UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CAREY SALT COMPANY, a subsidiary of COMPASS MINERALS INTERNATIONAL, INC. Respondent		
and		
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, and LOCAL 14425 Charging Parties	Cases	15-CA-020035 15-CA-061694

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIOINS TO DECISION BY ADMINSTRATIVE LAW JUDGE

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July 13, 2012

Subject Index

Table of Cases and Other Authorities Cited

I. Preliminary Statement

The Honorable Administrative Law Judge Keltner W. Locke's (Judge) carefully analyzed decision (ALJD) of May 16, 2012[1] reflects the Judge insightfully sorted through a number of factual and legal issues in the challenging circumstance of following the Honorable Administrative Law Judge Margaret G. Brakebusch's August 1, 2011 decision (***Carey Salt I ALJD*** – also before the Board on Respondent's exceptions and limited cross-exceptions.) Counsel for the Acting General Counsel (counsel for the GC) generally urges careful review, consideration and adoption of the ALJD,[2] which primarily concerns Respondent's independent Section 8(a)(1) threats to all bargaining Unit employees, its retaliatory withholding of a March 2011 wage increase and Respondent's failure and refusal to bargain regarding withholding the March 2011 wage increase in the midst of contract negotiations already impeded by Respondent's earlier unfair labor practices in 2010.

As discussed below, Respondent's Exceptions, all of which should be disregarded by the Board as deficient and/or moot, are lacking in many respects as they generally fail to meaningfully identify and discuss the record evidence before the Board. In fact, Respondent seldom references specific portions of the record evidence. It is noteworthy that three Respondent agents testified at the November 2011 unfair labor practice

[1] References to the May 16, 2012 decision or ALJD are designated "ALJD:" with an Arabic numeral(s) referencing to a specific page(s) of the decision; an Arabic numeral(s) following "ln" references a specific line(s) of the decision page(s) cited. Reference to the Exhibits of the General Counsel and Respondent will be designated as "GCX- #", and "RX- #," respectively, with the appropriate number(s) for those exhibits. References to the hearing transcript are designated as "Tr:" with an Arabic numeral(s) referencing to a specific page(s) of the transcript; an Arabic numeral(s) following "ln" references a specific line(s) of the transcript page(s) cited.

[2] Counsel for the GC is filing limited Cross-Exceptions.

hearing, but Respondent calls very little of their testimony to the Board's attention. Further, review of Respondent's Exceptions reveals that Respondent specifically excepts to very little of the Judge's factual findings, but instead vaguely excepts to certain of the Judge's conclusions. Significantly, the Board's Rules and Regulations (Board's Rules) at Section 102.46(b)(2) clearly provide that any exception to a ruling, finding, conclusion or recommendation which is not specifically urged shall be deemed to have been waived. Thus, Respondent concedes the accuracy of much of the ALJD, particularly the Judge's factual findings.

Furthermore, the Board is urged to review and consider the ALJD in the context of the extensive Section 8(a)(1)(3) and (5) violations as found by Judge Brakebusch in the ***Carey Salt I ALJD.*** Of particular note, the Section 8(a)(5) allegations found in Judge Locke's ALJD must be considered in the context of the repeated and yet to be remedied Section 8(a)(1) and (5) violations in the **Carey Salt I ALJD**. It is impossible for Respondent to now argue that it met is bargaining obligations in regard to withholding the March 2011 wage increase when the wage increase was withheld in the context of contract negotiations riddled by Respondent's unremedied Section 8(a)(1) and (5) allegations set forth in the ***Carey Salt I ALJD***. Similarly, Respondent withholding the March 2011 wage increase in retaliation for the protected activities of its employees, should be considered in the context of the Section 8(a)(1) and (3) violations and resulting exhibition of Respondent animus to the protected activities of its employees found in ***Carey Salt I ALJD.***

In the following pages, this brief includes the following three segments. First, a motion to strike all of Respondent's Exceptions. Second, responses to Respondent's Exceptions. Third, a brief conclusion.

II. Motion to Strike All of Respondent's -- Exceptions 1 through 6

Based upon Respondent's failure to comply with the clear language of the Board's Rules at Section 102.46 (b)(1)(i)(ii)(iii) and (iv), Counsel for the GC moves for the Board to immediately strike Respondent Exceptions 3, 4, 5 and 6. Further, Counsel for the GC moves to strike Exceptions 1, 2 and 5 because they are immaterial and moot.

A. Respondent Exceptions 3 Through 6 Do Not Comply with the Board's Rules and Should be Disregarded by the Board.

As to exceptions, the Board's Rules clearly provide at Section 102.46(b)(1) that exceptions shall (i) specifically set forth the questions of procedure, fact, law, or policy to which exception is taken; (ii) identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception:

> (b)(1) Each exception (i) **shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken**; (ii) **shall identify that part of the administrative law judge's decision to which objection is made**; (iii) **shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception.** If a supporting brief is filed the exceptions document shall not contain any argument or citation of authority in support of the exceptions, but such matters shall be set forth only in the brief. If no supporting brief is filed the exceptions document shall also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document shall be subject to the 50-page limit as for briefs set forth in section 102.46(j).
>
> (Bolding supplied.)

In light of Section 102.46(b)(2) providing that any exception which fails to comply with the foregoing requirements of Section 102.46(b)(1) may be disregarded, Counsel for the GC urges the Board to disregard and immediately strike:

(i) Respondent Exception 3, because of Respondent's failure to comply with Section 102.46(b)(1)(ii);

(ii) Respondent Exception 4, because of Respondent's failure to comply with Section 102.46(b)(1)(i)(ii)(iii) and (iv);

(iii) Respondent Exception 5, because of Respondent's failure to comply with Section 102.46(b)(1)(iii); and

(iv) Respondent Exception 6, because of Respondent's failure to comply with Section 102.46(b)(1)(i)(iii) and (iv).

The Board should disregard Respondent Exception 3, because Respondent failed to identify that part of the ALJD to which objection is made. As Respondent Exception 3 fails to give either the Board or the other Parties to the case (the Charging Party Unions (herein "Union") and the GC) notice as to the focus of Respondent Exception 3, Respondent fails to frame up an issue before the Board. Further, as Respondent Exception 3 denies the other Parties to the case any knowledge of the specific portions of the ALJD disputed they are denied a fair opportunity to respond to Exception 3. Thus, Respondent Exception 3 must be disregarded.

The Board should disregard Respondent Exceptions 4, 5 and 6, because Respondent fail, inter alia, to comply with Section 102.46(b)(1)(iii).

Specifically, Respondent Exceptions 4, 5 and 6 are devoid of any effort to designate by precise citation of page the portions of the record relied upon by Respondent. As a result, the evidence, if any, relied upon by Respondent is not before the Board, and again the other Parties to the case are denied a fair opportunity to respond to Respondent Exceptions 4, 5 and 6. Further, although Respondent did make some pro forma attempt to comply with Section 102.46(b)(1)(i)(ii) and (iv) in Respondent Exception 4, Exception 4 is so extraordinarily vague that as a practical matter Respondent failed to comply with Section 102.46(b)(1)(i)(ii)(iii) and (iv) in its entirety. Thus, Respondent Exceptions 4, 5 and 6, must be disregarded.

In addition to clearly failing to state the portion of the record relied upon, Respondent Exception 6 also fails to comply with Section 102.46(b)(1)(i) and (iv) in that Respondent fails to both specifically set forth the questions of procedure, fact, law, or policy to which exception is taken and fails to concisely state the grounds for the exception. Respondent Exception 6 is at best only a pro forma catch all exception that essentially challenges the Board to guess what is excepted to and why. Further, Respondent Exception 6 denies the other Parties to the case any fair chance to respond. Although each of the above-identified Respondent Exceptions should be rejected in light of Respondent's failure to comply with the Board's Rules, it is noteworthy that Respondent Exception 6 is so extraordinarily vague, ambiguous and lacking of specificity, as to be incomprehensible and devoid of any discernable meaning. As a matter of

policy the Board should expressly disregard such a vague and ill-crafted exception.

Immediately striking Respondent's deficient Exceptions will appropriately narrow the issues before the Board, conserve the Board's resources and expedite the consideration of this case -- by rejecting these Respondent Exceptions failing to comply with the Board's Rules the Board can best effectuate the Act.

B. Respondent Exceptions 1, 2 and 5, Are Immaterial and Moot and Should be Disregarded by the Board.

Respondent Exceptions 1, 2, and 5, should be disregarded by the Board as they are moot. Respondent Exception 1 narrowly focuses upon one sentence in ALJD; the sentence reads in its entirety, "[Later in this decision,] I conclude that Respondent's implementation of its final proposal bound it to grant the 2.5 percent pay increase on March 25, 2011." However, Respondent completely fails to except to the material portion of the ALJD on this issue (particularly ALJD:9 ln 18 through ALJD: 14 ln 13 setting forth the Judge's findings of facts, analysis and conclusions that Respondent was obliged to follow through on the previously implemented March 25, 2011 wage increase which Respondent delayed. As Respondent Exception 1 only excepts to a brief reference by the Judge as to his later findings and conclusions in the ALJD and the actual findings and conclusions are not the subject of Respondent's Exceptions, Respondent Exception 1 is immaterial and only moot. Thus, Respondent Exception 1 must be rejected. To consider an implied Respondent Exception 1 to the ALJD in

regard to ALJD: 9 ln 18 through ALJD: 14 ln 13, would be to needlessly consider a phantom exception not before the Board.

Respondent Exception 2 is also flawed, narrow and moot. In contending the Judge improperly concluded Respondent conditioned bargaining beginning in March 2011, Respondent references the ALJD but only at pages 21 and 22. However, Respondent fails to except at page 23 of the ALJD wherein the Judge actually found that Respondent did insist, as a condition to bargaining with the Union about the wage increase, that the Union convince the Board to withdraw the Section 10(j) petition (as alleged at paragraph 16 of the first complaint.)[3] ALJD: 23 ln 21-23. Moreover, the Respondent failed to except to the Judge's conclusion that Respondent conditioned bargaining about a mandatory subject, the wage increase, on the Union performing an act which was a nonmandatory subject in violation of Section 8(a)(1) and (5) of the Act as alleged in the complaint. ALJD: 23 ln 25 – 28. Given that Respondent has failed to except to the Judge's conclusions and conceded the Judge's analysis and conclusions at page 23 of the ALJD, Respondent Exception 2 is immaterial, moot and must be disregarded.

Respondent Exception 5, in which Respondent only excepts to the Judge's conclusion that Respondent's decision to withhold the March 2011 wage increase was *fait accompli*, is also narrow, immaterial and moot. Respondent's Exceptions make no effort to dispute the Judge's conclusion that Respondent's unilateral action in March 2011, in the absence of impasse, caused a material,

[3] The complaint in Case No. 15-CA-020035 is referred to as the "first complaint." The complaint in Case No. 15-CA-061694 is referred to as the "second complaint."

substantial and significant change in employee terms and conditions of employment without affording the union sufficient notice and an opportunity to bargain regarding Respondent's decision and effects in violation of Section 8(a)(1) and (5) of the Act. ALJD 20: ln 29–44. Thus, even if Respondent disputes the Judge's *fait accompli* analysis, Respondent concedes the Section 8(a)(1) and (5) violation of the Act. Accordingly, Respondent's narrow Exception 5 is immaterial and moot, and there is no reason for the Board to consider it as Respondent concedes the actual violation of the Act.

In summary, Respondent's Exceptions are so deficient, immaterial and moot they should be disregarded by the Board in their entirety. To consider Respondent's Exceptions would only delay the efficient and effective administration of the Act to the detriment of the Unit employees adversely affected by Respondent's unfair labor practices. Further, to consider Respondent's deficient, immaterial and moot Exceptions may well have the unintended consequence of encouraging the parties in other cases before the Board to file similar deficient and moot exceptions that would needlessly delay the Board's orderly processing of its caseload.

III. Respondent Exception 4[4]

As discussed above, Respondent Exception 4 fails to meet the requirements of the Board's Rules as it is so vague and nonspecific that it is essentially impossible to

[4] Respondent's Exceptions are addressed in the order best suited to reviewing the fact pattern before the Board.

determine what issues it places before the Board.[5] To the extent Exception 4 makes an argument, it appears to contend that Respondent's unlawful threats violative of Section 8(a)(1) were somehow protected "free speech." Of course, Respondent cites no legal authority in support of this free speech contention, because, as discussed below, the Act's Section 8(c) only allows speech that contains no threat of reprisal or force or promise of benefit. Thus, Respondent's Section 8(a)(1) threats are not shielded by the Act's Section 8(c), and it is difficult to imagine a more fatally flawed exception disputing findings of independent violations of Section 8(a)(1) of the Act.

Respondent's Section 8(a)(1)(3)[6](4) and (5) violations of the Act are substantially established by Respondent's repeated admissions against interest. Significantly, despite an abundance of evidence establishing Respondent's violations of the Act, one paragraph of a Respondent document, Respondent's March 10, 2011, notice to employees (GCX-7(B)), establishes the violations alleged in most of the first complaint's substantive paragraphs:

Cote Blanche Mine - Wage Increase Status

March 10, 2011

> We expect there are some employee questions about if or when any pay increase will take effect in 2011. **Wage increases historically have taken place in late March. <u>We were planning</u> to make a 2.50% increase (as we proposed in our final offer during** the contract negotiations with the union **a year ago),** but t**hat <u>increase will not be made</u> <u>until we successfully resist the injunction</u> that the National Labor Relations Board (NLRB) is**

[5] Of note, Respondent does not expressly except to the Respondent Section 8(a)(1) threat found by the Judge in regard to paragraph 7 of the second complaint in Case No. 15-CA-061694. ALJD: 23 ln 32 – ALJD: 24 ln 30. Thus, Respondent concedes that it unlawfully threatened employees in violation of the Act.

[6] Counsel for the GC is filing limited Cross-Exceptions that urge the Board to find the Section 8(a)(3) violation.

> **seeking against us.** [first Complaint paragraphs 7(a) and (c),[7] 8 -10, 15, 19-22] We don't think there is any basis for an injunction and we are vigorously resisting it. **We hope to have <u>prevailed by mid-2011 and in that case we would increase wages then</u>.** [first complaint paragraph 7-(b) and (c), 8 -10, 15, 19-22.]
>
> *******
>
> Shortly after the NLRB filed its injunction request, the Company posted a letter on February 21, 2011 and we thought it would be helpful to repeat it here:
>
> Dear Cote Blanche Employee:
>
> As you may have heard, **last week the National Labor Relations Board filed a petition for an injunction against the Cote Blanche Mine**.[8]

. . . . . .

(Emphasis supplied.)

In addition to posting the March 10 notice to employees, Respondent, on March 10, as alleged in the first complaint's paragraph 7(c),[9] emailed the same threatening notice to Unit employees (GCX-28(A) and (B); Tr: 75 ln 12 – Tr: 76 ln 15; Tr: 95 – 96.

As employee/Local Union President Migues[10] testified, Respondent's retaliatory March 10 notice to employees (GCX-7(B) had just its intended coercive effect upon Unit employees:

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[7] On the first day of the hearing, the Judge granted a motion to amend Paragraph 7(c) into the first complaint. Tr: 99 ln 22 – Tr: 100 ln 1.

[8] Mine Manager Gordon Bull confirmed that GCX-7(A) – (D) were Respondent notices to Unit employees; posted over the Respondent's "punch clock" and on Respondent bulletin boards at the Cote Blanche Mine. Tr. 59 -60. In 2011: GCX-7(A) was posted about February 21 (Tr. 61); GCX-7(B) was posted approximately March 10 (Tr. 60); GCX-(C) was posted about April 6 (Tr. 61); and GCX-7(D) was posted about May 20 (Tr. 61).

[9] The first complaint's paragraph 7(c), was properly amended into the first complaint and the Judge appropriately considered it on the merits. ***Redd-I, Inc.***, 290 NLRB 1115, 1115-1116 (1988), citing ***NLRB v. Dinion Coil***, 201 F.2d 484, 491 (2d Cir. 1952). See also ***Old Dominion Freight Line***, 331 NLRB 111 (2000).

Q And what was your understanding of that notice?

A This letter right here, this first paragraph?

Q The first paragraph, yes.

A (Perusing document.) This paragraph made me as a union worker feel that **we was being punished, because there was a Board charge filed against the company.**

Q Okay.

A **Something being taken away from them.**

(Emphasis supplied. Tr: 146 ln 21 – Tr: 147 ln 4.)

In other words, Mr. Migues and Unit employees understood who was "running the railroad" at the Cote Blanche Mine in that through its retaliatory and unilateral actions Respondent made it clear to Unit employees: 10(j) = no pay. In March 2011, Respondent effectively communicated to Unit employees that the NLRA was irrelevant, as the writing was literally posted "on the wall" at the Cote Blanche Mine.

As would be expected, the Board has consistently held that threats of retaliation as alleged in paragraph 7 of each of the complaints are unlawful. ***Anheuser-Busch, Inc***., 337 NLRB 3, 14 (2001) (employer unlawfully threatened an employee with reprisal when a union files charges with the Board, "Why do you pick on Joe?" . . . ."He's made trouble for me with the NLRB."):

> It is well settled that resort to the Board's processes and the filing of charges, regardless of whether they are ultimately meritorious, is concerted protected activity. *Braun Electric Co.*, 324 NLRB 1 (1997), citing, ***Bill Johnson's Restaurants v. NLRB***, 461 U.S. 731, 740 (1983), and ***Roadway Express,* 239 NLRB 653 (1978)** ("there can be no doubt that [filing charges] was protected by the Act."); ***Equitable Gas Co***., 303 NLRB 925, 936 (1991) (finding violation of Section 8(a)(1) where 'threats were premised … on the protected activities of

[10] Unit employee Migues is employed as a journeyman mechanic, welder. Tr: 139 ln 21 – Tr: 140 ln 1.

> filing charges and giving attendant supporting testimony under the Act"). Threatening to "get" an employee because he/she engaged in such activity is therefore a threat of reprisal and violative of the Act. See, e.g., ***Armstrong Rubber Co.***, 273 NLRB 233, 235 (1984); ***Donahue Beverages, Inc.***, 1999 NLRB 681, 583 (1972). By threatening Rimualdo with unspecified retaliation for filing charges with the Board, Respondent has violated Section 8(a)(1) of the Act.

Anheuser-Busch, Inc., 337 NLRB at 15.

Further in regard to Respondent's threats, the Board has found similar independent Section 8(a)(1) violations in a variety of fact patterns. ***Norris Concrete Materials, Inc***. 282 NLRB 289, 292 (1986) (Violation when employer threatened employee because his son filed a charge with the Board.) ***Glover Bottled Gas Corp***., 255 NLRB 137, 143 (1981), enfd. 697 F.2d 294 (2d Cir. 1982), (violation of Section 8(a)(1) of the Act for an employer to threaten to give an employee an unfavorable job reference in retaliation for filing a charge with the Board.) ***Murcole, Inc.*, 204 NLRB 228, 235 (1973)** (Employer unlawfully threatened employee she would be discharged if she did not have her name removed from ulp charge filed by Union.); ***The Frank Martz Coach Co., Inc***., JD-26-04 (April 1, 2004) (slip op 9) (Unlawful threat to unit employee/union president Davies that employer would eliminate employee safety bonuses if Union continued to pursue Board ulp charge.); ***Professional Medical Transport, Inc.***, JD(SF)-49-11 (December 20, 2011) (slip op 15) (Employer discipline citing unsubstantiated ulp charges impliedly threatened an employee in violation of Section 8(a)(1) of the Act.); and ***More Truck Line***, 336 NLRB 772, 772-773 (2001) (Unlawful employer threat not to implement negotiated future wage increase if incumbent union rejected in representation election.)

Furthermore, it is clear that Respondent's threats in this fact pattern, approved by Respondent's "upper management [at the] head office" and legal counsel (Tr: 63), were decidedly constructed to denigrate and undermine Unit employee support of the Union, the Union's efforts to represent the Unit employees, and the Board's efforts to administer the Act, including in particular remedies under Section 10. In ***Regency House of Wallingford, Inc.***, 356 NLRB No. 86 (2011), a somewhat similar fact pattern involving a disputed Board-rescission remedy, the Board, in rejecting a Section 8(c) free speech defense, as alluded to by Respondent in its Exception 4, recently found very similar respondent denigration of a labor organization to constitute independent Section 8(a)(1) violations:

> We agree with the judge's finding that the Respondent violated Section 8(a)(1) by denigrating the Union in correspondence and conversations on April 25, April 30, May 4, May 10, July 3, August 14, and an unspecified date in September.[FN15] In those communications, the Respondent repeatedly criticized the Union's rescission demand, impugned the Union's representational abilities, and questioned the Union's good faith toward unit members. The Respondent also repeatedly conveyed that the Union, by demanding rescission, was "harming" its members and "casting stones" at them, and that it was actually the Respondent who was trying to protect employees' interests. The record establishes that unit employees read and/or learned about these communications.[FN16]
>
> The Respondent's denigration of the Union did not occur in a vacuum, moreover, but in the context of its earlier unlawful granting of wage increases only to junior employees. **Instead of accepting responsibility for its unlawful conduct** and promptly remedying it, the **Respondent compounded it. The Respondent put the onus on the Union** for the rescission remedy and unlawfully delayed compliance with the Union's employee-approved request for rescission of the increase, acts likely to further undermine the Union in employees' eyes. **In those circumstances, we agree completely with the judge that the Respondent's conduct unlawfully denigrated the Union and conveyed that continued union representation would be futile.** See *Billion Oldsmobile-Toyota*, 260 NLRB 745, 754 (1982), enfd. 700 F.2d 454 (8th Cir. 1983).
>
> **Contrary to the Respondent's argument, its comments were not protected by Section 8(c) of the Act. That Section permits an employer to express its**

> **views and opinions only "if such expression contains no threat of reprisal or force or promise of benefit."** As discussed, in the context of the unlawful delay in rescinding the unlawful wage increase, **the Respondent's repeated denigration of the Union conveyed an implicit threat that employees' representation by the Union would be futile (i.e., that the Respondent would not fulfill its statutory obligations) and that employees would have to rely on the Respondent to protect their interests.** While paying lip service to its obligation to rescind the unlawful wage increase, the Respondent repeatedly denigrated the Union's acceptance of the Board-ordered remedy as contrary to the interests of the employees and blamed the employees' low level of compensation on their representation by the Union. **The Respondent thereby created an atmosphere of hostility toward the Union and interfered with, restrained, and coerced employees in the exercise of rights guaranteed by Section 7. Particularly in the context of the Respondent's other unlawful conduct, we find that its comments were more than a simple statement of its view of the Union.**[FN17]

(Emphasis supplied; ***Regency House.*** 356 NLRB at slip op 5 – 6.)

Thus, the Board may further affirm the Judge in regard to Respondent's unlawful Section 8(a)(1) statements because Respondent's threats also violated the Act by denigrating (1) Unit employee support of the Union, (2) the Union's efforts to represent the Unit employees, and (3) the Board's efforts to administer the Act, including in particular remedies under Section 10. ***See also, Bryant & Stratton Business Institute***, 327 NLRB 1135 fn 4 at paragraph 2 (1999) (Employer violated Section 8(a)(1) by written notice to employees blaming union for employer withholding wage increase to unit employees.)

IV. Respondent Exception 3

In its Exception 3, Respondent contends that the Judge erroneously found that Respondent retaliated against its employees for engaging in protected activity by delaying a scheduled wage increase in 2011 from March 25 to May 23. Respondent's unlawful unilateral action in violation of Section 8(a)(1)(3)(4) and (5) of the Act is most efficiently found by first focusing upon Respondent's March 10, 2011 admissions already discussed above, and Respondent's 2011 at-hearing admissions. As confirmed by Mine

Manager Bull and as reflected in the March 10 notice to employees GCX-7(B), historically on an annual basis Unit employee had received a wage increases in late March of each year – at least for 17-years, as admitted by Bull. Tr. 64 ln 11-16.[11] In regard to the 2011 wage increase for Unit employees, Respondent actually admitted in its at-hearing opening statement that it planned a 2011 wage increase, "And while the [Respondent] may have internally budgeted and planned to provide a 2.5 percent pay increase in 2011 under the new terms and conditions of employment it had implemented, it had certainly never planned for such an increase to be coupled with the return to the old, inefficient model that had preceded its March 31 implementation back in 2010."[12] Tr: 29 ln 6 – 11. As noted above, as reflected in Respondent's 2011 mine labor budget (GCX-26) and in Bull's testimony, about August 2010 Respondent began to work on the mine's 2011 labor budget, which included a 2011 2.5 wage increase for Unit employees. Tr. 66-67. Specifically, Bull admitted the mine planned to begin paying the 2011 2.5% Unit employee wage increase effective April 1, 2011. Tr. 68 ln 17-21. The April 1 effective date for the 2011 wage increase was selected by Respondent, because it was approximately the traditional annual March 25 wage increase date, and April 1 facilitated ease of budgeting/accounting. Tr. 69 ln 1-7. (In fact, April 1, 2011, was, as a practical

[11] The testimony of Local President Migues also detailed the long-standing practice of an annual March 25 Unit employee wage increase. Tr: 141 ln – Tr: 143 ln 8; GCX - (A)(B) and (C).

[12] Respondent appears to portend that it acknowledged a remedy for its unfair labor practices would cost money, and thus it sought to reduce any expense of a remedy by withholding a wage increase for Unit employees. If that is lawful, it provides the premise that anytime a Charging Party files what might be a merit charge, the Charged Party can reduce its expenses by exacting compensation from its employees or members, be it by wage cuts, reduced hours, fines, etc. As the Judge appropriately found, Respondent's explanation for withholding the March 2011 wage increase amounts to saying, "We won't implement the wage increase unless we are allowed to get away with committing an unfair labor practice." ALJD: 17 ln 10 – 12.

matter, the one-year anniversary of the March 31, 2010, 10:11 p.m., Respondent email unilaterally implementing Respondent's March 2010 final offer. GCX – 9; GCX-10(H).

Each time Respondent cites or suggests the Board's Section 10(j) petition as a reason for withholding the 2011 2.5% wage increase, Respondent admits against interest a prima facie case of its violation of the Act. Thus, Respondent's at hearing opening statement constitutes an admission against interest actually highlighting that Respondent's Unit employees having filed unfair labor practice charges, through their Union, which resulted in the Board's exercise of its powers under Section 10 of the Act, provided the direct causation that resulted in Respondent withholding the 2011 2.5% wage increase to Unit employees, "[Respondent] viewed the relief sought in the 10(j) as prohibitive at this time of a pay increase in 2011," Tr. 30 ln 3 – 7; Tr: 29 ln 8 – 11.[13]

Of particular note, Respondent, through Bull's admissions, also confirmed the Board-authorized Section 10(j) injunction then pending in U. S. District Court provided both the timing (Tr: 63, ln 23 – Tr: 64, ln 4) and the causation for the Respondent decision to announce to Unit employees that Respondent would withhold the planned 2011 wage increase.[14] Specifically, Bull confirmed the accuracy of the entire above-quoted first paragraph of the March 10 notice to employees, which included the evidence of unlawful causation and admission against interest "that increase will not be made until

[13] "It is settled law that the admissions of an attorney in the management of litigation are admissible against the client. ***Steve Aloi Ford,*** 179 NLRB 229 fn. 2 (1969); ***Pacific Intermountain Express Co.***, 110 NLRB 96, 104 (1954), enfd. 228 F.2d 170, 175 (8th Cir. 1955), cert. denied 351 U.S. 952 (1956)." ***Southern Maryland Hosp.***, 293 NLRB 1209, 1214 (1989) (Proffered stipulation, despite attorney's colorful or colloquial manner, accepted by judge as admission resolving issue before the Board.)

[14] In addition, see the testimony of Respondent's Vice President of Human Resources Victoria Heider (Tr: 135 ln 12 – 20), and the testimony of Mine Operations Manager Brumm. Tr: 216 ln 9 -19.

we successfully resist the injunction that the National Labor Relations Board (NLRB) is seeking against us**."** GCX-7(B). Tr:64, ln 5-8. Further in its March 10 "Wage Increase Status Talking Points" (GCX-14 p 3), Respondent again admitted against interest that it was then withholding the 2011 wage increase because Unit employees filing ulp charges, through the Union, caused the Board to exercise its Section 10 responsibilities:

> 4. **Why are you holding the wage increase because of the injunction**?
> **The NLRB** is asking to go back to the old work schedules. If we increase wages, those increased wages might apply even though we are forced to go back to old [work] schedules.

(Emphasis supplied. GCX-14 p 3.)

Other than its March 10 notice to employees (GCX-7(B), it is difficult to imagine Respondent drafting a more clear admission against interest than talking point "4" that there would be a wage increase but for the Union's ulp charges leading to the Section 10 remedial efforts by the Board.

The Board has long held that retaliation against employees for seeking access to the Board is unlawful. Under Section 8(a)(1) and (4) of the Act, it is an unfair labor practice for an employer to retaliate against employees because they or their collective-bargaining agent filed unfair labor practice charges against the employer. ***Summitville Tiles, Inc.***, 300 NLRB 64, 65 (1990) (Employer unlawfully retaliated against Unit employees when union filed Board charges on their behalf and they engaged in other protected activity.); ***Norris Concrete Materials, Inc***. 282 NLRB at 291-292 (Violation of Section 8(a)(1) and (4) of the Act when employer laid off employee because his son filed charges with the Board.); ***Murcole***, 204 NLRB at 237 (Employer unlawfully discharged employee who failed to have her name removed from ulp charge filed by a union.); and

The Frank Martz Coach Co., Inc., JD-26-04 slip op at 10 – 11. (Unlawful for an employer to eliminate safety bonuses because Union filed ulp charge.)

The Judge correctly found that no matter how the case is analyzed Respondent delayed the March 2011 wage increase in violation of Section 8(a)(1) and (4) of the Act. In finding a violation of Section 8(a)(1) and (4), the Judge carefully applied a ***Wright Line*** analysis. ALJD: 16 ln 22 – 25. ***Wright Line***, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved in ***NLRB v. Transportation Management Corp***., 462 U.S. 393 (1983). However, the Judge additionally astutely observed that when an employer's admitted reason for adverse action is itself activity protected by the Act, then a ***Wright Line*** analysis is neither necessary nor appropriate. Accordingly, the Judge correctly found that even in the absence of a ***Wright Line*** analysis Respondent's delay of the March 2011 wage increase was a violation of the Act. ALJD: 17 ln 46 – ALJD: 18 ln 10. The Judge's alternative findings make it clear that Respondent retaliatory withholding of the March 2011 wage increase violated Section 8(a)(1) and (4) of the Act.

Respondent also essentially offers the sham[15] defense that the Board's pending Section 10(j) petition somehow prevented Respondent from bargaining with the Union and instead forced Respondent to the threaten its employees on March 10 that it would not implement the 2011 2.5% wage increase. In reality, and as Respondent understood, its 2010 unlawful actions had in fact forced the Board to file the Section 10(j) petition to seek a remedy compelling Respondent to bargain (not to refuse to bargain.)

[15] ***Active Transport***., 296 NLRB 431, 432 (1989) (pretextual reasons are "indicative of illegal motivation."); and ***Shattuck Denn Mining Corp., v. NLRB***, 362 F.2d 466 (9th Cir. 1966).

The Board's original February 15, 2011 Section 10(j) petition sought a traditional order providing that upon the Union's request Respondent return to pre-implementation terms and conditions. (GCX-21 p2; GCX -22-(A) p15, paragraph 2(a); GCX-22(B) p3, paragraph 2(a). This was the Section 10(j) petition pending and relief sought before and also on March 10, 2011, as Respondent first determined and then unilaterally apprised Unit employees that Respondent was unlawfully withholding the 2011 2.5% wage increase. Respondent had every understanding that a traditional district court order, as sought by the Board, would allow the Union to agree that the 2010 and 2011 wage increases could remain in effect. In fact, during the course of the Section 10(j) litigation, Respondent, exhibited that understanding by objecting to, among other things, that it was "unfair" and "unreasonable" for a Board-sought district court order to allow the Union to "pick and choose" between the items Respondent unilaterally implemented in 2010 – for example see Respondent's Answer. GCX-22-(E) p 6, top half of the page. Not only was Respondent making this argument to the district court, but in its internal talking points Respondent instructed its managers and supervisors to make the same argument to the affected Unit employees, "If we increase wages, those increased wages might apply even though we are forced to go back to old [work] schedules." GCX-14 p 3.

It is true that in response to opposition to a district court 10(j) order allowing the Union to exercise the traditional "upon request" or "pick and choose" language," about March 18, the Board filed an amended Section 10(j) petition again seeking a court order with traditional "upon request language" and in the alternative a general return to the pre-implementation terms and conditions of employment. GCX-23-(A) p 15, paragraph 2(a). Respondent exhibited its contempt for the Board and the Act by objecting to the proposed

alternative relief, as "less than half baked." GCX-22-(E) p 6, bottom. In brief, Respondent objected to any remedial action by the Board or the district could (GCX-22-(E) p 10, middle of page), just as Respondent objected on March 10 (notice to employees), March 14 (Bull-Migues) and March 31 (Heider-Tourne), to providing the Union any meaningful notice and an opportunity for good faith bargaining in order that the Parties could attempt to resolve any dispute as to Respondent's fait accompli determination that Respondent would withhold the March 2011 2.5% Unit employee wage increase in violation of the Act.

Respondent seems to argue to the Board that Respondent withheld the 2011 2.5% wage increase because of the specter of running afoul of a broad district court order that had not issued (and never issued) – see Respondent's Exceptions at pages 3, and 13 -14. However, similar to its admissions against interest in its at-hearing opening statement, Respondent elicited testimony from Bull[16] in which he actually admitted that it was because[17] the Board's Section 10(j) petition might result in the loss of Respondent-

[16] Respondent had Bull testify as to his understanding of the relief sought in the Section 10(j) proceeding. Tr: 112 ln 2 – 21, although to the extent that is relevant the actual Section 10(j) papers received into evidence as exhibits are more probative. What's much more telling as to Respondent's defenses and its understanding of the Section 10(j) proceeding is Respondent's failure to call as witnesses the Respondent upper management individuals involved in the decision making as to the delay of the 2011 wage increase. Tr: 63 – 64. The Board is urged to infer their testimony would have further impeached Respondent's asserted-defenses.

[17] This Respondent admission, is, of course, additional evidence of causation and unlawful motive in support of the Section 8(a)(1)(3) and (4) allegations; and in regard to the Section 8(a)(5) unilateral change allegations further confirms that before the Board's Section 10(j) petition there was every expectation of a March 2011 2.5 wage increase.

implemented "productivity enhancements" favorable to Respondent that Respondent determined to withhold the 2011 wage increase.[18] Tr: 112 ln – Tr: 113 ln 6.

Despite any asserted specter of a looming district court section 10(j) order, there was no doubt in Respondent's mind that an agreement could be reached with the Union that would allow the March 2011 wage increase. Respondent, through Bull, admitted to the Union on May 20 that Respondent assumed the Union had no objection to the Unit employees receiving the 2011 2.5% wage increase. GCX-8(C). In fact, at the November ulp hearing, Respondent, through Bull, amplified that Respondent knew that the Union would have agreed to a Unit employee wage increase in May, April or even in March 2011 -- because the Union was always asking for more money for Unit employees. Tr: 113 ln 10 -14; Tr: 115 ln 17 – Tr: 116 ln 7. In brief, what everyone knows, as even Respondent conceded, the Union was always agreeable to and sought the timely payment of the 2011 2.5% wage increase. Except for Respondent own incessant unlawful refusal to bargain, nothing in the Respondent's bargaining relationship with the Union or in the overall fact pattern would have prevented mutual agreement by the Union and the Respondent for either the timely implementation of the 2011 wage increase and/or Respondent belatedly granting the 2011 wage increase retroactively, such as retroactive to March 25, 2011.

As the Board well knows, the Board authorized the Section 10(j) petition with the purpose in mind of obtaining an interim order facilitating actual bargaining between the Union and the Respondent. Respondent's attempt to denigrate the Board and the Union,

[18]For the Board to accept the argument that a charged party can reduce an employee's pay or benefits because a pending ulp charge might result in an economic loss to a Charged Party, is to eviscerate the purpose and meaning of Section 8(a)(4).

as the Board exercised its Section 10 responsibilities to prevent unfair labor practices, was obviously a per se, brazen retaliation against the Unit employees because of their support of the Union and because they sought access to the Board through their Union.

V. Respondent Exception 1

In Respondent Exception 1, Respondent asserts that the Judge erroneously found that Respondent implemented "out-year" (2011 and 2012) wage increases at the point of a bargaining impasse in March 2010. The issue arguably presented[19] by Respondent Exception 1, has been the Respondent's focus during this ulp litigation. This is apparently because Respondent believes this issue provides latitude to focus upon hypothetical facts and legal issues not present in the case before the Board, and because after all there is little in the actual fact pattern before the Board that Respondent actually desires to call to the Board's attention.

Although Respondent wants to first focus on March 2010, it need only go back to March 2011 when it reminded Unit employees of the "Wage Increase Status" of their then upcoming March 2011 wage increase:

Cote Blanche Mine - Wage Increase Status

March 10, 2011

> We expect there are some employee questions about if or when any pay increase will take effect in 2011. **Wage increases historically have taken place in late March. <u>We were planning</u> to make a 2.50% increase (as we**

[19] As argued above, as Respondent Exception 1 only excepts to a brief reference by the Judge as to his later findings and conclusions in the ALJD and as the Judge's actual findings and conclusions are not the subject of Respondent's Exceptions, Respondent Exception 1 is immaterial and only moot – thus Respondent Exception 1 must be rejected.

> **proposed in our final offer during** the contract negotiations with the union **a year ago),** but t**hat <u>increase will not be made</u> <u>until we successfully resist the injunction</u> that the National Labor Relations Board (NLRB) is seeking against us.** We don't think there is any basis for an injunction and we are vigorously resisting it. **We hope to have <u>prevailed by mid-2011 and in that case we would increase wages then</u>.**
>
> . . . . . .
>
> (GCX- 7(B)), (Emphasis supplied.)

Nonetheless, it is clear that repeatedly throughout 2010 Respondent communicated to Unit employees, through their collective-bargaining representative, that there would be a March 2011 wage increase. As detailed in the ***Carey Salt I ALJD***, in 2010 Respondent presented to the Union its final offer on March 19, and again made the final offer available to the Union on March 31. ALJD: 7 ln 36–ALJD: 8 ln 25; ALJD: 9 ln 5–10; ALJD: 9 ln 41. As Respondent explained to the Union at the bargaining table, Respondent's March 19, 2010 final offer included wage increases of 2.5% in each of three years (March 25, 2010; March 25, 2011; and March 25, 2012.) Tr: 171 ln 23 – Tr: 172 ln 7; Tr: 77 ln 9–16; GCX 9 p1; Tr: 129 ln 3–6; Tr: 162. At the bargaining table on March 31, Heider told the Union that Respondent would implement its final offer. ALJD: 10 ln 35–40. However, Respondent did not actually implement its March 2010 final offer until late at night (approximately 10:11 p.m.) on March 31, 2010. Tr: 79 ln 10 –Tr: 80 ln 5; GCX-10(H). In fact, before Respondent's late-night March 31 implementation, Respondent repeatedly apprised Unit employees, through their Union, that Respondent would implement its March 19, 2010 final offer, at most only excepting the implementation of "arbitration" and a "no-strike" clause. Tr: 79 ln 10-15; Tr: 126 ln 23 – Tr: 12 ln 12. On March 31, at about 1:17 p.m. Heider emailed the Unit's employees' Union, "[E]ffective with the rejection vote the Company will be

implementing the terms of its final offer" . . . [A]bsent contract acceptance, the arbitration obligation, as well as the no-strike clause, will not longer be in effect." GCX-10(B). On March 31, at about 4:08 p.m. Heider again emailed the Union, stating Respondent's intent, without reservation, to implement the March 19, 2010 final offer, "[I]f 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." GCX-10(D); TR: 126-128.

Respondent's actual March 31[20] implementation clearly conveyed to the Unit employees, through their Union, that the entire Respondent March 2010 final offer (GCX-9) was being implemented, except only "any agreement to submit disputes to arbitration and without any no-strike clause[:]"

> I understand from Gary Fuslier that our final offer was again rejected by the membership. Accordingly, as we previously explained and in view of being at impasse, effective immediately, the company's final offer[21] is being implemented but without any agreement to submit disputes to arbitration and without any no-strike clause. [ALJD: 13 ln 24-26.]

(Bull's March 31, 2010, 10:11 p.m. email; GCX-10(H).)

From the broad wording of Respondent's email, the Union understood the March 2010 implementation to include three years of wages increases in March of each 2010, 2011 and 2012. Tr: 163 ln 19 – Tr: 164 ln 2; Tr: 172 ln 18 – Tr: 173 ln 7. Although the

[20] At the November 2011 ulp hearing, Respondent, through counsel, conceded March 31, 2010, as the date of Respondent's implementation. Tr: 29 ln 6 – 11.

[21] Although Respondent attempts to defend its case by maintaining the March 31, 2010 implementation did not include the March 25, 2011, 2.5 wage increase, even Respondent admitted on March 10, 2011, in its notice to employees that the 2.50% 2011 increase was "proposed in [Respondent's] final offer during the contract negotiations with the [U]nion." That March 2010 final offer (with the 2011, 2.5% wage increase) was exactly the final offer Respondent on March 31, 2010, through Heider, stated would be implemented (Tr. 79 ln 10-15; GCX-10(B); and GCX-10(D), absent the Union's contract acceptance, and which Respondent, acting through Bull, implemented on March 31, 2010.

record is clear as to the Union's understanding of what was implemented, the record of the November unfair labor practice (ulp) hearing is conspicuously without the testimony as to the understanding of Respondent's negotiating committee members. Respondent's negotiating committee included Vice President – Human Resources Victoria Heider (lead negotiator), Mine Manager Gord Bull, Mine Operations Manager Don Brumm and Mine Human Resources Representative Toyla Charles (Tr: 161: 10 -14), none of which specifically testified at the hearing as to whether Respondent's March and June (discussed below) 2010 implementations did or did not include the 2.5% wage increases for 2011 and 2012 that were included in both Respondent's March and June 2010 final offers. Thus, in affirming the Judge, the Board is urged to infer from the silence (or absence) of Respondent's agents that if questioned as to Respondent's implementations that they each would have admitted the 2010 implementations included the 2011 and 2012 2.5% wage increases. ***Advocate South Suburban Hospital v. NLRB***, 468 F.3d. 1038, 1048 and fn. 8 (7th Cir. 2006); ***Parkside Group***, 354 NLRB No. 90, slip op 5 (2009);[22] and ***Martin Luther King, Sr. Nursing Home Nursing Center***, 231 NLRB 15, 15 fn. 1 (1977).

In a June 24, 2010 email, Bull again confirmed, without reservation, to the Unit employees, through their Union, that Unit employees were working "under the terms and conditions as described in the [Respondent's] final offer dated March 19, 2010." GCX-10(I).[23] The Union continued in its understanding that Respondent had implemented wages increases for each 2010, 2011 and 2012. Tr: 164 ln 13– 16.[24]

[22] A "two-Member" case.

[23] Of note, Bull's June 24, 2010 email directly impeaches any Respondent contentions (Tr: 26 ln 5 – 21) seeking to assert Respondent's May 22, 2010, Operating Procedures

As detailed in Judge Brakebusch's ***Carey Salt I ALJD*** (GCX-2), about June 23, 2010, Respondent again proposed a final offer, its "June" final offer, which again included the same three-year wage package as in the Respondent-implemented March 2010 final offer. GCX-11 p 37; Tr: 88 ln 19 – Tr: 89 ln 9; Tr: 129 ln 10 – Tr: 130 ln 12; Tr: 165; Tr: 172 ln 8-17. On June 26, Respondent apprised the Union that the June final offer would be implemented the next day – Respondent provided no limitation as to the three-year wage package:

> In view of the union's failure to accept the company's final offer dated 6/23/10, this email is to notify you **that the terms of such offer will be implemented effectively tomorrow**, excepting, of course, those terms that cannot by law be implemented, including the no-strike/no-walkout clause, dues check-off, and the obligation to arbitrate."
>
> As with the previous implementation after reaching impasse, the grievance procedure will remain in effect, with the exception that the company's decision in the final step will be binding.

(Emphasis supplied; GCX-12(A).)

Although Respondent's June 26, 2010 email did state that a certain limited number of items would not be implemented (ALJD 39 ln 20-25), there was no Respondent notice to the Union that the three-year wage package was not be again implemented. Again if the Union was to somehow infer in June 2010 that the three-year wage package was not being implemented, Respondent should have called a witness(es) to place that testimony into evidence. In the absence of such witnesses, the Board, in

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RX1-(B) or subsequent Operating Procedures somehow placed the Union and the Unit employees it represents on notice that the Respondent-implemented-and-planned 2011 wage increase would not go into effect.

[24] In regard to a Respondent June 17, 2010 email to the Union (GCX-15), Fuslier explained that Heider was responding to a June 17, 2010 inquiry from the Union as to the conditions Unit employees would be working under in 2010, as the ulp strike had just ended two days before. Tr: 165 ln 3 -7.

affirming the Judge, is again urged to infer that had Respondent agents such as Victoria Heider, Gord Bull,[25] Don Brumm and Toyla Charles testified that they would have admitted that their contemporaneous understanding in 2010 was that the three-year wage package (2010, 211 and 2012) was implemented in March 2010 and again in June 2010.

Moreover, later that month on the 29th, Respondent emphasized to the Union that it was implementing the "entire" June 2010 final offer (ALJD: 40 ln 8-10), except those things mentioned on June 26 that could not be implemented:

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

(Emphasis supplied; GCX-13; Tr: 89 ln 13 – Tr: 91 ln 15.)

Of note, although Respondent Exception 4 assertedly attempts (to some limited extent) to dispute what Respondent implemented in March 2010 as to 2011 and 2012 wage increases, Respondent's Exceptions make no effort to dispute that the 2011 and 2012 wage increases were again implemented in June 2010. Thus, even if there is an issue as to the scope of the March 2010 Respondent implementation, Respondent concedes the 2011 wage increase was implemented later in June 2010. In brief, Respondent

[25] As part of Respondent's defense, Bull testified that during the limited two-month period of time of March and April 2010 he had not discussed with the Union or employees "whether a 2011 pay increase was part of the terms and conditions that had been implemented with the company's final offer." As Respondent's first final offer was not implemented until March 31, 2010, in effect Bull was testifying to not discussing 2011 wages for a one month period in April 2010 – most of which was consumed by the ulp strike. Bull's limited testimony begs the Board's inference that he was discussing the 2011 wage increase with employees after April 2010. If the March 2011 wage increase was not a given, why else would Respondent post a March 2011 notice titled, "**Cote Blanche Mine - Wage Increase Status."**

Exception 4, is moot, immaterial, and just a waste of time, as even Respondent concedes the 2011 wage increase was implemented in June 2010.

Consistent with what Respondent told the Union, the Union continued to understand that Respondent had implemented wage increases for 2011 and 2012. Tr: 166 ln 21 – 167 ln 5; Tr: 173 ln 8 – Tr: 174 ln 9. As to the June 27, 2010 Operating Procedures attached to Bull's June 29 email (GCX-13), the Union understood the Operating Procedures to have their plain common sense meaning that they represented the wages that the Unit employees were receiving at that time in June 2010. Fuslier explained at hearing that Bull's June 29 email stated that the attached June 27 Operating procedures were prepared to set "forth what is now in effect." Tr: 167 ln 9 -11. (In other words, the Operating Procedures were **not** characterized as setting forth what wages would be in effect in 2011 or 2012, etc. – in fact Bull's email made no expressed reference to wages.) Clearly the Union had no reason to think the Operating procedures implied that the Unit employees would not receive their 2011 and 2012 wage increases incorporated in the Respondent-implemented March and June 2010 final offers. Further, Respondent never gave the Union the August 19, 2010 Operating Procedures RX-2; Tr: ln 13-21. However, nothing about the August 19, 2010 Operating Procedures would have tipped off the Union that the 2011 and 2012 wage increases were not to take effect on March 25 of each year. Rather, the August Operating Procedures, just as the June Operating Procedures, would have only indicated the wage rates being paid to Unit employees at that moment in 2010.

Furthermore, in all his bargaining and communications with Respondent, Fuslier never received any indication that the March and June 2010 implementations did not

include the 2011 and 2012 wage increases. Tr: 167 ln 12 – 17. Correctly, the Union had every belief that there would be 2011 and 2012 wage increases as implemented – how could it not? Tr: 174 ln 22 –Tr: 175 ln 5. Of particular note, is the absence of any contrary testimony from Bull, Brumm, Charles or Heider. The Board in affirming the Judge is urged to infer that Fuslier's/the Union's understanding was correct that in 2010 Respondent had twice implemented wage increases for 2010, 2011 and 2012, and that Respondent never gave the Union any indication to the contrary.

Further, Respondent's own internal documents reflect it understood there would be a 2011 wage increase, as in August 2010 Respondent began to budget for the March 2011 wage increase. GCX-26; Tr. 66-67; and Tr. 68 ln 17-21. In effect, it is only for the purposes of the Union's unfair labor practice charges that Respondent does not know that in 2010 it implemented 2011 and 2012 wage increases.

V. Respondent Exception 5

In Respondent Exception 5, Respondent does not except to the Judge's findings and conclusions that Respondent unilaterally withheld the 2011 wage increase, but instead narrowly asserts that the Judge erroneously viewed Respondent's decision to withhold the 2011 wage increase as *fait accompli*.[26] To the contrary, the Judge was right on point when he concluded that Respondent had no intent to bargain about withholding the wage increase and that any Respondent's communication to the Union was merely informational regarding a fait accompli decision to withhold the March 2011 wage increase. ALJD: 20 ln 16 – 22.

[26] As argued above, Respondent Exception 5 is so narrow as to be immaterial and should be disregarded as moot.

About Sunday, March 13, employee Local Union President Migues first saw the posted March 10 notice to employees.[27] Tr: 144 ln 20-22; Tr: 152 ln 1-3. About March 14,[28] Migues and then employee and Local Vice President O'Neal Robertson, at a "2:45"[29] meeting in Bull's office, met with Bull and Charles.[30] Tr: 147. When Migues asked if the Unit employees were going to "get a raise this year[,]"Bull responded by giggling and threatening employees Migues and Robertson with the question setting forth an unlawful quid pro quo, "Are you all going to drop the 10(j) charges[?]" Tr: 147 ln 24

[27] President Migues, as a maintenance employee, was normally scheduled to work dayshift, Sunday through Thursday, being off from work on Friday and Saturday of each week Tr: 140 ln 2–17. Former Unit employee Robertson was also a mine maintenance employee, and generally worked the same basic schedule as Migues. Tr: 146 ln 10-17.

[28] Mine Manager Bull is not normally at the mine on Sundays. Tr: 145 ln 24 – Tr: 146 ln 1.

[29] Throughout the hearing, the Parties agreed that in the earlier part of 2011, on weekdays, usually Mondays through Thursdays, Respondent (Bull, Brumm and/or Charles) would briefly meet with Local President Migues and/or then Local Vice President Robertson, at about 2:45 p.m., before the end of the dayshift at 3:00 p.m. Tr: 74 ln 11 - Tr: 75 ln 10; Tr: 146 ln 17.

[30] It is possible the March 14 meeting might have been March 15. During voir dire regarding RX-3, witness Brumm testified that in preparation for his testimony he had reviewed attendance records, which were produced under a FRE Rule 612 call. Brumm's testimony reflected that on Monday, March 14, Migues was on union business, on March 15 and 16, Migues worked, and on March 17, Migues was on union business (Tr: 202 ln 3-5); but Brumm added that he did not know what Migues did when on union business and that union business could include the 2:45 meetings with Respondent. Tr: 219 ln 15 – 22. Thus, Migues being on union business Monday, March 14, did not preclude a 2:45 meeting that day. (Respondent's spiral notebook (RX-3) did not show an entry for March 14, but Brumm admitted he didn't know if missing dates could be explained by his failure to include notes. Tr: 219 ln 11 -14. Further, the absence of a meeting date in Respondent's spiral notebook establishes little, as meeting dates do not run consecutively in the notebook, and as voir dire testimony reflected, the notebook is literally taped and stapled together to include additional notes or copies of notes. Further, Bull, apparently the actual custodian of the notebook (Tr: 217 ln 1-17), did not offer any testimony as to the notebook. The Board is urged to infer that the absence of Bull's testimony requires the inference his testimony would have impeached Brumm's testimony as to RX-3 and RX-3.) Respondent's notebook (RX-3) did show an entry for March 15, with Respondent designating as present (by use of only initials), Robertson, Migues and Bull. The notebook also reflects Migues and Brumm met March 16, RX-16, page 4.

– Tr: 148 ln 5. When the Union (Migues) declined to distanced itself from the Board's Section 10 remedial efforts, Bull further threatened that the only way the Unit employees would get a raise was to wait on the district court judge's decision on the Section 10(j) proceeding. Tr: 149 ln 7 -12. Thus, in a brief meeting Respondent, through Bull, (1) again unlawfully threatened Unit employees, as alleged in paragraph 7 of the second complaint,[31] (2) provided, yet again, direct evidence that Respondent would withhold the 2011 Unit employee wage increase while the Unit employees (such as Migues and Robertson) pursued the pending ulp charges, through their Union (upon which the Board was then seeking Section 10(j) relief) and (3) confirmed both Respondent's unilateral actions in delaying the wage increase and established that any Respondent bargaining regarding the 2011 wage increase was conditioned on the Union seeking to withdraw the pending ulp charges (or the Section 10(j) relief sought by the Board.)

Former Unit employee and Local Vice President Robertson (Tr: 154 ln 1 – 5) corroborated Migues as to the Migues-Bull exchange. GCX-17. As Robertson failed to honor his lawful Board subpoena to appear at the November ulp hearing (GCX-18), under FRE 804(a), the Judge appropriately received into evidence Robertson's NLRB affidavit with Robertson's attached March 14, 2011 notes. GCX-17; Tr: 179 – 186.[32] Of significance, Robertson did **not** learn of Respondent's March 10 notice to employees (GCX-7(B)) until he received telephone calls from Unit employees about March 11; and he did not actually see Respondent's March 10 notice to employees until about Sunday,

[31] Respondent does not except to this independent Section 8(a)(1) violation.
[32] Of significance, Robertson's affidavit is, of course, a sworn statement, thus giving it a high degree of trustworthiness and reliability. For example, often courts and administrative bodies decide summary judgment litigation based upon affidavits. Further, to the extent Respondent would dispute anything in Robertson's affidavit, it had available to it its agents such as Bull, Brumm and Charles to call as responsive witnesses.

March 13. GCX-17, paragraph 4. Additionally, Robertson clearly testifies in his sworn NLRB affidavit that he had **not** received advance notice of Respondent's posting of Respondent's March 10 notice to employees:

> 6. **Before the Employer posted the notice, the Employer had not contacted me as a Local Union officer to give me (the Union) any notice** that it was not going ahead with the March 2011 wage increase.

(Emphasis supplied; GCX-17, paragraph 6.)

On Respondent's cross-examination of Migues, Respondent elicited testimony from Migues confirming that Respondent's March 10 notice to employees had not been discussed at a 2:45 meeting on March 10. Tr: 152 ln 14 – 23.[33]

As to the Migues-Bull exchange at the March 14 2:45 meeting after Respondent's posting of the March 10 notice to employee, Robertson corroborated Migues that Bull threatened the two Unit employees (second complaint – paragraph 7) and orally conditioned the 2011 wage increase on Respondent's Unit employees, through their Union, seeking the withdrawal of the Board Section 10(j) petition. GCX-17, paragraph 5.

It is most noteworthy that another corroborative witness for Migues (and also Robertson) is Respondent's Mine Manager Bull, who attended the entire hearing, was probably the hearing's longest witness, but who never testified as to the Migues-Bull exchange. Bull made no effort to deny the meeting, nor to dispute what was said. The Board is urged to affirm the Judge's findings and conclusions that the 2:45 meeting took

[33] Respondent also elicited testimony from Migues that both Bull and Charles were present on March 10 (Tr: 152 ln 20 – 230, and Respondent failed to call either Bull or Charles to dispute this testimony it elicited from Migues. Thus, an inference should be drawn that had Bull and Charles testified they would have both corroborated Migues (the Union.)

place as described by Migues.[34] Thus, for all the above reasons, the Migues-Robertson uncontradicted testimony should be relied upon as evidence of Respondent's unlawful motive in withholding the March 2011 wage increase and that Respondent made it emphatically clear to the Union that it was unlawfully refusing to bargain about the withholding the March 2011 wage increase.[35]

After the March 14 meeting with Bull, Local Union officials Migues and Robertson did not attempt to further question Respondent's local mine management concerning Respondent withholding the 2011 wage increase, because, as Migues recognized, Respondent withholding of the wage increase was already *fait accompli* and premised upon Respondent's insistence the Union not pursue Section 10(j) interim relief. Specifically, Migues testified regarding the March 2011 wage increase, "It was pretty clear that we wasn't going to get one." Tr: 148 ln 16.[36] Of note, no Respondent witness testified to the contrary. As discussed below in regard to Respondent Exception 2, when the Union's International Representative requested bargaining, Respondent again refused to bargain.

Respondent's effort to dispute the Judge's fait accompli conclusion finding is directly impeached by the facts of the case. Respondent unilaterally posted the March 10, 2011 notice to employees without first communicating to the Union. Further, the March

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[34] Of further note, Migues recalled that Respondent's Toyla Charles was at the 2:45 meeting.

[35] ***Griffin Inns***, 229 NLRB 199 (1977) (The Board relied upon "uncontradicted testimony" to find employer unlawfully conditioned bargaining on withdrawal of ulp charge.)

[36] Although its coercive message was already clear, in a Respondent-posted April 6 notice to employees, Respondent again coerced Unit employees by ratifying its March 10 threats, admissions of unlawful motive and unlawful failure to bargain by again threatening Unit employees, "Our previous communications about our wage increase plans are still accurate." Tr: 149 ln 9 – 15; GCX-7(D).

14, "2:45" Migues-Bull meeting/conversation was not even belated notice to the Union. Respondent's at-hearing admissions reflect that it well-understood in March 2011 that notice to the Union about a change in wages should have been to the Union's International Representatives, not to the Local Union officials. Tr: 108 ln 8 – Tr: 109 ln 2. Further, Respondent understood that bargaining about wages would be done at the bargaining table. Tr: 214. In other words, even Respondent admits that it never gave the Union meaningful notice of Respondent's decision to withhold the March 2011 wage increase or an opportunity to bargain. Alleged "notice" was a November 2011 afterthought for the purposes of the NLRB charges. Instead in March 2011, Respondent was focused upon threatening the Unit employees, undermining their support for the Union and convincing the Unit employees they had no protection under the Act.

Respondent Exception 5 is also at odds with extant Board law. When parties are bargaining for a collective-bargaining agreement, an employer's obligation to refrain from unilateral change extends beyond the mere duty to provide a union with notice and an opportunity to bargain about a particular subject matter before implementing such changes. Rather, the employer must refrain from implementing such changes at all, absent overall impasse on bargaining for the agreement as a whole. ***Guard Publishing Co., d/b/a The Register-Guard***, 339 NLRB 353, 354 (2003) citing ***RBE Electronics of S.D., Inc.,*** 320 NLRB 80 (1995). See also ***Visiting Nurse Services of Western Mass., Inc.***, 325 NLRB 1125, 1130-1131 (1998), enf'd 177 F.3d 52, 56 (1st Cir. 1999), cert. denied, 528 U.S. 1074 (2000). Thus, one cannot take seriously Respondent's apparent defense that absent the Union's request to bargain about wages in the midst of contract

negotiations that Respondent was actually privileged to act upon a partial and regressive implementation based upon unlawful retaliatory motives in violation of Act.

Further, in the absence of impasse Respondent could not lawfully implement in March 2011 its delay of the 2011 wage increase. It is essentially hornbook law that in the absence of impasse an employer may not implement terms and conditions of employment during bargaining for a collective-bargaining agreement. Thus, Respondent cannot meaningfully except to any fait accompli finding by the Judge, without also proving the Parties were at impasse. Judge Brakebusch found Respondent failed to prove lawful impasse existed before Respondent's 2010 unlawful implementations:

> As discussed above with respect to the issue of Respondent's implementation of its final offer on March 31, 2010, the question of whether a valid impasse exists is a "matter of judgment" and relevant factors include (1) the bargaining history; (2) the good faith of the parties in negotiations; (3) the length of negotiations; (4) the importance of the issue or issues as to which there is disagreement; and (5) the contemporaneous understanding of the parties as to the stated negotiations. *Taft Broadcasting Co*., 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).
> While Respondent acknowledges that the application of the *Taft* standards to the claimed impasse on June 23 shows a closer case with respect to several criteria than for the March 31 impasse, Respondent nevertheless asserts that the application shows impasse. With respect to bargaining history, Respondent contends that while the asserted impasse of March 31 was broken by the strike, the additional proposals put the parties further apart than they were previously. With respect to the importance of the issue as to which there is no agreement, Respondent also asserts that because there were the same and even more issues in disagreement than on March 31, 2010, this criterion is even stronger for the Respondent than in March. While Respondent acknowledges that there were only seven days of negotiations as contrasted with the 16 days before the alleged March 31, 2010 impasse, Respondent asserts that additional days of negotiations "would have led nowhere." With respect to the contemporaneous understanding of the parties, Respondent contends that because the Union did not indicate that it would accept any of Respondent's core proposals, there was no basis for continuing the effort to have the Union change their mind.
> **The application of the *Taft* factors to the facts in this case strongly counters a finding of a valid impasse on June 23, 2010.** Aside from the fact that the bargaining period was only seven days and there was no evidence that there was a contemporaneous understanding of the parties, **the two factors that are most**

> **at odds with the existence of a valid impasse is the bargaining history and the absence of good faith.**
> Although there is no presumption that an employer's unfair lab practices automatically preclude the possibility of meaningful negotiations and prevent the parties from reaching good-faith impasse [footnote omitted], **the Board has also noted that a finding of impasse presupposes that the parties prior to the impasse have acted in good faith.** *White Oak Coal Co*., 295 NLRB 567, 568 (1989). In its decision in *Lafayette Grinding Corp*., 337 NLRB 832 (2002), the Board adopted the rationale of the court in *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 138 (D.C. Cir. 1999), in recognizing two alternative situations in which an unfair labor practice can contribute to the parties' inability to reach an agreement. **First of all, an unfair labor practice can increase friction at the bargaining table. Secondly, by changing the status quo, a unilateral change may move the baseline for negotiations and alter the parties' expectations about what they can achieve, making it harder for the parties to come to an agreement.**
> There is no question that as of June 23, 2010, and after 4 months of negotiations, **there was increased friction at the bargaining table. It is, however, the second prong of the *Alwin* analysis that is most relevant to the instant case. As of June 23, 2010, and at the time of the alleged impasse, Respondent had twice unlawfully implemented changes in terms and conditions of employment in the absence of a valid impasse. With each implementation, Respondent's proposals became more regressive and more employees' rights were eliminated. As of June 23, 2010, Respondent had continued to insist on bargaining proposals that left the Union without any representational rights and left employees in a worse position than if they had no collective-bargaining representative at all.**
> **Thus, Respondent's conduct for the period of time from March 31 until June 27, 2010, clearly moved the baseline on issues over which the parties were bargaining and altered the parties' expectations about what they could achieve, preventing a valid impasse on June 23, 2010. *Titan Tire Corp*., 333 NLRB 1156, 1159 (2001).**
> **Accordingly, the record evidence does not support a finding of a valid impasse on June 23, 2010**.

(Emphasis supplied; ALJD 38 – 39.)

It is clear that there was no impasse in 2010, and Respondent made no attempt at the November ulp hearing to prove that an impasse had developed before its March 2011 unilateral implementation. Thus, the Board is urged to conclude that Respondent's failure to establish impasse existed before its March 2011 unilateral delay of the 2011 wage increase precludes the finding of any lawful implementation (delay of wage

increase) in 2011. In fact, even had Respondent attempted to prove impasse in March 2011, it's clear that Respondent's earlier 2010 unfair labor practices would have made that impossible. However, we need not speculate as to what Respondent might have proved, as Respondent completely failed to even attempt to prove impasse in March 2011; Respondent instead conceded there was no impasse in March 2011 – thus there could not be a lawful unilateral delay of the 2011 wage increase. Accordingly, Respondent Exception 5 regarding the issue of fait accompli is completely immaterial – all the more reason it must be denied.

In summary, Respondent Exception 5 is unworthy of any consideration.

VII. Respondent Exception 2

In Respondent Exception 2, Respondent contends the Judge erroneously found that Respondent conditioned bargaining.[37] Although Respondent's fait accompli unilateral discrimination in violation of Section 8(a)(1)(3)(4) and (5) was already virtually etched in stone (perhaps rock salt) given Respondent's March 10 notice to employees (GCX-7(B)) and also Bull's statements to Migues and Robertson the following week on March 14, the Union went quite a distance beyond the extra mile to attempt to resolve the dispute through bargaining – despite the myriad of Respondent's earlier not yet remedied unfair labor practices as found by Judge Brakebusch. GCX-2. p 47 - 52. On about March 31, 2011, at about 11:43 a.m., International Union Staff

[37] As noted above, Respondent Exception 2 is flawed, narrow and moot. In contending the Judge improperly conditioned bargaining beginning in March 2011, Respondent only references the ALJD at pages 21 and 22. However, Respondent fails to except at page 23 of the ALJD wherein the Judge actually found that Respondent did insist, as a condition to bargaining with the Union about the wage increase that the Union convince the Board to withdraw the Section 10(j) petition.

Representative Michael Tourne emailed Respondent's Bull to object to the cancellation of the 2011 wage increase and to demand bargaining:

> **From:** Tourne, Michael
> **Sent:** Thursday, March 31, 2011 11:43 AM
> **To:** 'Gord Bull'
> **Cc:** 'Victoria Heider'; Fuslier, Gary
> **Subject:** Demand to Bargain
>
> Gord,
>
> The USW objects to the Company's cancellation of the 2.5% wage increase that the Company said would be effective March 25, 2011. **The Union demands to bargain over this cancellation and requests that the Company implement the 2.5% wage increase pending the outcome of our further negotiations**. Please contact me with your available dates.
>
> Thanks,
> Mike

(Emphasis supplied; GCX-8(A), p 2 – bottom.

On March 31, within an hour of the Union's email, Respondent's Heider (lead negotiator at contract negotiations) refused to bargain and conditioned bargaining regarding Respondent delaying the 2011 2.5% wage increase on the Union convincing the NLRB to withdraw the then pending Section 10(j) petition:[38]

> **From:** Victoria Heider []
> **Sent:** Thursday, March 31, 2011 12:16 PM
> **To:** Tourne, Michael; Gord Bull
> **Cc:** Fuslier, Gary
> **Subject:** Re: Demand to Bargain
>
> Dear Mike;
> The Company has never said that there would be a wage increase effective March 25, 2011. We proposed such in negotiations but that proposal was never accepted. **As you are aware, the government has a Section 10 (j) proceeding pending in federal court**.
>
> As part of that case, as you should know, the government (with the permission of the USW) has asked the federal court to order a return to

[38] As alleged at paragraph 16 – 18 of the first complaint.

> the pre-March 31, 2010 terms and conditions of employment, which would mean the cancellation of the 2010 wage increase as well as a prohibition of any 2011 increase. If you have not seen it, we can provide you a copy of the e-mail from the USW lawyer, Bruce Fickman, acknowledging the foregoing. **If the Union can convince the government to withdraw the ridiculous request being made in federal court to return to the pre-March 31 conditions of employment, we would be more than pleased to be able to immediately address the wage increase issue you are raising.** In the meantime, of course, as the bargaining representative for the unit, we would be pleased to meet with you at the earliest opportunity to discuss any of this.
>
> Regards, v

(Emphasis supplied; GCX-8(A), p 2 – top.)

It is important to remember the context's of Respondent's March 31, 2011 email, which was sent following a year of Respondent's already staggering Section 8(a)(1)(3) and (5) violations (GCX-2), Respondent bypassing the Union to threaten Unit employees with the March 10 notice to employees clearly calculated to denigrate both the Union and the Board's administration of the Act in the eyes of Unit employees, and Respondent's earlier March 14 threat, by Bull, to Unit employees Migues and Robertson, which conditioned the 2011 wage increase on withdrawal of the Section 10(j) petition.

Before the Union could respond to Heider's first March 31 email, within a half-hour, Heider again emailed the Union, acknowledging that the Union and the Employer were still in contract negotiations and effectively threatening asserted impasse and yet another unlawful implementation:

> **From:** Victoria Heider []
> **Sent:** Thursday, March 31, 2011 12:45 PM
> **To:** Tourne, Michael; Gord Bull
> **Cc:** Fuslier, Gary
> **Subject:** Re: Demand to Bargain

Mike:
At our last bargaining session, the parties pretty much "agreed to continue disagreeing" until the NLRB trial was finished. To my way of thinking, the trial, and its end, should impact everyone's position.
Do I gather from your earlier e-mail that you believe the parties are at impasse so that the Company can unilaterally implement portions of our final offer from last year? I do not see it that way but could be persuaded to such if that is your view. My thought is that we should be thinking about another bargaining session to see where the parties stand and that we should not be so quick to decide there is currently an impasse.

Regards, v

(Emphasis supplied; GCX-8(B) p 1 bottom – p 2 top.)

Early in the afternoon of March 31, 2011, in response to Heider's first March 31 email, Tourne promptly emailed Heider. Again the Union sought bargaining, reminded Respondent that it had implemented its March 2010 final offer with the 2011 2.5 wage increase, and reminded Respondent, as it already knew from the Board's original Section 10(j) petition of February 2011, that the Board's Section 10(j) petition proposed a return to pre-implementation terms and conditions of employment, as requested by the Union:

From: Tourne, Michael
Sent: Thursday, March 31, 2011 1:05 PM
To: 'Victoria Heider'
Cc: Fuslier, Gary; 'Gord Bull'
Subject: RE: Demand to Bargain

Victoria,

The Company did not just propose a 2.5% wage increase effective March 25, 2011, the Company implemented that provision when it unilaterally implemented its March 19, 2010 "final offer". The NLRB's pending request for the 10(j) injunction requests a return to the pre implementation terms and conditions, **as requested by the Union**. We have never requested cancellation of the March 31, 2010 2.5% wage increase nor will we seek cancellation of the 2.5% wage increase that was due effective March 25, 2011. We also want to continue our negotiations over the Company's termination of Graig Bernard. **Please provide your available dates.**

Thanks,
Mike

(Emphasis supplied; GCX-8(A) p 1 bottom – p 2 top.)

A short time later on March 31, the Union's Tourne also responded to Heider's second March 31 email, reminding Respondent that none of its unilateral actions were permissible, as the Parties had never bargained to impasse: [39]

From: Tourne, Michael
Sent: Thursday, March 31, 2011 1:07 PM
To: 'Victoria Heider'
Subject: RE: Demand to Bargain

Victoria,

There was **never** any bargaining impasse in these negotiations.

Mike

(Emphasis supplied; GCX-8-(B) p 1, bottom.)

In addition to there never being any impasse, there was also never any bargaining in response to the Union's March 31, 2011 written demands for bargaining. Tr: 85 ln 2 – 13. This was because, after all, as the March 10 notice informed Unit employees, as Bull told Migues and Robertson and as Heider emailed Tourne, Respondent conditioned bargaining upon its insistence that "the Union [] convince the [Board] to withdraw the "ridiculous**"** request being made in federal court to return to the pre-March 31 conditions of employment." (Emphasis supplied; GCX-8(A) p 2.)

In its Exception 2, Respondent argues that as Heider also first emailed that the Respondent would be pleased to meet that Respondent did not condition bargaining. What Respondent does not tell the Board is when, if ever, did Respondent bargain or

[39] Exactly the conclusion of Judge Brakebusch. GCX-2. p 48, 49.

even attempted to bargain with the Union over Respondent's decision to withhold the March 2011 wage increase. The answer: never. Tr: 30 ln 8. As the Judge insightfully found, Heider's first March 31 email leaves no doubt that Respondent, acting through Heider (just as Respondent had acted through Bull), without qualification conditioned bargaining about the 2011 wage increase and its effects on the Union's success in getting the Section 10(j) petition withdrawn. Heider's subsequent window dressing to the effect that Respondent would be pleased to meet and discuss (not bargain), does not change the Respondent-imposed condition preventing bargaining until the Section 10(j) petition was withdrawn. ALJD: 22 ln 1 – 16.

It's clear that when Respondent conditioned bargaining regarding Respondent's delay of the March 2011 2.5% wage increase upon the Unit employees and the Union convincing the Board not to exercise its Section 10 responsibilities, Respondent violated Section 8(a)(1) and (5) of the Act as alleged at paragraphs 16 through 18 of the first complaint. In the already existing context of Respondent's 2010 unfair labor practices (ALJD;[40] GCX-2), Respondent dramatically compounded and enhanced the unlawful effects of its earlier March 2011 Section 8(a)(1)(3)(4) and (5) violations, by refusing any bargaining to resolve the matter until the Unit employees were denied any interim relief under Section 10(j) of the Act. In **Regency House**, discussed above in regard to Respondent's unlawful Section 8(a)(1) threats, the Board adopted the ALJ's conclusions that the employer violated Section 8(a)(1) and (5) of the Act by conditioning bargaining for a successor agreement upon the union's agreement to restore a wage increase that had been rescinded pursuant to a Board order:

[40] For example, a similar unlawful Respondent conditioning of bargaining was found by Judge Brakebusch. ALJD: 37 ln 30 -35.

> Having so committed itself to early negotiations, Kaufman's insistence that the Union had to agree to restore the wages rescinded pursuant to the Board's Order before bargaining could commence, evidenced bad faith and a violation of Sections 8(a)(5) and 8d) of the Act as a party may not unilaterally impose conditions upon bargaining. ***Caribe Stable Co.***, 313 NLRB 877, 888–890 (1994);[41] ***Laredo Packing Co.***, 254 NLRB 1, 18–19 (1981).

(Regency House, 356 NLRB slip op at 15.)

Just as the ***Regency House*** employer unlawfully conditioned bargaining on the waiver of a Board remedy, Respondent in this fact pattern also conditioned bargaining on the waiver of a Board remedy, interim relief under Section 10(j) of the Act. ***Bryant & Stratton,*** 327 NLRB at 1137 (1999) (Employer conditioning wage increase on union's waiver of the right to file an unfair labor practice charge unlawful.); ***Griffin Inns***, 229 NLRB at 199 (Reversing ALJ, the Board relied upon "uncontradicted testimony" that an employer agent told the union, "If you drop those charges, we'll start to negotiate[,]" and concluded that the employer unlawfully conditioned bargaining on the withdrawal of ulp charges.") ***Cf. Vanguard Fire***, 345 NLRB 1016, 1017 (2005) (Board affirmed ALJ that employer unlawfully conditioned bargaining on the union preparing a bargaining agenda.)

VIII. Respondent Exception 6

As argued above, in addition to clearly failing to state the portion of the record relied upon, Respondent Exception 6 also fails to comply with Section 102.46(b)(1)(i) and (iv) of the Board's Rules in that Respondent fails to both specifically set forth the questions of procedure, fact, law, or policy to which exception is taken and fails to

[41] In ***Caribe Stable***, the employer violated Section 8(a)(1) and (5) of the Act by, among other things, refusing to meet unless the union agreed to withdraw all pending unfair labor practice charges and to waive the right to file such charges in the future.

concisely state the grounds for the exception. Respondent Exception 6 is at best only a pro forma catch all exception that essentially challenges the Board to guess what is excepted to and why.

IX. Conclusion: Rejection of Respondent's Exceptions

In the first paragraph of the March 10 notice to employees Respondent conspicuously engaged in violations of Section 8(a)(1)(3)[42](4) and (5) of the Act, by directly communicating to its employees that it was unilaterally, without notice to the Union, delaying a Respondent-promised-planned-implemented wage increase in violation of Section 8(a)(1) and (5) of the Act, twice threatening its employees in violation of Section 8(a)(1) of the Act, and explicitly admitting, against it own interest, the undisputed evidence of unlawful motive and animus conclusively proving the Section 8(a)(1)(3) and (4) violations. Respondent effectively communicated its own self-evident truth to its Unit employees that Respondent believes statutory employees have no protections under the NLRA.

This case presents not only admitted, hammer and tongs, unilateral Respondent-discrimination against the affected Unit employees, but more importantly Respondent's unlawful retaliation against its own Unit employees calls into question whether statutory "employees" can choose to engage in Section 7 concerted and/or union activities and/or seek meaningful access to the National Labor Relations Board (Board) free of retaliation. Respondent, in the face of a pending Board-authorized Section 10(j) petition, unilaterally apprising its Unit employees in writing that it would withhold a wage increase because they have concertedly sought access to the Board through their collective-bargaining

[42] As noted above, Counsel for the GC's Cross-Exceptions address the Section 8(a)(3) allegation.

representative (their Union), was clearly seeking to prevent employee access to the Board and to convert the Board's administration of the Act into an unfortunate parody.

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For the Board to fail to find Respondent's conspicuous violations of the Act in this fact pattern, would be for the Board to establish clear precedent that statutory employees seek access to the Board only at their peril and that the Board's remedial actions will predictably result in further charged party-retaliation that will never be remedied by the Board. Thus, the Board is respectfully urged to reject Respondent's Exceptions in their entirety.

Thank you for considering the above.

Respectfully submitted,

July 13, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2012, I caused to be E-filed the foregoing Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions to Decision by Administrative Law Judge and caused to be served by electronic mail (email) copies to the following counsel of Respondent and the Charging Parties:

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July 13, 2012