UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

REDBURN TIRE COMPANY

and **Cases 28-CA-023527**
28-CA-061437

GENERAL TEAMSTERS (EXCLUDING MAILERS), STATE OF ARIZONA, LOCAL UNION NO. 104, AN AFFILIATE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respectfully submitted,

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Pursuant to Section 102.46 of the Board's Rules and regulations, Counsel for the Acting General Counsel (General Counsel) files the following Brief in Support of Exceptions to the Decision of Administrative Law Judge Gerald A. Wacknov (the ALJ) [JD(SF)-13-12], issued on April 23, 2012, in this above-captioned case. As set forth in the General Counsel's Exceptions, filed under separate cover, the General Counsel excepts to the ALJ's failure to find that: (a) Redburn Tire Company (Respondent) threatened to implement its bargain proposal; (b) Respondent threatened to permanently replace its employees engaged in an unfair labor practice strike; (c) Respondent prematurely declared an impasse in bargaining as well as its intent to implement its bargaining proposal, and implemented its bargaining proposal when no overall good faith impasse existed; (d) the strike by Respondent's employees was or became an unfair labor practice strike; (e) Respondent refused and failed to reinstate employees engaged in an unfair labor practice strike upon their unconditional offer

to return to work; and (f) a meeting between Respondent and the Union's president took place on May 9, 2011.

I. INTRODUCTION

This is a case in which the record firmly establishes Respondent's rush to declare impasse, where none existed, so as to get rid of a benefit gained in prior bargaining, namely, free health insurance for employees with ten or more years of service. Through the course of bargaining the Union was continually moving toward Respondent's position on health insurance, just not at the pace Respondent wanted. The Union continued to request to bargain and make concessions, even after Respondent unlawfully declared impasse, just five months after negotiations began, and implemented its bargaining proposal. Respondent's Unit employees were palpably frustrated by Respondent's unlawful bargaining, which meant a reduced paycheck for some employees, and so engaged in an unfair labor practice strike. Even when the Union gave Respondent nearly everything it wanted, Respondent refused to reinstate the unfair labor practice strikers after they made an unconditional offer to return to work.

II. FACTS

A. Respondent's Operations

Redburn Tire Company (Respondent), is engaged in the business of selling and retreading truck tires. (ALJD 2; Tr. 28-29) Respondent has facilities in Arizona, Nevada, New Mexico, Colorado, and Texas and employs around 240 employees. (ALJD 2; Tr. 29) About 40 of those employees are involved in tire retreading. (ALJD 2; Tr. 29) Approximately eleven of Respondent's tire retreaders are located at Respondent's facility in Phoenix, Arizona (Respondent's facility), and comprise the bargaining unit (the Unit) in this

case. (ALJD 2) Donald Leffler (Leffler) is Respondent's Secretary-Treasurer and one of its two owners, along with Respondent's President J.D. Chastain (Chastain). (ALJD 3; Tr. 28, 336)

B. The Union's Representational Status

Since about 1970, Respondent has recognized General Teamsters (Excluding Mailers), State of Arizona, Local Union No. 104, an affiliate of the International Brotherhood of Teamsters (the Union), as the exclusive collective-bargaining representative of the Unit, to wit:

> [A]ll employees in the following classification at [Respondent's] location at 3801 West Clarendon Avenue, Phoenix, Arizona: Retreaders excluding all Deliverymen, Tire Servicemen, Heavy Duty Servicemen, Warehousemen, Office Employees, Salesmen, Guards, Watchmen, Wheel Refurbishers and Supervisors as defined in the Act.

(GCX 1(g), ¶ 5; GCX 1(i), ¶ 1) The parties' most recent collective-bargaining agreement was effective from January 1, 2007, through December 31, 2009 (the expired Agreement or the 2007 Agreement), and which, by its terms, was automatically extended to December 31, 2010. (GCX 1(g), ¶ 5(b); GCX 1(i), ¶ 1)

C. 2010-2011 Bargaining for a Successor Contract

The Union and Respondent began bargaining for a successor agreement to the expired Agreement on December 15, 2010. (ALJD 2; Tr. 76-77; 307; GCX 1(g) ¶ 7(a); GCX 1(i), ¶ 7(a)) Jerry Ienuso (Ienuso), the Union's business agent, was the Union's principal negotiator, along with Unit employees Ruben Martinez, Sr. (Martinez) and Ruben Martinez, Jr. (Martinez, Jr.). (ALJD 3; Tr. 75-76) Leffler and Chastain represented Respondent during bargaining with the Union. (ALJD 3; Tr. 77)

Between December 15, 2010 and May 25, the parties met ten times at the offices of the Federal Mediation and Conciliation Services (FMCS). (ALJD 2; JTX 1 (Tabs 1-10)) Bargaining sessions usually began around 1:00 or 2:00 p.m., after Unit employees finished work for the day. (Tr. 77-78) Sessions generally lasted anywhere from thirty minutes to two hours. (Tr. 78) For about one-third of the bargaining sessions, only one member of Respondent's bargaining team showed up which, according to Ienuso, "seemed to bog things down a little bit, that they needed to be together to make decisions." (Tr. 77)

1. The Expired Agreement's Economic Terms

The parties began negotiations by modifying various provisions of the expired Agreement. The economic provisions in the expired Agreement, particularly wages and health insurance, became the focal point of discussion as negotiations progressed, with the Union making concessions regarding several provisions such as lead-man pay, night-shift differential pay, personal days and finally, health insurance. The following summarizes the key economic terms in the expired Agreement that became the basis for negotiations:

Wages (Art. 2): **New Employees** who begin working after January 1, 2007:

	01/01/07	**01/01/08**	**01/01/09**
Start	$9.50	$9.75	9.75
6 months	$10.00	$10.25	$10.25
1 year	$10.50	$10.75	$10.75
18 months	$11.00	$11.25	$11.25
2 years	Current Retreader Rate		

Current employees:

01/01/07	**01/01/08**	**01/01/09**
$.70	$.50	$.50
	$.15*	$+.15*

*$.15 increase is a **productivity bonus** based on achieving an average Net Equivalent Unit (EU)/Man Hour Worked of 1.42 for calendar year 2007. $.15 increase effective 01/01/09 is contingent upon attainment of an average Net EU/Man Hour Worked of 1.45 for calendar year 2008.

Lead men are paid at least an extra $.30 an hour in excess of the above classification rates. Those working between 6:00 p.m. and 6:00 a.m. receive a night shift differential of $.05 an hour.

A monthly bonus is available for all Net EUs produced in excess of 1.25 units per man-hour worked, less penalties for adjustments and miscures. The monthly bonus is $4.00 per EU for production over 1.25 EU/man-hour and $5.00 per EU for production over 1.40 EU/man-hour.

Holidays (Art. 6): 7 scheduled holidays and one personal holiday for all employees. 3 additional personal days for employees with at least 10 years of continuous employment.

Health Insurance (Art. 23): Company provides the same basic individual group health insurance it provides for non-bargaining unit, non-supervisory employees. Employees who elect to purchase health insurance for dependents (spouse and family) pay the same amount for that dependent coverage as other non-bargaining unit employees, except that the Employer will provide at no charge dependent coverage for employees with over 10 years of service. Employees who waive health insurance coverage, prior to September 30, 1994, receive a $200 gross payment per month in lieu of coverage.

The expired Agreement contained the following schedule of health insurance premiums to be paid on a weekly basis by employees electing coverage (JTX 2, Art. 23):

	2007	**2008**	**2009**
Employee Only	$6/week	$8/week	$10/week
Employee + spouse	$22/week	$32/week	$44/week
Employee + children	$15/week	$25/week	$35/week
Employee + family	$30/week	$40/week	$50/week

Health insurance premiums, including the health benefits of employees with ten or more years of service, became a primary issue of contention between the parties during bargaining. (ALJD 3) Respondent wanted all Unit employees to pay the same schedule of health insurance premiums that non-Unit employees pay, and it wanted to eliminate the current benefit of free insurance for employees and dependents who have ten or more years of

service (herein referred to as the "ten-year benefit")[1]. (ALJD 3; Tr. 305-306) The Union, on the other hand, initially proposed changing the ten-year benefit of free dependent health insurance to begin after three years of service. (GCX 22, Art. 23(2))

2. December 2010 through February Bargaining Sessions -- Initial Bargaining

The parties met three times in December 2010, on December 15, 21 and 22, but only one of Respondent's representatives participated in the first two sessions. (See JTX (Tabs 1-3)) While all three Union bargaining-committee members were present for all December sessions, only Chastain participated for Respondent on December 15, 2010 and only Leffler represented Respondent at the December 21, 2010 session. (See JTX 1 (Tabs 1-3))

The Union made economic concessions early on in bargaining. For example, at the first bargaining session, Respondent proposed raising the new hire wage rate by $0.50 an hour to $10.00 an hour, and to delete the lead-man pay and night shift differential pay. The Union tentatively agreed to those three proposals on December 22, 2010. (GCX 23; Tr. 83) For existing employees, Respondent proposed no wage increase the first year of the contract and $.25 an hour increases the second and third years, contingent upon reaching a quota of 1.50 EU/Man Hour Worked the second year and 1.55 the third year. (GCX 23)

As to the issue of health insurance, Respondent proposed dropping the ten-year benefit and stated that it would be providing a current schedule of insurance premiums. (GCX 23; Tr. 84) At the first meeting, the Union proposed that the Respondent provide free health insurance to dependents of employees with three or more years of service, rather than waiting

[1] The parties went to arbitration in 2007 over the issue of whether the Union had agreed in bargaining to exclude the ten-year benefit from the 2007 Agreement. The arbitrator found in the Union's favor and awarded that "The Company will continue to refrain from deducting such premiums until and if a proper change in Article 23(A)(2) is negotiated between the Parties." (ALJD 3; JTX 3, p. 26)

until they reach ten years of service. (GCX 22) Even during the early stages of bargaining, the Union made concessions as it bargained in good faith. At the December 22, 2010 session, it dropped its proposal to change the ten-year benefit to a three-year benefit. (Tr. 88)

In examining Respondent's conduct during bargaining and its position on health insurance issues throughout bargaining, it is instructive to recall that from the beginning, Respondent made clear that it was not bargaining from a position of "economic necessity," nor was it claiming poverty: "You've asked us if we can't afford to meet your contract proposals. We're simply proposing to make changes to wages and benefits to make us more competitive. We are not saying and we have not said that we can't afford anything the Union has proposed." (GCX 29)

From the beginning, Respondent made drastic proposals related to health-insurance premiums. For example, at the December 22, 2010, bargaining session, Respondent proposed a schedule of health insurance premiums for its basic plan that was almost three times higher than the current premiums for an employee and his family:

Employee Only	$23/week
Employee + spouse	$110/week
Employee + children	$77/week
Employee + family	$145/week

(GCX 27; Tr. 88) That schedule of premiums comes with a $4,000 deductible. If employees wanted a lower $1,500 deductible, the proposed rates were as follows (GCX 27):

Employee Only	$36/week
Employee + spouse	$140/week
Employee + children	$101/week
Employee + family	$182/week

The Union had made a wage proposal during this same bargaining session, which did not offset the draconian increase in health insurance premiums proposed by Respondent. At

the December 22, 2010 session, the Union proposed a wage increase of $.50 cents an hour each year of the contract for current employees, and a $.25 an hour productivity bonus in years two and three based on meeting certain quotas. (GCX 22) Under this proposal, a current employee could make approximately $20 more per week in base wages during the first year of the contract, $40 more per week the second year of the contract, and $60 more per week in the third year of the contract. This wage increase, however, would not offset the higher cost of health insurance which, under the $4,000-deductible plan, would increase $95 a week for a family, and $132 a week for the lower, $1,500-deductible plan. (See JTX 2, GCX 27)

The bargaining teams met three times in January -- on January 4, 13 and 25. (JTX 1 (Tabs 4-6)) The Union lowered its wage proposal, but Respondent did not offer any changes to its health insurance proposal. By the end of the January 13 bargaining session, the Union was proposing a wage increase of $.35 an hour the first year, $.25 an hour the second year with an extra $.25 for meeting a quota of 1.45, and $.25 an hour the third year with an extra $.25 an hour for meeting a quota of 1.48. (GCX 33, p. 5)

The Union's bargaining notes from the next session, on February 15, show that the parties' remaining open items included Articles 2(b) (wage rates), 6 (holidays/personal days), 23 (health insurance), 24 (funeral leave) and 25 (term of agreement). (GCX 36; Tr. 94) Respondent presented a higher wage proposal that day, offering an increase in wages for existing employees of $.50 the first year, $.25 the second year with an additional $.35 an hour based on a quota of 1.45 and a $.25 an hour increase the third year with an additional $.35 an hour based on a quota of 1.48. (GCX 36, p. 2) Even with the higher wages, Respondent's

offer would not offset the significant cuts resulting from Respondent's health insurance proposal.

3. Respondent's First -- and Regressive -- "Last, Best and Final Offer"

The Union prepared a counter proposal for the next bargaining session, March 1, but did not present that proposal -- which reflected yet more concessions -- because Respondent, to the Union's surprise, gave the Union its first of two last, best and final offers. (ALJD 3-4; GCX 38 and 39; Tr. 101) The Union was in fact, "stunned" to receive Respondent's last, best and final offer so early in negotiations because, as Ienuso told Respondent, "we are here to discuss and negotiate further, [] there is room for negotiations. Last best and final [isn't] necessary nor for the company to declare impasse." (Tr. 102-103; GCX 37) Respondent's last, best and final offer regressed on wages from its previous package proposal of February 15, and only offered a base wage increases of $.35 an hour the first year, $.25 an hour the second year with an extra $.25 for meeting a quota of 1.45, and $.25 an hour the third year with an extra $.25 an hour for meeting a quota of 1.48. (GCX 39)

Respondent did not change its position on health insurance in this last, best and final offer. In its cover letter presenting the last, best and final offer, Respondent wrote that its offer would have Unit employees "pay the same amount as all other non-supervisory Redburn employees for the type of medical insurance coverage that they elect. As we have repeatedly discussed during the current negotiations, for us this is a matter of fairness and also competitiveness. None of our competition provides free insurance to their employees." (ALJD 3; GCX 39) The Union responded as follows:

> On the issue of fairness--demanding on some occasions that an employee agree to deduct one-third (1/3) of his/her weekly salary, every week, to obtain family insurance is hardly a matter of fairness.

> On the issue of competitiveness--it was asked by the Union to explain this. The Company said it would not explain it to the Union however would explain it in private to the Federal Mediator. The Union to this date has not received an explanation.
>
> Equally, no proof has been presented by the Company to support its claim referencing what other employees working for competitors pay or do not pay.

(GCX 40)

On March 15, Unit employees unanimously voted to reject Respondent's last, best and final offer. (ALJD 4; GCX 41) The parties agreed to resume bargaining. (Tr. 104; GCX 41)

4. Parties Resume Bargaining -- March 29

The parties met again on March 29, at which time the Union presented a counter offer which contained yet more concessions. (GCX 43; Tr. 105-106) The Union's proposal provided, for the first time, that employees with more than ten years of service would begin paying the employee-only insurance premium, which had previously been paid by Respondent. (Tr. 107; GCX 43) The Union also proposed the following schedule of insurance premiums, which increased the premium employees would pay for employee-only insurance by $4 a week (GCX 43):

	2011	**2012**	**2013**
Employee Only	$10/week	$12/week	$14/week
Employee + spouse	$22/week	$32/week	$44/week
Employee + children	$15/week	$25/week	$35/week
Employee + family	$30/week	$40/week	$50/week

On wages, the Union proposed a $.45 an hour increase the first year. For the second and third years, the Union proposed a $.35 an hour increase along with an additional $.25 an hour for meeting a quota of 1.45 in year one and 1.48 in year two. (GCX 43) The Union made further concessions by proposing that current employees keep their existing four paid

personal days after ten years but that new hires receive only two personal days after ten years of service. (GCX 43)

Respondent submitted a counter-offer on April 11 that matched the Union's March 29 proposal on wages and personal days. (GCX 46) Respondent maintained its proposal to take back free health insurance after ten years of service and proposed the following schedule of premiums for the higher deductible insurance plan, which phased in over three years what it had previously proposed for all three years (GCX 46):

	2011	**2012**	**2013**
Employee Only	$23.00/week	$23/week	$23/week
Employee + spouse	$44/week	$64/week	$110/week
Employee + children	$35/week	$55/week	$77/week
Employee + family	$50/week	$70/week	$145/week

The Union was still not convinced by Respondent's assertions that it needed employees to pay these amounts for their health insurance in order to remain competitive, so the Union made an information request that day. (Tr. 108-109; GCX 47) The Union requested, among other things, Respondent's customer list and price list for services in the retread shop "in order to compare prices of competitors." (GCX 47)

5. Respondent's Second Final Offer

Respondent was not happy with the information request and, at the next bargaining session on April 28, ominously made it clear to Ienuso and the employees on the Union's bargaining committee that requesting the information could be harmful to them. (See Tr. 111, 308) The April 28 session began with Respondent giving the Union a counterproposal (GCX 50) which contained the same terms as in its April 11 proposal (see GCX 46; Tr. 112). Respondent also provided documents at the start of the session pursuant to the Union's information request. (Tr. 110) Following a heated discussion about the purpose of the

Union's information request (Tr. 111, 308-309), Respondent turned its April 11 proposal into a firm and final offer. (ALJD 5; GCX 51; Tr. 113)

6. The Union Remains Flexible

Despite the dispute about the Union's information request at the April 28 bargaining session, the Union continued to work toward an agreement and arranged a meeting for May 9[2] between Andy Marshall (Marshall), the Union's Secretary-Treasurer, and Respondent's owners, to explore other ways of moving forward in bargaining. (Tr. 115) This was a good faith effort on the part of the Union to further negotiations. Leffler recalled that the "gist of the conversation" with Marshall was that the Union would not "approve or recommend give-backs or concessions, which would mean the net paycheck might be reduced or affected."[3] (Tr. 328) Ienuso's notes for that meeting reflect that Respondent "has been competitive, there is no disadvantage, Company had quadrupled in size, costs per tire repair not an issue. Companies have left and come back," referring to Respondent's customers. (GCX 52; Tr. 117) Ienuso also wrote that Respondent is "not losing business due to pricing. With Company's proposal every employee takes a cut in pay in its first year. Their raise is $18 a week, however, depending on their status, it is between $5 and $32 a week cut in pay for the basic (health insurance) plan. This is the $4,500 deductible. In the second year (of the contract), you have that initial $18 a week plus $14 a week bump because of a raise, which equals $32 a week." (GCX 52; Tr. 117) By year three of the contract, those who take the employee-only insurance will receive an additional $46 a week; however employees taking insurance for their dependents will see "a pay cut between $31 and $99 a week for the basic

[2] The General Counsel excepts to the fact that the ALJ incorrectly found that the date of the meeting between Marshall and Respondent's owners was May 29, 2011. (ALJD 12)

[3] Respondent stipulated at trial that Marshall said the Union's goal was ensuring that employees did not take home less pay after the contract was ratified. (Tr. 330)

plan." (Tr. 117; GCX 52) Marshall's message to Respondent's owners was clear -- that the Union would not recommend approving "anything that reduces the net paycheck" of Unit employees. In other words, and critically, the Union remained flexible and open to creative ideas as to how to achieve both parties' goals. Stated differently, at no time during this meeting, or afterwards, did Marshall or the Union foreclose further bargaining or proposals from either party, nor did they express a rigid position. (See Tr. 328) To the contrary, the purpose of the meeting, and the statements made by the Union's representatives at the meeting, were to convey to Respondent that the Union was willing to explore a host of other terms and proposals, so long as employees' net take-home pay did not decline. Such a framework left a wide range of options on the table. By its subsequent actions, it is evident that Respondent declined the Union's broad and expansive efforts to continue to bargain. Instead, Respondent focused on its goal -- to declare impasse as soon as possible, whether one existed or not -- and to implement the terms it wanted without having to exhaust bargaining with its employees' representative.

7. Unit Employees Discuss Possible Counteroffers

Unit employees voted unanimously on May 20 to reject Respondent's second final offer. (ALJD 6; Tr. 119, 197; RX 2) Ienuso met with employees before the vote to explain Respondent's latest proposal, and told employees that the Union recommended a no vote, which was also "an authorization to strike." (Tr. 119-120) At this meeting, the employees discussed the specifics of Respondent's second final offer and Respondent's approach to and conduct during bargaining. (Tr. 119-120) Although they rejected the offer, they provided specific terms and guidance to the Union as to how far they were willing to give back in terms of insurance premiums. (Tr. 255) This, in itself, provides yet addition evidence -- and an

indication to Respondent -- that the Union, and its represented employees, were prepared to continue to make movement in negotiations.

Ienuso sent an email to Respondent the day of the vote informing Respondent that employees had rejected its second firm and final offer. (ALJD 6; RX 2) In conveying the results of the vote, Ienuso offered to meet again and asked if Respondent was willing to do so. (Tr. 120)

8. Respondent Declares Impasse in Bargaining

Rather than return to the bargaining table, as it did the last time employees rejected its final offer, and despite the then-present framework showing that the Union remained willing to make further concessions within the broad parameters stated by Marshall, Respondent simply declared an impasse and its intent to implement its last bargaining proposal. In a letter to the Union dated May 25, Leffler wrote (ALJD 6; GCX 54):

> As we have previously advised, the health care premium issue is critical to us and we do not foresee that we will change our position on it. While we are certainly willing to consider any change in the Union's position on this issue, both parties' recent unwillingness to further compromise on this issue has convinced us that we are at an impasse in our effort to reach agreement on a successor contract.
>
> Therefore, please be advised that it is our intent to implement our final offer effective June 1, 2011.

The Union vehemently disagreed that that the parties were at impasse because, as Ienuso explained, "we were still making movement at the time." (Tr. 122) In fact, at the Union's request, the parties agreed to meet again for bargaining on June 2. (Tr. 127-128)

Ienuso responded to Leffler's May 25 letter on June 1, refuting any assertion that the Union would not move any further. (ALJD 7; GCX 55) Ienuso rejected

Respondent's claim of "impasse" as "false." (ALJD 7; GCX 55) Ienuso made clear that the Union wanted to continue negotiations. He wrote that while Respondent stated it was "not moving any further. The Union did not make any such statement." (GCX 55) Ienuso ended the letter by writing, "The Union has repeatedly told the Federal Mediator it is willing to resume negotiations. That was after the membership on May 20th rejected the Company's firm and final by one hundred per cent (100%)." (GCX 55)

Moreover, the parties were making steady progress toward an agreement. In particular, the Union was repeatedly moving toward Respondent's position on the economic issues, including health insurance. For example, on April 11 the Union not only agreed to delete two personal days for new hires, it also offered to increase the amount employees pay for health insurance premiums and agreed that all employees were "going to pay something" for their health insurance benefits, which they had previously received for free. (Tr. 124)

9. Parties' June Meetings

The June 2 bargaining session, like prior sessions, took place at the offices of the FMCS. (Tr. 127-128) However, only Leffler showed up for the meeting, and it was over within half an hour. (Tr. 128) The Union came to the meeting with a new proposal, which yet again contained concessions, but Leffler rejected further negotiations. In fact, Leffler announced that Respondent was implementing its final proposal and that the following week, around June 9, "the insurance deductions will start." (Tr. 128; GCX 56) Ienuso asked Leffler "what it would take to stop the implementation," and Leffler responded "we don't know." (Tr. 128; GCX 56) Ienuso asked Leffler, "what if it is $5 less than?" (Tr. 257) Leffler answered, "we will continue to entertain any offers you send us, email them to me or send

them to me." (ALJD 8; Tr. 257) Ienuso asked Leffler if he was there to negotiate and Leffler, who "never sat down, had his hand on the doorknob," said "no." (Tr. 128; GCX 56) Ienuso asked Leffler to agree to another bargaining session, but Leffler refused to do so. (GCX 57) Ienuso and the bargaining committee members were "stunned and bewildered" because, as Ienuso explained, the Union committee "thought we were [t]here to negotiate, he (Leffler) wouldn't negotiate, he looked angry." (Tr. 129) Obviously, despite the Union's entreaties to Respondent, and its continued willingness to make concessions, Respondent took it upon itself to simply refuse to bargain.

Later that same day, despite Respondent's conduct at the FMCS, Ienuso emailed the Union's latest proposal to Leffler. In his cover email, Ienuso wrote that "you were asked to schedule another date. You refused to do so. We see these issues as bad faith bargaining. We will be awaiting your response to our counter proposal." (GCX 57; GCX 58[4]) The Union's proposal shows that the Union once again moved on the health insurance issue, this time changing the ten-year benefit to a twelve-year benefit so that employees must work twelve years before Respondent would pay dependent coverage. (Tr.130; GCX 57) Leffler simply responded to Ienuso's email by writing, "You can avoid our unilateral implementation by agreeing to our proposal on medical premiums." (GCX 58)

10. Employees Learn of Respondent's Threat to Implement

Employees were upset when they learned, on June 3, that Respondent had declared an impasse and intended to implement its final offer. The two employees on the Union's bargaining committee met with their co-workers around 4:00 a.m., before their shift started that day. Martinez, Jr., told the employees "the contract was being forced on us[.]" (Tr. 284,

[4] Ienuso explained that GCX 58 contains both his original email statements and Leffler's interlineated responses, which Ienuso underlined. (Tr. 131-132) RX 5 contains the same email but with Ienuso's statements and Leffler's responses appearing in different colors.

259). Employees asked the two committee members if they had presented Respondent the numbers they had discussed the day of the strike vote, on May 20, and Martinez told them, "No, they weren't there to negotiate. They were there just to tell us that the contract was being forced on us." (Tr. 259, 284) Martinez testified that "the guys were just very upset," and one employee commented, "we've kept working at the same pace. We never slowed down, never done anything. Why are they doing this to us?" (Tr. 259) Another employee asked, "why don't we go on strike now?" (Tr. 259) Unit employees were scheduled to work nine hours that day. (GCX 7) However, all of the Unit employees left after eight hours. (ALJD 8; Tr. 262) Respondent admits that Unit employees ceased work concertedly and engaged in a strike that day. (GCX 1(i), ¶ 8(a))

11. Respondent Implements its Bargaining Proposal

Respondent implemented its final bargaining proposal in June 2011. Employees first saw the full effect of the implementation in their paychecks issued on or about June 16, 2011.[5] (Tr. 273; GCX 76) The paychecks of Unit employee Martinez, Sr., prior to implementation reflected a $30 per week deduction for health insurance. (Tr. 273; GCX 75) After implementation, his paychecks reflected a $74 per week deduction for health insurance.[6] (GCX 76)

[5] Respondent avers in its Answer to the Complaint that employee paychecks on June 9 reflected the increase in amounts charged to Unit employees for health insurance premiums. Respondent admits that health insurance premiums relate to wages, hours and other terms and conditions of employment of Unit employees and are mandatory subjects for the purposes of collective bargaining. The paycheck employees received on June 9, which is dated June 4, only reflects the partial implementation. The full implementation took effect with the paycheck dated June 11, which employees received on or about June 16. (See Tr. 274-275)

[6] The $.45 an hour base wage increase amounted to an additional $18 in weekly wages for Martinez, not enough to offset the higher health insurance premium.

12. Employees' June 21 Strike

Unit employees continued working for Respondent until June 21, when they again ceased work concertedly and engaged in a strike.[7] After the June 2 bargaining session, and before June 21, Ienuso met with Unit employees at the Union hall to discuss what happened at the prior bargaining session, stating that "we discussed the firm and final, the threat to implement, everything." (Tr. 133) Ienuso reminded employees that "every time we vote whether we're going to ratify or not, if it's a no vote for ratification, it's an authorization to strike." (Tr. 133) So at this meeting, Ienuso reminded employees "that they voted no to, no on the contract and that meant you're authorizing a strike, so it is a good possibility there will be one." (Tr. 133)

The Union's bargaining committee met separately before June 21 to discuss when the strike would occur, and Ienuso explained that despite Respondent's threat to implement on June 1, "we were going to wait to see if the threat came to fruition, meaning that they were going to start deducting the increased medical, you know, the whole package, even the wages . . . and then when that happened, when we seen that happen, then we were going to, you know, select a date." (Tr. 134) Employee paychecks reflected the full implementation around the second or third week of June, which Ienuso confirmed with Martinez. (Tr. 134)

The strike began June 21, once it became clear to employees that the fruits of Respondent's unlawful bargaining were in effect. On that date, when Ienuso arrived at Respondent's facility and everyone clocked out. (ALJD 10; Tr. 289) Martinez told Salaz, the supervisor, "we were tired of working without a contract, we weren't going to work without a contract anymore." (Tr. 276) Unit employees then met with Ienuso who explained to

[7] Respondent admits this allegation. (GCX 1(i), ¶ 8(d))

employees how to conduct themselves on the strike line and that "this is an unfair labor practice strike, you will notice that the signs all say unfair labor practice strike." (Tr. 276) Ienuso told employees, "you're out here because the company refuses to give you a contract and negotiate[] in good faith." (Tr. 276) Ienuso wrote "Redburn" and "Unfair" on the picket signs carried by striking employees. (Tr. 136-137; GCX 59-61)

13. Respondent Threatens to Replace Striking Employees

About a week after the strike began, on June 28, Respondent posted a sign in the area where striking employees were picketing, stating: "Striker Replacement Applications Received 125+". (ALJD 10; GCX 10; GCX 11; GCX 60; GCX 61; Tr.59-61) Unit employees discussed the sign, and Martinez testified that "our thoughts on that sign were that the company [] did what they wanted to do all along, that was replace us. They wanted--we felt we had been pushed to go out on strike. We felt that this sign just reflected what the company wanted to do all along. They wanted to get rid of the union." (Tr. 277; 290) Employees from other unions joined the Unit employees on the picket line, and Martinez, Jr., discussed with them why Unit employees were on strike, including the fact that "we had a contract forced on us that we didn't appreciate--you know, we don't care for and that the company stopped negotiating, that's why we're out here." (Tr. 294)

14. Respondent Permanently Replaces Striking Employees

By July 5, Respondent made good on its threat to replace striking employees by hiring a "full complement of permanent replacement workers." (GCX 65) Respondent notified the Union by email dated July 15 that it had hired the permanent replacement workers. (ALJD 10; GCX 65) Ienuso, in turn, relayed the information to striking employees out on the strike line. (Tr. 140, 277) Employees were "devastated" and asked Ienuso if they had been

fired. (Tr. 140) Ienuso said, "I think so, looks like you're been permanently replaced is what he's telling you." (Tr. 140) Martinez said that employees discussed the fact that they'd been permanently replaced and "we were all saying this is very consistent with the rest of the sign [regarding applications for replacement workers] and everything else they were doing. We felt the company had had enough of the [U]nion, they didn't want to deal with it no more. We felt that them stopping negotiations and all this was just--it was all directly connected, they just wanted to be done with the union, not to deal with us anymore." (Tr. 277-278)

15. Union Agrees -- Making Yet Further Concessions -- to Respondent's Offer on Medical Insurance

Notwithstanding Respondent's premature declaration of impasse and implementation, the Union continued to make offers which would bring the parties closer to Respondent's ultimate goal of eliminating the ten-year health insurance benefit. In fact, the Union requested another bargaining session, and the parties, along with the mediator, met on July 14 at Respondent's facility. (Tr. 137) The Union requested the meeting because it "had more proposals." (Tr. 137) In its proposal, the Union made significant steps toward Respondent's position by eliminating the ten-year benefit altogether for employees hired after ratification. (ALJD 10; Tr. 138-139; GCX 63) Thus, as current employees, many of whom are nearing retirement age, are replaced, their replacements will not receive the ten-year benefit, which has been Respondent's goal all along. The Union also agreed to pay the significantly higher health insurance premiums listed in Respondent's firm and final offer of April 28. (Tr. 138; GCX 62) Finally, the Union agreed that all employees opting for health insurance will pay for employee-only coverage regardless of years of service. (ALJD 10; Tr. 138; GCX 62; GCX 63)

The Union's agreement to pay Respondent's proposed health insurance premiums was a substantial change from the Union's prior proposal, as evidenced in comparing the Union's position with Respondent's proposal. The Union had previously proposed a far lower schedule of premiums that employees would pay, which, by 2013, was $14 a week for employee-only coverage; $44 a week for an employee and spouse; $35 a week for an employee and children; and $50 a week for an employee and family. In its July 14 offer, the Union was agreeing that employees would pay, by 2013, $23 a week for employee-only coverage; $110 a week for employee and spouse; $77 a week for an employee and children; and $145 a week for an employee and family.

Despite giving Respondent nearly everything it demanded on the health insurance issue, Respondent again rejected the Union's offer. (GCX 64) Leffler's email response to the Union shows that Respondent was determined to not budge in the slightest, despite the Union's significant efforts to reach agreement. (ALJD 10-11; GCX 64)

> We appreciate the movement the Union has made on employee-only coverage. JD and I have discussed your proposal and we have decided not to accept it. . . . [E]liminating the 10-year benefit for new hires does not equate with meaningful improvement for the Company at any time under a new 3-year contract.

16. Employees Unconditionally Offer to Return to Work; Respondent Refuses to Reinstate Unfair Labor Practice Strikers

On September 23, the Union made an unconditional offer to return to work on behalf of striking Unit employees. (ALJD 11; GCX 12) On September 28, the parties met at the FMCS office with the mediator to discuss the Union's offer. (Tr. 145-146) On October 5, Leffler sent the Union the following message by email (GCX 14):

> Given our position that the strike was an economic strike and the strikers' offer to return to work, they have certain rights to fill vacancies which arise. We now have our first vacancy, in final inspection, and will notify the strikers who had been

> regularly performing that function before the strike (with copies to you). In the event that more than one employee timely notifies us that he wants to fill the vacancies, we think it would make sense to use the layoff recall selection criteria from the contract."

Ienuso responded that same day: "It is our position that the Strike is an Unfair Labor Practice Strike and all of the employees are entitled to immediate reinstatement however to mitigate damages and without waiving any rights to immediate reinstatement, back pay or other remedies the Board may order, the strikers will be advised to accept offers of recall as such offers are made." (GCX 14)

Respondent sent another email to the Union on October 13 (ALJD 11; GCX 72):

> We have carefully considered the Union's offer to return to work. Our position has not changed. We firmly believe that we implemented our final offer only after bargaining to a lawful impasse and, therefore, the strike was an economic one. As we informed you on October 5, 2011, we will offer strikers the opportunity to fill vacancies as they arise.

The Union responded: "The Union's position is unchanged that the Strike is an Unfair [Labor] Practice Strike." (GCX 72) Ienuso explained that the strike is an unfair labor practice strike, in part, because of the "false impasse" and Respondent's implementation of its bargaining proposal. (Tr. 147)

As of the date of the hearing, Respondent had reinstated only two Unit employees. (Tr. 65-66; see GCX 15-17)

III. ARGUMENT

A. Respondent Violated Section 8(a)(1) of the Act by Threatening to Implement its Bargaining Proposal

In his decision, the ALJ dismissed the General Counsel's allegation that Respondent's May 25 letter was a threat to implement its final offer without first bargaining to impasse. (ALJD 12) Instead, the ALJ found that "Because the parties reached a lawful impasse prior to

the Respondent's announcement of its intent to implement its final offer and the actual implementation of its final offer, I find the announcement of intent to implement and the subsequent implementation are therefore not violative of the Act, as alleged. (ALJD 12) However, for the reasons set forth in Section III(C)(1) *infra*, the parties were not at a lawful impasse.

Unit employees learned of Respondent's threat to implement its final proposal within days of Respondent sending its May 25 letter to the Union. Martinez and Martinez, Jr., told Unit employees on June 3 that Respondent was implementing its proposal and was refusing to bargain. The Board has found that an employer damages a union's bargaining authority, in violation of Section 8(a)(1), "merely by the threat to implement, as such threat emphasizes to employees that there is no necessity for a collective bargaining agent." *Eagle Transport Corp.*, 2002 WL 1011733, n.12 (May 15, 2002) (citing *ABC Automotive Products Corp.*, 307 NLRB 248 (1992) (finding employer's letter to the Union stating, in part, that it was making its final offer and that "all contributions to the Union Health Fund will terminate" to be announcement of implementation of a unilateral change in violation of Section 8(a)(1) and (5) where no impasse was reached in bargaining); see also *J. Josephson, Inc.*, 287 NLRB 1188, 1190 (1988)). In *Titan Tire Cop.*, 333 NLRB 1156 (2001) the Board upheld the administrative law judge's finding that an employer's unilateral implementation of its final offer, and "prior threat to do so," violated Section 8(a)(1) and (5) of the Act. Likewise, here, Respondent has unlawfully implemented its bargaining proposal, following its threat to do so.

Accordingly, it is respectfully submitted that the record supports a finding that on May 25, Respondent threatened to implement its final offer without bargaining to impasse in violation of Section 8(a)(1) of the Act.

B. Respondent's Threat to Permanently Replace Unfair Labor Practice Strikers Violates Section 8(a)(1) of the Act

The ALJ erroneously found that the Unit employees were engaged in an economic strike and therefore dismissed the allegation that Respondent unlawfully threatened to permanently replace its striking employees. (ALJD 13) Contrary to the findings of the ALJ, and as explained in Section III(D)(1) *infra,* the record supports a finding that Unit employees were engaged in an unfair labor practice strike and that the sign Respondent posted on June 28, a week after the unfair labor practice strike began, violated Section 8(a)(1) of the Act.

Informing employees that they will be permanently replaced if they "strike" is an unlawful threat of termination, particularly when it is made at a time where the employer has not yet hired any permanent replacements.[8] *Noel Corp.,* 315 NLRB 905, 908 (1994) (the Board viewed the terms "you will be permanently replaced" and "the company has hired permanent replacements" as reasonably conveying the same message and constitute an unlawful threat of termination when made at a time when no replacements have actually been hired.) See also *Unifirst Corp.,* 335 NLRB 707, 707 (2001).

In this case, when Respondent posted the sign announcing the number of striker replacement applications received, the employees were engaged in an unfair labor practice strike. The sign is a threat to striking employees that they will be permanently replaced, a threat which is confirmed a week later when Respondent hired a full complement of permanent replacements. Thus, the sign unlawfully threatens striking employee with the possibility they will be permanently replaced in violation of Section 8(a)(1) of the Act. See, e.g., *Trading Port, Inc.,* 219 NLRB 298 (1975) (finding Respondent violated Section 8(a)(1)

[8] Respondent did not inform the Union until July 15 that it had hired a full complement of replacement workers, as of July 5.

in letters threatening to permanently replace workers engaged in an unfair labor practice strike if they did not return to work by a certain date). Even an employer's mere statement of the right to replace strikers, under certain circumstances, may be unlawful. *Sygma Network Corp.*, 317 NLRB 411 (1995) (letter stating "We have the legal right to hire permanent replacements for employees who strike over contract demands" violated Section 8(a)(1)). Accordingly, the General Counsel asks that the Board find that Respondent violated Section 8(a)(1) of the Act as alleged.

C. Respondent Violated Section 8(a)(1) and (5) of the Act

1. Respondent Failed to Bargain to a Good-Faith Impasse

In his decision, the ALJ dismissed the General Counsel's allegations that, during bargaining, Respondent (a) declared an impasse in negotiations; (b) its intent to implement its bargaining proposal; (c) implemented its bargaining proposal; and (d) increased the amount charged to Unit employees for health insurance premiums, without first bargaining with the Union to a good-faith impasse and at a time when no overall good faith impasse had been reached on bargaining for a success or agreement. (ALJD 12) Rather, the ALJ erroneously found that after Respondent presented its last and final offer, "the Union not only had nothing further to propose but was also insistent that there would be no agreement unless the Respondent changed its last and final offer. Thus it is significant that on May 29, 2011, the Union's secretary-treasurer, Andy Marshall, told Leffler and Chastain that there would be no new contract unless the Respondent changed its position on medical insurance[.]" (ALJD 12)

First, the meeting with Andy Marshall, at which he made clear that the Union was still willing to move, occurred on May 9, 2011, before Unit employees voted May 20 on

Respondent's last and final offer. (See Tr. 115, 313; GCX 52) Accordingly, the record supports a finding, contrary to the ALJD, that this meeting occurred on May 9.

Second, there is nothing in the record indicating that Marshall said "there would be no new contract unless the Respondent changed its position on medical insurance." The testimony regarding the meeting with Marshall centered on Marshall saying the Union was not going to approve anything that reduces the net paycheck of Unit employees. (See, e.g., Tr. 115-117; 313-316; 328) Further, the Union's words and actions after the May 20 vote belie any notion that the parties were at impasse. Specifically, Ienuso responded to Leffler's May 25 letter on June 1, refuting any assertion that the Union would not move any further. (ALJD 7; GCX 55) Ienuso rejected Respondent's claim of "impasse" as "false." (ALJD 7; GCX 55) Ienuso made clear that the Union wanted to continue negotiations. He wrote that while Respondent stated it was "not moving any further. The Union did not make any such statement." (GCX 55) Ienuso ended the letter by writing "The Union has repeatedly told the Federal Mediator it is willing to resume negotiations. That was after the membership on May 20th rejected the Company's firm and final by one hundred per cent (100%)." (GCX 55)

The Union arrived at the June 2 bargaining session, which it requested, prepared to present a new offer to Respondent. The Union's offer, emailed to Respondent later that day, again moved towards Respondent's position on the health insurance by moving the ten-year benefit to twelve years. Thus, the record shows that the parties were not at a good faith impasse and that Respondent was not privileged to implement it bargaining proposal.

Section 8(d) of the Act states that it is the "mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." "The general rule is

that when parties are engaged in negotiations for a new agreement, an employer's obligation to refrain from unilateral changes encompasses a duty to refrain from implementation unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *Pleasantville Nursing Home*, 335 NLRB 961, 962 (2001) (citing *Bottom Line Enterprises*, 302 NLRB 373 (1991)).

Though often overlooked, the fact is that the threshold for finding that an actual impasse has been reached is extremely high. In fact, the Board directs that an impasse does not occur until such time that "the parties are warranted in assuming that further bargaining would be futile. . . . 'Both parties must believe that they are at the end of their rope.'" *A.M.F. Bowling Co*., 314 NLRB 969, 978 (1994) enf. denied 63 F.3d 1283 (9th Cir. 1995) (quoting *PRC Recording Co*., 280 NLRB 615 (1986)). An impasse does not exist unless there is "no realistic possibility that continuation of discussions at that time would have been fruitful." *AFTRA v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968). The burden is on the party asserting impasse, and the Board does not lightly find an impasse. *CJC Holdings, Inc.*, 320 NLRB 1041, 1044 (1996); *Sacramento Union*, 291 NLRB 552 (1988); *Laurel Bay Health & Rehabilitation Ctr*., 353 NLRB 232 (2008), reaffirmed and incorporated by reference 356 NLRB No. 3 (2010), (citing *North Star Steel Co.*, 305 NLRB 45 (1991), enfd. 974 F.2d 68 (8th Cir. 1992)). In *Laurel Bay*, the Board found that the respondent failed to carry its burden of showing a bona fide impasse over health insurance because the record showed that "the parties had agreed to meet again, that the Union would be preparing counterproposals, and that there was at least professed flexibility on health insurance alternatives." *Laurel Bay*, 353 NLRB 232. Thus, even though "the Respondent might have reasonably doubted the

sincerity of the Union's stated willingness to move from its Benefit Fund proposals, it did not test that doubt." Id.

Among the factors the Board considers in determining whether an impasse exists are "the bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement [and] the contemporaneous understanding of the parties as to the state of negotiations." *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1969) enfd. 395 F.2d 622 (D.C. Cir. 1968). An impasse does not exist where one party remains flexible on certain issues and indicates its willingness to compromise further. *Grinnell Fire Protection*, 328 NLRB at 585-586. See also *CJC Holdings, Inc.*, 320 NLRB at 1044 ("a genuine impasse is synonymous with deadlock. . . . neither party is willing to move from its respective position.")

In this case, the one decision cited by the ALJ in support of his finding of impasse, *California Pacific Medical Center*, 356 NLRB No. 159 (2011), is readily distinguishable. As the ALJ in *California Pacific* noted, after the employer declared impasse, "neither party, at that point, had anything further to offer. . . . Nor did the Union attempt to break the impasse by subsequent 'concrete' offers of compromise regarding wages or healthcare.'" Id. at slip op. 11 (quoting *ACF Industries*, 347 NLRB 1040, 1042 fn. 4 (2006)) (other citations omitted). In *California Pacific*, the Board took note of the fact of a bargaining "hiatus of some 10 months" and the fact that the union did not make a counterproposal on wages "until some 4 months . . . after the Respondent . . . had put the Union on notice of the Respondent's last, best, and final offer[.]" Id. at slip op. 6. Here, the facts are far different. The Union denied the parties were ever at impasse and in fact made immediate, subsequent offers on the issue of the 10-year health insurance benefit. The Union's first proposal was made within a week of

Respondent's claim of impasse, when the Union proposed increasing the ten-year benefit to twelve years. Then, a month later, the Union agreed to exclude any new hires from the ten-year benefit altogether and agreed to Respondent's proposed schedule of health insurance. Thus, it is clear -- not only by Marshall's assurances, but also by the Union's conduct and concessions -- that the Union was not "at the end of [its] rope." See *Newcor Bay City*, 345 NLRB 1229, 1237-38 (2005).

Also, regarding the parties' bargaining history, Respondent and the Union successfully negotiated at least two prior collective-bargaining agreements, and there is no reason to doubt they could have negotiated a successor agreement had Respondent not prematurely pulled the plug. During the current negotiations, the parties had met seven times over a two-and-a-half month period when, as if out of the blue, Respondent abruptly presented a final offer on March 1. Unit members rejected that offer on March 15, and the parties resumed bargaining. The Union presented a new proposal on March 29 and Respondent countered that proposal on April 11; however, that April 11 proposal became Respondent's second firm and final offer on April 28, after a heated bargaining session. Respondent presented its second firm and final offer despite the fact that the Union's proposals continued to show movement towards Respondent's demands.

Unit employees rejected Respondent's second final offer on May 20, and the Union made clear to Respondent that it wanted to continue bargaining and had more proposals to offer. A mere ten bargaining sessions over a five-and-a-half month period does not amount to a lengthy period of negotiations, especially when both parties were regularly making proposals. Moreover, for about one third of the bargaining sessions, only one person showed

up to represent Respondent, leaving the impression with the Union's bargaining committee that issues could not be decided unless both owners were present.

From the outset, Respondent's bargaining stance was rigid. In fact, it can fairly be said that Respondent entered bargaining with a closed mind, having already concluded that it would get certain, particular terms no matter what. Respondent's owner, Leffler, testified that his intent from the start of negotiations was to "eliminate the free dependent insurance and get the Unit employees on parity with the rest of our employees and with our competition in the market," indicating that Respondent never intended to compromise on this issue. (Tr. 305-306) The Board has found that impasse does not exist where, as here, the employer is determined to unilaterally implement its proposal regardless of the state of negotiations. *Newcor Bay City*, 345 NLRB at 1237.

The Union's offers on health insurance demonstrate that it was clearly willing to compromise. While it may appear the parties were initially far apart on this issue, it is evident that the Union was continually moving toward Respondent's ultimate goal of eliminating the ten-year benefit and having Unit employees pay the same amount for premiums that Respondent's other employees pay. The Union initially proposed making the ten-year benefit effective after three years of service. The Union eventually dropped this position, and later proposed starting this benefit after twelve years of service. Finally, the Union proposed eliminating the benefit altogether for employees hired after ratification. Moreover, the Union made another dramatic move on health insurance premiums on July 14 when it accepted Respondent's proposed schedule of health insurance premiums in its final offer.

The Union has never stated that the parties were at impasse, and so informed Respondent in its June 1 letter and at the June 2 meeting when the Union asked Respondent

what it would take to stop implementation. The Union repeatedly demonstrated its willingness to compromise both before and after Respondent declared impasse. The Union had prepared a counterproposal for the April 28 session, it arranged a meeting with Respondent's bargaining team and Marshall in early May--after Respondent presented its second final offer--and on May 20, when they voted down Respondent's second offer, Unit employees discussed what numbers they could live with on health care premiums for when the parties resumed bargaining. Then, in June and July, the Union continued to make significant movements in bargaining, finally proposing to eliminate the ten-year benefit for all new hires and to accept Respondent's schedule of health insurance premiums. The July 14 proposal was a significant compromise on the Union's part in light of the fact that two of the eleven employees have worked for Respondent over 30 years, and two others have worked for Respondent more than 20 years, which means over a third of the Unit may be approaching retirement (in fact, one Unit employee, Clark, retired in December 2011). (Tr. 332)

Finally, the weight of the evidence demonstrates there was no "contemporaneous understanding" between the parties that they were at impasse. *Taft Broadcasting*, 163 NLRB at 478. The Union expressly informed Respondent by letter on June 1 that there was no impasse; the Union requested to continue bargaining and the parties agreed to meet again on June 2 with the federal mediator present; the Union asked Respondent what it would take to stop implementation, indicating that it was willing to consider other proposals by Respondent; and the Union presented counter proposals on June 2 and again on July 14. While Respondent may not think these moves were significant, that is not the requirement for a finding of impasse. See *Cotter & Co.*, 331 NLRB 787, 788 (2000) (determining no impasse

existed because there had been movement on important issues and the union demonstrated flexibility on those issues).

Even if the Board concludes the parties were at an impasse on May 25, that impasse was broken on June 2 when the Union presented a new bargaining proposal. As the Court of Appeals stated in enforcing the Board's decision in *Taft Broadcasting*, it is a "fundamental tenet of the Act that even parties who seem to be in implacable conflict may, by meeting and discussion, forge first small links and then strong bonds of agreement." *AFTRA*, 395 F.2d at 628. "Anything that creates a new possibility of fruitful discussion (even if it does not create a likelihood of agreement) breaks an impasse … [including] bargaining concessions implied or explicit." *PRC Recording*, 280 NLRB at 636. Even Respondent made clear it did not truly believe the parties were at impasse because on June 2 Leffler told the Union's bargaining team "we will continue to entertain any offers you send us, email them to me or send them to me." (Tr. 257) Later that same day Ienuso emailed Respondent its counterproposal, which contained an explicit bargaining concession by raising the ten-year benefit to twelve years. The Union presented additional bargaining concessions on July 14 when it proposed eliminating the ten-year benefit for new hires, accepted Respondent's schedule of health insurance premiums and proposed that all employees pay their own health insurance.

Respondent recognized -- and thus admits -- that the Union was moving toward its position in its email on July 19 when Leffler wrote, "We appreciate the movement the Union has made on employee-only coverage." (GCX 64) Therefore, any impasse that may have existed as of May 25 -- and to be clear, General Counsel contends that no impasse was reached at any time in this case -- was broken on June 2. Under these circumstances, any claim that the parties were at impasse is unsupported by the facts and the law.

Accordingly, it is respectfully submitted that the record supports a finding by the Board that Respondent has failed to carry its burden of demonstrating impasse, has failed and refused to bargain collectively and in good faith within the meaning of Section 8(d) of the Act, and has thereby violated Section 8(a)(1) and (5) of the Act.

2. Respondent's Unilateral Changes Violate Section 8(a)(1) and (5) of the Act

Because the parties had not reached impasse in bargaining, the ALJ erred in finding that Respondent's subsequent implementation of its bargaining proposal did not violate the Act. (ALJD 12) In situations were no impasse exists, an employer is not entitled to unilaterally change its employees' terms and conditions of employment. "[A]n employer violates Section 8(a)(5) and (1) of the Act by implementing its final bargaining proposals without reaching a bargaining impasse." *Laurel Bay*, 353 NLRB 244 (citing *Cotter & Co.*, 331 NLRB 787, 787-788 (2000)). There are two exceptions to this rule, to wit, "when a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining, and when economic exigencies compel prompt actions." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) enfd. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994). Here, neither exception applies.

More specifically, Respondent, which has the burden here of demonstrating impasse, presented no evidence that its unilateral implementation was justified either by any purported effort on the part of the Union in "continually avoiding or delaying bargaining," or by "economic exigencies." After Respondent submitted its second firm and final offer on April 28, the Union arranged a meeting between the parties and Union Secretary-Treasurer Marshall on May 9. At that meeting, Marshall made clear that the Union was open to a wide

range of bargaining options, so long as employees' take home pay was not reduced. Obviously, this pronouncement, offered in part to make clear to Respondent that the Union was ready, willing, and able to be creative in addressing Respondent's goals in terms of healthcare, demonstrates that the Union was serious about doing what it would take to reach an agreement.

Moreover, after employees rejected Respondent's second firm and final offer on May 20, the Union again requested to bargain. The parties did bargain on June 2 and again on July 14, at the Union's request. Again, such evidence demonstrates that the Union has not avoided or delayed bargaining.

In addition, Respondent has presented no economic exigencies which would have privileged its implementation of its final offer. In fact, Respondent has expressly stated that, "We are not saying and we have never said we can't afford anything the Union has proposed." (GCX 29)

"It is well settled that the real harm in an employer's unilateral implementation of terms and conditions of employment is to the Union's status as bargaining representative, in effect undermining the Union in the eyes of the employees." *Page Litho, Inc.*, 311 NLRB 881, 881 (1993) (citing *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 430 fn. 15 (1967)). Here, as the Board found in *Page Litho, Inc.,* "the damage to the Union's authority as bargaining representative was accomplished by the threat and the actual implementation of the threat to set terms and conditions of employment unilaterally, thereby emphasizing to employees that there was no necessity for a collective-bargaining agreement." Id. *(*citing *J. Josephson, Inc.*, 287 NLRB 1188, 1190 (1988)).

Based on the foregoing, General Counsel respectfully urges the Board to find that Respondent implemented its final proposal when an overall impasse had not been reached, and that Respondent's unilateral changes violated Section 8(a)(1) and (5) of the Act.

D. Respondent's Refusal to Reinstate Employees Upon Their Unconditional Offer to Return to Work Violates Section 8(a)(1) and (5) of the Act

1. The Strike Was and Is an Unfair Labor Practice Strike

The ALJ erred in failing to find that Unit employees were engaged in an unfair labor practice strike beginning June 21. (ALJD 13) In deciding whether a strike is an unfair labor practice strike, the Board seeks to determine whether the employer's "unlawful conduct was a factor (not necessarily the sole or predominant one)" causing or prolonging the strike. *C-Line Express*, 292 NLRB 638, 639 (1989). Stated otherwise, if the unfair labor practices were a "contributing cause" of the strike, or one of the causes of the strike, then, as a matter of law, an unfair labor practice strike exists. *Pennant Foods Co.*, 347 NLRB 460, 469 (2006); *R & H Coal Co.*, 309 NLRB 28 (1992); *Boydston Electric, Inc.*, 331 NLRB 450 (2000); T*eamsters Local Union No. 515*, 906 F.2d 719, 723 (D.C. Cir. 1990). In *Golden Stevedoring Co.*, 335 NLRB 410, 411 (2001) the Board explained:

> It is well established that a work stoppage is considered an unfair labor practice strike if it is motivated, at least in part, by the employer's unfair labor practices, even if economic reasons for the strike were more important than the unfair labor practice activity. It is not sufficient, however, merely to show that the unfair labor practices preceded the strike. Rather, there must be a causal connection between the two events.

In determining whether a causal connection between the strike and the preceding unfair labor practices exists, the Board looks to the strikers' "state of mind." *C-Line Express*, 292 NLRB at 639. When it is reasonable to infer from the record that an employer's unlawful conduct played a part in the decision of employees to strike, the strike is an unfair labor

practice strike. *Child Development Council of Northeastern Pennsylvania*, 316 NLRB 1145 n.5 (1995) (citing *NLRB v. Cast Optics Corp.*, 458 F.2d 398, 407 (3d Cir. 1972) (as long as an unfair labor practice has "anything to do with" causing the strike, it will be considered an unfair labor practice strike). "In making this determination, the Board does not calculate the relative severity of the unfair labor practices." *Pennant Foods*, 347 NLRB at 469. The burden is on the employer to show that the strike would have occurred even if it had not committed unfair labor practices. *Larand Leisurelies, Inc. v. NLRB,* 523 F.2d 814, 820 (6th Cir. 1975).

In the instant case, it is evident that Respondent's unfair labor practices contributed to -- and actually caused -- the June 21 strike. Ienuso explained at trial that the strike is an unfair labor practice strike because of, in part, the "false impasse, [and] the implementation" of Respondent's final bargaining proposal. (Tr. 147) Numerous other factors support a finding that employees were engaged in an unfair labor practice strike. The day employees walked out, on June 3, they met and discussed Respondent's unfair labor practices, including Respondent's premature declaration of impasse and unlawful threat to implement its final proposal. As Martinez testified, he told employees that Respondent was refusing to negotiate and "the contract was being forced on" Unit employees. (Tr. 284) The day the longer-term strike began, June 21, Ienuso told Unit employees "you're out here because the company refuses to give you a contract and negotiate[] in good faith." (Tr. 276) Martinez, Jr., told other employees on the strike line that the reason for the strike was because "we had a contract forced on us that we didn't appreciate--you know, we don't care for and that the company stopped negotiating, that's why we're out here." (Tr. 294) Employees also perceived the sign Respondent posted about applications it received for replacement workers

to be a threat to get rid of them (Tr. 277, 290), and Respondent confirmed that threat a week later when it hired a full complement of permanent replacement employees. Finally, the picket signs carried by the Union and employees reflect that they were striking because of Respondent's unfair labor practices. (Tr. 276) The picket signs prominently declared "Redburn" and "Unfair." (Tr. 136-137; see GCX 59-61) As the Board found in *Page Litho, Inc*., 311 NLRB 881, 891 (1993), the fact that the union in that case consistently took the position the strikers were unfair labor practice strikers supported such a finding. See also *R&H Coal Co.*, 309 NLRB 28, 28 (1992) (picket signs saying "unfair labor practice strike" is a factor supporting a finding that the strike was protesting employer's unfair labor practices). Based on such a substantial record, it is evident that employees were engaged in an unfair labor practice strike because Respondent unlawfully declared an impasse, implemented its bargaining proposal, and threatened to, and then permanently, replaced them.

In addition, the record establishes that the Union and employees waited to see if Respondent went ahead with its threat to implement its final proposal before going out on strike. Once they confirmed that Respondent had unlawfully and unilaterally implemented its final proposal, they went out on strike. Because Respondent's multiple unfair labor practices played heavily into the decision of employees to strike, the strike, as a matter of law, is an unfair labor practice strike.

The primary cause of the strike was Respondent's unlawful unilateral implementation of its final proposal. It is also reasonable to find that Respondent's other unlawful conduct in declaring impasse prematurely played a significant part in the decision of employees to strike. *Child Development Council of Northeastern Pennsylvania*, 316 NLRB at n. 5. Finally, Respondent presented no evidence at trial to show that the strike would have occurred even if

it had not committed unfair labor practices. See *Larand Leisurelies, Inc. v. NLRB,* 523 at 820. Therefore, it is respectfully submitted that the record as a whole supports a finding that employees were engaged in an unfair labor practice strike.

2. Respondent Violated Section 8(a)(1) and (3) by Failing to Reinstate Striking Employees

Because he failed to find that the Unit employees were engaged in an unfair labor practice strike, the ALJ dismissed General Counsel's allegations that Respondent unlawfully failed and refused to reinstate the named Unit employees upon their unconditional offer to return to work. (ALJD 13-14)

On September 23, the Union presented Respondent with an unconditional offer to return to work on behalf of the employees engaged in an unfair labor practice strike. "Unlike the obligation of an employer to an economic striker, upon an unconditional offer to return to work, an employer must immediately reinstate an unfair labor practice striker." *Post Tension of Nevada*, 352 NLRB 1153, 1163 (2008) (citing *Sproule Construction Co.*, 350 NLRB 774 fn. 2 (2007)). See also *Orit Corp.*, 294 NLRB 695, 698 (1989) ("The law is very clear respecting the obligations and responsibilities of an employer upon the conclusion of an unfair labor practice strike. It is obligated immediately to reinstate unfair labor practice strikers who make an unconditional offer to return to work and must reinstate them either to their former jobs or, if for any reason the jobs no longer exist, to substantially equivalent positions.") (citation omitted). The employees must be reinstated, "even if it means discharging persons who were employed as strike replacements in order to make room for the return of the strikers; since the employer is at fault for interfering with protected rights of the employees, it must bear the consequences of having violated the Act." Id. (citing *Mastro Plastics v. NLRB,*

350 U.S. 270 (1956); *NLRB v. Cast Optics Corp*., 458 F.2d 398 (3d Cir. 1972), cert. denied 409 U.S. 850 (1972); *NLRB v. Blu-Fountain Manor*, 785 F.2d 195 (7th Cir. 1986)).

As of the hearing, Respondent has returned only two of the eleven striking employees to work, though even those resulted from the fact that Respondent had openings at the time. By failing to immediately return all striking employees to work once the unconditional offer was made, it is respectfully requested that the Board find that Respondent violated Section 8(a)(1) and (3) of the Act.

V. CONCLUSION

Based upon the foregoing, the General Counsel respectfully requests that the Board reverse the ALJ's findings and conclusions set forth above and find that Respondent violated Section 8(a)(1), (3), and (5) of the Act as delineated herein.

Dated at Phoenix, Arizona this 21st day of May 2012.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE, Cases 28-CA-023527, et. al., as served by E-Gov, E-Filing, E-Mail, and regular mail on this 21st day of May 2012, on the following:

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