No. 12-60757

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CAREY SALT COMPANY

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION AND LOCAL UNION 14425

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT REGARDING ORAL ARGUMENT

The Board believes that this case involves the application of well-settled legal principles to extensive but straightforward facts, and that it may therefore be decided on the briefs. However, if the Court believes that oral argument would be of assistance, the Board respectfully requests to participate and submits that 15 minutes per side would be sufficient.

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National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF JURISDICTION

This case is before the Court on a petition filed by Carey Salt Company ("the Company") to review, and the cross-application of the National Labor

Relations Board ("the Board") to enforce, a Board Order issued against the Company. The Board's Decision and Order issued on September 12, 2012, and is reported at 358 NLRB No. 124. (D&O1-32.)[1] In its decision, the Board found (D&O1-2) that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 158(a)(5) and (1)) ("the Act") by unilaterally changing employees' terms and conditions of employment, and by otherwise failing and refusing to bargain in good faith with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union and Local Union 14425 ("the Union") as the employees' exclusive collective-bargaining representative. The Board further found (*id.*) that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by failing to promptly reinstate employees who offered to return to work after engaging in a strike to protest the Company's unfair labor practices. The Union has intervened on the side of the Board in this proceeding.

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(e) and (f) of the

[1] Record references are to the Board's Decision and Order ("D&O"), the transcript ("Tr.") of the underlying unfair-labor-practice hearing, and the exhibits submitted by the General Counsel ("GCX") and the Company ("ERX") at that hearing. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." references are to the Company's opening brief.

Act (29 U.S.C. § 160(e) and (f)), because the unfair labor practices occurred in Louisiana, and because the Board's Order is final with respect to all parties.

The Company filed its petition for review on September 27, 2012. The Board filed its cross-application for enforcement on October 22, 2012. Both filings were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of the uncontested portions of its Order.

2. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally changing its unionized employees' terms and conditions of employment, and otherwise failing to bargain in good faith with the Union.

3. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(3), (5) and (1) of the Act in its treatment of strikers, and the Union, following the unfair-labor-practice strike.

STATEMENT OF THE CASE

Acting on charges filed by the Union, the Board's Acting General Counsel issued a complaint alleging that the Company committed numerous unfair labor practices over the course of collective-bargaining negotiations with the Union in

2010, and also at the conclusion of a related unfair-labor-practice strike, including violations of Section 8(a)(1), (3), and (5) of the Act (29 U.S.C. §§ 158(a)(1), (3), and (5)). (D&O4;GCX1(j).) Following a hearing, an administrative law judge issued a decision and recommended order finding that the Company had violated the Act largely as alleged. (D&O4-32.) The Company filed timely exceptions, and the General Counsel and the Union thereafter filed timely cross-exceptions. (D&O1.) After considering the parties' exceptions and briefs, the Board issued a decision affirming all but one of the judge's unfair-labor-practice findings.[2] (D&O1-2.) The facts supporting the Board's decision, as well as the Board's Conclusions and Order, are summarized below.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACTS

A. Background; the Company and the Union Begin Negotiations for a Successor Collective-Bargaining Agreement

The Company operates a salt mine in Cote Blanche, Louisiana, and employs approximately 100 production and maintenance employees to extract, move, and process salt from the mine. (D&O5;Tr.133-35.) The Union has represented the production and maintenance employees for purposes of collective bargaining for

[2] The Board reversed the judge's finding that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by insisting on bargaining proposals that robbed the Union of its representational rights.

the past four decades, negotiating several successive collective-bargaining agreements with the Company during that time. (D&O5-6;Tr.82-83,115.) The parties' last executed agreement was effective, by its terms, from March 25, 2007 through March 24, 2010 ("the 2007 agreement"). (D&O5;GCX3(b).)

In February 2010, as the expiration date for the 2007 agreement approached, the parties began bargaining for a successor contract. (D&O5-6,11;RX4.) They met for 9 bargaining sessions in February, and several more in March. (D&O5-6,11;Tr.68.) At all of these sessions, the Company's lead negotiators were Vice President of Human Resources Victoria Heider and Cote Blanche Mine Manager Gord Bull. (D&O6;Tr.82,133,207,1062.) During the relevant time period, the Union's lead negotiator was International Representative Gary Fuslier. (D&O6;Tr.202-05.)

B. The Company Presses for Significant Changes to the Parties' Existing Agreement; the Parties Reach Compromises

At the parties' March 10, 2010 bargaining session, Heider provided a summary of where matters stood in bargaining. (D&O6;Tr.210,GCX5.) Her summary reflected that the parties had reached agreement on 13 contract items, but still had a number of "open" or unresolved issues to discuss. (D&O6;GCX5.) Among the open issues were three company proposals that, respectively, would: (1) change the method of distributing overtime work; (2) lengthen production

employees' work shifts from 8 to 11 hours, and include regular Sunday work for maintenance employees; and (3) eliminate previously negotiated restrictions on the cross-assignment of employees from one job type to another. (D&O6;Tr.211-18.)

Although the Union generally opposed these proposals, it agreed, over the course of bargaining on March 10, to try the proposed new work schedule (proposal #2 above) for a limited time. (D&O6;Tr.228-30.) Specifically, Fuslier suggested that the Company could implement the new work schedule for a period of one year, after which time either party could serve notice to revert to the pre-existing schedule. (*Id*.) The Company adopted this suggestion and modified its proposal accordingly. (*Id*.) Meanwhile, the parties also moved toward agreement on other issues. (D&O6-7;Tr.219-53,GCX6-7.)

C. The Union Requests an Extension of the Existing Agreement While Bargaining Continues; Company Negotiator Heider Refuses To "Prolong the Process"; the Union Requests a Complete Contract Offer to Present to the Employees Before the Agreement Expires

Just before the parties' scheduled bargaining session on March 18, the Union bargaining committee—consisting of Fuslier, Local Union President Mark Migues, and four bargaining-unit employees—met and discussed the status of negotiations from their vantage point. (D&O7;Tr.206-07,253-56.) They concluded that, in the interest of achieving an overall agreement, they would have to yield to some extent on two of the Company's open issues, namely the proposals to modify employee

work schedules and to change the method of allocating overtime. (D&O7;Tr.254-56.) With regard to the Company's third open issue, relating to cross-assignment, Fuslier did not believe that the Company would seriously insist on eliminating all existing restrictions on cross-assignment, and he accordingly did not view that issue as an obstacle to overall agreement. (*Id*.) After discussing possible resolutions of the remaining (union) open issues, the committee decided it was time to discuss wages with the Company—a subject that had been tabled up to that point—with the goal of preparing a complete contract proposal to present to the membership before the 2007 agreement expired on March 24, 2010. (D&O7;218-19,254-56,260.)

When the parties met for bargaining on March 18, Fuslier began by emphasizing the union bargaining committee's concern about the impending expiration of the 2007 agreement. (D&O7;Tr.258-59.) He proposed that the parties extend the 2007 agreement while they continued to negotiate a successor agreement. (*Id*.) Heider rejected this proposal, maintaining that this would "just prolong[] the process." (*Id*.)

Fuslier accordingly turned to the issue of wages, in keeping with the union bargaining committee's decision to move discussions toward a complete proposal that could be presented to the membership before the contract expiration date. (D&O7;Tr.259-60.) Fuslier referred to the Union's initial bargaining proposal,

which suggested an eight-percent wage increase. (*Id*.) Heider called this proposal "ridiculous" and stated that the Company would counter-propose an equally ridiculous zero-percent wage increase. (*Id*.) Following these comments, the parties took a break. (*Id*.)

During the break, the union bargaining committee once again resolved that it needed a complete contract proposal to present to the membership before the 2007 agreement expired on March 24. (D&O7;Tr.260-61.) Fuslier, in particular, believed that the bargaining-unit employees should see for themselves what was on the table as their existing collective-bargaining agreement was set to expire. (*Id*.) Accordingly, when bargaining resumed after the break, Fuslier requested that the Company provide a final contract offer for the membership to review. (*Id*.)

D. Heider Provides a Complete Contract Offer on March 19; It Omits Several Compromises Struck in Earlier Bargaining Sessions and Includes all of the Company's Proposed Changes to Work Schedules, Overtime Opportunities, and Cross-Assignments; the Employees Vote to Reject the Offer

Heider complied with Fuslier's request and provided a final offer during the next bargaining session, on March 19. (D&O7;Tr.262-63,GCX9.) In examining the offer, however, Fuslier discovered that it departed from the parties' bargaining discussions in several respects. (D&O7;Tr.263-65.) For example, it deleted compromises, in regard to the classifications eligible for hazard pay and the new work schedule, that the Company had incorporated into its proposals based on

discussions on March 10 and 11. (D&O7;Tr.178-79,263-65.) Beyond these departures, the offer included changes to the method of allocating overtime, and eliminated all previously negotiated restrictions on cross-assignment. (D&O7;Tr.263-65,GCX9.) And contrary to Heider's comment at the March 18 session that the Company would not increase wages, the offer increased wages by 2.5 percent. (*Id*.)

Particularly in light of the significant proposed changes to employee work schedules, overtime opportunities, and assignments, Fuslier considered the Company's final offer unusual. (D&O7-8;Tr.265.) He informed company representatives of this and stated that, as a consequence, he would need time to explain the offer to the employees before they voted on it. (D&O8;Tr.265-66.) The employees subsequently voted to reject the offer on March 24. (D&O8;Tr.267.)

E. The Parties Arrange To Meet for Resumed Bargaining on March 31; the Company Plans in Advance To Declare Impasse

Fuslier immediately informed Heider of this result and told Heider that the Union was prepared to resume bargaining anytime. (D&O8;Tr.268.) He further told her that the Union was willing to continue working under the terms of the existing (but soon-to-expire) collective-bargaining agreement while negotiations continued. (D&O8;Tr.268-69.) Heider told Fuslier that the Company's

representatives were available to meet on March 31. (*Id*.) She later conveyed that the Company was also willing to continue the terms of the 2007 agreement until March 31. (*Id*.)

In preparation for the March 31 bargaining session, Heider spoke to Company CEO Brisimitzakis on March 30. (D&O8;Tr.82,87-88.) Shortly thereafter, Brisimitzakis sent Heider an email "confirming" their conversation and setting out "the specific steps that will play out" at the March 31 bargaining session and beyond. (D&O8;GCX10.)

The email, which Brisimitzakis entitled "CB Game Plan/End Game," stated that Heider and Bull would spend the first two hours of the bargaining session trying to secure the Union's agreement to the Company's March 19 final offer. (*Id*.) If they were unsuccessful within that time frame, the email stated that they were to declare impasse. (*Id*.) Immediately after declaring impasse, Heider would give the Union a prepared letter, written by the Company's legal department, confirming the impasse and indicating that there would be no further negotiations. (*Id*.)

The email went on to detail other letters that the legal department would prepare for transmission to managers, supervisors, and employees at the Cote Blanche mine, following the declaration of impasse. (*Id*.) The email specifically stated that the letter to the unionized employees would invite them to continue

working for the Company "at new/higher wages . . . but subject to the terms of" the March 19 final offer. (*Id.*) The email also specified that the legal department would prepare a "revised" collective-bargaining agreement, incorporating the terms of the March 19 final offer, for distribution to managers and supervisors. (*Id*.) Brisimitzakis concluded his email by emphasizing that the Company was "entering a[] '100% legal phase' right now," meaning that all communications would have to go through the Company's legal department. (*Id*.)

F. Heider Executes the Company's Plan and Declares Impasse at the March 31 Bargaining Session; She Leaves the Session Over the Union's Protest

The parties' March 31 bargaining session was scheduled to take place around 9:00 a.m., at a Holiday Inn in New Iberia, Louisiana. (D&O8;Tr.113,206,GCX10.) Heider made reservations to travel by plane to New Iberia on March 30, from the area of the Company's headquarters in Overland Park, Kansas; to stay overnight at the Holiday Inn where the parties would be meeting; and to return to Kansas on a 2:20 p.m. flight on March 31. (D&O8;Tr.86-87,113,GCX11.) This itinerary allowed Heider just a few hours to implement the pre-arranged plan outlined in Brisimitzakis' email—that is, to seek the Union's wholesale acceptance of the March 19 offer and then, if unsuccessful, to declare impasse. (*Id*.)

Meanwhile, the Union bargaining committee planned for substantial negotiations on March 31. (D&O8;Tr.269-71,275-76.) They discussed how they might restore some of the agreements that the Company had abandoned in its March 19 final offer. (*Id*.) They also discussed dropping some of the Union's open issues and merely softening the language of the Company's offer in regard to overtime and cross-assignment. (*Id*.) Fuslier, moreover, contacted Federal Mediator Sherman Bolton and asked for his assistance in moving negotiations forward. Bolton agreed to travel to New Iberia on March 31. (D&O9;Tr.272.)

Fuslier began the March 31 bargaining session, before Bolton arrived, by explaining the employees' vote and their concerns about the March 19 offer. (D&O8-9;Tr.269-70.) He noted that the employees' concerns on three key issues—the proposed new work schedule, method of overtime distribution, and changes to cross-assignment policy—were essentially the same as those voiced by the union bargaining committee during negotiations. (*Id*.) Heider neither took notes nor referred to any notes during Fuslier's recitation of employee concerns. (D&O8-9;Tr.278.) Instead, when Fuslier finished, Heider said "that's what we have already heard." (D&O8-9;Tr.269-70.) Heider then requested a break. (*Id*.)

When the parties returned from the break approximately 30 minutes later, Heider asked whether the Union was prepared to accept the Company's March 19 final offer. (*Id*.) The union bargaining committee responded that it was not. (*Id*.)

Heider then stated that the Company, for its part, was not prepared to move on any issues, it had nothing else to offer, and "our final is our final." (D&O8-9;Tr.270-71.) Fuslier replied that the Union nevertheless had matters it wanted to discuss. (D&O9;Tr.271.) Heider repeated that the Company's final offer was its final offer, and added that the parties were at impasse. (*Id*.)

On hearing this, Fuslier flatly denied that the parties were at impasse and reminded Heider that the Union had matters it wanted to discuss. (D&O9;Tr.271-72.) Fuslier further asked Heider if she was saying she would not listen to any proposals the Union wanted to make. (*Id*.) Heider did not answer Fuslier's question, but simply repeated that the Company's final offer was its final offer, and that the parties were at impasse. (*Id*.) In response, Fuslier again denied any impasse. (*Id*.)

Fuslier further mentioned that he had contacted Federal Mediator Bolton to assist the parties, and that Bolton was en route to the bargaining session. (*Id*.) Fuslier asked that the Company's representatives at least meet with Bolton. (*Id*.) Heider refused, stating that the Union should have involved Bolton earlier, and that company representatives were not prepared to meet with anyone. (*Id*.) Although Fuslier nonetheless entreated Heider to stay until the mediator arrived, she stated that the session was over and prepared to leave. (*Id*.)

As she did so, Fuslier asked about the state of the collective-bargaining agreement. (D&O9;Tr.272-73.) When Heider responded that it had expired, Fuslier asked whether the employees would be locked out. (*Id*.) Heider replied that the employees would not be locked out, but would work under the terms of the March 19 final offer. (*Id*.) Heider and Bull then left the bargaining session. (D&O9;Tr.273-74.)

G. The Union Enlists the Help of a Federal Mediator To Get Company Representatives Back to the Bargaining Table; Heider Refuses to Return; She Insists That the Parties Are At Impasse, Even After Hearing That the Union Has Proposals For Movement Toward the Company's Offer

Soon after Heider and Bull left, Fuslier called Mediator Bolton, who was en route to the session. (D&O9;Tr.274-75.) Fuslier told Bolton that the Company had declared impasse and suggested that Bolton talk to company representatives about this. (*Id*.) Fuslier then called Bull and again asked that company representatives remain on the premises and at least meet with Bolton. (*Id*.) Bull told Fuslier that they could not stay, as Heider had a plane to catch and the Company had already presented its final offer. (*Id*.)

Notwithstanding Bull's comments, Fuslier went to the union bargaining committee and told them to prepare a substantial proposal for the Company's representatives to review, in the event that Bolton was able to persuade them to return. (D&O9;Tr.275-76,278-79.) Meanwhile, Bolton arrived and called Heider.

(D&O9;Tr.91-93.) He asked her to resume bargaining, noting that the Union had some proposals for movement toward the Company's offer. (*Id*.) Heider refused. (*Id*.) She stated that she was already on her way back to Kansas, and there was nothing further to discuss: the Union had asked for a final offer, the Company had provided one, and "final means final." (*Id*.) Consistent with this position, Heider did not suggest an alternative date to meet with the Union and Bolton, nor was she interested in hearing the Union's proposals. (*Id*.)

When Fuslier learned of Heider's continued refusal to resume bargaining, he sent her a series of emails emphasizing that the parties were not at impasse and that the Union stood ready to bargain. (D&O9-10;Tr.276-77,GCX17.) In the first of these emails, Fuslier specifically stated that the Union was "preparing a new proposal that will significantly move toward the Company's position" on scheduling and other issues. (*Id*.) Heider responded that any union proposals for movement were irrelevant, as "[t]he Company has made its final offer . . . and it is not going to move from that . . . ." (*Id*.) She further said in a later email, "if you want a contract, you need to accept our offer." (*Id*.) She maintained this position throughout the email exchange on March 31, charging the Union to consider only "whether you will, or will not, accept [the Company's] offer." (*Id*.)

H. The Union Re-Submits the Company's Offer to the Employees for a Vote; the Employees Reject it; Upon Learning of the Employees' Vote, the Company Announces That It Is Implementing the Offer

The Union submitted Heider's question to its membership later in the day on March 31, and the membership once again rejected the Company's offer. (D&O10;Tr.293.) While relaying the results of the vote to Heider via email, Fuslier stressed that the parties still were not at impasse, that the Union was interested in meeting immediately, and that it had a new proposal "that move[d] in a meaningful way toward the Company's position on scheduling and other open issues." (D&O10;GCX17.) Fuslier accordingly requested that Heider notify him of her availability to meet with the union bargaining committee and Mediator Bolton. (*Id*.)

Within 30 minutes of sending this message, Fuslier received an email from Mine Manager Bull, informing him that, because the membership had rejected the final offer, the Company was implementing it without further bargaining. (*Id*.) In so doing, the Company effectively changed, as of March 31, employee wages and shift schedules, the procedure for distributing overtime, cross-assignment policy, and a host of other terms and conditions of employment. (D&O14;GCX3(b),9.)

I. The Union Continues to Request Bargaining; the Company Refuses to Meet, Insisting that the Parties Are at Impasse; the Employees Begin an Unfair-Labor-Practice Strike

On April 1, Heider responded to Fuslier's email from the previous day. (D&O15;GCX17.) Contrary to Fuslier, Heider insisted that the parties were at impasse because the Union was unwilling to accept the Company's offer, and the Company was unwilling to compromise in any way. (*Id*.) Thus, Heider told Fuslier that "[t]he Company is not interested in meeting somewhere between our final offer and your current position, whatever that is." (*Id*.)

Fuslier responded that the Union had a new proposal to submit and again asked if Heider would inform him of her availability to meet, so that he could notify Mediator Bolton as well. (*Id*.) Heider rejected Fuslier's suggestion to meet, stating that "there is no reason to meet again unless you are willing to accept the pending final offer." (*Id*.)

On April 7, the union bargaining committee met with the employees to explain the status of bargaining. (D&O16;Tr.294-99.) In the course of that meeting, Fuslier explained the concept of impasse and told the employees that it was the committee's position that the Company had illegally declared impasse, making the implementation of the March 19 offer unlawful. (*Id*.) After listening to Fuslier's remarks, the employees voted to strike in protest of the Company's actions. (*Id*.) During the ensuing strike, employees carried signs stating that they

were on a "ULP" or unfair-labor-practice strike against the Company. (D&O16;Tr.301-02,GCX21.)

While the strike was continuing, on April 20, Union Director Mickey Breaux requested an off-the-record meeting with company officials to listen to the Company's position and perhaps defuse tensions. (D&O15;Tr.302-05.) The meeting, which was attended by Breaux, Fuslier, Heider, and Bull, took place at a restaurant in the Houston airport. (*Id*.) No bargaining proposals were exchanged, nor were the parties' respective bargaining committees present. (*Id*.)

J. The Parties Resume Bargaining; the Company Implements New Operating Procedures, Adds to Its List of "Core" Issues, and Insists that There Can Be No Collective-Bargaining Agreement Until the Union Accepts All of the Company's Proposals on Core Issues

On April 30, at the instigation of Federal Mediator Bolton, Heider agreed to meet with the Union for resumed bargaining. (D&O16;Tr.305-06.) During the April 30 session, Heider gave the Union a modified final offer, incorporating some of the Union's counter-proposals on the issue of overtime distribution. (D&O16-17;Tr.307,317,GCX26.) Heider then told the union bargaining committee that if the Union rejected the modified final offer, the Company would step up the hiring of permanent replacements for the striking employees, and would also re-evaluate all of the Union's proposals. (D&O16-17;Tr.927,938,1089.)

Following the bargaining session, Heider informed Company CEO Brisimitzakis that she was planning to request that the next few bargaining sessions occur in late May, in the hope that this would "forestall the union calling off the strike." (D&O17;Tr.93-95,GCX10.) The Union eventually agreed to the suggested late-May bargaining dates. (D&O8-20;Tr.320-22.)

On May 22, just before the first of these agreed-upon sessions, the Company sent a letter to employees stating that they were to follow new operating procedures, which were attached to the letter. (D&O17-18;GCX53.) The Company did not give the Union prior notice of the new operating procedures, and made no reference to them in the parties' late-May bargaining sessions. (D&O17-18;Tr.159-60,165.)

At the parties' subsequent bargaining session on May 25, Heider provided a new contract offer for the Union to consider. (D&O18;ERX16.) After reviewing the proposal, the union bargaining committee determined that it was worse than the April 30 modified offer. (D&O18;Tr.323-24.) Accordingly, Fuslier requested a sidebar conference with Heider, and told her that his committee was prepared to recommend that the employees accept the April 30 offer. (D&O18;Tr.325.) Heider, however, refused to revert to the April 30 offer, maintaining that the latest (May 25) offer was what the Company now wanted. (D&O18;Tr.326.)

The May 25 offer eliminated, among other things, certain seniority provisions in the 2007 agreement and proposed that any recall of employees to their employment should be based on merit rather than seniority. (D&O18-19;Tr.97,ERX18.) As Heider explained, moreover, the May 25 offer reflected the Company's addition of four "core" issues to the existing list of "core" or "open" issues identified during bargaining earlier in the year. (D&O19;Tr.96-97,120-21,353,GCX10,ERX16.)

In subsequent bargaining on June 3, Heider revisited the matter of the core issues and stated that the Union would have to agree to the Company's proposals on all seven core company issues, or there would be no contract. (D&O21-22;Tr.374.) Heider further asserted that there was no use in discussing other matters until the Union accepted the Company's positions on its core issues. (*Id*.)

K. The Strike Ends; the Company Establishes a Preferential Recall List to Place Former Strikers in Jobs As They Become Available; the Union Objects; Meanwhile, the Company Makes a New Contract Offer, Declares Impasse Shortly Thereafter, and Then Implements the Offer

On June 9, 2010, Heider informed Fuslier that the individuals that the Company had hired over the course of the strike, to replace striking employees, were permanent replacements. (D&O22;ERX20.) Heider accordingly stated that if, and when, the strike ended, the Company probably would not be able to return all of the strikers to their jobs. (*Id*.) She suggested that the parties establish a

preferential recall list to handle the placement of employees in positions as they became available, with employees ranked on the list based on merit rather than seniority. (*Id*.)

Days later, on June 15, 2010, the Union notified the Company that employees were ending the strike and unconditionally offering to return to work. (D&O22;GCX32.) Heider again suggested that the strikers be returned to work in order of merit, rather than seniority. (*Id*.) Bull prepared a preferential recall list in accordance with Heider's view. (*Id*.) The Union, however, objected and requested bargaining over the issue. (*Id*.) The Union also informed the Company that it would consider any recall inconsistent with the 2007 agreement to be an unlawful unilateral change. (*Id*.)

The parties subsequently met for bargaining sessions on June 22 and 23. (D&O22-23;Tr.382,GCX42,45.) Heider presented a new contract offer at the first of these sessions, and Fuslier immediately requested additional time to review the latest offer. (D&O22;Tr.387-88.) In addition, Fuslier attempted to discuss the return of the former strikers to their jobs, but Heider declined to engage him on that issue at the time. (D&O23;Tr.394-95.) Later that day, Heider emailed Fuslier and gave him until the following day (June 23) to review the Company's latest contract proposal. Revisiting the issue of the former strikers, she said the

Company would not immediately reinstate them as requested by the Union. (D&O23;GCX43.)

Heider reiterated the Company's position with regard to the former strikers at the parties' bargaining session the following day. (D&O23;Tr.400-04.) Turning to the latest contract proposal, she asked whether the Union would agree to the Company's proposals on its core issues. (*Id*.) Fuslier told Heider that the Union was still considering those proposals, and he then attempted to discuss other matters. (*Id*.) Heider responded that if the Company could not secure acceptance of its proposals on the seven core issues, there would be no contract. (D&O23;Tr.116-17,400-04,GCX10.) Later in the bargaining session, Heider told Fuslier that the Company saw no reason to continue discussions if the Union would not accept the Company's offer. (*Id*.) The Company eventually implemented its June 22 offer on June 27. (D&O23;GCX49.)

While these events unfolded, the Company made offers of reinstatement to 23 of the approximately 120 strikers, selecting them based on their relative merit as positions became available. (D&O27;Tr.138-40,GCX36-37.) The Company informed those who were offered reinstatement that they had 72 hours to respond to the Company's offer, otherwise their position would be given to someone else. (D&O29;ERX24.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Members Hayes, Griffin, and Block) found (D&O1-2) that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by: unilaterally implementing contract offers on March 31 and June 27, 2010, each time in the absence of a valid impasse; failing to bargain in good faith with the Union from March 31 to April 30, 2010 (Member Hayes not passing); unilaterally implementing new operating procedures on May 22, 2010; presenting the Union with a regressive bargaining proposal on May 25, 2010 (Member Hayes not passing); conditioning bargaining over mandatory bargaining subjects on the Union's concessions to the Company's bargaining demands from June 3 to June 22, 2010 (Member Hayes not passing); and engaging in overall bad-faith bargaining in May and June 2010.

The Board further found (D&O1) that the strike—which lasted from April 7 to June 15, 2010—was caused by the Company's unlawful implementation of its contract offer on March 31, and was prolonged by the Company's bad-faith bargaining in late May and early June. Accordingly, the Board found (D&O1-2) that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by threatening to permanently replace the unfair-labor-practice strikers, and violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by failing to promptly reinstate the strikers upon receipt of their unconditional offer to return to

work. In addition, the Board found (D&O1-2) that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by changing the seniority-based recall procedures applicable to the returning strikers; continuing to honor job offers made to replacement workers even after the strikers had unconditionally offered to return to work; and unilaterally changing the time period for returning strikers to accept offers of re-employment.

The Board's Order requires the Company to cease and desist from the unfair labor practices found, and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (D&O2.) Affirmatively, the Board's Order requires the Company to: bargain with the Union, on request, as the exclusive representative of the bargaining-unit employees; restore the terms and conditions of employment that existed for the bargaining-unit employees prior to March 31, 2010, and continue those terms in effect until the parties have bargained to agreement or a valid impasse; offer employees who may have lost their employment as a result of the Company's unilateral changes, or the effects thereof, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions; make the bargaining-unit employees whole for all losses they may have suffered as a result of the unlawful unilateral changes to their terms and conditions of employment beginning on or about March 31, 2010; offer the former unfair-labor-practice

strikers reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions; make the former strikers whole for lost earnings and other benefits; and post a remedial notice. (D&O2-3.)

SUMMARY OF ARGUMENT

Preliminarily, the Company does not contest the Board's finding that it violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by threatening to permanently replace the unfair-labor-practice strikers. The Company further does not contest the Board's findings that it violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally implementing new operating procedures on May 22, 2010, and unilaterally changing the time period for former strikers to accept offers of re-employment. The Board is accordingly entitled to summary enforcement of its Order insofar as it relates to these uncontested findings.

With regard to the bargaining-related violations, substantial evidence supports the Board's findings that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally implementing two contract offers—one on March 31, 2010, and the other on June 27, 2010—in the absence of a valid impasse in negotiations with the Union. Substantial evidence also supports the Board's finding that the Company violated the same provision of the Act by

engaging in various forms of bad-faith bargaining in the period between these two major unilateral actions.

In response to these unlawful actions, the employees engaged in a two-month unfair-labor-practice strike, only to be met with more unlawful company conduct when they ended their strike. Substantial evidence thus supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by failing to immediately reinstate all of the unfair-labor-practice strikers, as required by law, upon their unconditional offer to return to work. Likewise, substantial evidence supports the Board's findings that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by continuing to honor job offers made to replacement workers even after the former strikers had unconditionally offered to return to work, and by unilaterally changing the method of recall applicable to the returning strikers.

STANDARD OF REVIEW

This Court applies a deferential standard in reviewing Board decisions. Specifically, the Court has stated that it "will uphold the Board's decision if it is reasonable and supported by substantial evidence on the record considered as a whole." *Strand Theatre of Shreveport Corp. v. NLRB*, 493 F.3d 515, 518 (5th Cir. 2007) (internal quotation marks and citation omitted); *see also* 29 U.S.C. 160(e) (factual findings of the Board are "conclusive" if supported by substantial

evidence). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *accord Entergy Gulf States, Inc. v. NLRB*, 253 F.3d 203, 208 (5th Cir. 2001). Thus, "the Board's findings of fact, along with its application of law to those facts, 'must be upheld if a reasonable person could have found what [the Board] found, even if the appellate court might have reached a different conclusion had the matter been presented to it in the first instance.'" *Oaktree Capital Mgmt., L.P. v. NLRB*, 452 F. App'x 433, 437 (5th Cir. 2011) (citation omitted).

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE UNCONTESTED PORTIONS OF ITS ORDER

In the proceedings before the Board, the Company did not file exceptions to the administrative law judge's finding that it violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by threatening to permanently replace the employees who went on strike in protest of the Company's unfair labor practices. *See NLRB v. Laredo Coca Cola Bottling Co.*, 613 F.2d 1338, 1341 (5th Cir. 1980). The Board accordingly adopted (D&O1-2&n.8) the judge's Section 8(a)(1) finding and ordered an appropriate remedy. Under settled law, the Board is entitled to summary enforcement of the portion of its order relating to this uncontested finding. *See* 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456

U.S. 645, 665-66 (1982); *NLRB v. Mooney Aircraft, Inc.*, 310 F.2d 565, 565-66 (5th Cir. 1962).

In addition, the Company has explicitly stated in its brief (Br.46) that it does not contest the portions of the Board's Order corresponding to the Board's findings that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally implementing new operating procedures on May 22, 2010, and by unilaterally changing the time period for former strikers to accept offers of re-employment. The Board is accordingly entitled to summary enforcement of those aspects of the Order. *See Sara Lee Bakery Group, Inc. v. NLRB*, 514 F.3d 422, 429 (5th Cir. 2008) (finding that "when an employer does not challenge a finding of the Board, the unchallenged issue is waived on appeal, entitling the Board to summary enforcement").

The Company's uncontested violations do not disappear simply because they are not preserved for appellate review; rather, they remain in the case, "lending their aroma to the context in which the remaining issues are considered." *See NLRB v. Clark Manor Nursing Home*, 671 F.2d 657, 660 (1st Cir. 1982); *accord NLRB v. Gen. Fabrications Corp.*, 222 F.3d 218, 232 (6th Cir. 2000).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY CHANGING ITS UNIONIZED EMPLOYEES' TERMS AND CONDITIONS OF EMPLOYMENT, AND OTHERWISE FAILING TO BARGAIN IN GOOD FAITH WITH THE UNION

A. Applicable Principles

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer to refuse to "bargain collectively" with the representatives of his employees. In turn, Section 8(d) of the Act (29 U.S.C. § 158(d)) defines collective bargaining as "the mutual obligation of the employer and the representative of the employees to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ."

1. The basic requirement of good-faith bargaining

The obligation to bargain in good faith imposed by Sections 8(a)(5) and 8(d) of the Act requires both parties "to enter into discussions with an open and fair mind, and a sincere purpose to find a basis of agreement . . . ." *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960); *accord NLRB v. Pine Manor Nursing Home, Inc.*, 578 F.2d 575, 576 (5th Cir. 1978). As the Supreme Court has explained, "[c]ollective bargaining . . . is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement, to enter into a

collective bargaining contract." *NLRB v. Ins. Agents' Int'l Union, AFL-CIO*, 361 U.S. 477, 485 (1960).

Although a party to negotiations is not required to make particular concessions or to yield any bargaining positions fairly maintained, it is "under an obligation to make a sincere, serious effort to adjust differences and to reach an acceptable common ground." *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1187 (D.C. Cir. 1981). Those requirements are not satisfied where a party comes to the bargaining table "with a 'predetermined resolve not to budge from an initial position.'" *NLRB v. Gen. Elec. Co.*, 418 F.2d 736, 763 (2d Cir. 1969) (citation omitted). Because "[t]he line between protected and proscribed conduct is a faint one that shifts with the circumstances of negotiation," the Board is accorded the flexibility to make "reasoned inferences about the parties' subjective mental states," and to draw conclusions based on its experience examining the rituals of bargaining, and its informed consideration of all the surrounding circumstances. *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1187 (5th Cir. 1982); *see Ins. Agents' Int'l Union*, 361 U.S. at 498; *NLRB v. Big Three Indus., Inc.*, 497 F.2d 43, 46-47 (5th Cir. 1974).

This Court, further, gives "great weight" to the Board's determinations regarding a party's good faith or want of good faith. *Huck Mfg. Co.*, 693 F.2d at 1187; *see Big Three Indus.*, 497 F.2d at 46-47. Thus, the Court "will enforce a

Board determination of bad faith if it finds support in the record as a whole . . . even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Huck Mfg. Co.*, 693 F.2d at 1187 (internal quotation marks and citation omitted).

2. Absent a good-faith impasse in negotiations, it is unlawful for an employer to unilaterally change existing terms and conditions of employment

As an extension of the principles above, it is well settled that an employer violates the bargaining obligation created by Section 8(a)(5) and 8(d) "if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); *accord NLRB v. Powell Elec. Mfg. Co.*, 906 F.2d 1007, 1013 (5th Cir. 1990) (recognizing that "[a]s a general rule, where no impasse in negotiations has occurred, a company's unilateral implementation of terms and conditions of employment is an unfair labor practice"). This is true whether the parties are in negotiations for an initial collective-bargaining agreement or for a successor agreement. *See Litton*, 501 U.S. at 198; *NLRB v. Haberman Constr. Co.*, 618 F.2d 288 (5th Cir. 1980) ("At contract expiration, an employer may not alter, without bargaining to impasse, a contractual term that is a mandatory subject of bargaining."). In either situation, "it would be difficult to bargain if, during negotiations, an employer [wa]s free to alter the very terms and conditions that are

the subject of those negotiations." *Litton*, 501 U.S. at 198. Thus, an employer is required to maintain the status quo with regard to employees' wages, hours, and other terms and conditions of employment unless and until an agreement is reached or the parties negotiate in good faith to impasse. *See id*; *Reed Seismic Co. v. NLRB*, 440 F.2d 598, 601 (5th Cir. 1971); *Intermountain Rural Elec. Ass'n v. NLRB*, 984 F.2d 1562, 1566 (10th Cir. 1993).

As the Supreme Court has explained, a unilateral change to the status quo is unlawful because it is "a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal" to negotiate. *NLRB v. Katz*, 369 U.S. 736, 742 n.9, 743 (1962). Moreover, it "minimizes the influence of organized bargaining" and "interferes with the right of self organization by emphasizing to the employees that there is no necessity for a collective bargaining agent." *May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945). For these reasons, even unilateral improvements in employment terms—for example, wage increases—are unlawful during negotiations, absent a bona fide impasse. *See Katz*, 369 U.S. at 744-46 (finding unilateral wage increases unlawful).

Where, as here, an employer asserts that there was a bona fide impasse in negotiations that rendered its unilateral changes permissible, it bears the burden of proving the asserted impasse before the Board. *See CJC Holdings, Inc.*, 320 NLRB 1041, 1044 (1996), *enforced mem.*, 110 F.3d 794 (5th Cir. 1997).

Specifically, because an impasse is essentially a deadlock in negotiations, the employer must show that, at the time of the unilateral changes, the parties, "despite the best of faith, [were] simply deadlocked," making "further discussion . . . futile as of that time." *Powell Elec. Mfg. Co.*, 906 F.2d at 1011-12; *Huck Mfg. Co.*, 693 F.2d at 1186 (internal quotation marks and citation omitted). As this Court has emphasized, moreover, "for such a deadlock to occur, *neither party* must be willing to compromise." *Powell Elec. Mfg. Co.*, 906 F.2d at 1011-12 (emphasis in original; internal quotation marks and citation omitted).

In evaluating the employer's evidence regarding impasse, the Board considers all of the circumstances of the bargaining. *See Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *aff'd sub nom. Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968); *see also Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390, 1398 (5th Cir. 1983) (recognizing that whether an impasse exists depends on all of the surrounding circumstances). The Board has identified as particularly relevant: (1) the parties' bargaining history; (2) their good faith in negotiations; (3) the length of negotiations; (4) the importance of the issue or issues as to which there was disagreement; and (5) the contemporaneous understanding of the parties as to the status of negotiations. *Taft Broadcasting*, 163 NLRB at 478. Ultimately, because "[a] decision about whether negotiations have reached an impasse is particularly suited to the Board's expertise as fact finder," the Court will uphold

the Board's findings relating to impasse so long as they are supported by substantial evidence. *Powell Elec. Mfg. Co.*, 906 F.2d at 1011; *accord Huck Mfg. Co.* 693 F.2d at 1186.

Here, as detailed below pp. 36-47 and pp. 53-55, substantial evidence supports the Board's findings (D&O1,10-15,24-26) that the Company and the Union were not at impasse on two occasions[3] when the Company admittedly made unilateral changes to employees' terms and conditions of employment, in violation of Section 8(a)(5) and (1) of the Act.[4] Substantial evidence also supports the Board's findings (D&O1,15-24) that, between these two occasions of major unilateral changes, the Company engaged in various forms of bad-faith bargaining, as detailed below pp. 47-53, in further violation of Section 8(a)(5) and (1) of the Act.

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[3] As explained above p. 28, the Company has expressly declined (Br.46) to contest the Board's finding that the May 22, 2010 unilateral changes violated Section 8(a)(5) and (1) of the Act.

[4] An employer's violation of Section 8(a)(5) of the Act derivatively violates Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act (29 U.S.C. § 157), including the right to bargain collectively. *See, e.g., Tri-State Health Serv., Inc. v. NLRB*, 374 F.3d 347, 350 n.1 (5th Cir. 2004).

B. Overview of the Company's Unilateral Changes

It is undisputed that the Company unilaterally implemented two contract offers over the course of negotiations with the Union for a successor collective-bargaining agreement in 2010. (D&O10,24.) Thus, the evidence shows that the Company implemented one so-called "final" contract offer on March 31, and another on June 27, without the Union's consent and, indeed, over the Union's strenuous objections. The first of these implemented offers introduced significant changes to employees' terms and conditions of employment, including their wages, work schedules, overtime opportunities, and vulnerability to cross-assignment from one type of work to another. The second implemented offer went even further, making additional changes in the above-mentioned areas, while also enacting new employee absenteeism and safety rules, enabling the Company to establish new jobs and pay rates, and enabling the Company to assign bargaining-unit work to supervisors. The Company's implemented offers thus grew "more regressive [over time,] and more employees' rights were eliminated." (D&O24.)

Notwithstanding this evidence, the Company has consistently maintained that it was privileged to make the extensive unilateral changes at issue, because the parties were at impasse on March 31 and June 27. The Board, as explained below pp. 36-47 and pp. 53-55, reasonably rejected this defense, and accordingly found that the Company's unilateral changes on March 31 and June 27 violated Section

8(a)(5) and (1) of the Act. Although the Company now advances (Br.16-18) a new and alternative defense to the finding of the March 31 violation, the Court is jurisdictionally barred from reaching that belatedly presented defense, as further explained below. *See* 29 U.S.C. § 160(e).

C. The Company Was Not Privileged To Make Its March 31 Unilateral Changes

The Company's position that the parties were at impasse on March 31 stems from company negotiator Heider's declaration of impasse during the parties' March 31 bargaining session. However, the evidence shows that Heider made that declaration in furtherance of a plan formulated by the Company in advance, and without any regard for the Union's assertions during the bargaining session that it had matters it wanted to discuss. Thus, Heider refused to even remain and listen to such matters once she ascertained, in accordance with the Company's pre-arranged plan, that the Union would not accept the Company's March 19 offer exactly as presented. Given this evidence, the Board found (D&O1&n.5,10-14) that the Company failed to establish that there was a true impasse on March 31—that is, that "good-faith negotiations ha[d] exhausted the prospects of concluding an agreement." *See Taft Broadcasting Co.*, 163 NLRB at 478.

In so finding, the Board carefully considered all of the relevant circumstances identified in *Taft Broadcasting*, 163 NLRB at 478.[5] In particular, the Board acknowledged that the parties had enjoyed a long and productive bargaining relationship prior to 2010 (*Taft Broadcasting* factor 1), and had met for numerous bargaining sessions before the late March 2010 events at issue (*Taft Broadcasting* factor 3). Despite this history of functional relations, however, ample evidence supports the Board's finding (D&O11) that the parties' proximate history—just before and during the March 31 bargaining session—was troubled, and it was so "by design."

Specifically, the record evidence shows that after the employees voted to reject the Company's March 19 offer, company officials implemented a plan to bring collective-bargaining negotiations to an abrupt close at the very next bargaining session, and to force the March 19 offer on the employees. In a March 30 email entitled "CB Gameplan/Endgame," Company CEO Brisimitzakis

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[5] Contrary to the Company's suggestion (Br.19-22), the Board did not depart from the well-settled *Taft Broadcasting* analysis in this case. Indeed, the Board affirmed (D&O1) the administrative law judge's application of the *Taft Broadcasting* factors, disagreeing (D&O1n.5) only with the judge's finding (D&O11) that the regressiveness of the Company's March 19 offer effectively ensured that no meaningful negotiations could follow. As the Board noted (D&O1n.5), a regressive proposal does not necessarily preclude meaningful negotiations, nor is it per se unlawful to proffer a regressive proposal, but the Board did find that the March 19 regressive proposal here was part of the Company's overall plan to frustrate agreement.

"confirm[ed]" the elements of the plan, which "w[ould] play out" at the March 31 bargaining session. First, he stated, Heider would press for acceptance of the rejected March 19 offer. When the union negotiators refused, as Heider knew they would, the "endgame" would come into play: Heider would declare impasse, and then the Company would swiftly proceed with implementation of the March 19 offer. (D&O8;Tr.88-89,GCX10.) Brisimitzakis' email estimated that the entire exercise would take about two hours.

Accordingly, Heider made airline reservations that required she leave the negotiations and return home to Kansas in the middle of the afternoon on March 31. This travel itinerary comported with the Company's plan to participate in the March 31 bargaining session for no more than about two hours. There is no evidence, in any event, that Brisimitzakis or Heider planned for any substantive discussion or actual bargaining that would detain Heider on March 31.

Consistent with the Company's plan to manufacture an impasse, and its corresponding lack of any plan for bargaining, there was "no actual bargaining" concerning the Company's offer during the March 31 session, "prior to the [Company's] declaration of impasse." (D&O11.) Heider sat quietly through Union negotiator Fuslier's recitation of employee concerns with the March 19 offer, neither taking nor referring to any notes. She did not engage with Fuslier about any of the substantive concerns he raised. And when he finished his initial

presentation, she simply asked whether the Union would accept the offer in whole. When Fuslier said the Union would not, Heider declared impasse. Despite Fuslier's immediate protests that the Union still had matters it wanted to discuss, Heider refused to listen to what the Union had to say and continued to insist that the parties were at impasse—in rigid adherence to the Company's pre-arranged plan, which only anticipated a declaration of impasse.

Given this sequence of events, the record fully supports the Board's finding (D&O11-12) that the bargaining history (*Taft Broadcasting* factor 1) just prior to the asserted impasse does not support the Company's position that the parties, "despite the best of faith" (*Taft Broadcasting* factor 2), were simply deadlocked. *Huck Mfg. Co.*, 693 F.2d at 1186; *Taft Broadcasting*, 163 NLRB at 478. On the contrary, as the Board found (D&O1n.5,11-12), the evidence shows that the Company decided to take a hard line with respect to its March 19 offer, and to engage in no substantive discussion of it, as "part of [its] overall plan to frustrate agreement." *See Outboard Marine Corp.*, 307 NLRB 1333, 1363 (1992) (noting that assertion of impasse "must be made in good faith and not be merely designed to frustrate the bargaining process"), *enforced mem.*, 9 F.3d 113 (7th Cir. 1993).

Turning to the particular matters as to which there was disagreement between the parties (*Taft Broadcasting* factor 4), the Board acknowledged (D&O12) that the parties held divergent views on three significant issues: the

Company's proposed modifications to employee work schedules, its proposed changes to the method of overtime allocation, and its proposal to lift all restrictions on cross-assignments. However, as the Board found (D&O12), the evidence fails to establish that, by March 31, the parties had exhausted the prospects of reaching agreement on these admittedly important issues. *See Taft Broadcasting*, 163 NLRB at 478. Indeed, in mid-March, the Union made a major concession—that it would agree to the proposed new work schedules on a trial basis, with the option to revert to the schedule in the 2007 agreement after a period of one year. The Company initially embraced this concession, but then abandoned it without explanation in the March 19 offer. Nevertheless, the Union never withdrew its counter-offer to try the Company's proposed new schedule. In these circumstances, substantial evidence supports the Board's finding (D&O12) that there was "movement" as to one significant issue in dispute between the parties, precluding a finding that they were fixed in divergent positions on major issues—and accordingly at impasse—on March 31. *See Saunders House v. NLRB*, 719 F.2d 683, 688 (3d Cir. 1983) (finding that a "concession by one party on a significant issue in dispute precludes a finding of impasse," because "there is reason to believe that further bargaining might produce additional movement").

Finally, the Board found (D&O12-13) a lack of evidence to establish that the parties shared a contemporaneous understanding (*Taft Broadcasting* factor 5) that

they were deadlocked on March 31. As this Court has underscored, "for a deadlock to occur, *neither party* must be willing to compromise." *Huck Mfg. Co.*, 693 F.2d at 1186 (emphasis in original); *accord NLRB v. Powell Elec. Mfg. Co.*, 906 F.2d 1007, 1011-12 (5th Cir. 1990). Here, the Union was willing to compromise as of March 31, at least on the issue of the proposed work schedules, as discussed above. Moreover, Union negotiator Fuslier expressly stated during the March 31 session, in the face of Heider's impasse declaration, that the Union still had matters it wanted to discuss. Although the Company suggests (Br.29-30) that this was just bluster, and that the Union really had nothing to offer by March 31, substantial evidence supports the Board's finding (D&O13) to the contrary.

Specifically, the evidence shows that, just before the March 31 session, the Union had enlisted the help of a federal mediator to advance the parties' bargaining efforts. As the Board found (*id.*), "[t]he fact that the union committee had already contacted the Federal mediator represents not only an element of optimism, but also evidences a desire to continue to bargain toward an agreement." The Board's finding in this regard is entirely consistent with the law of this Court, which recognizes that the involvement of a federal mediator in bargaining efforts "reinforces the inference that the negotiations were continuing at that time." *Huck Mfg. Co.*, 693 F.2d at 1186.

Notwithstanding the above evidence, the Company argues (Br.29) that the Union's request for the March 19 final offer provides evidence enough that the Union knew negotiations were "not going anywhere." In so arguing, the Company relies on the testimony of its witnesses—company negotiators Heider and Bull—as to the Union's purported reasons for requesting a final offer. However, the Board specifically credited (D&O13) the contrary testimony of union negotiator Fuslier, that in requesting the final offer, he expressly told the Company that he was doing so only "in order to take something to the membership" before the parties' 2007 agreement expired on March 24. (Tr.260-61.) Thus, according to Fuslier's credited testimony, the Union simply wanted the employees to know exactly what was on the table in terms of a successor agreement as their existing agreement was set to expire. The Company's brief does not address—much less explain why the Court should reject—this credited testimony. *See El Paso Elec. Co. v. NLRB*, 681 F.3d 651, 665 (5th Cir. 2012) (reiterating "settled law" that, on appeal, "credibility determinations are not to be disturbed unless they are inherently unreasonable or self-contradictory" (internal quotation marks and citation omitted)).

In any event, as the Board further found (D&O7,13), Fuslier requested the final offer with the expectation that, "if the offer was rejected by the membership," the Union "could go back to the bargaining table and share the true feelings of the membership." (Tr.260-61.) Consistent with this expectation, when the employees,

in fact, voted to reject the offer, Fuslier immediately requested and secured further bargaining with the Company on March 31. At the March 31 bargaining session, moreover, Fuslier voiced the employees' specific concerns about the offer—for example, their concerns about the proposed new work schedule and their potential loss of overtime opportunities. As the Board found (D&O13), "[h]ad the Union believed that the parties were hopelessly deadlocked, there would have been no reason to 'educate' [the Company's bargaining committee] on the membership response and concerns." Thus, after considering all of the relevant evidence, the Board reasonably found (D&O13) that "the record as a whole reflects no contemporaneous understanding" that the parties were actually at impasse as of Heider's impasse declaration on March 31.

Having considered the salient aspects of the surrounding circumstances identified in *Taft Broadcasting*, the Board concluded (D&O13-14) that the Company did not carry its burden of proving that the parties were at a bona fide impasse around 11 a.m. on March 31, when Heider declared impasse and left the bargaining session. In addition, a majority of the Board (Member Hayes finding it unnecessary to resolve) found (D&O1n.5) that, even assuming there was a bona fide impasse during the bargaining session, any such impasse was promptly broken. *See Charles D. Bonanno Linen Serv. v. NLRB*, 454 U.S. 404, 412 (1982) (describing impasse as "only a temporary deadlock or hiatus in negotiations,"

which is almost always "eventually broken, through either a change of mind or the application of economic force"); *accord Raven Servs. Corp. v. NLRB*, 315 F.3d 499, 504-05 (5th Cir. 2002).

In so finding, the Board expressly relied on the holding of this Court in *Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390, 1399 (5th Cir. 1983), that "[a]nything that creates a new possibility of fruitful discussion (even if it does not create a likelihood of agreement) breaks an impasse." In the present case, the evidence unequivocally shows that, soon after company negotiators Heider and Bull left the bargaining session, Fuslier and Federal Mediator Bolton each told Heider that the Union had proposals for movement toward the Company's March 19 offer. As the Board found (D&O14), these implied bargaining concessions effectively created "a new possibility for fruitful discussion," breaking any impasse that may have existed earlier in the day. *See Gulf States Mfg.*, 704 F.2d at 1399 (noting that even implied bargaining concessions may break an impasse). Accordingly, the Company's impasse defense to the Section 8(a)(5) violation here fails, not only because the Company failed to prove that an impasse actually arose during the March 31 bargaining session, but also because any such impasse would necessarily have been broken by communications between the parties later in the day.

Implicitly recognizing the weakness of its impasse defense, the Company attempts (Br.16-18)—at this late stage in the proceedings—to make use of a

"distinct exception[]" to the general rule against unilateral changes recognized in this Circuit. *See Nabors Trailers, Inc. v. NLRB*, 910 F.2d 268, 273 (5th Cir. 1990), *cert. granted sub nom. NLRB v. Nabors Trailers, Inc.*, 500 U.S. 903 (1991), *cert. dismissed pursuant to Rule 46*, 501 U.S. 1266 (1992). Because the Company never raised such an alternative defense in the proceedings before the Board, however, the Court is without jurisdiction to consider it on appeal. Indeed, under Section 10(e) of the Act (29 U.S.C. § 160(e)), "[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." *See* cases cited above pp. 27-28 and *NLRB v. McEver Eng'g, Inc.*, 784 F.2d 634, 643-44 (5th Cir. 1986). Here, far from presenting any applicable extraordinary circumstances, the Company does not even acknowledge its failure to preserve its *Nabors Trailers* defense through exceptions to the administrative law judge's decision.

In any event, it is not at all clear that the exception recognized in *Nabors Trailers*, 910 F.2d at 273, provides a viable excuse for the Company's unilateral actions. *Nabors Trailers* held that an employer may lawfully make unilateral changes, "even in the absence of an impasse, if the employer notifies the union that it intends to institute the change[s] and gives the union the opportunity to respond to that notice." *Id.* However, subsequently, the Supreme Court adopted the

Board's contrary view, that "an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). Moreover, since the Supreme Court's decision in *Litton*, this Court has narrowed its application of the *Nabors Trailers* exception so that an employer is permitted to take unilateral action, absent impasse and based on the giving of notice and an opportunity to bargain, only where the union "has avoided or delayed bargaining," or has otherwise waived its right to bargain over the subject of the unilateral change. *See NLRB v. Pinkston-Hollar Constr. Servs., Inc.*, 954 F.2d 306, 311-13 & n.6 (5th Cir. 1992) (noting that "*Litton* did not, expressly or impliedly, overrule . . . decisions, including *Nabors Trailers*, that have recognized that *some form of waiver* will also excuse . . . unilateral [action], even short of impasse" (emphasis added)).

Thus, it appears that *Nabors Trailers* is no longer interpreted in this Circuit as providing blanket permission, as the Company suggests (Br.16-18), for an employer to make unilateral changes after merely giving a union notice and an opportunity to bargain. There must also be a showing of union waiver or dereliction to justify unilateral action in those circumstances. *See Pinkston-Hollar Constr.*, 954 F.2d at 311-13 & n.6. In the present case, there is no question that the Union acted diligently in pursuing bargaining over the Company's March 19 offer

before that offer was unilaterally implemented on March 31. The Company, therefore, cannot make use of this Court's notice-and-opportunity-to-bargain exception as applied since the Supreme Court's *Litton* decision.[6]

Because the Company, thus, was not privileged to make its March 31 unilateral changes based on either of the exceptions to the general rule against unilateral changes discussed above, the Board properly found that the Company's conduct violated Section 8(a)(5) and (1) of the Act. *See NLRB v. Powell Elec. Mfg. Co.*, 906 F.2d 1007, 1013-14 (5th Cir. 1990); *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186-87 (5th Cir. 1982).

D. The Company Failed To Bargain in Good Faith with the Union Between March 31 and April 30, 2010

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with the Union between March 31 and April 30, 2010. Specifically, the evidence shows that, late on March 31, union negotiator Fuslier emailed company negotiator Heider and informed her, as he had several times earlier in the day, that the Union had a new

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[6] Moreover, because the impasse and notice-and-opportunity-to-bargain exceptions to the rule against unilateral changes are analytically distinct, an employer "cannot attempt to use one [exception], and on failing, fall back on the other." *CJC Holdings, Inc.*, 320 NLRB 1041, 1046 (1996), *enforced mem.*, 110 F.3d 794 (5th Cir. 1997). The Company's belated efforts to defend its unilateral changes by reference to the notice-and-opportunity-to-bargain exception accordingly fail for this additional reason.

proposal for the Company. Fuslier assured Heider that the proposal "move[d] in a meaningful way toward the Company's position on scheduling and other open issues," and he accordingly requested a meeting. Heider, however, maintained that there was "no reason to meet again unless [the Union was] willing to accept the [Company's] pending final offer"—that is, the March 19 offer that the Company had already implemented.

In Heider's own words, the Company simply "[wa]s not interested in meeting somewhere between [the Company's] final offer and [the Union's] current position, *whatever that is*." (Emphasis added.) Heider, thus, refused to even engage in the pretense of bargaining and, as the Board found (D&O16), "summarily rejected [the Union's] offer without even knowing the nature of the new proposals." The Board reasonably found (*id*.) this conduct inconsistent with the statutory duty to bargain in good faith.

Although the Company argues (Br.32-33) that Heider's conduct was lawful because she never flatly refused to meet with the Union, and because she eventually met with union officials on April 20 and 30, those arguments miss the mark. Preliminarily, as the Board found (D&O15), Heider's off-the-record meeting with union officials at an airport restaurant on April 20 was not a bargaining session. No proposals were exchanged at that meeting, nor were the parties' respective bargaining committees present. Thus, Heider's position on

April 1, that there was "no reason to meet again," effectively stopped bargaining until Federal Mediator Bolton persuaded Heider to relent and return to the bargaining table on April 30.

Moreover, because the question here is whether the Company complied with its duty to bargain *in good faith*, it is irrelevant that Heider may not have uttered an absolute refusal to meet on April 1. Her conduct, as the above exchange with Fuslier shows, was "in effect a refusal to negotiate" that "directly obstruct[ed] or inhibit[ed] the actual process of discussion," and the Board is empowered to remedy such conduct. *See NLRB v. Katz*, 369 U.S. 736, 747 (1962).

Similarly lacking in merit is the Company's suggestion (Br.33) that Heider was privileged to refuse to continue meeting with the Union as of April 1 because the parties were at impasse. As the Board found (D&O15), even if the parties had reached a valid impasse on March 31—which they had not, as shown above—that impasse was definitively broken by the Company's unilateral implementation of its March 19 offer late in the evening on March 31. As the Board explained (*id*.), this exercise of economic force "br[oke] the stalemate between the parties, change[d] the circumstances of the bargaining atmosphere, and revive[d] the parties' duty to bargain." *See Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 412 (1982) (describing impasse as a "temporary" deadlock that is eventually broken through either a change of mind or the application of economic force); *accord Hi-*

Way Billboards, Inc., 206 NLRB 22, 23 (1973). Accordingly, the Company cannot insulate Heider's April conduct from judgment based on an impasse that assertedly arose, but then fell away, on March 31. The Board's finding that the Company's conduct violated Section 8(a)(5) and (1) of the Act therefore stands.

E. The Company Engaged in Bad-Faith Bargaining by Presenting Its Regressive May 25 Proposal In Order To Frustrate Agreement

The evidence shows, and the Board found (D&O19-20), that on May 25 the Company presented a proposal to the Union that "upped the ante" and purposefully added bargaining demands in an effort to frustrate and prolong negotiations. Specifically, the Company added four core or "must have" provisions to the three already identified in its March 19 offer. Substantial evidence supports the Board's finding (*id.*) that Heider took this approach of piling on demands in order to make it harder for the Union to accept the Company's proposal, which in turn would slow the bargaining process and increase the chances that the strike—and the Company's hiring of permanent replacement workers—would continue.

Thus, at the parties' April 30 bargaining session, Heider had explicitly stated the Company's plan to hire more replacement workers if the Union did not accept the offer that the Company had presented at that time. The evidence shows that Heider added a new dimension to the plan in mid-May, telling Company CEO Brisimitzakis that she was selecting bargaining dates in May with a view to

"forestall[ing] the union calling off the strike." And following the May 25 bargaining session, Heider confirmed to Brisimitzakis that, "according to plan," when Fuslier suggested that the union bargaining committee would recommend acceptance of the Company's March 19 offer—which included three core company issues—Heider told him that the March 19 offer was no longer on the table, and she substituted an offer with a total of seven core company issues. (D&O19-20;GCX10.) As Heider anticipated, this tactic effectively prevented any agreement; so much so that her bargaining committee was able to "head home." (*Id*.)

Given the evidence above, consisting mainly of Heider's own emails, the record amply supports the Board's finding (D&O20) that the Company's objective in presenting its regressive bargaining proposal on May 25 was "the continuation of the strike and the avoidance of reaching an agreement." The Board properly based this finding (D&O19-20) not merely on examination of the May 25 proposal itself as the Company contends (Br.33), but on consideration of all the surrounding circumstances relevant to determining whether the Company was "seeking to avoid an agreement rather than reach one." *See Cent. Missouri Elec. Coop.*, 222 NLRB 1037, 1042 (1976). The Board's finding of a Section 8(a)(5) and (1) violation is, thus, supported by substantial evidence.

F. The Company Engaged in Bad-Faith Bargaining by Conditioning Bargaining over Mandatory Subjects on the Union's Concessions to Its Bargaining Demands between June 3 and June 22, 2010

The evidence shows that during the parties' June 3 bargaining session, Heider made several statements indicating that there could be no compromise and no collective-bargaining agreement unless and until the Union agreed to all seven of the Company's so-called core issues. Thus, Heider rejected the Union's counter-proposals on the core issues and told the union bargaining committee that the Union would have to agree to the Company's proposals on those core issues or there would be no contract. She further said that although the Company had "lots" of room to move on various issues, it would not do so unless the Union first accepted the Company's priorities. Indeed, Heider said that she would not even bother discussing the possibilities for movement on other issues because it made no sense for the Company to make gestures as to those issues without first securing the Union's acceptance of the Company's seven core issues.

In view of this evidence, the record fully supports the Board's finding (D&O23) that Heider engaged in "take it or leave it" bargaining during the June 3 bargaining session, which is not good-faith bargaining at all. *NLRB v. Ins. Agents' Int'l Union, AFL-CIO*, 361 U.S. 477, 485 (1960); *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 232 (5th Cir. 1960). Moreover, because Heider did not withdraw from her "take it or leave it" approach until the parties' next bargaining session on

June 22, the Board found (*id*.) that Heider's bad-faith bargaining conduct continued until that date.

G. The Company Was Not Privileged To Make Unilateral Changes on June 27

As with its March 31 unilateral contract implementation, the Company defends its June 27 unilateral contract implementation by asserting that the parties had reached impasse, privileging the Company to act unilaterally. The Board reasonably rejected this defense after considering all of the relevant record evidence.

In particular, substantial evidence supports the Board's finding (D&O24) that the *Taft Broadcasting* factors "strongly counter[]" the assertion that the parties reached a valid impasse on June 23, 2010, just before the Company's unilateral implementation of yet another contract offer on June 27. Thus, the evidence shows that following the March 31 unilateral implementation and resulting disruption of bargaining, the parties did not resume bargaining until April 30, and then they met for only 7 bargaining sessions (*Taft Broadcasting* factor 3) before the asserted late-June impasse and implementation. As of June 23, moreover, although the parties were divided on the same concededly important issues as before, as well as newly identified core company issues, the parties had just begun discussions of those issues based on a new company proposal presented on June 22.

Nor does the evidence show any contemporaneous understanding (*Taft Broadcasting* factor 5) on June 23 that the parties were at impasse. Thus, at the June 23 bargaining session, Fuslier told Heider that the Union was considering the Company's proposal and had specific matters it wanted to discuss; Heider, by contrast, took the position that further discussion would be futile unless the Union was willing to accept the offer. All of these facts, as the Board found (D&O24), "strongly" weigh in favor of finding that the parties were not at impasse as of June 27.

The record also amply supports the Board's finding (D&O24) that the first and second *Taft Broadcasting* factors "are most at odds with the existence of a valid impasse" at the time in question. The parties' bargaining history (*Taft Broadcasting* factor 1) by late June included not only the unlawful March 31 implementation, but also an undisputedly unlawful unilateral implementation of new operating procedures in late May, and several instances of bad-faith bargaining, all discussed above. These prior unfair labor practices, as the Board found (*id*.), are significant because they "clearly moved the baseline on issues over which the parties were bargaining and altered the parties' expectations about what they could achieve, preventing a [good-faith] impasse on June 23, 2010." *See Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 138 (D.C. Cir. 1999).

Substantial evidence, thus, supports the Board's findings (D&O1,24), pursuant to *Taft Broadcasting*, that the Company was not privileged to unilaterally implement a contract proposal in late June 2010 based on a valid impasse. The Board therefore properly found (*id*.) that the Company's unilateral action violated Section 8(a)(5) and (1) of the Act.

III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3), (5), AND (1) OF THE ACT IN ITS TREATMENT OF STRIKERS, AND THE UNION, FOLLOWING THE UNFAIR-LABOR-PRACTICE STRIKE

A. The Company Failed To Reinstate the Strikers After the Union's Unconditional Offer To Return to Work, and Even Continued to Hire More Striker Replacements

It is well settled that unfair-labor-practice strikers—that is, employees who strike in protest of labor law violations—"are entitled to reinstatement immediately upon an unconditional offer to return to work, regardless of whether the company has made permanent replacement hires."[7] *Poly-America, Inc. v. NLRB*, 260 F.3d 465, 476 (5th Cir. 2001); *accord NLRB v. Int'l Van Lines*, 409 U.S. 48, 50-51 (1972); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956). Thus, an employer violates Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and

[7] By contrast, employees who engage in a strike based solely on economic concerns are not entitled to immediate reinstatement if permanent replacements have been hired. *See NLRB v. Powell Elec. Mfg. Co.*, 906 F.2d 1007, 1016 n.9 (5th Cir. 1990).

(1))[8] by failing to immediately and fully reinstate former unfair-labor-practice strikers once they have made an unconditional offer to return to work. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *NLRB v. Gulf-Wandes Corp.*, 595 F.2d 1074, 1079 (5th Cir. 1979).

Here, the Company does not dispute (Br.43) that certain of the Section 8(a)(5) violations discussed above made the strike an unfair labor practice strike, as opposed to an economic strike. Indeed, the Company stipulated that if its unilateral implementation of a final contract offer on March 31, 2010 was unlawful, as the Board ultimately found, then the strike—which began on April 7 and was clearly directed toward the Company's March 31 conduct—was an unfair-labor-practice strike from its inception. (D&O26;GCX25.) The Company further stipulated that if its subsequent bargaining conduct on March 25 and June 3, 2010 was unlawful, as the Board also ultimately found, then that conduct served to prolong the unfair-labor-practice strike. (*Id*.)

In addition, the Company does not dispute that it failed to offer immediate and full reinstatement to all of the former strikers upon the Union's June 15 offer to return to work unconditionally, as required by law when the strike is an unfair-

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[8] Section 8(a)(3) of the Act prohibits employer "discrimination in regard to hire or tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization." A violation of Section 8(a)(3) produces a derivative violation of Section 8(a)(1) of the Act. *See above* p. 34 n.4.

labor-practice strike. Instead, the Company notified the Union that it was refusing to reinstate strikers to the positions it had filled—all of the production positions, and approximately half of the maintenance positions. (D&O26;Tr.139,927.) Thus, five days after the strikers' unconditional offer to return to work, fewer than 30 of the approximately 120 unfair-labor-practice strikers had received offers of re-employment.[9]

Given these undisputed facts, the Board reasonably found (D&O27) that the Company violated Section 8(a)(3) and (1) of the Act by failing to meet its obligation to immediately and fully reinstate *all* of the unfair-labor-practice strikers, as a group. The Board further reasonably found (*id*.) that the offers the Company extended to a fraction of the strikers were invalid because they reinstated employees "to positions with unlawfully imposed terms and conditions of

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[9] While the Company points out (Br.43-44) that none of the replacements would be displaced if the strike had been found to have been an economic one, the Company includes among those replacements the last six hired. We note, however, that even if the strike were an economic strike, it does not necessarily follow that the Company was entitled to honor, after the strike, job offers it assertedly made to these six replacements during the strike. *See Poly-America, Inc. v. NLRB*, 260 F.3d 465, 476-78 (5th Cir. 2001) (where an economic strike is concerned, the employer bears the burden of proving that it "in fact . . . hired" striker replacements before it received an unconditional offer to return to work from the striking employees, and an employer's mere decision or plan to hire replacements at the time is not sufficient to withhold the reinstatement of returning strikers). Accordingly, if the Court were to disagree with the Board and find the strike to be an economic strike, the Board respectfully submits that a remand would be necessary to adjudicate the Company's claim that the final six replacements were in fact "hired" during—not after—the strike.

employment," in light of the unilateral changes discussed above. (Tr.147-48.) *See PRC Recording Co.*, 280 NLRB 615, 615 n.2 (1986), *enforced*, 836 F.2d 289 (7th Cir. 1987).[10]

B. The Company Unilaterally Changed the Seniority-Based Recall Procedures Applicable to the Returning Strikers

As discussed above, Section 8(a)(5) and 8(d) of the Act impose on employers an obligation to "preserve the status quo" with respect to wages and other mandatory subjects of bargaining while collective-bargaining negotiations are ongoing, and until the parties reach overall agreement or impasse. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 551 (1988); *accord Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991). The terms of an expired collective-bargaining agreement accordingly

[10] In regard to the remedy, the Board specifically found (D&O27) that the Company cannot benefit from any administrative grace period for reinstating the strikers, given that it failed to make timely and valid reinstatement offers in the first place. The Company's backpay obligation to the former strikers accordingly begins on June 15, 2010, when the Union made an unconditional offer, on their behalf, to return to work. In addition, to the extent that some of the strikers declined offers of reinstatement or resigned their employment, the Board found (D&O27) that they did so "because of [the Company's] unlawful changes in terms and conditions of employment," or to overcome temporary hardships imposed by the prolonged strike. As the evidence, thus, fails to show that they unequivocally intended to permanently abandon employment with the Company, the Board found (*id*.) that those former strikers remain entitled to a remedy under the Board's Order. The Company does not challenge any of these findings relevant to the scope of the remedy for the unfair-labor-practice strikers, resting instead on its unsuccessful theory (Br.43-44) that they were not involved in an unfair-labor-practice strike.

retain legal significance during the pendency of negotiations, as they "define the status quo for purposes of the prohibition on unilateral changes." *Litton*, 501 U.S. at 206.

Here, at all relevant times, the parties' expired 2007 collective-bargaining agreement defined the status quo with regard to employee recall procedures. Notwithstanding this provision, the Company decided to alter this status quo in June 2010, recalling the former unfair-labor-practice strikers to work, not based on seniority, but based on relative merit as determined by the Company.

Although an employer may unilaterally implement changes upon impasse, even then, it cannot lawfully implement changes that were not encompassed in its final, pre-impasse contract offer. *See Loral Defense Sys.-Akron v. NLRB*, 200 F.3d 436, 449 (6th Cir. 1999). Applying this principle here, the Board preliminarily noted (D&O28) that there was only one asserted impasse that pre-dated the unilateral change at issue, and only one "final" contract offer associated with that asserted impasse: the March 19 offer discussed above. That offer, however, did not include any proposed changes to the seniority-based recall provision of the 2007 agreement.[11] Accordingly, even assuming that the parties reached impasse

[11] The Company contends (Br.45) that the recall at issue here "was not a recall from a layoff situation governed by the contract or past practice," and suggests that it therefore could lawfully seek piecemeal bargaining and implementation on this particular matter. However, the Company cites no evidence to establish its

on March 31, empowering the Company to make lawful unilateral changes, the Company still would not have been privileged to unilaterally implement the changes to the parties' established recall procedure here, as such changes were well beyond the Company's March 19 final offer.[12]

In sum, the Board is entitled to summary enforcement of its order insofar as it relates to several uncontested unfair-labor-practice findings. Moreover, for the reasons detailed above, the Board is also entitled to enforcement of its Order insofar as it relates to the contested unfair-labor-practice findings, all of which are supported by substantial evidence. In particular, the record amply supports the Board's findings that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally implementing two contract offers, in the absence of a valid impasse in collective-bargaining negotiations, and by failing to bargain in good faith with the Union at times between those two unlawful contract implementations. The record likewise supports the Board's findings that the Company breached its duties

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premise that the seniority-based recall provision of the parties' last collective-bargaining agreement was limited, either by its terms or by the parties' interpretation, to apply exclusively to situations involving recall from a layoff. And, in fact, Mine Manager Bull admitted that the seniority-based recall provision of the last agreement would have applied to the striker-recall here. (Tr.155-56.)

[12] In its brief to this Court (Br.44-45), the Company asserts that it included a non-seniority-based recall provision in its May 25 bargaining proposal. That proposal, however, was not a final contract offer, nor did any impasse (and related license to make unilateral changes) follow from that proposal.

toward employees and the Union in the wake of a strike protesting the Company's unlawful bargaining conduct, thereby violating Section 8(a)(3), (5), and (1) of the Act.

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

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February 2013

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CAREY SALT COMPANY, A SUBSIDIARY OF COMPASS MINERALS INTERNATIONAL, INC.	)	No. 12-60757
Petitioner/Cross-Respondent	)	
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	Board Case Nos. 15-CA-19704 15-CA-19738
and	)	
UNITED STEEL, PAPER AND FORESTRY, RUBBER MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION AND LOCAL UNION 14425	)	
Intervenor	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 13,868 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

COMPLIANCE WITH CONTENT AND VIRUS SCAN REQUIREMENTS

Board counsel certifies that the contents of the accompanying CD-ROM, which contains a copy of the Board's brief, are identical to the hard copy of the

Board's brief filed with the Court and served on the Petitioner/Cross-Respondent.

Board counsel further certifies that the CD-ROM has been scanned for viruses using Symantec Antivirus Corporate Edition, program version 11.0.7000.975 According to that program, the CD-ROM is free of viruses.

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Dated at Washington, D.C.
this 25th day of February 2013

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CAREY SALT COMPANY, A SUBSIDIARY OF COMPASS MINERALS INTERNATIONAL, INC. Petitioner/Cross-Respondent v. NATIONAL LABOR RELATIONS BOARD Respondent/Cross-Petitioner and UNITED STEEL, PAPER AND FORESTRY, RUBBER MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION AND LOCAL UNION 14425 Intervenor	)	No. 12-60757 Board Case Nos. 15-CA-19704 15-CA-19738

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that the participants in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

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