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 REPLY BRIEF

TO: Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary

Respectfully submitted,

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On May 21, 2011, Counsel for the Acting General Counsel (General Counsel) filed Exceptions, and a Brief in Support, to the Decision of Administrative Law Judge Gerald A. Wacknov [JD(SF)-13-12], which issued in this matter on April 23, 2012 ("ALJD").[1] Thereafter, Respondent filed its Answering Brief to General Counsel's Exceptions. Pursuant to Section 102.46(h) of the Board's Rules and Regulations, General Counsel files this Reply Brief.

I. INTRODUCTION

In its Answering Brief, Respondent glosses over the paramount issue in this case -- whether the parties were at a genuine impasse such that Respondent could lawfully implement its bargaining proposal. The facts clearly demonstrate that impasse did not exist, that there was no contemporaneous understanding of the parties that impasse existed, and the Union was

[1] Redburn Tire Company is referred to herein as "Respondent." General Teamsters (Excluding Mailers), State of Arizona, Local Union No. 104, an affiliate of the International Brotherhood of Teamsters, is referred to as the "Union." References to the ALJD show the applicable page number. "RAB" refers to Respondent's Answering Brief. "Tr. __" refers to pages of the transcript of proceedings for the hearing held December 13-15, 2011. "GCX __" refers to the General Counsel's Exhibits, "RX__" refers to Respondent's Exhibits, and "JTX __" refers to the parties' Joint Exhibits.

continually moving toward Respondent's bargaining position. Thus, Respondent was not entitled to implement its bargaining proposal. As Respondent conveniently ignores, "the existence of an impasse is 'not lightly inferred,' and the burden of proving that a genuine impasse existed rests with the party making the contention." *Pratt Industries, Inc.*, 358 NLRB No. 52, slip op. at 7 (June 5, 2012) (quoting *Monmouth Care Center*, 354 NLRB 11, 59 (2009)). Respondent failed to meet this stringent burden at trial, and has failed to demonstrate either of the situations that permit unilateral changes to employees' terms and conditions of employment, i.e., because the union was insisting on "continually avoiding or delaying bargaining" or that "economic exigencies" compelled "prompt action." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. 15 F.3d 1087 (9th Cir. 1994).

II. ANALYSIS

A. Thirteen Bargaining Sessions Over Five Months Is Not Exhaustive

In determining whether an impasse exists, the Board evaluates, among other things, "the length of the negotiations." *Pratt Industries, Inc*., supra, slip op. at 7. The parties had only been at the bargaining table for a little over five months when Respondent abruptly declared impasse -- for the second time -- and implemented its bargaining proposal. While the parties did, in fact, meet 11[2] times at the offices of the Federal Mediation and Conciliation Services before Respondent's May 25, 2011[3] impasse declaration, with two other "sidebar" meetings, that relatively small number of bargaining sessions supports General Counsel's contention that bargaining was still progressing and nowhere near the point of impasse.[4] The

[2] JTX 1 does reflect only 10 sign-in sheets for the FMCS sessions; however, there was one session on April 28, 2011 for which no sign-in sheet was recorded.
[3] All dates are 2011 unless otherwise indicated.
[4] Respondent mistakenly asserts that there were only three meetings out of thirteen at which only one of Respondent's co-owners was present. However, there were a total of four meetings where only one of the co-owners was present, including one of the sidebar meetings. (JTX 1; Tr. 114, 209) Thus, only half of Respondent's bargaining committee was present for nearly a third of the bargaining sessions, and Respondent's

fact that Respondent declared impasse twice in a few short months of bargaining further supports the General Counsel's contention that Respondent was dead set on rushing to impasse from the start of bargaining.

Respondent's reliance on *California Pacific Medical Cente*r, 356 NLRB No. 1569 (2011) to show the parties were at impasse is misplaced, for the reasons set forth in General Counsel's Brief in Support of Exceptions. Likewise, *ACF Industries, LLC,* 347 NLRB 1040 (2006), is inapposite as the union there said it had additional economic proposals to offer, but refused to divulge those proposals. The Board, in *ACF Industries,* specifically found that, "[a]bsent a concrete proposal from the Union, the parties were at impasse." Id. at 1042. Here, when Respondent declared impasse, the Union actually presented concrete proposals, first on June 2, and then again on July 14. The other cases cited by Respondent also support General Counsel's position that the parties had not reached impasse both because of the short amount of time that bargaining had taken place and because the Union was still making concrete proposals. For example, in *E.I. du Pont de Nemours & Co.*, 346 NLRB 553 (2006), the parties had been bargaining for nearly eight years and held over 170 bargaining sessions, compared to the parties here who had met a total of 13 times over five and half months when Respondent declared impasse. Likewise, the parties in *Edward S. Quirk Co., Inc.*, 330 NLRB 917 (2000), enfd. in part, vacated in part 241 F.3d 41 (1st Cir. 2001), had been bargaining for over ten months when the employer presented a proposal in late March 1995. The union wanted time to examine the new proposals and then canceled two April bargaining sessions, without explanation, and said it was not available until mid May. The employer then transmitted its final offer on May 1, and the parties met once more on May 15, but neither

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attempts to minimize the impact of this fact should not be countenanced. (See RAB at fn. 5) Moreover, only one of Respondent's co-owners showed up for the June 2 bargaining session requested by the Union.

party "was willing to make any concessions on the health insurance copayment or wage incentive issues." Id. at 922. The facts here are far different than in *Quirk*, because the parties were still bargaining up until the time Respondent declared impasse, the Union was requesting more bargaining sessions, and the Union was continuing to make concessions both before and after Respondent declared impasse.

B. The Union was Flexible from the Start

Respondent attempts to paint the Union as the intransigent party on the issue of health insurance. Negotiations on a successor contract began in mid-December 2010, with the Union proposing that the expired contract's benefit of free insurance for employees and dependents with ten or more years of service (the "ten-year benefit") be changed to free health insurance after three years of service. Respondent contends that, as of March 1 the Union had not changed its initial bargaining position on the ten-year benefit. (RAB 2) That is incorrect as the record evidence establishes that the Union conceded its position early on and changed its three-year proposal for the free health insurance benefit back to ten years as early as December 22, 2010. (Tr. 88; GCX 33 at 4)

C. Respondent Was Intransigent on the Ten-Year Benefit

Respondent takes issue with General Counsel's contention that Respondent intended to eliminate the ten-year medical benefit from the start of negotiations. (RAB at 4) Yet, the evidence clearly demonstrates Respondent's intransigence on this issue (See, e.g., GCX 23; Tr. 305-306), and Respondent has failed to point to any contrary evidence. From the outset, Respondent's goal was to eliminate the ten-year benefit, and it was unwilling to accept any proposal from the Union that fell short of that goal, even when the Union agreed to Respondent's position for all future employees. (See GCX 64)

D. The Union Proposed that All Employees Pay for Their Own Health Benefits

Contrary to Respondent's assertions, the Union, by March 29, was proposing that all employees, regardless of years of service, pay the employee-only health insurance premium. Previously, employees with more than ten years of service had not been paying for their or their dependents' coverage, but as Union representative Ienuso testified, the Union's March 29 proposal meant that "everybody is going to pay something" for their health insurance benefits. (Tr. 106-107) This is clear from Ienuso's handwritten notes on the Union's March 29 proposal which states "over 10 years each employee will pay employee only costs." (GCX 19, tab 5, p. 2) It is further clarified in Ienuso's July 18 email in which he writes "all employees will pay employee coverage regardless of years of service should the employee opt for coverage." (GCX 19, tab. 7)

E. The Union's Proposals in June and July 2011 Were Not Meaningless

Respondent appears to believe that unless the Union completely capitulated to its demands on the ten-year benefit, then it was free to declare impasse and implement its bargaining proposal. For example, Respondent characterizes the Union's June 2 proposal to change the ten-year benefit to twelve years as "meaningless," thus authorizing it to implement its bargaining proposal. (RAB 12) Further, Respondent contends that the Union's July 14 proposal "was also immaterial and could be of no consequence for many years to come[.]" (RAB 13) A finding of impasse, however, is not dependent on one party's assessment of whether a bargaining proposal is meaningful.

As noted earlier, the standard for finding impasse is high and an employer may not declare impasse "simply because the union's concessions were not more comprehensive or sufficiently generous." *Larsdale, Inc.*, 310 NLRB 1317, 1319 (1993) (citing *Old Man's*

Home, 265 NLRB 1632 (1983) and *Cal-Pacific Furniture*, 228 NLRB 1337 (1977)). Also, as in *Larsdale*, the Union here "did not say that no further concessions could be expected." Id. Not only did the Union *not* say it had no further concessions, it did, in fact, make further concessions. Moreover, the Board does not find impasse exists when a union indicates "flexibility on significant issues," even when there is a "wide gap" between the parties' bargaining positions. *Newcor Bay City*, 345 NLRB 1229, 1238 (2005). Here, the evidence could not be clearer that the Union was expressing flexibility on the significant issue of health insurance, and was regularly making concessions, bringing it ever closer to Respondent's position. Therefore, while the Union's proposals may not have been as generous as Respondent wanted, Respondent was not entitled to reject them as meaningless and simply declare impasse.

F. The Board Possesses the Necessary Quorum

Respondent, in its "Potpourri" argument, objects to the participation in this case of Board members serving as recess appointments. Consequently, and citing no legal authority for this proposition, Respondent argues that the Board lacks a quorum to decide this case. (RAB 16) The Board, earlier this year, considered this same argument and ruled that a quorum exists for the Board to issue rulings such as the one requested here. In *Center for Social Change, Inc*., 358 NLRB No. 24, slip op. at 1 (March 29, 2012), the respondent argued that summary judgment was not appropriate because the Board lacked a quorum to act under *New Process Steel, L.P. v. NLR*B, 130 S.Ct. 2635 (2010). The Board summarily rejected this baseless attack on its authority, finding that "it has applied the well-settled presumption of regularity of the official acts of public officers in the absence of clear evidence to the contrary. In keeping with this practice, we reject the Respondent's arguments that the Board

lacks a quorum[.]" Id. (citing *Lutheran Home at Moorestown*, 334 NLRB 340, 340-341 (2001)). In accordance with this precedent, the Board should reject Respondent's argument and conclude that it possesses the necessary quorum to decide this case.

III. CONCLUSION

Based upon the foregoing, the General Counsel respectfully requests that the Board reverse the ALJ's findings and conclusions and grant the General Counsel's exceptions in this case. The exceptions, and brief in support of them, clearly have merit and it is respectfully requested that the Board find that Respondent violated Section 8(a)(1), (3), and (5) of the Act.

Dated at Phoenix, Arizona this 18th day of June 2012.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S REPLY BRIEF in Redburn Tire Company, Cases 28-CA-023527, et. al., as served by E-Gov, E-Filing, E-Mail, and regular mail on this 18th day of June 2012, on the following:

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