UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CAREY SALT COMPANY, A SUBSIDIARY OF COMPASS MINERALS INTERNATIONAL, INC. and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION AND LOCAL UNION 14425	Case Nos. 15-CA-020035 15-CA-061694

RESPONDENT'S EXCEPTIONS TO THE
DECISION OF ADMINISTRATIVE LAW JUDGE

The allegations herein were heard before Judge Keltner W. Locke on November 14-15, 2011 in New Iberia, Louisiana. These Exceptions are to the Decision of Judge Locke subsequently issued on May 16, 2012. Respondent will sometimes be referenced as the "Company," Charging Party as the "Union," and Counsel for Acting General Counsel as "General Counsel."[1]

Summary of Respondent's Position

Upon reaching what it believed to be a lawful bargaining impasse on March 31, 2010, the Company announced that it was implementing the terms of its final offer, which included an immediate, across-the-board pay increase, as well as numerous proposals for increased work efficiencies that were opposed by the Union. The Company's pending final offer at that point also included proposals for a second and third year across-the-board pay increase to be effective

[1] During the time period when many of the operative facts in this case arose, there was a collateral Section 10(j) proceeding pending. On May 18, 2011, United States District Judge Rebecca Doherty denied the NLRB's petition for relief. *McKinney v. Carey Salt Company*, Civil Action No. 11-0287 (W.D. La. 2011).

April 1, 2011 and April 1, 2012, respectively. It is agreed that there was no discussion between the parties at or around the time of the impasse implementation as to its effect on those proposed "out-year" increases.

The Union filed unfair labor practice charges challenging the Company's implementation and commenced what it claimed to be an unfair labor practice strike. The parties resumed bargaining, and, later, the Union demanded to know exactly what the Company had implemented, to which the Company responded with a written document dated June 27, 2010, which incorporated the efficiency proposals, as well as a wage schedule reflecting the April 1, 2010 wage increase. (GC 50). There was never any reference to or discussion of any implementation of the "out-year" increases.

The Company's belief as of the time of implementation was that it could not, by law, implement across the board changes in wages or benefits affecting future years, as its right to put those changes into effect would depend on future bargaining between the parties, and, more particularly, whether the parties would be at impasse at such future time. The employer's understanding was supported by Board law at that time (and all logic as of this time) because it makes no sense to allow an employer to put "into effect" without further bargaining, changes in future years merely because of a past bargaining impasse. Such would go far beyond the existing limited right of an employer to change the current status quo upon impasse, which right was been held to further rather than retard the bargaining process. (If General Counsel is correct here, any well-advised employer will simply "implement" multiple years of changes the moment of a bargaining impasse and be done with bargaining for however many years it chooses.)[2]

[2] The employer believes it would have been an unfair labor practice for it to have claimed that "out-year" changes in wages and benefits in 2011 and 2012 were effectively implemented prospectively back in 2010. Further, it inserted a provision in the Recognition clause of the Operating Procedures expressly recognizing that future changes would need to be bargained.

The second major area of dispute with the Judge's analysis is his failure to understand and report in his Decision that the Company's concern with the Section 10(j) case was not its mere filing and existence, but, rather, that the injunctive remedy alternatively being requested in that proceeding, if granted, would have resulted in the Company possibly being subject to contempt proceedings had it given a 2011 wage increase. This is because the Board had submitted, with Union approval, a request to the District Court for an injunctive order cancelling the 2010 wage increase along with all other items unilaterally implemented by the Company. Had the District Court entered such an Order, and, in compliance, had the Company reduced wages by 2.5%, it hardly could have then immediately increased them by 2.5%, especially when the Board and Union were claiming that any such increase would have been a continuing violation of Section 8(a)(5).

As to its various communications with employees, the Company did no more than try to convey and explain what was going on and how the requested remedy in the Section 10(j) case had put it in a bind as to what could and could not be done. This was nothing more than an exercise of its free speech rights.

EXCEPTION 1

The ALJ erroneously finds that Respondent implemented "out-year" wage increases at the point of a bargaining impasse in March 2010.

> "I conclude that Respondent's implementation of its final proposal [in March 2010] bound it to grant the 2.5 percent pay increase on March 25, 2011."
>
> ALJ p.5, lines 25-26

(*See* second paragraph of Recognition clause at p. 2 of GC 50). The required notice was given once the Section 10(j) case was resolved, and, at that time, the Union acquiesced in the grant of the increase proposed.

This finding and conclusion, to the effect that an employer upon a momentary impasse, can place into effect multiple years of future changes in wage rates, to take effect whether or not the parties remain at impasse at such future times, is inconsistent, indeed antithetical, to all reasonable principles of collective bargaining.

At the time of the critical events in question here, the applicable Board principle of law was set forth in *Comau, Inc.*, 356 NLRB No. 21 (Nov. 5, 2010). In *Comau*, the Board determined that an employer could not implement a previously "implemented" prospective change unless and until it had reached a "point of no return" in the processing of such change. There, the employer had announced an implementation of certain health insurance changes to take effect four months later. When the appointed time arrived, however, the parties were no longer at impasse; and the Board concluded that the employer, therefore, could no longer unilaterally proceed with the implementation.

The reviewing appeals court reversed the Board. *Comau, Inc. v. NLRB*, _ F.3rd _ No. 10-1406 (D.C. Cir. 2012), holding that the employer should have been allowed to proceed with the implementation of the health insurance changes.

Respondent here submits that this Board needs to more carefully analyze the underlying issue and set forth a principle whereby employers will know what can and cannot be implemented based upon an impasse occurring at an earlier date but no longer in place at the time of change in question. Here, Respondent's view was (and is) that multiple future years of across-the-board wage increases (or decreases) cannot properly be "implemented" as part of an implementation at impasse, and to allow such would undermine the bargaining process and give employers far too much power and potential leverage. In particular, one can only imagine the mischief to the process if an employer were to use a momentary impasse to, effectively, set terms

and conditions of employment for as many years as it had decided to propose. Consider a five year offer with increases or decreases of 5% per year proposed in 2012 and "implemented" at impasse. What great leverage the employer thereafter would have knowing that each year, with no need for any further bargaining impasse, it could simply put into effect the yearly 5% increase or decrease. Of course, wage increases/decreases are just one of the infinite number of subjects the employer could effectively control for years to come based on a one time impasse.

An impasse is but a temporary suspension of a bargaining obligation, as the Board has explained:

> "An impasse is only a temporary "deadlock" or "hiatus" in negotiations which in almost all cases is eventually broken, through either a change of mind or the application of economic force. Indeed, an impasse may be brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process. Suspension of the process as a result of an impasse may provide time for reflection and a cooling of tempers; it may be used to demonstrate the depth of a party's commitment to a position taken in the bargaining; or it may increase economic pressure on one or both sides, and thus increase the desire for agreement. For example, impasse permits the employer to place into effect those [changes] it has theretofore offered, an action (or the possibility of it) which may substantially shift the bargaining positions of the parties. In these and other possible uses of impasse as a bargaining tactic, the emphasis is toward achieving agreement rather than causing a permanent disruption of the relation."

Charles D. Bonanno Linen Service, Inc., 243 NLRB 1093, 1094 (1979).

The foregoing principles were quoted with approval and affirmed by the Supreme Court in *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 412 (1981) and later reaffirmed by the Board in *McClatchey Newspapers*, 321 NLRB 1386, 1389 (1996).

It makes sense to allow an employer to proceed with an implementation post-impasse in certain circumstances, for example where preparatory steps need be taken such as with health insurance changes. A wage step progression could be another, where individuals move from one

step to another on a particular schedule throughout the year. But an across-the-board wage increase or decrease in future years goes far beyond the need to make an immediate change in the status quo and should not be permitted; and the Company here was careful never to suggest it was, or could be, done.

The Judge acknowledged that, in response to a Union request, the Company provided a comprehensive document setting forth the terms that had been implemented and that such terms did not include a second or third year increase. (GC 50; ALJ p. 10, line 31 to p. 11, line 4). The Judge, however, seized upon the Company's statement that the document set forth what is now in effect (his emphasis) to argue that what might be in effect in the future was something different. Yet, what was in effect as of that time is precisely the relevant question in determining whether a unilateral implementation comes within the rationale for allowing an employer to take unilateral action. If the future wage schedule increases were in effect, *i.e.*, implemented, promised or scheduled, they should and would have been set forth in the writing.

The ALJ's discussion and reliance on the Company's internal budgeting process for 2011 proves nothing as to what had or had not been implemented. (ALJ p. 11, lines 14-15). A budget is a budget, not a promise or requirement, and budgets change. There were a host of possible circumstances that would have allowed the budgeted amount to be spent; and there were some that would have caused the amount budgeted to be changed. The only thing the budget establishes is that at the time of its making the Company was planning for a possible 2.5% increase as of April 1, 2011, something with which Respondent has never disagreed. But planning for an increase is not the same as having promised or implemented one.

The Board, of course, has held that once an employer promises a future non-discretionary wage increase, the future increase becomes an existing term and condition of employment that

cannot be cancelled absent a bargaining impasse or union consent. *E.g., Liberty Telephone & Communications,* 204 NLRB 317, 317-318 (1973) (employer's action in announcing wage increase, subject to IRS approval, created a reasonable expectation of an increase to take place upon a certainty); *More Truck Lines*, 336 NLRB 772, 772 (2001), enfd. 324 F.3d 735, 739 (D.C. Cir. 2003) (once promised, future nondiscretionary wage increases are existing terms and conditions of employment). However, these cases were not "impasse implementation" cases, and the only two cases squarely addressing out-year pay increases as a part of a Company's final offer are *Johnstown America Corp.*, 6-CA-33127, and *Durez Corp.*, 3-CA-25193.

In *Durez*, the employer implemented its final proposal to end a lockout. Prior to returning employees to work, the employer held morning and afternoon meetings with employees to discuss their terms and conditions of employment upon their return. Those terms and conditions of employment corresponded with the proposals and tentative agreements contained in the Company's implemented final offer. During the meetings, the employer used an overhead slide projector to assist in the presentation of employees terms and conditions of employment. Among the slides was one containing "descriptions of the [e]mployer's wage rates for the next five years." "Employer representatives read verbatim from the slides, and passed out hardcopy versions of the overhead slide information." Over the next several months, the parties continued negotiations, but out-year pay increases were not discussed during the meetings. Based on these facts, the Division of Advice agreed with the Region:

> that the Employer promised [the out-year wage increases] to the employees on January 9, and that they became a reasonable expectancy of the employment relationship. Accordingly, the Employer's refusal to implement them violated Section 8(a)(5).

The Division of Advice issued a similar opinion in *Johnstown America Corp.*, Case 6-CA-33127, Advice Memorandum dated May 28, 2003, accord *Johnstown America Corp.*, JD-

135-03, Case 6-CA-33127, JD 135-03, 2003 WL 22945711 (NLRB Div. of Judges Dec. 10, 2003). There, under very similar circumstances, it advised:

> By letter dated January 15, the Employer notified the Union that it was clear to the Employer that the parties were at impasse and that the Employer intended to implement its December 18 final proposal. And by letter dated January 16, the Employer notified the employees that it intended to 'implement the terms of the Company's final contract proposal on Monday, January 21, 2002.' The letter stated, 'the implemented five-year proposal contains an immediate average hourly wage increase of fifty-five cents and hourly wage increases of forty cents in the second, third and fourth year and forty-five cents in the final year.' An attachment to the letter contained the terms that the Employer planned to implement that included a summary setting forth the annual wage increase schedule, with the specific amounts to be paid for each of the five years of the proposed agreement.
>
> …
>
> We conclude that the Employer violated Section 8(a)(5) and (1) when it unilaterally refused to grant the increase it had previously promised for the second year, thus freezing wages at the level granted for the first year of its proposal. By having promised to grant the schedule of increases included in years two through five of its proposal, the Employer made that schedule part of the employees' existing terms and conditions of employment. The Employer could not thereafter lawfully change the schedule absent the Union's consent or an impasse on an overall agreement.

Id. at *2, 4-5.

The only evidence on the record that the Company ever specifically discussed 2011 or 2012 pay increases with the Union or its employees is testimony from Gary Fuslier, the Union's chief negotiator, indicating that the Company proposed the out-year pay increases for 2011 and 2012 during negotiations. (Tr. 171-172). But that is precisely what is supposed to take place during negotiations; the parties describe their proposals in detail to the other side, which then accepts or rejects those proposals. In this case, the Union rejected the Company's proposal, and the mere fact that the out-year pay increases were discussed during negotiations is insufficient to

make those increases a reasonable expectancy of the employment relationship given the Union's rejection of the Company's proposal.

Nor were the Company's communications with the Union regarding its March 31, 2010 implementation sufficient to rise to the level of a "promise" of out-year pay increases. On March 31 through April 1, 2010, both Victoria Heider and Gord Bull exchanged a series of e-mails with the Union through Fuslier. Those e-mails appear in the record as General Counsel Exhibits 10(a)-(h), and (j)-(l). In several of those e-mails, Heider and Bull indicated to Fuslier that the Company was planning to implement, or had implemented its March 19, 2010 final offer. Nowhere in any of those e-mails, however, do Heider or Bull mention a 2011 pay increase. Rather, they simply reiterated, several times, that the Company was implementing its "final offer." For example:

- At 1:17 p.m. on March 31, 2010, Victoria Heider wrote in pertinent part: "effective with the rejection vote the Company will be implementing the terms of its final offer . . . this means that beginning with this evening's 11:30 shift, the employees will either be working under the terms of a new contract or they will be working under the terms of our implemented proposal. Either way, I hope you will explain to your membership that the wage increases will be taking effect immediately." (GC 10(b)).
- In Heider's 4:08 p.m. e-mail on March 31, 2010, she wrote: "if there is no acceptance within the time you promised us a vote, the Company will proceed as previously indicated to put the proposal into effect." (GC 10(d)).
- At 10:11 p.m. on March 31, 2010, Gord Bull wrote: "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." (GC 10(h)).

- At 9:22 a.m. on April 1, 2010, Heider again generically informed Fuslier that the Company had implemented its "final offer," and requested that Fuslier contact her if he had "any question about the implementation or its terms." (GC 10(j)).

Even the Union's chief negotiator, Gary Fuslier, recognized during the hearing that none of these communications contain any sort of affirmative representation or commitment that the Company was implementing a pay raise in 2011. (Tr. 169). Fuslier also noted that he never had any communications at all with Heider, Bull, or any other Company representative where anyone from the Company indicated to him specifically that a 2011 pay increase was being implemented. (Tr. 169).

Given the Company's generic references to the implementation of its "final offer," and given the complete lack of reference to "out-year" wage increases, or to a "2011 wage increase," in the Company's communications with the Union regarding the March 31, 2010 implementation, there is simply no basis on which to conclude that the Company's communications incorporated out-year increases into its employees terms and conditions of employment, or that it somehow "promised" wage increases beyond the immediately implemented 2.5% increase for 2010.

It should be noted that Heider specifically advised that the Company was not seeking to implement anything that could not be implemented as a matter of law (GC 12(a)) – and the Company's understanding, as well as Board law at that time, was that across-the-board, out-year wage changes could not be implemented at impasse under the law.

Thus, not only did General Counsel fail to show that the Company affirmatively represented that a 2011 or 2012 pay increase was a part of any implementation, the conduct and

communications between the parties confirm that as of June 27, 2010, the only implemented wage rate was the one associated with the 2010 rate contained in the Company's proposals.

The June 27, 2010 Operating Procedures document was not the only such document the Company promulgated subsequent to its March 31, 2010 implementation. The Company also promulgated and distributed operating procedures documents dated May 22, 2010, and August 19, 2010. (R1(b), R2). As with the Operating Procedures document dated June 27, 2010, these documents make clear that the implemented terms and conditions of the Company's various implementations included only a wage rate for 2010, and contain no suggestion that employees are entitled to a wage increase in any subsequent year. (R1(b), p. 15 (including wage rate only for 2010); R2, p. 15 (same)).

Gord Bull testified that the Company used one of its three Operating Procedures documents at all employee orientation meetings and that to his knowledge none of the Company's final proposals was ever distributed. (Tr. 100-104). Bull also testified that at the orientation meetings he attended, the Company never discussed 2011 or 2012 pay rates with employees. (Tr. 102-103). Indeed, not a single one of General Counsel's witnesses identified a single conversation with anyone from the Company about 2011-2012 wage rates, except for the discussion of those proposed rates during bargaining.

EXCEPTION 2

The Judge erroneously found that the Company improperly conditioned bargaining beginning in March 2011. (ALJ p. 21-22). This finding is unsupported by the record, as General Counsel failed to show that the Company "conditioned" bargaining on anything. While Victoria Heider's March 31 e-mail (12:16 p.m.), indicates that the Company would be willing to "immediately address the wage increase issue" raised by the Union (i.e., grant that increase) if the relief sought in the 10(j) proceeding was modified, that e-mail also makes it clear that the

Company was more than willing to meet with the Union to discuss its position in this regard. (GC 8(a), p. 2 (Heider to Tourne: "In the meantime, of course, as the bargaining representative for the unit, we would be pleased to meet with you at the earliest opportunity to discuss any of this.")). Against this backdrop, General Counsel's allegation that the Company impermissibly conditioned bargaining regarding the 2011 pay increase is wholly without merit, and that portion of the Complaint should be dismissed in its entirety.

EXCEPTION 3

The Judge erroneously found that the Company retaliated against its employees for engaging in protected activity (filing the unfair labor practice charges in 15-CA-19704 and 15-CA-19738), by delaying a scheduled wage increase in 2011 from March 25 until May 23. As discussed in detail above, the Company never promised the 2011 pay increase. Nor did the Company otherwise implement or incorporate that increase into its employees' terms and conditions of employment.[3] Accordingly, the Company did not delay the implementation of any benefit, because the Company's employees were not entitled to the identified benefit from the outset.

The Company did budget, internally, a possible 2011 pay increase in the March-April 2011 timeframe. (Tr. 66-67; GC 26). Bull testified that he understood that once the decision to go ahead with such an increase was made, the Company would have had an obligation seek the Union's consent before implementing the increase. (Tr. 115-117), which is what later was done after the Section 10(j) case was dismissed.

[3] To the extent that General Counsel now contends that the Company's labor budget, GC 26, somehow incorporated a 2011 pay increase into its employees' terms and conditions of employment, General Counsel failed to present any evidence showing that the Company shared its labor budget with the Union or any of its employees, or that any of the Company's employees reasonably expected a 2011 pay increase based on the contents of the labor budget.

Both Bull and Heider testified that the **relief sought in the 10(j) proceeding** was the driving force behind the Company's decision not to proceed with an increase during the pendency of the 10(j). Specifically, in the 10(j) proceeding, the Region sought either: (1) that the Union be permitted to select which terms and conditions would remain in place and which would be rescinded if the Region prevailed, or (2) a full rescission of all of the Company's implemented terms and conditions of employment since March 31, 2010. (Tr. 111-113, 123-124 (Bull Test.); 131-133 (Heider Test.); R. 4 (e-mail from Union counsel regarding relief sought in 10(j) proceeding).

Given the fact that the Company had never promised a 2011 pay increase to its employees, and was therefore not obligated to grant such an increase in March 2011, it is nonsensical to assert that the Company, from a purely business perspective, would initiate the process of implementing such an increase when it was faced with the prospect of a federal judge either ordering it to rescind all pay increases to the pre-March 31, 2010 level, or to allow the Union to rescind all of the productivity improvements that the Company proposed in conjunction with its 2010, 2011, and 2012 pay increases. Either of these outcomes would have been disadvantageous to the Company, and it was not required to act affirmatively to its detriment in March 2011 to grant a wage increase that it had not otherwise promised to employees.

Further, Judge Locke wholly failed to address Respondent's legal concern about the pending Section 10(j) case and its relationship to the implementation of a possible 2011 wage increase. His analysis makes it appear that the mere filing and pendency of the Section 10(j) was the concern; when, rather, the concern was the nature of the injunctive order being sought. Had the Company proceeded with the 2011 increase, there was a real and substantial likelihood that

the Board would claim such as unlawful and use the action against the Company before the District Court.

EXCEPTION 4

The Judge erroneously found certain Company communications about a possible 2011 increase constituted violations of the Act. (ALJ, pp. 4-8). As discussed above, the Company did no more than accurately describe the box into which it had been put by the remedy that was being sought in the Section 10(j) case. Such was protected free speech.

EXCEPTION 5

It is undisputed that the Company provided the Union with two weeks advance notice of its intent to not proceed with the increase in light of the remedial issues then being pursued in the District Court. Judge Locke erroneously viewed the decision as a fait accompli, thereby excusing the Union from requesting bargaining over the matter. (ALJ pp. 19-20). A "fait accompli" connotes something already done; it can never be something that will not be done unless and until the moment for its being passes. Here, there were two weeks before the time of the beginning of the possible increase and there were an infinite number of weeks where the increase could have been negotiated retroactively. The Union may have had relatively little bargaining leverage, but it did have an opportunity to bargain.

EXCEPTION 6

Respondent submits that it did not violate the Act in any of the manners alleged and, accordingly, excepts to the Judge's Conclusions of Law, Remedy and Order (ALJ pp. 24-27) and requests that the Complaints be dismissed in their entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of June, 2012, Respondent's Exceptions to the Decision of Administrative Law Judge was e-mailed, to:

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