original charge included the following language:

20 Since on or about March 10, 2011, the Employer has coerced its production and maintenance employees by threatening in writing to withhold a scheduled pay increase until such time that it could “successfully resist the injunction that the National Labor Relations Board (NLRB) is seeking against us.”

25 Since on or about March 10, 2011, the Employer has coerced its production and maintenance employees by threatening in writing to implement a scheduled pay raise only upon its successful defense to the NLRB’s petition for Section 10(j) relief and “in that case we would increase wages then.”

30 Thus, the charge alleges that Respondent made the threat “in writing” while complaint paragraph 7(c) alleges that Respondent made the threat by email. If this new allegation, of a threat by email, is “closely related” to the allegation raised by the charge, then Section 10(b) does not bar litigation of the new allegation. See *Redd, Inc.*, 290 NLRB 1115, 1118 (1988).

35 To determine whether a new allegation is “closely related” to the allegations raised by a charge, the Board considers

- 40 (1) Whether the otherwise untimely allegations of the amended charge involve the same legal theory as the allegations in the timely charge;
- (2) Whether the otherwise untimely allegations of the amended charge arise from the same factual situation or sequence of events as the allegations in the timely charge; and
- 45 (3) Whether a respondent would raise the same or similar defenses to both the untimely and timely charge allegations.

See, e.g., *WGE Federal Credit Union*, 346 NLRB 982 (2006). In the present instance, the answer to all 3 questions is “yes.” The new allegation obviously involves the same legal theory and arises from the same factual situation. The offending language is the same. Only the means of delivery differed.

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Moreover, because the language is the same, the Respondent would raise the same defenses. It is a bit difficult to imagine how the lawfulness or unlawfulness of the language would entail different legal principles depending on whether the language were posted or emailed. Therefore, I conclude that the new allegation is closely related to the allegations raised by the charge, and reject Respondent’s 10(b) defense.

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At first glance, it might appear that, because the offending language is the same, the remedy for the violations alleged in complaint paragraphs 7(a) and (b) necessarily would remedy the harm done by the violation alleged in complaint paragraph 7(c). However, the method of delivery does make a difference.

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More employees would be likely to read a notice sent to them by email than a notice posted near the punch clock. Employees reporting for their shifts may well be in a hurry to clock in and begin work. Likewise, at the end of their shifts, many employees likely will be eager to clock out and go home. For this reason, they might well pass by without reading the notice.

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However, an employee using a computer at home would have more time to read an email and consider it. Additionally, an email addressed to an employee might well be more likely to attract that person’s attention than a general notice on the wall or bulletin board. A full remedy for this violation, therefore, must involve Respondent emailing the Board–ordered “Notice to Employees” to all members of the bargaining unit.

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Complaint Paragraphs 8, 9 and 10

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Complaint paragraph 8 alleges that Respondent delayed a wage increase for its production and maintenance employees from about March 10, until about May 22 or 23, 2011. Respondent denies this allegation.

The complaint further alleges that this delay violated a number of subsections of the Act. Here, I consider whether Respondent did delay a wage increase and, if so, whether this action constitutes discrimination in violation of Section 8(a)(3) and (4) of the Act.

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As discussed above, in proving that a threat violating Section 8(a)(1), the Government need not establish that Respondent actually had planned to raise wages on March 25, 2011. Respondent’s message to employees – essentially that it had been planning to increase pay on that date but would not because of the 10(j) proceeding – chills the exercise of protected rights regardless of whether the Respondent in fact had intended to grant the increase on that date. However, proving unlawful discrimination requires more. If employees are not entitled to receive a wage increase on a certain date, then failing to raise pay on that date does not affect their employment in a sufficiently adverse way to violate Section 8(a)(3) and (4).

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5 An 8(a)(1) violation certainly causes harm by interfering with, restraining, or coercing employees in the exercise of protected rights. However, when the 8(a)(1) violation involves a threat, the Board applies an objective standard to determine the effect the words reasonably would have on a typical employee. The Government need not prove that the threat actually had such an impact on any particular individual.

10 On the other hand, as a general principle, proof of an 8(a)(3) or (4) violation must include a showing that the alleged unlawful action affected the terms and conditions of employment of a specific employee or group of employees. The complaint alleges that Respondent discriminated against the bargaining unit employees by delaying a pay raise which was due to bargaining unit employees on a particular date. Establishing such a discriminatory delay must begin with proof that the employees were, in fact, to receive a pay raise on that date.

15 Although complaint paragraph 8 alleges that Respondent delayed a wage increase from March 10 until about May 22 or 23, 2011, the record does not establish that the unit employees were to receive a wage increase on March 10. On the other hand, abundant evidence indicates that they were to receive the 2.5-percent pay raise on March 25, 2011.

20 Such evidence includes Respondent’s undisputed statements, which constitute admissions. As discussed above, on March 10, 2011, Respondent posted at its mine and also emailed to employees a notice which stated, in part: “We were planning to make a 2.5% increase (as we proposed in our final offer during the contract negotiations with the union a year ago) . . .”

25 Further, Respondent’s vice president for human resources, Victoria Heider, testified that in August 2010, when Respondent prepared its 2011 budget, it included in that budget the 2.5-percent raise. Thus, Heider’s testimony corroborates Respondent’s March 10, 2011 admission that it was planning to make the pay increase.

30 Mine Manager Gordon Bull, who was on management’s budgeting team, testified that Respondent had planned to grant the pay increase on April 1, 2011, rather than on March 25, 2011:

35 Q. Okay. Well, since you were on the budgeting team, how did you pick the April 1 date?

A. We chose April 1 for — it was approximately March 25, and April 1 was the beginning — it was for ease of budgeting, to pick the beginning of the month.

40 Q. Oh, okay. So it was sort of coming from following the traditional March 25 date, but for ease of accounting, you sort of made it April 1.

A. Correct.

45 Even though Mine Manager Bull’s testimony indicates that management intended to implement the pay raise a week after March 25, 2011, it nonetheless shows that Respondent was treating the raise not as a speculative matter but as an obligation. The documentary

evidence points to a similar conclusion.

As discussed above, on March 20, 2010, Respondent presented the Union with a “final offer” and thereafter would not change it. This written proposal specified a 2.5-percent wage increase on March 25, 2010, another 2.5-percent pay raise on March 25, 2011, and a third 2.5-percent increase on March 25, 2012. At a bargaining session on March 31, 2010, Respondent’s vice president of human resources said that the parties were at impasse and that Respondent was going to implement its final offer except for the arbitration and no–strike provisions.

That same day, Mine Manager Bull stated in an email to Union Representative Fuslier, “in view of being at impasse, effective immediately the Company’s final offer is being implemented (but without any agreement to submit disputes to arbitration and without any no strike clause).” If Respondent had failed to implement the wage schedule, presumably Bull’s email would have listed it among the exceptions, but it did not. The email clearly conveys the sense that Respondent had implemented the wage schedule, and Respondent’s subsequent conduct confirms that interpretation. Thus, if management had not, in fact, implemented the wage schedule, it would not have included the pay raise in its 2011 budget.

The Union engaged in a strike from about April 7, 2010 to June 15, 2010, when it made, on behalf of the strikers, an unconditional offer to return to work. The Union then asked Respondent about the terms and conditions under which the employees were working. In a June 24, 2010 memo to Union Representative Fuslier, Mine Manager Bull stated: “All employees are presently working under the terms and conditions as described in the Company’s final offer dated March 19, 2010.” As noted above, that offer included a wage schedule providing for a 2.5-percent increase on March 25, 2011.

All of this evidence points in the same direction, towards the conclusion that Respondent implemented the wage schedule which provided for implementation of a 2.5-percent raise on March 25, 2011. Is there any contrary evidence?

On June 28, 2010, in an email to the mine manager, Union Representative Gary Fuslier again sought information concerning the terms and conditions of employment which Respondent had implemented. It stated:

Please provide the Union with a list of all portions of the Company’s June 23 “Final” proposal that have been unilaterally implemented since June 27th.

Please provide this information by 5 p.m. today.

The next day, Mine Manager Bull emailed the following reply:

Gary – We are implementing the entire proposal, except those things mentioned in the Saturday June 26, 2010 notification that cannot be implemented. We have prepared a document setting forth what is now in effect. Please find a copy attached.

Attached to the email was a document dated June 27, 2010 and titled, “Operating Procedure.” Although the title was different, the document resembled Respondent’s final proposal. However, its schedule of wages showed only the rates in effect in 2010 and made no mention of future increases.

5

Does the absence of the March 25, 2011 and March 25, 2012 wage increases from this document signify that Respondent had not, in fact, adopted the wage schedule in its final proposal. For the following reasons, I conclude it does not.

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First, Bull’s email does not claim that the attached document reflects all the terms and conditions of employment which Respondent implemented. Rather, Bull’s email stated, “We have prepared a document setting forth *what is now in effect*.” (Emphasis added.)

15

Second, Respondent’s inclusion of the March 25, 2011 increase in its 2011 budget indicates a continuing intention to follow the final proposal it implemented on March 31, 2010.

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Third, Respondent did implement the 2.5-percent increase, albeit on May 23, 2011, almost 2 months past the specified date. The fact that it did implement the increase, and did so shortly after the District Court denied the injunction sought by the Board, suggests that Respondent intended all along to raise wages and delayed doing so because of the proceeding in District Court.

25

The March 10, 2011 notice which Respondent posted and emailed to employees also expressed a clear intention to grant the wage increase “but that increase will not be made until we successfully resist the injunction . . .” For these reasons, I conclude that the document attached to Bull’s June 29, 2010 email was precisely what the email stated, “a document setting forth what is now in effect.” Therefore, it does not contradict the evidence establishing that Respondent implemented all parts of its March 20, 2010 final offer except for the arbitration and no-strike provisions.

30

In its post-hearing brief, Respondent raises further arguments which I have considered and reject for the reasons stated below.

35

Respondent’s brief acknowledges that “the Board has held that an employer can incorporate a future benefit into its employees’ terms and conditions of employment by promising or announcing the benefit to its employees.” Its brief further concedes that the “Division of Advice has applied this rule to the implementation of final offers where an employer makes specific representations to the Union and/or to its employees regarding the out-year pay increases contained in a final proposal.” However, Respondent vigorously argues that “the Company made no such representation, indication, reference, or promise here.”

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Although this portion of Respondent’s brief is correct on the law, it is wrong on the facts. Quite wrong. As discussed above, clear and uncontroverted evidence establishes that Respondent did represent, indicate, reference and promise a 2.5-percent wage increase on March 25, 2011. Indeed, the plain wording of Respondent’s March 19, 2010 “final offer” leaves no doubt.

5 More precisely, did the Union have a reasonable expectancy that the March 25, 2011 wage increase would take place? Clearly, Respondent had the power to dispel any such expectancy simply by telling the Union that this provision in its “final proposal” was not written in stone, in other words, that it was not really final. However, if Respondent had said to the Union that the specified March 25, 2011 wage increase did not mean what it said, that statement would have undercut Respondent’s claim that the parties were at impasse.

10 If Respondent had told the Union that the final proposal did not promise a 2.5 percent wage increase on March 25, 2011, the obvious conclusion compelled by the proposal’s plain language, that would have been tantamount to conceding that a core term and condition of employment, wages, remained for bargaining. In view of Respondent’s rigid strategy to declare impasse, described in detail in Judge Brakebusch’s decision, Respondent could not afford to communicate any uncertainty about the firmness of the terms in its final offer. It did not.

20 To the contrary, Respondent’s mine manager, Gord Bull, sent a March 31, 2010 email to Union International Representative Gary Fuslier, which clearly communicated that the wage provisions of Respondent’s final proposal had been placed in effect. Bull’s email, addressed to “Gary Fustier” (sic), noted that the Union membership had rejected Respondent’s final offer:

25 Accordingly, as we previously explained and in view of being at impasse, effective immediately the Company’s final offer is being implemented (*but without any agreement to submit disputes to arbitration and without any no strike clause*). [Emphasis added.]

30 If Respondent did not intend to implement the wage provisions, it would have listed that exclusion along with the excluded arbitration and no–strike provisions. The fact that Mine Manager Bull did *not* announce an exception for the wage schedule. but did explicitly exclude the arbitration and no–strike clauses, clearly signified that the Respondent was implementing the wage provisions, which specified a 2.5-percent raise on March 25, 2011.

35 In sum, the terms of the “final proposal” itself, the absence of any parol which contradicted those terms, and Mine Manager Bull’s March 31, 2010 email, left the Union with the reasonable expectancy that employees would receive a 2.5-percent wage increase starting March 25, 2011.

40 Respondent’s brief appears to argue that, to create a reasonable expectancy of a wage increase, an employer must make promises or statements *apart from* the words in a proposal which it has announced it will implement. However, Respondent does not explain why statements it made in a “final proposal” would be any less trustworthy, or should be taken any less seriously, than statements it makes in other ways.

45 Moreover, Bull’s March 31, 2010 email to Fuslier does constitute the sort of statement which Respondent claims to be necessary. The email’s statement that Respondent was implementing its final proposal *except for* the arbitration and no–strike provisions clearly

communicated that the remaining provisions, including the wage provisions, were being implemented. Those wage provisions, as noted above, specifically included the March 25, 2011 increase.

5 Therefore, I reject as contrary to fact the statement in Respondent’s brief that “the Company never promised its employees a pay increase as a part of its implementation of its March 19, 2011 [sic] final offer.” The final offer itself unequivocally provided for a pay increase on March 25, 2011 and Mine Manager Bull informed the Union that Respondent was implementing the offer.

10 Accordingly, for all the reasons stated above, I find that Respondent delayed a wage increase for its production and maintenance employees from March 25, 2011 until May 23, 2011.

15 Complaint paragraph 9 alleges that Respondent delayed the wage increase because the employees of Respondent formed, joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. Complaint paragraph 10 alleges that Respondent delayed the wage increase because the Union filed unfair labor practice charges in Case 15–CA–19704. Respondent denies both these allegations.

20 Complaint paragraph 20 alleges that Respondent’s delay of the wage increase violated Section 8(a)(1) and (3) of the Act and complaint paragraph 21 alleges that this same conduct violated Section 8(a)(4) of the Act. Respondent denies these allegations.

25 In analyzing these allegations, I will follow the procedure set forth by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *American Gardens Management Co.*, 338 NLRB 644 (2002) (the Board applies the *Wright Line* analytical framework in cases alleging discrimination under Sec. 8(a)(4) as well as those alleging 8(a)(3) discrimination.)

30 Under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the Government must show the existence of activity protected by the Act. Second, the Government must prove that Respondent was aware that the employees had engaged in such activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the Government must establish a link, or nexus, between the employees’ protected activity and the adverse employment action. More specifically, the General Counsel must show that the protected activities were a substantial or motivating factor in the decision to take the adverse employment action. See, e.g., *North Hills Office Services*, 346 NLRB 1099 (2006).

40 In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083, at 1089; *Hyatt Regency Memphis*, 296 NLRB 259, 260 (1989), enfd. in relevant part 939 F.2d 361 (6th Cir. 1991). See also *Manno Electric, Inc.*, 321 NLRB 278, 280 at fn. 12 (1996).

5 The first *Wright Line* element requires the General Counsel to prove the existence of protected activity. As noted above, the Union filed charges against Respondent in Cases 15–CA–19704 and 15–CA–19738. After an investigation, the Regional Director issued an order consolidating cases, consolidated complaint and notice of hearing, resulting in the hearing before Judge Brakebusch discussed above. In connection with these cases, the Regional Director also filed a petition for injunctive relief in the United States District Court for the Western District of Louisiana. On May 18, 2011, the Court denied the petition.

10 The Union’s filing of the unfair labor practice charge on behalf of employees in the bargaining unit it represents constitutes protected activity attributable to those employees. So does the Union’s cooperation in the investigation. Therefore, I conclude that the General Counsel has satisfied the first *Wright Line* element.

15 Respondent was aware of this protected activity because it received service of the unfair labor practice charges and the 10(j) petition filed in Federal court. Additionally, Respondent appeared by counsel in court. Therefore, I conclude that the General Counsel has proven the second *Wright Line* element.

20 Third, the Government must establish that employees suffered an adverse employment action. As noted above, the record establishes that Respondent delayed implementing the 2.5-percent wage increase from March 25 to May 22, 2011. Moreover, Mine Manager Bull credibly testified that when Respondent implemented the raise on May 22, 2011, it was not retroactive.

25 Because a 2.5-percent wage increase on March 25, 2011, was a definite term of employment, the employees suffered a definite loss when Respondent delayed it. Respondent could have corrected this harm by making the raise retroactive, but did not. Accordingly, I conclude that the employees suffered an adverse employment action and that the General Counsel has established the third *Wright Line* element.

30 Fourth, the Government must prove a connection between the adverse employment action and the protected activity. Respondent admits that it delayed the wage increase because of the 10(j) proceeding in Federal court and the documentary evidence accords with this admission. Indeed, Respondent seeks to justify the wage increase delay as an appropriate response to the 10(j) lawsuit.

On March 10, 2011, Respondent emailed a notice to employees which is set forth in full above. It also posted the same notice. These words form its core:

40 We were planning to make a 2.5 percent increase. . .but that increases will not be made until we successfully resist the injunction that the National Labor Relations Board (NLRB) is seeking against us.

45 These words establish a clear connection between the adverse employment action, withholding the wage increase, and the protected activity, the Union filing the unfair labor

practice charges which led to the Board’s 10(j) lawsuit. Additionally, Mine Manager Bull communicated the same message to union officials on March 14, 2011.

5 On that day, Union President Mark Migues and Vice President O’Neal Robertson met with Mine Manager Bull and Human Resources Representative Toyla Charles. According to Migues, he asked Bull “if we was going to get a raise this year” and Bull responded by asking Migues if they were going to drop the 10(j) charges. Migues said that he didn’t think so. Migues quoted Bull as responding that “the only way we’d get a raise, we’d wait on the Judge’s decision on the 10(j).”

10 No evidence contradicts Migues’ testimony. Moreover, the statement that Migues attributed to Bull is consistent with the March 10, 2011 notice which Respondent posted and emailed to employees. Crediting that testimony, I find that Respondent communicated to employees that they would not be receiving the wage increase before the District Court ruled on the Board’s 10(j) petition.

15 Based upon both Respondent’s March 10, 2011 notice to employees and the statement Mine Manager Bull made to the union officials, I find that Respondent delayed the scheduled wage increase because of the 10(j) petition filed in Federal court. According, I conclude that the General Counsel has established the fourth *Wright Line* element.

20 Because the Government has proven all four *Wright Line* elements, the burden shifts to Respondent to establish that it would have taken the same action even in the absence of the protected activity. For the following reasons, I conclude that Respondent has not carried its rebuttal burden.

25 In his opening statement, Respondent’s counsel disagreed with the Government’s position that Respondent had made a commitment to grant a 2.5-percent wage increase on March 25, 2011. Further, he explained Respondent’s reasoning for not raising wages on that date:

30 The company changed its mind, because General Counsel was seeking 10(j) injunction relief, and in that relief, they sought a full return to the terms and conditions that existed prior to the implementation of the initial final offer, back on March 31, 2010. Now, that final offer contained a number of operational changes that had drastically increased efficiency at the mine. There were shift schedules and work assignment changes in that final offer. And while the company may have internally budgeted and planned to provide a 2.5-percent pay increase in 2011 under those new terms it had implemented, it had certainly never planned for such an increase to be coupled with the return to the old, inefficient model that had preceded its March 31 implementation back in 2010.

35 So phrased, Respondent’s reason for delaying the increase appears to be a business justification devoid of any hostility towards the Union. However, Respondent’s explanation omits an important fact: Its implementation of the “operational changes that had drastically increased efficiency” was unlawful. Judge Brakebusch’s decision found that those changes

violated Section 8(a)(5) and (1) of the Act.

Recognition of the illegality of Respondent’s action changes the tenor of Respondent’s argument: “And while the company may have internally budgeted and planned to provide a 2.5-percent pay increase in 2011 under those new [unlawful] terms it had [illegally] implemented, it had certainly never planned for such an increase to be coupled with the return to the old, inefficient [lawful] model . . .”

An employer’s fear that it would be forced to operate lawfully does not constitute a legitimate business justification. In essence, Respondent’s explanation amounts to saying “We won’t implement the wage increase unless we are allowed to get away with committing an unfair labor practice.” That supposed “justification” cannot carry the Respondent’s rebuttal burden, and I conclude that it does not.

In these circumstances, Respondent has failed to carry its rebuttal burden. Accordingly, I conclude that Respondent’s delay in implementing the March 25, 2011 wage increase violates Section 8(a)(4) of the Act, which makes it unlawful for an employer “to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.” 29 U.S.C. § 158(a)(4). Here, all of the bargaining unit employees filed the charge through their Union and all of the unit employees suffered the effects of Respondent’s decision to delay the pay raise.

However, it is unnecessary to conclude that Respondent’s action also violated Section 8(a)(3) of the Act because the remedy for such a violation would be the same as that for the 8(a)(4) violation. Moreover, the credited evidence does not establish that Respondent delayed the wage increase because of any protected activity other than the filing of the unfair labor practice charge, which resulted in the Board instituting the 10(j) lawsuit. Stated another way, the credited evidence does not establish that Respondent acted with an intent to encourage or discourage membership in a labor organization by delaying the wage increase.

In the discussion above, I reached the conclusion that Respondent violated Section 8(a)(4) and (1) through a *Wright Line* analysis. However, an admission in Respondent’s opening statement may call into question the suitability of this analytical approach. Specifically, Respondent stated that it “changed its mind” about the March 31, 2011 wage increase “because the General Counsel was seeking 10(j) injunction relief . . .” In view of this admission, it concerns me that the *Wright Line framework* might not be appropriate.

The *Wright Line* analytical technique reaches its stride when the evidence suggests that the employer considered more than one reason, or was influenced by more than one reason, in making its decision to take an adverse employment action. In such “mixed motive” situations, the Board must determine whether the unlawful motive “tipped the balance” and caused the employer to take an action it otherwise would not have taken.

However, when an employer’s admitted reason for imposing discipline is conduct which is itself protected by the Act, a *Wright Line* analysis is neither necessary nor appropriate. See, e.g., *Phoenix Transit System*, 337 NLRB 510 (2002) (employee discharged for the

protected activity of writing articles for union news letter); *Saia Motor Freight Line, Inc.*, 333 NLRB 929 (2001) (employee disciplined for violating unlawful no–solicitation/no–distribution rule); *Beverly Health & Rehabilitation Services*, 346 NLRB 1319 (2006) (employee suspended for discussing pending grievance). Here, Respondent has admitted that it delayed the wage increase because of the 10(j) lawsuit.

Therefore, I note that I would reach the same conclusions in this instance even without a *Wright Line* analysis. Respondent delayed implementing the pay raise because of the 10(j) lawsuit. I conclude that this delay violated Section 8(a)(4) of the Act, but not Section 8(a)(3).

One other matter may merit some discussion. Although the District Court denied the Board’s petition for an injunction, it should be noted that the Court did not rule on whether or not Respondent committed an unfair labor practice by declaring impasse and implementing its final offer. Indeed, it appears that Respondent did not wish the Court to examine too closely how it had acted in dealing with the Union. Thus, the District Court’s May 18, 2011 Memorandum Order denying the injunction includes a footnote which states, in part, as follows:

It is difficult for this Court to gauge exactly which facts are disputed and which are not, because Carey Salt has elected not to delineate the facts and circumstances surrounding the actual bargaining sessions that led to this dispute, arguing those facts are not relevant to this Court’s determination as to equitable necessity. This Court tends to agree . . .

The Respondent is correct that the Board possessed exclusive jurisdiction to determine whether it had committed the unfair labor practices alleged. After a hearing lasting more than 5 days, Judge Brakebusch found that Respondent unlawfully had declared impasse and implemented its “final offer.” In contrast, the District Court neither heard the testimony given before Judge Brakebusch nor reached the merits of the unfair labor practice allegations. It simply determined whether interim equitable relief should be granted. Thus, the Court stated:

This Court is reminded that Section 10(j) is an extraordinary remedy to be used in rare cases only when the evidence shows an employer or union has committed such egregious unfair labor practices that any final order of the Board will be meaningless or so devoid of force that the remedial purposes of the Act will be frustrated and immediate temporary injunctive relief is warranted. This Court concludes the facts and circumstances of this case are not so extraordinary and rare that immediate temporary injunctive relief is warranted.

Accordingly, the District Court’s denial of injunctive relief in no way casts doubts on the findings which Judge Brakebusch later made after extensive testimony.

In sum, for the reasons stated above, I conclude that Respondent’s withholding of the wage increase constituted discrimination in violation of Section 8(a)(4) of the Act, as alleged. However, I further conclude that Respondent did not, by this conduct, violate Section 8(a)(3).

Alleged Unilateral Change

Complaint paragraph 8 alleged and, as discussed above, I have found that Respondent delayed the March 25, 2011 pay increase. Complaint paragraph 15 alleges that Respondent did so without prior notice to the Union, without affording the Union an opportunity to bargain with respect to this conduct and its effects and without first bargaining with the Union to a good–faith impasse. Complaint paragraph 22 alleges that Respondent thereby violated Section 8(a)(1) and (5) of the Act. Respondent denies these allegations.

As discussed above, Respondent has admitted, and I have found, that the Union is the exclusive representative of an appropriate unit of Respondent’s employees, that it has recognized the Union, and that such recognition has been embodied in collective–bargaining agreements. However, Respondent denies another element which must be established to prove the alleged unlawful unilateral change, an element alleged in complaint paragraph 14. Respondent denies that the delayed wage increase was a mandatory subject of bargaining.

It is long established that wage rates are a mandatory subject of bargaining. Indeed, the duty to bargain about wages is so fundamental and so mandatory the statute specifically mentions it. Section 8(d) of the Act defines the duty to bargain as including the duty of the parties to meet and “confer in good faith, with respect to wages, hours, and other terms and conditions of employment . . .” 29 U.S.C. § 158(d). Therefore, I conclude that the Government has proven the allegations raised in complaint paragraph 14.

The evidence thus establishes that Respondent changed a term of employment that was a mandatory subject of bargaining. The record further establishes that it did so without affording the Union notice and an opportunity to engage in bargaining over this decision and its effects, as alleged in complaint paragraph 15. To the contrary, it announced the decision as a fait accompli. Thus, on March 10, 2011, Respondent informed employees:

We were planning to make a 2.5% increase (as we proposed in our final offer during the contract negotiations with the union a year ago), but that increase will not be made until we successfully resist the injunction that the National Labor Relations Board (NLRB) is seeking against us.

In a meeting with union officials on this same date, Mine Manager Bull left no doubt that Respondent did not intend to negotiate about whether it would implement the raise. When asked by Union President Miguez whether the employees were going to receive a raise that year, Bull responded by asking whether “they” were going to drop the 10(j) “charges.” (“They” presumably meant the Union or its officials, because Bull was meeting with the union president and vice president at this time.)

When Miguez replied that he didn’t think the 10(j) proceeding would be dropped, Bull said that the only way they would get a raise was to wait on the judge’s decision in that case. Those words, “the only way,” clearly signify that Respondent was unwilling to implement the raise so long as the 10(j) petition remained pending.

Moreover, these events took place in the context of Respondent’s earlier unfair labor practices. As Judge Brakebusch found, Respondent unlawfully implemented its final offer at a time the parties were not at impasse and did so even though the Union insisted that there was no impasse and repeatedly requested to bargain. In the present case, no credible evidence even hints that management had decided to change course or that it had given the Union any reason to believe it was now willing to bargain.

Where, as here, a labor organization is the exclusive representative of a unit of an employer’s employees, and where the employer contemplates making a material, substantial and significant change in a term or condition of employment which is a mandatory subject of bargaining, the employer must inform the union of its proposed actions under circumstances which at least afford a reasonable opportunity for counter arguments or proposals. *Defiance Hospital, Inc.*, 330 NLRB 492 (2000), citing *NLRB v. Centra*, 954 F.2d 366, 372 (6th Cir. 1992).

Although the Respondent informed the Union of its decision 2 weeks before the raise was to take effect, I find that Respondent had no intent to bargain about the matter. Respondent’s timing, notifying the union officials on the same day it told the bargaining unit employees, hardly suggests Respondent had bargaining in mind. See *Roll & Hold Warehouse & Distribution Corp.*, 325 NLRB 41, 42 (1997). I conclude that management’s notification to the Union was merely informational, about a fait accompli, and fails to satisfy the requirements of the Act.

Accordingly, I conclude that the General Counsel has proven that the Respondent made the decision to delay the March 25, 2011 wage increase without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to the decision and its effects.

Complaint paragraph 15 further alleges that Respondent made this decision without first bargaining with the Union to a good-faith impasse. Here, Respondent made the decision to delay the scheduled pay raise without negotiating at all with the Union. In the absence of bargaining, there can be no valid impasse. *L.W.D., Inc.*, 342 NLRB 965 (2004).

To be unlawful, a unilateral change must cause a material, substantial, and significant change in employees’ terms and conditions of employment. *Ead Motors Eastern Air Devices, Inc.*, 346 NLRB 1060, 1065 (2006), citing *Millard Processing Services*, 310 NLRB 421, 425 (1993). Here, all employees in the bargaining unit earned less money than they would have earned if Respondent had implemented the wage increase on schedule. Accordingly, I conclude that Respondent’s unilateral decision causes a material, substantial, and significant change in employees’ terms and conditions of employment.

In sum, I conclude that, by delaying the March 25, 2011 pay raise, without affording the Union sufficient notice and an opportunity to bargain regarding this decision and its effects, Respondent violated Section 8(a)(5) and (1) of the Act.

Alleged Conditioning of Bargaining

5 Complaint paragraph 16 alleges that on about March 31, 2011, Respondent insisted, as a
 condition to bargaining with the Union about the delay of the wage increase for unit employees,
 that the Union convince the Board to withdraw its petition seeking injunctive relief against
 Respondent. Complaint paragraph 17 alleges that this condition is prohibited by Section
 8(a)(1) and (5) of the Act. Complaint paragraph 18 alleges that since about March 31, 2011, in
 10 support of this condition, Respondent refused to bargain about the delay in the wage increase
 and its effects. Respondent denies this allegations.

On March 31, 2011, Union International Representative Michael Tourne sent an email
 to Mine Manager Bull and Human Resources Vice President Heider. This email stated:

15 The USW objects to the Company’s cancellation of the 2.5% wage
 increase that the Company said would be effective March 25, 2011. The Union
 demands to bargain over this cancellation and requests that the Company
 implement the 2.5% wage increase pending the outcome of our further
 negotiations. Please contact me with your available dates.

20 Thanks, Mike

About a half hour later, Heider emailed to Tourne the following reply:

25 Dear Mike;

The Company has never said that there would be a wage increase effective March
 25, 2011. We proposed such in negotiations but that proposal was never accepted.
 As you are aware, the government has a Section 10 (j) proceeding pending in
 30 federal court. As part of that case, as you should know, the government (with the
 permission of the USW) has asked the federal court to order a return to the pre–
 March 31, 2010 terms and conditions of employment, which would mean the
 cancellation of the 2010 wage increase as well as a prohibition of any 2011
 increase. If you have not seen it, we can provide you a copy of the e–mail from
 35 the USW lawyer, Bruce Fickman, acknowledging the foregoing. *If the Union can
 convince the government to withdraw the ridiculous request being made in
 federal court to return to the pre–March 31 conditions of employment, we would
 be more than pleased to be able to immediately address the wage increase issue
 you are raising.* In the meantime, of course, as the bargaining representative for
 40 the unit, we would be pleased to meet with you at the earliest opportunity to
 discuss any of this.

Regards, v

45 (Emphasis added)

5 The italicized portion of Heider’s email leaves no doubt that Respondent conditioned bargaining about implementation of the pay raise, and its effects, on the Union’s success in getting the 10(j) petition withdrawn. The next sentence, stating, “we would be pleased to meet with you” to “discuss any of this,” does not change the thrust of the requirement Respondent imposed.

10 In this regard, Respondent’s email did not state “we are *considering*” imposing the condition but offering to discuss it, but rather announced the condition as an accomplished fact. Moreover, under the circumstances present here – an employer’s vice president of human resources communicating with a union’s international representative – Respondent’s use of the term “discuss” rather than “bargain” is significant. Both the sender and recipient of the message were labor relations professionals who would appreciate the distinction between “discussing” and “bargaining.” In this context, Heider’s choice of words supports the conclusion that Respondent had made up its mind not to implement the wage increase unless the 10(j) petition was withdrawn.

20 Therefore, I conclude that the Government has proven that Respondent, on about March 31, 2011, insisted, as a condition to bargaining with the Union about the delay of the wage increase for unit employees, that the Union convince the Board to withdraw its petition seeking injunctive relief against Respondent, as alleged in complaint paragraph 16.

25 In its answer, the Respondent has admitted that the Union, at all material times since March 25, 2007, has been the exclusive representative, within the meaning of Section 9(a) of the Act, of an appropriate unit of Respondent’s employees. Respondent thereby admitted that it is legally obligated to bargain with the Union about wages, hours, and other terms and conditions of employment which are mandatory subjects of bargaining. As the word “mandatory” indicates, Respondent has no choice.

30 On the other hand, not all conceivable topics are mandatory subjects of bargaining. As a general principle, neither party to a collective–bargaining relationship may insist to impasse that the other party bargain about a nonmandatory subject. *NLRB v. Borg–Warner Corp.*, 356 U.S. 342 (1958).

35 Nonmandatory subjects of bargaining fall into two categories, permissive and unlawful. The parties may negotiate and reach agreement, if they wish, on terms and conditions which are “permissive” subjects. Although neither side may force the other to agree to a term or condition which is a permissive subject, if the parties do agree, such a term will be a lawful and enforceable part of the contract.

40 Presumably, it would be permissible, although not mandatory, for the parties to bargain concerning whether the Union would request that the Board withdraw the petition for injunctive relief. However, the facts here establish more than a request to negotiate concerning a nonmandatory subject. Rather, Respondent specifically required, as a condition of even considering the Union’s position on the wage increase, a mandatory subject of bargaining, that the Union convince the Board to withdraw the 10(j) petition.

Respondent, having a legal duty to bargain with the Union, may not condition the performance of that duty even on something as trivial as, say, the Union providing coffee and doughnuts at the negotiating session. It certainly could not require the Union to convince the Board to withdraw a lawsuit.

Complaint paragraph 18 alleges that since about March 31, 2011, in support of the condition – that the Union convince the Board to withdraw the 10(j) petition – Respondent refused to bargain about the delay of the wage increase. The record establishes that on May 22 or 23, 2011, less than a week after the District Court denied the Board’s petition for an injunction, the Respondent implemented the wage increase it had delayed. However, the record does not indicate that Respondent, at any time before implementing the wage increase, informed the Union that it would not require, as a condition of bargaining about the wage increase, that the Union procure the withdrawal of the 10(j) petition.

After the Court denied the Board’s petition on May 18, 2011, the condition simply became unnecessary. The Respondent’s decision to implement the pay raise at that point does not make lawful its earlier refusal to bargain about the pay raise unless the 10(j) petition were withdrawn.

In sum, I find that Respondent did insist, as a condition to bargaining with the Union about the wage increase, that the Union convince the Board to withdraw the 10(j) petition, as alleged in Complaint paragraph 16. Further, I conclude that this condition is a nonmandatory subject of bargaining, but need not determine whether it is a prohibited subject, as alleged in complaint paragraph 17. The fact that Respondent conditioned bargaining about a mandatory subject, the wage increase, on the Union’s performing an act which was a nonmandatory subject, suffices to constitute a refusal to bargain in good faith, in violation of Section 8(a)(1) and (5) of the Act, as alleged in complaint paragraphs 19 and 22.

Case 15–CA–61694

Paragraph 7 of the complaint in Case 15–CA–61694 alleges that on about March 14, 2011, Respondent, by Mine Manager Bull, threatened its employees that they would not have a wage increase while the Board’s 10(j) petition as pending. Paragraph 8 of this complaint alleges that the statement violated Section 8(a)(1) of the Act. Respondent denies this allegation.

This allegation arises out of a statement attributed to Bull which I have already discussed above in connection with the 8(a)(3) and (4) discrimination allegations raised in Case 15–CA–20035. That complaint did not specifically allege this March 14, 2011 statement to be violative, but the statement was relevant to the discrimination allegations because it cast light on Respondent’s motive for withholding the pay increase. Here, I revisit that statement not because it provides evidence of motive but to determine whether the statement itself, made to one of the bargaining unit employees, interferes with, restrains, or coerces employees in the exercise of the Section 7 rights in violation of Section 8(a)(1).

As a matter of routine, Respondent’s mine management and Local union officials meet regularly to discuss whatever issues have arisen. On March 14, 2011, Local Union President Mark Migues and Union Vice President O’Neal Robertson met with Mine Manager Gordon Bull and Human Resources Representative Toyla Charles.

5

As discussed above, I have credited Migues’ testimony that he asked Bull “if we was going to get a raise this year” and that Bull answered by asking “[a]re you all going to drop the 10(j) charges?” Migues replied that he didn’t think so. Bull then said “only way we’d get a raise, we’d wait on the Judge’s decision on the 10(j).”

10

Applying an objective standard, I conclude that an employee reasonably would understand Bull’s words to mean that the Respondent was delaying the scheduled raise because the Board had filed a lawsuit seeking an injunction against Respondent. Moreover, an employee reasonably would associate the Board’s 10(j) petition with the Union’s filing of the underlying unfair labor practice charge.

15

Certainly, Migues, who was both a bargaining unit employee and Local Union president, would appreciate the connection between the Union’s filing of the unfair labor practice charge and the actions taken by the Board based on that charge. Based on the entire record, and noting that members of the bargaining unit had engaged in a strike to protest Respondent’s unfair labor practices, I conclude that employees were quite aware of the connection between the unfair labor practice charge filed by the Union and the Board’s petition for injunctive relief.

20

In such circumstances, a statement that Respondent was delaying the pay increase because of the 10(j) petition clearly would tend to chill employees’ willingness to file unfair labor practice charges with the Board. Therefore, I conclude that Bull’s statement interfered with employees in the exercise of protected rights and further conclude that this statement violated Section 8(a)(1) of the Act, as alleged in paragraph 8 of the complaint in Case 15–CA–61694.

25

30

Respondent has admitted being an employer engaged in commerce, and I conclude that all the unfair labor practices found above affect commerce, as alleged in paragraph 23 of the complaint in Case 15–CA–20035 and in paragraph 9 of the complaint in Case 15–CA–61694.

35

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix.

40

Respondent must also post a notice attached to this decision as Appendix, to inform employees that it has been found guilty of committing unfair labor practices and the action it will take to remedy those unlawful actions. In both complaints, the General Counsel “seeks an Order requiring that Respondent have its representative at the Cote Blanche, Louisiana facility

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read the Notice to its employees during their paid work time.” This remedy is an extraordinary one, *Chinese Daily News*, 346 NLRB 906, 909 (2006), which I do not believe warranted in the present case.

5 However, it is entirely appropriate, and I believe necessary, for Respondent to transmit a copy of the notice to each employee in the bargaining unit by email. On March 10, 2011, Respondent committed an unfair labor practice by informing such employees by email that they would not be receiving a raise on March 10, 2011 because of the 10(j) petition pending in federal court. Just as Respondent used email to break the law, so it should be ordered to use
10 email to undo the harm. See *J. Picnic Flooring*, 356 NLRB No. 9 (2010) (“[N]otices shall be distributed electronically, such as by email. . .if the Respondent customarily communicates with its employees [members] by such means.”).

15 Additionally, Respondent must make its employees whole, with interest, for all losses they suffered because Respondent unlawfully delayed the March 25, 2011 wage increase.

Conclusions of Law

20 1. The Respondent, Carey Salt Company, a Subsidiary of Compass Minerals International, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

25 2. The Union, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union and Local Union 14425, is a labor organization within the meaning of Section 2(5) of the Act.

30 3. The Respondent violated Section 8(a)(1) of the Act by threatening its employees that it would withhold a scheduled pay increase until such time as it could successfully resist an injunction the Board was seeking against it in Federal court in connection with unfair labor practice charges filed by the Union on behalf of bargaining unit employees, and threatening employees that this scheduled pay increase was being withheld until it prevailed in the injunction proceeding.

35 4. The Respondent violated Section 8(a)(4) and 8(a)(1) of the Act by delaying, from about March 25, 2011 to May 23, 2011, a 2.5-percent wage increase bargaining unit employees were scheduled to receive on March 25, 2011.

40 5. The Respondent violated Section 8(a)(5) and 8(a)(1) of the Act by delaying the scheduled March 25, 2011 wage increase, as described in paragraph 4 above, without affording the Union notice and an opportunity to bargain about this decision and its effects, and without first bargaining with the Union to a good-faith impasse.

45 6. The Respondent further violated Section 8(a)(5) and 8(a)(1) of the Act by refusing to bargain about the implementation of the wage increase described above, about Respondent’s decision to delay such implementation and about the effects of that decision, and by conditioning its willingness to bargain about these issues on the Union’s persuading the

Board to withdraw the petition for injunctive relief which the Board had filed against Respondent in United States District Court.

7. The Respondent’s unfair labor practices described above affect commerce 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 in this case, I issue the following recommended¹

ORDER

The Respondent, Carey Salt Company, a Subsidiary of Compass Minerals International, Inc., (Location i.e., city and state of Respondent) its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees that it would withhold a scheduled wage increase until such time as it could successfully resist a petition for injunctive relief which the Board had filed against it in connection with the Union’s unfair labor practice charges.

(b) Delaying or withholding a scheduled wage increase, or otherwise discriminating against its employees, because they, or the Union on their behalf, filed unfair labor practice charges with the Board, cooperated with the Board during an investigation, gave testimony under the Act, or did not persuade the Board to withdraw its petition for injunctive relief or take other action sought by Respondent.

(c) Failing and refusing to bargain in good faith with the Union in its capacity as exclusive representative of bargaining unit employees, by delaying implementation of a scheduled wage increase or otherwise changing any term or condition of employment which is a mandatory subject of collective bargaining, in the absence of a bonafide impasse, without affording the Union notice and an opportunity to bargain about the decision and its effects.

(d) Failing and refusing to bargain in good faith with the Union in its capacity as exclusive representative of bargaining unit employees by conditioning negotiations concerning any mandatory subject of bargaining upon the Union engaging in conduct which is not a mandatory subject of bargaining.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to

¹ If no exceptions are filed as provided by Section 102.46 of the Board’s Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

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

(a) Make bargaining unit employees whole for any loss of earnings and other benefits suffered as a result of the Respondent’s delay in implementing the 2.5-percent wage increase which had been scheduled for March 25, 2012. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest 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).

(b) Within 14 days after service by the Region, post at its Cote Blanche, Louisiana mile and facilities, copies of the attached notice marked “Appendix.”² Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Additionally, Respondent shall transmit a copy of the notice by email to each bargaining unit employee. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 10, 2011.

(c) 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 Regional Director attesting to the steps that the Respondent has taken to comply.

Dated Washington, D.C. May 16, 2012

Keltner W. Locke
Administrative Law Judge

² If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading “**POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD**” shall read “**POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.**”

APPENDIX

NOTICE TO EMPLOYEES

**Posted 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 post and abide by 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 interfere with, restrain or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT threaten to withhold a scheduled wage increase because the National Labor Relations Board had instituted legal proceedings against us, or threaten to withhold such a scheduled wage increase until we prevailed in such a proceeding, or threaten to withhold such a scheduled wage increase until the Union persuaded the Board to discontinue such proceedings.

WE WILL NOT delay the implementation of a scheduled wage increase for bargaining unit employees or otherwise discriminate against any employee because an employee or the Union representing our employees filed unfair labor practice charges with the Board, or because the Board took action against us as a consequence, or because any such legal proceedings remain pending.

WE WILL NOT, in the absence of a lawful impasse, decide or effectuate a decision to delay a scheduled wage increase for bargaining unit employees, or change any other term or condition of employment which is a mandatory subject of collective bargaining, in any material, substantial and significant manner, without first affording the Union notice and an opportunity to bargain about the decision and its effects.

WE WILL NOT condition bargaining with the Union about any term or condition of employment which is a mandatory subject of collective bargaining upon the Union persuading the Board to discontinue legal proceedings or upon the Union taking any other action which is not a mandatory subject of collective bargaining.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make our employees whole, with interest, for all losses they suffered because we delayed implementation of the wage increase which had been scheduled to take effect March 25, 2011.

WE WILL afford the Union, as exclusive representative of our bargaining unit employees, notice and an opportunity to bargain concerning a decision to delay a scheduled wage increase or to change, in any material, substantial and significant manner, any other term or condition of employment which is a mandatory subject of collective bargaining.

**CAREY SALT COMPANY, A SUBSIDIARY OF
COMPASS MINERALS INTERNATIONAL, INC.**
(Respondent)

Date: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

Hebert Federal Building, 600 South Maestri Place, 7th Floor, New Orleans, LA 70130-3408
(504) 589-6361, Hours: 9:00 a.m. to 5:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (504) 589-6389