UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW NGC, INC., d/b/a NATIONAL GYPSUM COMPANY

and Case 25-CA-031825

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (USW), AFL-CIO, CLC

and Cases 25-CA-031898
25-CA-065321

UNITED STEELWORKERS LOCAL UNION NO. 7-0354, a/w UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (USW), AFL-CIO, CLC

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

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Comes now Counsel for the Acting General Counsel and respectfully submits this Brief in Support of Exceptions to the decision of the Administrative Law Judge issued in this matter on September 7, 2012.

I. STATEMENT OF THE CASE

Pursuant to charges filed by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial, and Service Workers International Union, AFL-CIO, and its Local Union No. 7-0354 (the "Union"), a Consolidated Complaint was issued on February 23, 2012. The Consolidated Complaint alleged that New NGC, Inc. d/b/a National Gypsum Company ("Respondent") engaged in conduct violative of Section 8(a)(1), (3), and (5) of the Act. A

hearing was held on the issues raised by the Consolidated Complaint on May 7 to 9 before Administrative Law Judge Jeffrey D. Wedekind.

On September 7 Judge Wedekind issued his decision finding that Respondent had violated Section 8(a)(1) and (5) of the Act. Specifically, the Judge found that Respondent had made unilateral changes to its employees' terms and conditions of employment by refusing to pay any portion of the increase in health insurance premiums and by changing the number of locks employees were required to carry on their person. The Judge, however, failed to find that Respondent prematurely declared that the parties were at an impasse in their contract negotiations; Respondent insisted to impasse on a permissive subject of bargaining, namely a ratification vote on the collective-bargaining agreement by the employees; Respondent refused to engage in further bargaining with the Union; and Respondent then proceeded to lock out its employees in support of its unlawful bargaining position. The Acting General Counsel excepts to the Judge's conclusion that the parties had reached a valid impasse in their negotiations on September 2, 2011, and his corresponding dismissal of Consolidated Complaint allegations 5(a), 5(b), 7(g), 7(h), 7(j), 7(k), and 8.

II. SPECIFICATION OF THE QUESTIONS INVOLVED

A. Did the Judge err when he found that the parties had reached an impasse on September 2, 2011 (Exceptions 1, 2, 4 through 15, 19, and 23)?

B. Did the Judge err when he found that Respondent did not unlawfully declare that the parties were at impasse in their negotiations (Exceptions 1, 2, 4 through 15, and 23)?

C. Did the Judge err when he refused to find that Respondent had unlawfully insisted to the point of impasse on a non-mandatory subject of bargaining (Exceptions 1, 2, 9 through 13, 16 through 21, and 23)?

D. Did the Judge err when he failed to find that Respondent unlawfully ceased bargaining with the Union on September 2, 2011 (Exceptions 1 and 23)?

E. Did the Judge err when he failed to find that the lockout against the Union and all bargaining unit employees violated Section 8(a)(1), (3), and (5) of the Act (Exceptions 1, 22, and 23)?

III. ARGUMENT

In his decision, the Judge found that the parties had reached an impasse in their negotiations on September 2, 2011. However, the record evidence does not support the Judge's conclusion, either that the parties were at overall impasse in negotiations or that the parties had reached an impasse on any critical issue in the negotiations. Rather, the evidence clearly supports a finding that the parties were not at impasse on September 2 when Respondent prematurely declared that the parties were at impasse, ceased further bargaining with the Union, and subsequently locked out the bargaining unit employees in support of Respondent's unlawful bargaining position.

A. Despite Respondent's Declaration to the Contrary, the Parties Were Not at Impasse on September 2

The Board considers negotiations to be in progress, and that no genuine impasse exists, until it is clear that further bargaining would be futile or that there is "no realistic possibility that continuation of discussion . . . would [be] fruitful." Saint-Gobain Abrasives, Inc., 343 NLRB 542, 556 (2004) (citations omitted), enfd. 426 F.3d 455 (1st Cir. 2005); Talbert Mfg., Inc., 250 NLRB 174, 178 (1980), enfd. mem. 676 F.2d 698 (7th Cir. 1982); see also PRC Recording Co., 280 NLRB 615, 635 (1986), enfd. 836 F.2d 289 (7th Cir. 1987). The Board does not lightly infer the existence of an impasse, and the burden of proving one rests on the party asserting it. See Naperville Ready Mix, Inc., 329 NLRB 174, 183 (1999), enfd. 242 F.3d 744 (7th Cir. 2001); Serramonte Oldsmobile, 318 NLRB 80, 97 (1995), enfd. in relevant part 86 F.3d 227 (D.C. Cir. 1996). Where movement between the parties continues to occur, the Board does not confine its

examination of bargaining history solely to the item claimed to be at impasse. See Duffy Tool & Stamping, L.L.C. v. NLRB, 233 F.3d 995, 999 (7th Cir. 2000) ("the Board is on sound ground in insisting that the employer bargain until it is plain that the parties are deadlocked in the negotiation as a whole"); Sacramento Union, 291 NLRB 552, 556-57 (1988), enfd. sub nom. Sierra Publishing Co. v. NLRB, 888 F.2d 1394 (9th Cir. 1989) (unpublished table decision). Rather, the very nature of collective bargaining presumes that while movement may be slow on some issues, a full discussion of other issues may result in agreement on stalled ones; "bargaining does not take place in isolation and a proposal on one point serves as leverage for positions in other areas." Patrick & Co., 248 NLRB 390, 393 (1980) (citation omitted), enfd. mem. 644 F.2d 889 (9th Cir. 1981); see also Sacramento Union, 291 NLRB at 556. The greater the number of bargaining sessions on the subject claimed to be at impasse, the greater the chance that an impasse exists. See PRC Recording Co., 280 NLRB at 635 ("While it is true that the number of negotiating sessions is not controlling, generally, the more meetings, the better the chance of finding an impasse."); WPIX, Inc., 293 NLRB 10, 17 (1989) ("the fact that the parties were not close on many issues does not indicate that the negotiations were deadlocked; it shows that the parties still had many hours of bargaining before them in order to resolve their differences"), enfd. 906 F.2d 898 (2nd Cir. 1990). Finally, the Board will not find an impasse unless *both* parties believe that they are "at the end of their rope" and are unwilling to compromise. See Saint-Gobain Abrasives, 343 NLRB at 556 (citing PRC Recording Co., 280 NLRB at 635); Grinnell Fire Protection Systems Co., 328 NLRB 585, 585 (1999), enfd. 236 F.3d 187 (4th Cir. 2000); WPIX, Inc., 293 NLRB at 17 (no impasse where employer waited until eleventh session to introduce its final contract proposal, the parties met only three additional

times to discuss the new proposal and made progress at each meeting, and the union, but not the employer, stated its willingness to negotiate further).

Contrary to the Judge's conclusion, in the present case the evidence demonstrates that Respondent, at their September 2, 2011, bargaining session, prematurely declared that the parties were at impasse and then offered to withdraw its claim of impasse if the Union took Respondent's last, best, and final offer to another ratification vote. Although the Union rejected the claim of impasse and sought to continue bargaining, Respondent broke off negotiations, refused to bargain with the Union, and shortly thereafter locked out the employees. As discussed below, the evidence demonstrates that there was no bargaining impasse, and therefore Respondent's premature declaration of impasse and refusal to engage in further bargaining interfered with the bargaining process, in violation of Section 8(a)(1) and (5) of the Act.

1. The Parties Had Not Reached an Overall Impasse in Negotiations

The evidence clearly demonstrates that the parties had not reached impasse on September 2, the date that Respondent declared impasse and refused to continue bargaining. As an initial matter, significant movement occurred throughout the negotiating process right through the final bargaining sessions. For example, during the earlier sessions, the parties reached tentative agreements on seniority, vacation**,** bereavement leave, and other miscellaneous proposals. (G.C. ex. 10, pgs. 1-8) While the Judge noted the progress made by the parties at the July 28 bargaining session and described the session as "relatively productive" (ALJD pg. 22, ll. 8-19), Respondent's Labor Relations Manager, Matt May, identified that particular session as "probably the most constructive since the beginning of negotiations" (TR 63). May further testified at the hearing that the Union's decision to withdraw its dues deduction and retroactive wage proposals at the July 28 session were "significant moves." (TR 64-65) And yet this

bargaining session was the one that immediately proceeded Respondent's declaration of impasse on September 2.

At the September 2 bargaining session itself, just moments before Respondent declared impasse, the Union not only modified its proposals about the length of time adverse items could remain in an employee's personnel file, moved closer to Respondent's position on the defined benefit multiplier the Union was seeking, and accepted two grievance resolutions as tentative agreements, it also agreed to exactly match the wage rates Respondent had proposed in its last, best, and final offer. (ALJD pgs. 23-24; TR 151-52; G.C. ex. 5, pg. 95-97) See Towne Plaza Hotel, 258 NLRB 69, 78 (1981) (recent union concession and expression of willingness by union to consider employer's proposals show no impasse existed). In fact, in his bargaining notes from that session, Respondent's Production Manager Jeff Hawk noted that the Union's movement "shows making progress." (Resp. ex. 132) By that point in the negotiations, of the seven "sticking points" that the Union had identified on March 28 before Respondent issued its first last, best, and final offer, the parties had resolved four of them and moved closer on the defined benefit multiplier, leaving the new retirement account ("RA") and 401(k) proposals for further discussion. (TR 429-33)

Yet rather than actually discussing those or any of the other open proposals at the table, Respondent came back from a caucus and simply declared that the parties were at impasse (unless, of course, the Union was willing to take a new last, best, and final offer to a ratification vote). Specifically, as May himself testified, he informed the Union that Respondent's new last, best, and final offer should be taken to a vote, that there was nothing further to discuss, and that "short of taking the last, best, and final offer to a vote, yes" the parties were at impasse. When Union representative Chris Bolte asked May to reaffirm his statement "so what you're saying is,

if we take the contract to a vote, we're not at impasse, but if we don't take it to a vote, we're at impasse," May agreed that was the case. (ALJD pg. 24, ll. 17-26; TR 67-68, 407-08; Resp. ex. 131)[1]

Further, *both* parties clearly did not believe that they were "at the end of their rope" on September 2. To the contrary, when Respondent declared impasse, Bolte strongly disagreed, pointed to the numerous tentative agreements reached in the last two bargaining sessions alone, and said that the parties needed to continue bargaining that day. However, May refused to bargain any further that day, and refused to provide additional dates to bargain in the future, even though Bolte had asked for such dates. Shortly after the meeting, Bolte sent May an e-mail confirming the parties' respective positions, including the Union's belief that the parties were not at impasse and that Respondent had rejected the Union's overtures to continue bargaining on September 2 or to provide future dates for bargaining. (ALJD pg. 24, ll. 34-41; TR 154-55, 300; Resp. ex. 44) While the Judge rejected Bolte's statements with little explanation and indicated there is no reasonable basis for the Union to believe that further bargaining would have been

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[1] This version of events is not only corroborated by Bolte's testimony (TR 153-55), but also by the bargaining notes of Respondent's chief note taker, Terri Gammon (Resp. ex. 131):

Matt	—	chance to review union's last counter LBF union should allow ees to vote contract again & with stated position of this morning, we are at impasse
Chris	—	you are claiming impasse at this time
Matt	—	short of a new vote
Chris	—	do you have a LBF for us to review
Matt	—	we could put together a document with TAs
Chris	—	want to be sure I understand what LFB is?
Matt	—	
Chris	—	if we take to a vote - you are not claiming impasse correct
Matt	—	yes
Chris	—	if we don't take to a vote - you are claiming impasse
Matt	—	yess [sic]

fruitful, the record evidence is to the contrary. Indeed, as noted above, just moments before the declaration of the impasse the Union had changed their wage proposal to accept Respondent's proposed wage rates, a move which is hardly indicative of a party that is unwilling to compromise or "at the end of their rope." And when the parties next met for negotiations, on October 24 and with the only intervening factor being Respondent's unlawful lockout of the employees, they reached a tentative agreement on another of Respondent's bargaining proposals concerning employees appointed to International Steelworkers positions (TR 160; G.C. ex. 5, pg. 103). At that same meeting the Union was also able to introduce a new proposal that would allow it to accept Respondent's new RA approach if a USW-PACE fund was available as an investment option (TR 71-72, 76, 161-66).[2]

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[2] In his decision, the Judge mistakenly states that the parties had previously reached a tentative agreement on Respondent's bargaining proposal concerning employees appointed to International Steelworkers positions. (Exception 3) However, the evidence indicates that the parties never reached agreement on that proposal until October 24. The proposal in question is identified by the parties as "Co NE1" or "Co #1" (meaning Respondent's first non-economic proposal), and later as "Article 4, Section 14." As early as March 10, the Union proposed accepting Respondent's move on that article to two years without loss of seniority, *contingent upon* Respondent accepting the "Un #3" proposal. (G.C. ex. 5, pg. 57) On July 28, the Union withdrew Un #3 and in turn converted their position to rejecting Respondent's two year proposal on Article 4, Section 14. (G.C. ex. 5, pg. 89) That remained the Union's position until October 24, when it tentatively agreed to Respondent's two year position as identified in the last, best, and final offer. (G.C. ex. 5, pg. 103)

The Acting General Counsel is also excepting to the Judge's refusal to consider post-impasse evidence demonstrate that the parties were not at impasse on September 2. (Exception 7) Contrary to the Judge's analysis, the fact that the parties were able to make further progress on October 24, the next bargaining session after the unlawful declaration of impasse and with no intervening facts other than Respondent's unlawful lockout, provides further evidence that no impasse existed on September 2. Thus, had the parties been allowed to continue bargaining on September 2, at least some of the movement that was seen on October 24 could have occurred nearly two months earlier and helped move the negotiations forward. Instead, Respondent cut off negotiations and prematurely declared impasse. The cases cited by the Judge for example are inapposite to the present case since they involved respondents attempting to use after-the-fact evidence to demonstrate the existence of an earlier impasse, unlike the present case where the record evidence helps prove that an impasse never existed in the first place and there remained a need for further bargaining.

In sum, the parties continued to exchange proposals and reach agreement throughout the bargaining process, and nothing in the final sessions justified either party concluding that further bargaining would be futile. Given these facts, the Judge was incorrect to conclude that the parties reached impasse on September 2, and the Acting General Counsel respectfully requests that the Judge's decision be reversed.

2. The Parties Had Not Reached an Impasse on Any Critical Issue

To the extent that the Judge's decision can be read to find that the parties were at an impasse on two "critical" issues related to employee retirement, such a conclusion is contrary to the record evidence and extant Board law. Thus, while a single issue can create an overall bargaining impasse, it must be of "such overriding importance" that the impasse on that issue frustrates progress on further bargaining. Calmat Co., 331 NLRB 1084, 1097 (2000). An employer claiming impasse based on a single, critical issue must demonstrate three things:

> first, the actual existence of a good-faith bargaining impasse; second, that the issue as to which the parties are at impasse is a critical issue; third, that the impasse on this critical issue led to a breakdown in the overall negotiations—in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved.

Id. In the present case the Judge failed to properly apply that three-prong test to the facts of this case and, had he done so, he would have found that no single-issue impasse existed on September 2.

First, as discussed above, there was no actual existence of a good-faith bargaining impasse. Rather, the parties continued to bargain, including making important concessions and reaching tentative agreements, until the moment that Respondent declared impasse. In fact, with regard to the defined benefit multiplier, which is one of the related "critical" retirement items identified by Respondent's Labor Relations Manager, Matt May, in his September 6 e-mail to the

Union (Resp. ex. 44), the Union moved closer to Respondent's position right before impasse was declared. (ALJD pg. 23, ll. 44-45) Further, there was no contemporaneous agreement that impasse was reached.

Second, although the three disputed items (the defined benefit multiplier, the new RA proposal, and 401(k) proposals) were clearly necessary to the parties' ability to reach overall agreement, Respondent itself did not treat them as especially critical during the bargaining process. Thus, in the twelve sessions that the parties held before Respondent declared impasse, Respondent did not formally introduce its new RA and 401(k) proposals until the fifth session February 9 (G.C. ex. 5, pgs. 38-39), and the parties had very little, if any, actual discussion of those proposals until at least the ninth session on March 28. As Chris Bolte testified, the new RA proposal was discussed for at most two hours and the 401(k) proposal for maybe ninety minutes over seven months of bargaining. (TR 166-67) In fact, there is almost no record evidence at all that the parties actually bargained over any of the details of Respondent's new RA proposal, such as the percentage of employee pay that would be contributed to the retirement fund or the years of service that would entitle an employee to a designated percentage contribution. And it is not just the Union's testimony that supports this proposition—Respondent's bargaining notes (Resp. exs. 130-133), likewise demonstrate little discussion of the new RA at the bargaining table. For example, the notes of Terri Gammon, the official note taker for Respondent, show that the new RA was referenced on January 25 during the discussion on the funding status of the existing pension; was formally presented on February 9; briefly discussed on March 28, including being listed as a "sticking point;" and was discussed in slightly more detail on May 10 and July 28 due to the Union's request for a guaranteed fund. (Resp. ex. 131) Certainly, as the Judge points out in his decision, there was some mention by the parties

of these proposals in the bargaining updates that were issued to the employees, but memos to employees are hardly the same as actual negotiations occurring at the bargaining table. Rather, most of the parties' time at the table was spent addressing other significant issues including wages, health insurance rates, grievances, and the defined benefit plan pension multiplier.

Further, contrary to the Judge's decision, there is no evidence to suggest that the parties would have been unable to make progress on these issues if given more time. Thus, with respect to Respondent's proposal to suspend its 401(k) contribution upon notice to the Union, Respondent did agree, in response to one of the Union's proposals, to modify the language to include an obligation to meet with the Union and provide information regarding the need for a suspension. (TR 126; G.C. ex. 5, pg. 61) With regard to the most contentious aspect of Respondent's proposals, the new RA plan, the Union raised and made significant movement towards Respondent's position, but Respondent rebuffed the Union's efforts without discussion and never pressed the Union to make an alternative proposal. Thus, on May 10, the Union moved from its demand to retain the defined benefit plan under the previous contract and offered to consider Respondent's new RA proposal if it could guarantee a 5% return. Respondent merely responded that it was Respondent's bargaining practice not to "sweeten" a last, best, and final offer once made. (ALJD pg. 21, ll. 17-20; TR 61-62, 134-36)

Other options presented by the Union but summarily rejected by Respondent included a contingent proposal presented on March 28 whereby the Union would withdraw a number of proposals it was seeking if Respondent would withdraw its remaining economic items, including the new RA. (TR 128; G.C. ex. 5, pg. 69) And at the July 28 session, the Union suggested that perhaps Respondent could withdraw its new RA proposal and reintroduce it at a later date once data had been gathered from other locations where it had already been implemented. (TR 248,

398-99) While these options might not have been deemed acceptable to Respondent, these proposals were sincere efforts by the Union to advance the negotiations toward a final contract and they show that there was plenty of room left for discussion by the parties. (TR 233-36, 248-49) By the October 24 meeting, after Respondent unlawfully declared impasse but the negotiations had resumed at the request of the mediator, the Union presented an alternative investment fund that would enable it to accept Respondent's new RA proposal. (TR 161-66) Thus, the fact that little progress had been made on these issues by September 2 does not suggest that they were intractable. Rather, there were still a lot of options available to the parties and they simply had not yet discussed these issues long or hard enough for either party to claim impasse. See, e.g., Grinnell Fire Protection Systems, 328 NLRB at 596.

Third, as discussed above, the parties' differences regarding these issues did not lead to a breakdown in overall negotiations. For example, at the eleventh session (July 28) the parties reached a tentative agreement on seven grievances and a miscellaneous provision. (G.C. ex. 10, pgs. 9-10) The Union also dropped proposals regarding dues deductions and retroactive pay in return for a signing bonus (TR 142-44; G.C. ex. 5, pgs. 89, 91). Respondent deemed this movement by the Union as significant, making this the most productive session to date. At the twelfth session on September 2—just moments before Respondent declared impasse—the Union agreed to Respondent's wage proposal and the parties reached tentative agreements on additional miscellaneous issues. Thus, it cannot be said that no progress could be made on any aspect of negotiations until the purported "critical" issues were resolved. Indeed, Respondent's own characterization of the purported impasse—that the parties were at impasse *only* if the Union failed to take Respondent's last, best, and final offer to another ratification vote (but *were not* at impasse if the Union did conduct such a vote)—undermines the notion that a genuine impasse

existed or that the defined benefit multiplier, new RA, or 401(k) proposals were single critical issues that justified a declaration of impasse and a refusal to engage in further bargaining.

3. Respondent Unlawfully Declared that the Parties Were at Impasse and Refused to Engage in Further Bargaining with the Union

As can be seen, the credible evidence establishes that the parties were not at an overall impasse or at impasse on any critical issue on September 2. However, Respondent's Labor Relations Manager, Matt May, declared that the parties were at impasse and that there was nothing further to discuss. (TR 68, 407) Union representative Chris Bolte stated that the parties should continue bargaining that day and he also requested future dates for bargaining, but May rejected or ignored both suggestions. (ALJD pg. 24, ll. 34-37; TR 154-55, 300) In his September 4 e-mail to May, Bolte reiterated the parties' positions, including his request to continue bargaining on September 2 or on dates in the future. In responding to Bolte's e-mail, May never disputed Bolte's statements that the Union had requested to continue bargaining further on September 2 and had requested additional dates for more bargaining. Instead, May ultimately responded by stating that "continuing to meet seems highly unlikely to produce an agreement" and that the Union could contact him if it disagreed. But when Bolte responded that the parties should continue to meet and discuss proposals, May did not respond and no further bargaining sessions were scheduled. (ALJD pg. 24, ll. 39-41; Resp. ex. 44) Even when the parties did meet again, on October 24, it was at the request of the mediator, not an effort by Respondent to retract its statements that "there was nothing further to discuss." By declaring that the parties were at impasse when they were not, and by cutting off the bargaining on September 2 and refusing to engage in any further bargaining, Respondent clearly interfered with the bargaining process and violated Section 8(a)(1) and (5) of the Act, and the Judge's failure to

find that violation was in error. See, e.g., Whitesell Corp., 357 NLRB No. 97, slip op. at 6, 64-66 (Sept. 30, 2011) (violation found when employer falsely declared impasse at a time when good-faith negotiations had not led to a valid impasse in bargaining).

B. Respondent Insisted to the Point of Impasse on a Ratification Vote for the Contract, a Non-Mandatory Subject of Bargaining

Even if the Judge is correct in ruling that an impasse did exist on September 2, 2011, the Judge failed to find that such an impasse was only because Respondent unlawfully made it so. A valid impasse cannot be found to exist when a party creates that impasse by insisting upon a non-mandatory subject of bargaining. See, e.g., NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958). Holding a ratification vote by employees is one such non-mandatory subject and refusing to continue to bargain after making such a demand taints any claim of impasse. See Jano Graphics, Inc., 339 NLRB 251, 251 (2003); Movers and Warehousemen's Assn. of Metropolitan Washington, D.C., Inc., 224 NLRB 356, 357 (1976), enfd. 550 F.2d 962 (4th Cir. 1977).

Contrary to the Judge's conclusion, the facts in the present case clearly establish that during the meeting on September 2 Respondent's Labor Relations Manager, Matt May, insisted to the point of impasse on the non-mandatory subject of a contract ratification vote. As noted above, May told the Union that "short of taking the last, best, and final offer to a vote, yes" the parties were at impasse, and when Union representative Chris Bolte asked May "so what you're saying is, if we take the contract to a vote, we're not at impasse, but if we don't take it to a vote, we're at impasse," May was straight-forward in agreeing that was the case. (TR 67-68, 407-08; Resp. ex. 131) There was nothing inartful about May's statements on September 2 and no way to misconstrue or misunderstand what May was saying: let the employees *vote* on our most

recent contract offer or we are at impasse. May did not claim that the parties were at impasse unless the employees *ratified* the contract; he stated that the parties were at impasse unless the union allowed the employees a second chance to *vote* on the contract. In fact, May's statement is entirely consistent with the position Respondent had repeatedly communicated to its employees that a second ratification vote should be held. (ALJD pgs. 21, ll. 33-38, pg. 23, ll. 5-8; Resp. exs. 83, 86) But when it became clear that its appeals to employees for a second ratification vote had failed, Respondent decided its best course of action was to declare impasse and refuse to bargain further until a second ratification vote had been held. As further proof of the true meaning of May's statement, one can look at Respondent's decision to lock out its employees, where May identified only one purpose behind the lockout: to put pressure on the employees to have the Union hold a second ratification vote. (TR 462, 470) To declare impasse unless the Union holds a second ratification vote, to use that as a bargaining strategy coupled with a contemporaneous refusal to bargain, either further on September 2 or on future dates, is a violation of Section 8(a)(1) and (5) of the Act which the Judge should have found.

In his decision, the Judge concluded that only a second ratification vote could have broken the "deadlock" the parties purportedly had reached by September 2. First, as noted above, the parties were not at all deadlocked on September 2. Rather, numerous other issues remained on the table, such as the existing defined benefit multiplier and "balance billing" due to Respondent's unlawful unilateral change to health insurance premium payments, and there was every indication that further negotiations may well have generated further movement by the parties (which was, in fact, what happened at the October 24 bargaining session). Second, there is little evidence in the record to justify Respondent's purported belief that a second ratification vote would result in the employees ratifying the contract. Thus, the Judge points to negotiations

that had occurred at other facilities with other locals as evidence that employees may well accept Respondent's last, best, and final offer despite the union rejecting it at the bargaining table. What the Judge fails to address, however, is that the parties at Shoals were involved in much more protracted negotiations than in the past and were beyond the point that negotiations at other facilities had reached. (ALJD pgs. 14-15) Rather, the employees at Shoals had already had an opportunity to consider Respondent's proposed last, best, and final offer and had rejected it; there was nothing intervening that should lead Respondent to conclude that simply holding another vote would change that result.[3] Rather, what needed to happen was for the parties to continue bargaining at the table to try to reach an agreement or lawful impasse.

C. Respondent's Decision to Lock Out Its Employees Following Its Conduct at the September 2 Meeting Violated the Act

The absence of impasse does not itself make a lockout in support of bargaining demands unlawful. See Harter Equipment Inc., 280 NLRB 597, 599 (1986), aff'd. sub nom. Operating Engineers Local 825 v. NLRB, 829 F.2d 458 (3rd Cir. 1987). However, a "bargaining lockout" must be for the sole purpose of bringing economic pressure to bear in support of the employer's legitimate bargaining position. See American Ship Bldg. Co., 380 U.S. 300, 318 (1965); cf. Electrical Workers Local 15 v. NLRB, 429 F.3d 651, 660 (7th Cir. 2005) ("An employer's discriminatory lockout on the basis of a protected activity is unlawful even when it is supportive of an employer's bargaining position."). Since a union's power to end the lockout rests entirely on its ability to reach an agreement that is acceptable to an employer, a lockout is unlawful if it is designed to evade an employer's bargaining obligations. See Bagel Bakers Council, 174 NLRB 622, 631 (1969) (lockout in support of employer's bad-faith bargaining violated 8(a)(3) and (5)),

[3] In fact, when another ratification vote was later held, the employees again rejected Respondent's last, best, and final offer by a substantial margin. (ALJD pg. 26, ll. 6-7)

enfd. in relevant part 434 F.2d 884, 888-89 (2nd Cir. 1970). Thus, in the absence of an impasse, Respondent may not lock out its employees while simultaneously violating Section 8(a)(1) and (5) of the Act by refusing to bargain. See, e.g., Assn. of D.C. Liquor Wholesalers, 292 NLRB 1234, 1236-37 (1989), enfd. sub nom. Teamsters Local 639 v. NLRB, 924 F.2d 1078 (D.C. Cir. 1991) (respondents' lockout and replacement of employees were measures taken in bad faith because they were taken in support of the bad-faith effort to abort the bargaining process through the false claim of impasse); Clemson Bros., Inc., 290 NLRB 944, 945 (1988) ("it is the Respondent's avoidance of its bargaining obligation in instituting the lockout, rather than the absence of a lawful impasse, which renders the lockout violative of Section 8(a)(3) and (1)"). Further, an employer may not lawfully lock out its employees in support of its demands on a non-mandatory subject of bargaining, including the condition that the union agree to employee ratification of the parties' collective-bargaining agreement, which is a violation of Section 8(a)(1) and (5) of the Act. See Movers and Warehousemen's Assn. of Metropolitan Washington, D.C., Inc., 224 NLRB 356, 357 (1976), enfd. 550 F.2d 962 (4th Cir. 1977).

Based on these principles, there can be little question that the Judge erred in failing to find that Respondent violated Section 8(a)(1), (3), and (5) of the Act by locking out the entire bargaining unit on September 6, 2011, in support of its bad-faith bargaining position, namely its premature declaration of impasse and subsequent refusal to bargain based on that declaration. See Assn. of D.C. Liquor Wholesalers, 292 NLRB at 1236-37, enfd. sub nom. Teamsters Local 639 v. NLRB, 924 F.2d at 1085; Clemson Bros., 290 NLRB at 945; Bagel Bakers Council, 174 NLRB at 631, enfd. in relevant part 434 F.2d at 888-89. Moreover, Respondent violated Section 8(a)(1) and (5) of the Act by locking out the entire unit in support of its demand on a non-mandatory subject of bargaining, namely that the Union submit Respondent's last, best, and final

offer to another employee ratification vote. See Movers and Warehousemen's Assn., 224 NLRB at 356. Respondent's Labor Relations Manager, Matt May, basically confirmed this unlawful motive for the lockout at the hearing, noting that the purpose of the lockout was to put pressure on the employees to persuade the Union to hold another ratification vote (TR 462, 470), which, as noted above, was something Respondent had been trying to do for several months. The Judge's failure to find this violation was err, and the Acting General Counsel respectfully requests that his decision be reversed.

IV. CONCLUSION

For the foregoing reasons, Counsel for the Acting General Counsel respectfully requests that the Acting General Counsel's Exceptions to the Administrative law Judge's Decision be granted and that an appropriate order and remedy issue.

SIGNED at Indianapolis, Indiana, this 5th day of November 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Acting General Counsel's Brief in Support of Exceptions to the Administrative Law Judge's Decision has been filed electronically with the Office of the Executive Secretary through the Board's E-Filing System this 5th day of November 2012. Copies of said filing are being served upon the following persons by electronic mail:

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