

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

In the Matter of	:	
	:	
MIKE-SELL'S POTATO CHIP CO.	:	CASE NO. 9-CA-094143
	:	
and	:	
	:	
GENERAL TRUCK DRIVERS,	:	
WAREHOUSEMEN, HELPERS, SALES	:	
AND SERVICE, AND CASINO	:	
EMPLOYEES, TEAMSTERS LOCAL	:	
UNION NO. 957	:	
	:	

**BRIEF OF RESPONDENT MIKE-SELL'S POTATO CHIP COMPANY TO THE
NATIONAL LABOR RELATIONS BOARD IN SUPPORT OF ITS EXCEPTIONS TO
THE DECISION OF ADMINISTRATIVE LAW JUDGE GEOFFREY CARTER**

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I. INTRODUCTION

Respondent Mike-sell’s Potato Chip Company¹ (“Mike-sell’s” or “Company”) has filed Exceptions to the Decision and Order of Administrative Law Judge Geoffrey Carter (“ALJ”), which issued in the above-captioned case on June 18, 2013 (JD-40-13) (“Decision”).² Stated briefly, Mike-sell’s excepts to certain factual findings, evidentiary rulings, and legal conclusions of the ALJ, as well as his ultimate holding that (1) “[b]y, on or about November 19, 2012, unilaterally implementing its full and final offers for the warehouse and driver units without first bargaining with the Union to a good-faith impasse, Respondent violated Section 8(a)(5) and (1) of the Act;” and (2) “[b]y committing the [Sections 8(a)(5) and 8(a)(1) violations], the

¹ Mike-sell’s Potato Chip Company recently changed its name to Mike-sell’s Snack Food Company.

² Citations to the Decision are parenthetically referenced as “ALJD, p. ____.” Citations to Joint Exhibits, Respondent Exhibits, and General Counsel Exhibits are parenthetically referenced as “JX-____,” “RX-____,” and “GX-____,” respectively. Citations to Official Transcript pages are parenthetically referenced as “Tr. ____.”

Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.” (ALJD, p. 19.) Mike-sell’s also excepts to the ALJ’s proposed Remedy and Order. The Company’s specific exceptions are detailed in the contemporaneously-filed Exceptions to the Decision of Administrative Law Judge Geoffrey Carter (“Exceptions”), which this Brief supports.

II. STATEMENT OF FACTS

A. Background Information

This matter came before the ALJ on April 15-17, 2013, in Cincinnati, Ohio. It concerns a Complaint issued by the Regional Director of Region 9 of the National Labor Relations Board (“Board”) based on two unfair labor practice charges filed by the General Truck Drivers, Warehousemen, Helpers, Sales and Service, and Casino Employees, Teamsters Local No. 957 (“Union”) against Mike-sell’s. (ALJD, p. 1; GX-1(a).) The Company categorically denies that it committed any unfair labor practices by implementing its last, best, and final offers (“Final Offers”) for the warehouse, route sales, and over-the-road (“OTR”) drivers after their labor agreements expired. (ALJD, p. 1.) Rather, the Company contends that it implemented these changes only after the parties reached a legitimate bargaining impasse.

Mike-sell’s is a privately-held manufacturer and distributor of snack foods and is headquartered in Dayton, Ohio. (ALJD, p. 2; Tr. 28, 35.) While the Company has been in business for over a century, it has suffered significant financial losses over the past several years. (ALJD, p. 4; Tr. 404.) The primary reason for the Company’s ongoing losses is the competitive imbalance between Mike-sell’s and its primary competitor, Frito-Lay. (ALJD, p. 4; Tr. 243-45, 405-07.) Unlike Frito-Lay, Mike-sell’s cannot afford to intentionally discount the price for its products so deeply as to knowingly take a loss for a temporary period in order to steal away store

shelf space and sales volume from smaller competitors. (ALJD, p. 4; Tr. 407-09.) And while Frito-Lay owns its own potato farms, Mike-sell's must buy raw ingredients on the open market. (ALJD, p. 4; Tr. 408.) The Company's financial condition and competitive struggles are not unique in its industry. Across the country, small snack manufacturers see Frito-Lay as a fierce, national competitor with the ability to price local concerns out of business. (Tr. 243, 406-08.)

Mike-sell's has two production facilities, one of which is in Dayton, Ohio. (ALJD, p. 2; Tr. 404.) Mike-sell's manufactures and packages snack products at its Dayton operation and then distributes those products to retailers in Ohio, Indiana, and Kentucky through the help of route sales drivers, over-the-road ("OTR") drivers, and independent distributors. (ALJD, p. 2; Tr. 404.) At the time of the hearing in this case, Mike-sell's employed about 10 warehouse workers (i.e., employees who pack boxes of product onto pallets); about 30 route sales drivers (i.e., employees who deliver and sell products directly to stores); and about four OTR drivers (i.e., employees who deliver products to warehouses, stand-alone storage bins, and distribution centers). (Tr. 26-28, 602-04.) Mike-sell's formerly employed about 60 route sales drivers, but as will be explained below, the Company was forced in 2012 to close several distribution centers and turn its sales routes over to independent distributors (i.e., independent businesses who buy and re-sell Company products). (ALJD, p. 9; Tr. 27, 91-92, 405, 437.) Mike-sell's has also laid off a number of nonunion employees and salaried staff. (Tr. 405, 443.)

B. Bargaining Relationship and History

Mike-sell's warehouse workers are represented by the Union, and their employment was formerly governed by a labor agreement effective October 26, 2008, through October 26, 2012. (ALJD, p. 3; Tr. 24; GX-3.) Mike-sell's route sales drivers and OTR drivers are also represented by the Union, but in a separate bargaining unit, and their employment was formerly governed by a

labor agreement effective November 17, 2008, through November 17, 2012. (ALJD, p. 3; Tr. 24; GX-2.) Mike-sell's and the Union met several times to negotiate successor labor agreements for these two units, although negotiations for each unit were held separately. (ALJD, p. 5; Tr. 22.) In fact, the route sales negotiations have been separate from the OTR negotiations, even though those two groups of drivers are in the same bargaining unit. (ALJD, p. 5; Tr. 35.)

The Union's lead negotiator is Business Representative Michael Maddy ("Maddy"). (ALJD, pp. 4-5; Tr. 26.) Starting November 14, 2012, Maddy enlisted the assistance of Attorney John Doll ("Doll"). (ALJD, p. 10; Tr. 345.) The Company's lead negotiator is Human Resources Director Sharon Wille ("Wille"), and she attended all bargaining sessions for all units, except for one session on January 3, 2013. (ALJD, p. 5; Tr. 413-15.) Wille has been assisted by other members of management, such as President Charles Shive, Chief Financial Officer Paul McNeil, and Vice President of Sales Phil Kazer ("Kazer"). (Tr. 413, 436, 450.)

Due in large part to the Union's unavailability and cancelling of meetings, the parties met relatively few times prior to the expiration of the labor agreements.³ (Tr. 410-12, 438, 447; RX-1.) The pre-expiration route sales negotiations were held on October 10th and 24th, and November 14th. (ALJD, pp. 8-12; Tr. 230, 413.) The pre-expiration meetings for OTR drivers occurred on October 12th and 29th, and November 5th. (ALJD, pp. 6-8; Tr. 232, 415.) The pre-expiration meetings for the warehouse unit were held on September 12th, and October 3rd, 23rd, 25th, and 26th. (ALJD, pp. 5-6; Tr. 233, 414.) The parties also met for warehouse negotiations

³ Wille requested to begin negotiations in August 2012, but Maddy was not available until September 2012. (Tr. 228-29, 410-12; RX-1; GX-4; GX-5.) Wille scheduled several bargaining sessions with the Union in advance, including two sessions on October 17th and 31st that the Union later cancelled. (Tr. 412.) Maddy testified that, at some unknown point in time (he could not remember when), Mike-sell's indicated that it would be preferable to meet on Wednesdays. (Tr. 319-20.) Wille confirmed that she asked to meet "at least every Wednesday." (Tr. 412.)

on November 13th and 15th, after the warehouse labor agreement expired but before Mike-sell's implemented its Final Offers. (ALJD, pp. 5-6; Tr. 234, 414-15.)

The most contentious negotiations have been with the route sales drivers, which comprise the largest portion of both bargaining units. (Tr. 416.) The OTR drivers and warehouse workers chose to defer to the route sales drivers to pave the way on the key issues of pensions and healthcare. (ALJD, pp. 6-7; Tr. 125, 195, 232-34, 248, 415-16.) The parties reached tentative agreements on discrete issues for warehouse and OTR employees,⁴ but they remained deadlocked on healthcare and pension for all employees, and on commissions for the route sales drivers, at the time that the Company's Final Offers were implemented on November 19, 2012. (Tr. 415-16, 460-62; RX-6.) Negotiations for all three groups proceeded in a similar manner, but the route sales drivers are at the crux of the overall impasse for both units on the issues of healthcare and pensions, so the route sales negotiations are the main focus in this case.

C. The Company's Financial Condition

At the outset and throughout negotiations, Mike-sell's talked with each of the Union's bargaining units about the Company's continuing financial struggle. (ALJD, pp. 5-6, 8; Tr. 36, 74, 138, 240-42, 438; RX-4.) Mike-sell's shared the reasons for its ongoing losses, including the poor economy, the sharp rise in costs for materials, the continuing decline in overall sales, the stiff increase in competition, and the recent loss of major accounts (e.g., Mission Food). (ALJD, p. 4; Tr. 38-39, 48-49, 74, 99, 138, 243-45, 405, 435, 438-40; RX-4, GX-8.) Mike-sell's disclosed complete financial information to the Union, which reflected that the Company had lost almost \$5.5 million in just over four years.⁵ (ALJD, pp. 4, 5-6, 8; Tr. 74-75, 97-98, 138,

⁴ The Union has since suggested that it may not honor the warehouse and OTR tentative agreements that the parties previously reached. (Tr. 234-40; 588-89; RX-8 at 2-27-13.)

⁵ The Union took these figures at "face value" and had no reason to doubt their accuracy. (Tr. 242.)

404; RX-4.) These mounting financial losses forced Mike-sell's, in 2012, to convert its sales territories in Columbus, Cincinnati, and Sabina from Company routes to independent distributorships. (Tr. 91-92, 245.) The closure of these distribution centers resulted in the permanent layoff of about 30 route sales drivers. (Tr. 91-92, 245.) Mike-sell's also shared comparative industry data from the local area, which showed other employers paying wages and benefits significantly lower than those paid by the Company. (Tr. 49-50, 100, 139-40, 144, 440-42.) Mike-sell's further emphasized the skyrocketing healthcare and pension costs and the debilitating effect that they were having on the Company. (ALJD, p. 4; Tr. 36-37, 48-50, 100-01, 140; GX-14; GX-22.) Mike-sell's invited the Union to brainstorm about cost-cutting measures in these key areas, as well as to propose other strategies to help the Company regain a competitive position and become profitable. (ALJD, p. 8; Tr. 75, 251-52, 435-36.)

D. The Three Key Issues

Throughout negotiations, the Company's focus has always been on cutting costs in three key areas: commissions, healthcare, and pensions. (Tr. 416.) Concessions in these areas were absolutely necessary for Mike-sell's to remain a viable and profitable competitor. (Tr. 416-32.)

1. Commissions

Mike-sell's needed a change in commission structure for the route sales drivers from a basis of gross sales to net sales. (ALJD, p. 8; Tr. 263-65; GX-19, p. 2.) Such a change in commission structure was the only feasible way for Mike-sell's to be able to increase sales volume and realize a profit.⁶ (Tr. 128-29, 163, 263-64, 423-28.) Specifically, Mike-sell's

⁶ Another way to cut manufacturing costs would be to reduce the amount of potato chips / snacks in each bag. (Tr. 263-64, 430.) But consumers are more savvy these days, and they notice when companies reduce product volume, especially given that stores now print a breakdown of unit price (per ounce or gram) on the shelf. (Tr. 430-31.)

needed to increase the perceived “discount” to consumers so the Company could be competitive with the perceived “discount” provided by Frito-Lay.⁷ (Tr. 427-28, 689.)

2. Healthcare

Like many employers, Mike-sell’s is concerned about the unpredictability of the Affordable Care Act. (Tr. 70, 214, 249, 419-22, 682-85.) The Company therefore bargained for greater flexibility with regard to healthcare for bargaining unit employees. (ALJD, pp. 5-6, 8-9; Tr. 419-23, 732-33.) Mike-sell’s also needed to eliminate retiree coverage, which was a huge expense. (ALJD, pp. 6, 9; Tr. 69, 272-73, 556-57; GX-19, p. 14.)

3. Pensions

It is vital for Mike-sell’s to get relief from the Union’s seriously underfunded multi-employer pension plan. (Tr. 163, 416-18, 599.) The Central States Pension Fund (“Fund”) is about 48% underfunded. (Tr. 416, 599.) Many participating employers are going bankrupt, whereas others who can afford to pay a significant withdrawal penalty are withdrawing from the

⁷ To understand the difference between “net” sales versus “gross” sales, one must understand three price points in the snack food industry: the bag price, the shelf price, and the retailer price. (Tr. 423-25.) The “bag price” is the price printed on the top corner of any bag of potato chips / snacks; the manufacturer sets this fictional “gross” price with full knowledge that consumers will almost never pay it. (Tr. 423-26, 690, 734-35.) The “shelf price” is the price displayed on the store shelf for the sale of the potato chips / snacks; it is the price the consumer actually pays the store for the product. (Tr. 423-24.) The “retailer price” is the price the retailer pays to the manufacturer for the potato chips / snacks; it is the amount the Company actually receives from the store for its products. (Tr. 424.) Because it is forced to compete with industry giants like Frito-Lay, Mike-sell’s has little control of the retailer price and even less control of the shelf price—which continues to climb. (Tr. 426-27.) If the Company attempts to increase the retailer price or decrease the shelf price, then the store will simply stop buying Mike-sell’s products and sell more Frito-Lay instead. (Tr. 426-27.) The only price point over which Mike-sell’s has full control is the bag price. (Tr. 427-28.) If the Company can raise the bag price so as to create a bigger gap from the store’s shelf price, then consumers will perceive a bigger “discount” and will buy more Mike-sell’s products. (Tr. 427-28.) Frito-Lay and other industry competitors have manipulated these price points for years, and in order to keep up, Mike-sell’s needs to do the same. (Tr. 425-26, 428-29.) But Mike-sell’s cannot hike the bag price if it continues to pay route sales commissions based on “gross sales,” which means commissions based on the fictional bag price that the consumer never pays and the Company never receives. (Tr. 425, 427.) If Mike-sell’s continued paying commissions based on gross sales, then the additional revenue made from increased sales volume would be lost to higher route sales commissions. (Tr. 429.) Mike-sell’s instead needs to pay route sales commissions based on “net sales,” which means commissions based on the retailer price that is actually paid to the Company for its products. (Tr. 428.) In this way, Mike-sell’s can increase its sales volume while still paying route sales drivers a fair commission based on the Company’s actual revenue, and the route sales drivers do not suffer a wage decrease because the lower price base for commissions is offset by an increase in sales. (Tr. 428, 431-32, 596; GX-39.)

Fund altogether. (Tr. 416-17, 600.) Employers are racing to withdraw from the Fund because the last employer standing will be stuck with the tab. (Tr. 608-09.) At the same time, the retiree pool is growing rapidly. (Tr. 416-17.) For every active employee in the Fund, there are four retirees receiving benefits. (Tr. 416, 599.) This “perfect storm” has led pension contribution rates and administrative costs to skyrocket, currently costing almost \$170.00 per week, per employee. (Tr. 417, 442, 599-600.) Pension costs are expected to rise up to 8% per year for the next five years. (Tr. 417-18, 600.) Unfortunately, Mike-sell’s cannot afford to pay the penalty to withdraw from the Fund, which would cost almost \$20 million. (ALJD, p. 4; Tr. 417, 600.)

E. The October 10th Bargaining Session (See generally RX-8 at 10-10-12)

Mike-sell’s presented its initial route sales proposal on October 10th. (ALJD, p. 8; Tr. 95, 247-48; GX-19.) On commissions, Mike-sell’s proposed that drivers be paid on net sales at the rates of 13% for manufactured products, 9% for non-manufactured products, 7% for private-label products, and 3% for chocolates. (ALJD, p. 8; GX-19, pp. 2-3.) On healthcare, Mike-sell’s proposed that employees be entitled to participate in any insurance plan(s) offered on the same terms and conditions as are provided to nonunion employees, except that retiree insurance would be permanently discontinued. (ALJD, pp. 8-9; Tr. 272, 419-23; GX-19, p. 14.) On pensions, Mike-sell’s proposed that employees pay 50% of current pension contributions, plus 100% of any future pension cost increases.⁸ (ALJD, p. 9; Tr. 478-79; GX-19, pp. 14-15.) Mike-sell’s emphasized that it had no interest in re-negotiating the expiring labor agreement, so its proposals were instead contained in a new proposed contract. (Tr. 93, 95-96, 246, 437; GX-19.) The Company provided a summary overview of its package proposal, but the Union needed to review the entire proposal in full, given that it was an entirely new document. (Tr. 95, 247-48; GX-18.)

⁸ After learning that the Fund does not permit direct employee contributions, Mike-sell’s revised its proposal to ask that employees reimburse the Company for the increased pension costs. (ALJD, p. 5; Tr. 269-70.)

The Union then presented its initial proposal at the October 10th meeting. (Tr. 75-89; GX-17.) Although well aware of the Company's financial woes, the Union only made proposals that would cost more money; there were no savings in any of the Union's proposals that would help Mike-sell's regain profitability. (Tr. 77-89, 436; GX-17.) On commissions, the Union proposed (1) either (a) moving to a base-plus-commission structure, or (b) increasing the commission rate for all products to 15%; and (2) increasing the daily and weekly rates paid for route riding from \$90.00 to \$130.00 and from \$450.00 to \$650.00, respectively. (ALJD, p. 8; Tr. 77-79, 505; GX-17, p. 1.) On healthcare, the Union proposed moving employees and retirees to the Central States Health and Welfare Plan ("Plan"), a preferred provider plan that would result in a 21% cost increase to Mike-sell's. (ALJD, pp. 8-9; Tr. 178-79, 418-21, 552, 596-98; GX-17, p. 5.) On pensions, the Union proposed to maintain the same terms with Mike-sell's paying the full pension contributions, plus all cost increases. (ALJD, p. 9; Tr. 558; GX-17, pp. 5-6.)

At the end of the meeting, Mike-sell's inquired as to the actual cost of the Union's proposals. (Tr. 442-43.) The Union was unable to provide an answer, as no cost analysis had been conducted. (Tr. 251, 442-43.) Mike-sell's responded that it had no money to fund the Union's proposals. (Tr. 92-93, 250, 254, 442.) Wille also informed the Union that the labor agreement was expiring on November 17th and would not be extended. (Tr. 437.)

F. The October 24th Bargaining Session (*See generally* RX-8 at 10-24-12)

When the parties met on October 24th, rather than discussing the parties' respective proposals, the Union's first order of business was to negotiate severance packages for laid-off route sales drivers. (ALJD, p. 9; Tr. 443.) The Union later indicated that it was not interested in the concepts outlined in the Company's proposals on the key issues of commissions, healthcare, and pensions. (ALJD, pp. 9-10; Tr. 255-57, 263; GX-18.) The Union made no movement

toward accepting net sales commissions, despite the fact that Mike-sell's had explained its paramount importance. (ALJD, p. 9; Tr. 163, 255-56, 443-45; GX-18.) On healthcare, the Union still insisted that Mike-sell's join its Plan and maintain retiree coverage, but the Union wanted to postpone further healthcare discussions until after it had a Plan representative give a presentation to the Company.⁹ (ALJD, pp. 9-10; Tr. 444, 452.) In response to the Company's continuing request for pension relief, the Union flippantly suggested that Mike-sell's pay the \$20 million withdrawal penalty. (Tr. 141, 163, 269.) Overall, the Union simply responded that the Company's proposals were "hard to accept." (ALJD, pp. 9-10; Tr. 255-56, 443-45; GX-18.)

Neither party made any movement on the three key issues, although Mike-sell's did agree to three of the Union's language changes. (ALJD, p. 9; Tr. 445-46.) The bargaining session ended with Maddy stating that the parties were "worlds apart;" that the Union would be bringing in its attorney; and that the Union needed to cancel the next session that had been scheduled for October 31st. (ALJD, p. 10; Tr. 136, 231, 446-47, 632-33.) Maddy said he would get back to Wille with a new date to meet, and he rejected Wille's suggestion to involve a federal mediator. (ALJD, p. 10; Tr. 136, 231, 261, 632-33.) Wille reminded Maddy that "[the parties were] 24 days away from the end of this contract." (ALJD, p. 10; Tr. 447.)

G. The Company's Ongoing Efforts To Facilitate Negotiations

Wille heard nothing from Maddy about any new date to meet. Because of the lack of meetings and the impending expiration of the route sales labor agreement, Wille wrote Maddy on November 2, 2012, offering to schedule additional meetings, suggesting several available dates to bargain, and again requesting to involve a federal mediator. (Tr. 258-60, 458-60; GX-32; RX-

⁹ The Union made no Plan presentation until November 13, 2012, four days before the route sales labor agreement expired. (Tr. 452.)

5.) It was not until November 14th—three days before the route sales labor agreement expired—that the Union was willing to meet. (ALJD, p. 10; Tr. 459-60.)

H. The November 14th Bargaining Session (*See generally* RX-8 at 11-14-12)

At the third route sales session, the Union withdrew several of its pending proposals. (Tr. 182-85; RX-11, pp. 1-3.) Mike-sell's again shared its financial condition, explained the impact of gross sales versus net sales, reviewed industry trends of deferring pension increases, and discussed rising healthcare costs. (ALJD, pp. 10-11; Tr. 449-50.) The parties reviewed the few items on which they had reached agreement, and then the Union raised four new issues for the first time, which only added to the open issues on the table. (Tr. 448-49; RX-11, p. 4.)

The Union offered a one-year extension of the expiring labor agreement, but Mike-sell's could not agree to any contract or extension without key changes to commissions, pensions, and healthcare. (ALJD, p. 10; Tr. 142, 160, 163, 275-76, 332, 448-49, 647-48.) Mike-sell's stood firm on its original healthcare proposal from October 10th, but it did make a couple significant revisions to its commissions and pension proposals. (ALJD, p. 11; Tr. 270-71; 339-40.) Specifically, Mike-sell's proposed (1) to accept a small increase in commission rates (but still less than the Union wanted) if the Union moved to net sales and if the drivers increased their individual sales by 3% during the first year of the contract and maintained that increase thereafter;¹⁰ and (2) to require employees only to pay the pension increases (not also half of the entire pension contribution). (ALJD, pp. 11-12; Tr. 267, 338-39, 680-81; RX-8 at 11-14-12, p. 2; GX-35, p. 16; GX-40, p. 5.) Although the Union eventually agreed to entertain the concept of net sales commissions, the Union proposed commission rates that were far too high and not conditioned on an increase in sales volume. (ALJD, p. 11; Tr. 266-67, 312-13, 338-39, 349, 450-

¹⁰ The sales increase requirement was minimal, and many drivers routinely increased their route sales by much greater amounts. (Tr. 611-12, 678-79.)

51, 453-55, 648-49.) Ultimately, the Company’s proposals on all three key issues were rejected, and the Union wanted to postpone healthcare discussions until it could get composite numbers from its Plan. (Tr. 187-88, 275-76, 455-56, 469, 601-02, 610; RX-8 at 11-14-12, pp. 1-2.)

Maddy stated that he saw “no point” in taking the Company’s proposal to the membership and that the parties were “just spinning their wheels.” (Tr. 448.) Doll similarly admitted that the parties “didn’t move the ball very far today.” (ALJD, p. 12; Tr. 189, 342, 456-57.) Kazer partially disagreed with Doll, clarifying “we have made the progress; you have done nothing.”¹¹ (Tr. 457, 657-58 (verbal emphasis and gesturing in original).) Mike-sell’s offered to meet again on November 16th—or any other date before the labor agreement expired—but the Union declined to schedule another session at that time. (ALJD, p. 12; Tr. 189-90, 451-52, 464, 652.) The meeting ended with Maddy and Doll saying that they would get back to the Company later. (ALJD, p. 12; Tr. 189-90, 282, 344-45, 452.) Wille reiterated that Mike-sell’s would not extend the expiring labor agreement and that the Union should vote on the Company’s proposal.¹² (Tr. 342, 451-52, 463-64, 652; RX-8 at 11-14-12, p. 6.)

I. Impasse and Implementation

As of November 16, 2012—the day before the labor agreement was set to expire—the Union still had not gotten back to Mike-sell’s with its availability. (Tr. 459-61, 464.) It appeared there had been a genuine exhaustion of productive discussions, and neither party had indicated a willingness to compromise any further on the three key issues. (Tr. 460-64.) Therefore, on November 16th, Wille hand-delivered a letter to Maddy. (ALJD, pp. 12-13; Tr.

¹¹ The pronoun “we” referenced Mike-sell’s, whereas the pronoun “you” referenced the Union. (Tr. 657-58.)

¹² Maddy claims that he “do[es] not recall” Mike-sell’s asking the Union to take a vote, and he “do[es] not recall” Wille stating that Mike-sell’s would not extend the labor agreement, although he does recall some reference to the labor agreement’s looming expiration date. (Tr. 191, 257-58, 284.) Maddy’s lack of memory is insufficient to rebut Wille’s testimony and business records of what Mike-sell’s conveyed at the end of the November 14th meeting.

197-200, 284-85, 464-65; RX-6; GX-34; GX-35; GX-36.) The letter confirmed that the Union had thus far refused to meet and emphasized that Mike-sell's would not extend the labor agreement. (RX-6.) The letter also reiterated the Company's previous request for the Union to vote on its November 14th proposal, which was the Company's "full and final offer." (Tr. 464-65; RX-6.) The letter enclosed copies of the Company's Final Offers for the Union's reference.¹³ (Tr. 464-65; RX-6.) Maddy scanned the letter and hastily replied to Wille that the Union would not be available to meet prior to the expiration of the labor agreement. (Tr. 464.) Maddy also said that he would contact the Union's attorney. (Tr. 465.)

Mike-sell's heard nothing from the Union in response to the November 16th letter. (Tr. 465-66.) The Company knew that it was unwilling to move any further on its commissions, pension, and healthcare proposals. (Tr. 462.) The Union had not budged on its pension proposal, and while its healthcare proposal had fluctuated "all over the map," it never included a feasible rate or the elimination of retiree coverage. (Tr. 460-64, 552; RX-11.) Finally, while the Union had agreed to consider commissions based on net sales, it wanted to set the commission rates too high, and it had not accepted the condition of a sales increase. (Tr. 461; RX-11.)

On November 18, 2012, Mike-sell's wrote another letter, which was faxed, emailed, and sent certified mail to the Union. (ALJD, p. 13; Tr. 285-87, 466; RX-7; RX-10.) The November 18th letter stated that the labor agreement had expired; that no vote had been taken by the Union; that an impasse existed in both bargaining units;¹⁴ and that Mike-sell's intended to implement its Final Offers effective November 19, 2012. (Tr. 467; RX-7.) Wille called Maddy several times

¹³ The warehouse and OTR employees had deferred to the route sales drivers for healthcare and pensions, so the parties' lack of agreement on those issues affected all three groups of employees. (Tr. 125, 195, 232-34, 248, 415-16.) Thus, the Company extended a "full and final offer" to both bargaining units.

¹⁴ Because the parties were at impasse for route sales drivers on the issues of healthcare and pensions, they were equally at impasse for the warehouse and OTR employees.

over the weekend to discuss the matter, but she had to leave a voicemail each time. (Tr. 468, 673.) Mike-sell's ultimately implemented both Final Offers on November 19th, which included the Company's last, best proposal on all issues, as well as any tentative agreements that had been reached by the parties. (ALJD, pp. 13-14; Tr. 468-70.) Mike-sell's did not implement any terms that had not been previously discussed at the bargaining table. (Tr. 610.)

Maddy eventually called Wille on November 19th, but he still provided no bargaining dates, nor did he indicate that there was movement to be made on the key issues. (Tr. 468.) In fact, after this brief discussion, Mike-sell's heard absolutely nothing at all from the Union until November 26th, when the Union proposed to meet on December 5, 2013. (Tr. 189-90, 469.)

J. Post-Implementation Bargaining Sessions¹⁵

As of the hearing in this matter, the parties had met six times since implementation of the Company's Final Offers: December 5 and 7, 2012; January 3 and 22, 2013; February 13 and 27, 2013; and March 20, 2013. (ALJD, pp. 14-15; Tr. 288.) None of the three key issues were settled during these post-implementation bargaining sessions. (Tr. 472.) The parties have settled some issues, and as agreements were reached, Mike-sell's has acted in good faith to incorporate them into the implemented terms. (Tr. 472-74, 562; GX-45.) But as soon as the parties made some progress, the Union would raise new issues for the first time or reinstate old proposals that had previously been withdrawn. (Tr. 471-72, 518-19; RX-11.) The Union's strategy essentially resulted in the parties taking one step forward and two steps back at each bargaining session.

¹⁵ Mike-sell's raised a blanket objection to all evidence of post-implementation bargaining, but the ALJ overruled that objection. (ALJD, pp. 14-15, 19.) The ALJ instead selectively admitted certain post-implementation evidence, while excluding other post-implementation evidence all together. Mike-sell's still believes that the ALJ erred in admitting the post-implementation evidence, as indicated in Exception 10 and in Section IV(B) of this Brief. However, to the extent that post-implementation evidence is considered, it must be properly analyzed to determine whether the parties reached (another) impasse some time later.

On December 5th, the parties settled 14 issues. (GX-45, pp. 4, 7-11.) But then the Union raised several new issues for the first time (including 16 separate “job protection or security” issues), despite the fact that the Company’s proposal to change or omit those protections had been on the table since October 10th.¹⁶ (Tr. 207-15, 297-99, 357-58, 375-80, 386, 485; RX-11, p. 4.) The parties came no closer to reaching an agreement on healthcare or pension; the Company’s position on these issues had not changed, and the Union’s proposed changes were unacceptable. (Tr. 215, 270-71, 506, 553-54, 556, 558; RX-11, pp. 1, 3.)

On December 7th, the parties settled four issues, but then the Union raised one new issue and reinstated all of its original proposals from October 10th. (Tr. 485, 518-19, 552, 554, 639-40; GX-45, pp. 6, 8, 16, 18; RX-8 at 12-7-12; RX-11.) As a result, any progress that had been made on these proposals was lost. The Union also raised one new issue for the first time based on language that had been presented by Mike-sell’s on October 10th. The parties came no closer to reaching an agreement on the issues of healthcare or pension. (Tr. 215, 554, 558.)

On January 3rd, the parties did not reach any agreements, nor did they make progress on the key issues. (Tr. 485, 506; RX-11, pp. 1, 3.) But the Union raised one new issue for the first time based on language presented by Mike-sell’s on October 10th. (RX-11, p. 4.)

On January 22nd, the parties settled six issues, but then the Union raised four more new issues for the first time based on language that had been presented by Mike-sell’s on October 10th. (Tr. 485; GX-45, pp. 3-4, 8, 15, 19; RX-11, p. 4.) The parties made no progress on the key issues, although the Union made a new but equally untenable healthcare proposal, which would require Mike-sell’s to continue its own health plan and pay employees \$1,200.00 per month (and retirees \$1,000.00 per month) if they chose to opt out of it. (Tr. 506, 555, 558, 669-71, 734.)

¹⁶ Maddy admits that he recognized that Mike-sell’s was proposing an entirely new contract and that its initial proposal distributed on October 10th was not based on the current labor agreement. (Tr. 325-27.) Maddy also admits that he “looked over” the Company’s initial proposal before the October 24th session. (Tr. 325-26.)

On February 13th, the parties settled 11 issues, but then the Union raised one new proposal for the first time based on language that had been presented by Mike-sell's on October 10th. (Tr. 485; GX-45, pp. 3, 5-7, 9, 14; RX-11, p. 5.) In addition, the major issues of commissions, healthcare, and pensions were still looming, and Mike-sell's did not budge in its position on those subjects. (Tr. 270-71, 586.) The parties made no progress on the key issues. (Tr. 586.) Kazer informed the Union that there was "nothing left to discuss;" that Mike-sell's had just presented its last, best, and final offer; that Mike-sell's would prepare the offer in written form and present it later that week; and that the Union should vote on it. (Tr. 584-86.) After this bargaining session, the Union took a strike vote for both bargaining units. (Tr. 294-95.)

On February 27th, the parties did not reach agreement on anything. The Union finally entertained the idea of a sales volume increase as part of the commission plan, but the proposed increase was too low, and it was based on sales of the entire bargaining unit rather than sales of individual drivers. (Tr. 520-22; RX-11, p. 1.) The Union then raised four new issues for the first time based on language that had been presented by Mike-sell's on October 10th. (Tr. 485; RX-11, p. 5.) The Union also suddenly suggested, for the first time, that it would not honor the tentative agreements reached for the warehouse and OTR employees. (Tr. 588-89.) Mike-sell's did not change its position and repeatedly emphasized that it had already presented its last, best, and final offer on February 13th and the Union should vote on it. (Tr. 587-88; RX-8 at 2-27-13.)

On March 20th, the parties met for the first time with a federal mediator. (Tr. 288-89.) It was the first session since implementation that the Union did not raise new issues. (RX-11.) Mike-sell's still did not change its position at all from February 13th. (Tr. 589-91.) No progress was made, and the parties left with around 30 open issues—all but three were the Union's alone and had been raised or revived since implementation. (Tr. 562-80, 589-91; RX-11.)

III. QUESTIONS PRESENTED

Mike-sell's respectfully submits that the following questions are presented for review by the Board, based on the Company's contemporaneously-filed Exceptions: (A) Whether the record as a whole contains a preponderance of evidence that the parties were at impasse on November 19, 2012; (B) Whether the ALJ erred in admitting evidence about post-implementation bargaining; and as a result, (C) Whether the record as a whole contains a preponderance of evidence to support the ALJ's credibility assessments, factual findings, conclusions of law, remedy, and order.¹⁷

IV. ARGUMENT

This case turns on whether the parties were at impasse on November 19, 2012. In answering this question, the ALJ was required to consider all of the documentary evidence and testimony in the record. The ALJ repeatedly concluded that an impasse did not exist. However, in several instances, the ALJ made improper assumptions of fact, took evidence out of context, relied on improperly-admitted evidence, and failed to consider undisputed evidence that conflicted with his findings and conclusions. This kind of "selective analysis" is improper, especially where the inferences drawn from ignoring certain evidence are contrary to direct, un rebutted testimony. *See, e.g., NLRB v. Cutting, Inc.*, 701 F.2d 659, 665-69 (7th Cir. 1983). Here, the evidence ignored by the ALJ is the same critical evidence that reveals the truth about this case: As of November 19th, the parties were deadlocked on the three key issues, and the Union sought to avoid the appearance of impasse by delaying negotiations and "stonewalling" the Company.

¹⁷ These concepts are inextricably intertwined, so the Board should consider all of the Company's exceptions and all of the Company's arguments to apply with equal force to all of the questions presented for review.

Based on the following considerations, which are explained below in further detail, the Company's exceptions should be granted, the ALJ's ruling should be reversed, and the General Counsel's Complaint should be dismissed because: (A) the record as a whole does contain a preponderance of evidence that the parties were at impasse on November 19th; (B) the ALJ did err in admitting evidence about post-implementation bargaining; and as a result, (C) the record as a whole does not contain a preponderance of evidence to support the ALJ's credibility assessments, factual findings, conclusions of law, remedy, and order.

A. The record as a whole contains a preponderance of evidence that the parties were at impasse on November 19th. (Relates to Exceptions 1-10.)

Impasse can be an elusive concept. Generally, an impasse is said to exist when the parties are deadlocked in their negotiations and further discussions are fruitless in the absence of a change in position. *See, e.g., Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973). Impasse can occur at any time in negotiations; it is not dependent upon a particular number of meetings between the parties. *See, e.g., Dixon Distribution Co.*, 211 NLRB 241, 244 (1974) (permitting unilateral implementation after only one 20-minute bargaining session). There is no less of an impasse when parties happen to reach agreement on some issues and are therefore closer to agreement than they were previously; "a deadlock is still a deadlock whether produced by one or a number of significant and unresolved differences in positions." *Taft Broadcasting Co.*, 163 NLRB 475, 478. In the end, it must appear that there has been a genuine exhaustion of productive discussions and an unwillingness by both parties to compromise any further toward reaching an agreement. Where good faith bargaining has not resolved key issues and there are no definite plans for further sessions to break the deadlock, a finding of impasse is warranted. *See, e.g., Dallas Gen. Drivers, Local No. 745 v. NLRB*, 355 F.2d 842, 845 (D.C. Cir. 1966).

It is the Company's position that the parties were at impasse on November 19th.¹⁸ Mike-sell's was therefore permitted to unilaterally implement changes in the terms and conditions of employment for both bargaining units consistent with its pre-impasse Final Offers. *See, e.g., Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enforced sub nom., Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir 1968). The ALJ reached the opposite conclusion only because he ignored several critical (and undisputed) facts in the record; improperly relied on irrelevant facts; made improper assumptions of fact; and applied the law of cases that are factually distinguishable from the instant case.

1. The ALJ Failed To Properly Analyze Evidence Pertaining To The Union's Dilatory Motives And Pre-Implementation Strategy of Delay.

The ALJ's findings related to the Union's behavior are based on his analysis of pre-bargaining communications and pre-implementation bargaining sessions for all three groups of employees (i.e., route sales, OTR drivers, and warehouse workers). (ALJD, pp. 16-18.) It was improper to aggregate and collectively rely on events for all three groups of employees because only the route sales negotiations are relevant to this case. The parties deliberately held separate negotiations for each group of employees, and the OTR and warehouse employees expressly deferred to the route sales drivers on the key issues of pension and healthcare. (ALJD, pp. 6-7; Tr. 125, 195, 232-34, 248, 415-16.) It is therefore irrelevant that the parties began warehouse negotiations in September (ALJD, p. 16); that the parties held 12 bargaining sessions for all three groups combined (ALJD, pp. 17-18); that the parties reached tentative agreements for the warehouse and OTR employees (ALJD, pp. 16-17); and that Mike-sell's expressed satisfaction with the OTR negotiations (ALJD, pp. 16-17). The Union only acted in a dilatory fashion with

¹⁸ Mike-sell's actually believes the parties reached impasse on November 17, 2012, when the contract expired, but the impasse became even more clear by November 19th, when the Union continued to "stonewall" the Company. (Tr. 189-90, 465-66, 468-69, 673.)

regard to route sales negotiations, as route sales drivers control the ultimate outcome on the three key issues. Hence, the fact that the Union did not begin bargaining for route sales until October (as opposed to September), and only appeared for three pre-implementation bargaining sessions for route sales (as opposed to 12), carries special significance.

In addition, the ALJ ignored the Union's motives and dilatory behavior throughout the route sales bargaining process. The Union quickly recognized the Company's dire financial straits and its need to cut costs. The Union's initial strategy to oppose the Company's efforts to reduce costs was to stall negotiations in an attempt to delay the concessions that would inevitably come with any new labor agreement. *See, e.g., M & M Contractors*, 262 NLRB 1472, 1472 (1982) (“[w]hen a union . . . insists on continually avoiding or delaying bargaining, an employer may be justified in implementing unilateral changes”). The Union did not want to reach a new agreement (which would result in concessions), but it also did not want to reach impasse (which would result in an implementation or a lockout). The best way to accomplish both of the Union's objectives was to impede the bargaining process, as shown in the following examples of conduct that was either ignored or given improper weight by the ALJ:

- The Union arrived late and unprepared to bargaining sessions (Tr. 586-87);
- The Union cancelled two previously scheduled bargaining sessions (Tr. 412, 461);
- The Union took unreasonably frequent and long breaks during meetings (Tr. 450; RX-8 at 11-14-12);
- The Union wasted valuable bargaining time to address unrelated issues (Tr. 443);¹⁹

¹⁹ When the parties met on October 24th, rather than discussing the parties' respective proposals, the Union first wanted to negotiate severance packages for laid-off route sales drivers. (Tr. 443.) This tangential task could have been completed at a separate meeting, and it took a significant amount of time away from the bargaining session.

- The Union declined to discuss healthcare until a Plan representative made a presentation on November 13th (Tr. 444, 452);
- The Union refused to meet until November 14th after canceling the session on October 31st, despite receiving the November 2nd letter (Tr. 258-60, 458-60; GX-32; RX-5);
- The Union failed to provide any substantive response to the Company’s October 10th proposal until November 14th (Tr. 255-56, 443-45; GX-18);²⁰
- The Union indicated on November 14th (even after the November 13th Plan presentation) that it would have to wait for composite numbers from the Plan before further responding to the Company’s healthcare proposal (Tr. 647; RX-8 at 11-14-12, p. 2);
- The Union twice refused the Company’s request to engage the help of a federal mediator (Tr. 136, 259, 261-62; GX-32; RX-5);
- The Union failed to respond in any manner to the Company’s correspondence of November 16th and 18th until after implementation (Tr. 412, 460-68; RX-5); and
- The Union did not respond to the Company’s repeated requests for bargaining availability until November 26th—a week after implementation—when the Union finally proposed to schedule a bargaining session for December 5th. (Tr. 189-90, 412, 468-69; RX-5.)

In short, the Union sought to avoid an agreement by simply not meeting with Mike-sell’s and postponing discussion of the key issues, thereby hoping to delay the bargaining process and extend the expiring labor agreements. These delay tactics support a finding of impasse and justify the Company’s implementation. *M & M Contractors*, 262 NLRB 1472, 1472. Had the ALJ properly considered these critical and undisputed facts pertaining to the Union’s pre-

²⁰ On October 24th, the Union simply told Mike-sell’s that its initial proposal would be “hard to accept;” no substantive counter-offer was made. (Tr. 255-56, 443-45; GX-18.)

implementation conduct, he would have concluded that the Union did indeed act in a dilatory fashion that contributed to the parties reaching impasse on November 19th.

2. *The ALJ Made Improper Assumptions of Fact, Applied Distinguishable Caselaw, And Considered Irrelevant Facts In Determining That No Impasse Existed.*

The ALJ relied on the fact that Mike-sell’s “repeatedly declared its intention to move on from the expiring contracts” to support his finding that no impasse existed and that the Company had merely established an “artificial” or “arbitrary” deadline for negotiations. (ALJD, pp. 18, 19.) The ALJ cites *Newcor Bay City Division*, 345 NLRB 1229, 1240 (2005), and *CBC Industries*, 311 NLRB 123, 127 (1993), to support his finding of no impasse, but these cases are easily distinguishable.

In *Newcor*, the employer expressly announced that the contract expiration date was the “deadline” for signing a new contract and, unlike Mike-sell’s, did not seek the help of a federal mediator. *Newcor*, 345 NLRB 1229, 1234, 1239-40. The *Newcor* union never delayed negotiations by cancelling sessions or instigating a bargaining “hiatus,” although the employer had cancelled a meeting. *Id.* at 1241. On the day before the contract expired, the employer broke off negotiations at 7:00 p.m. and announced impasse, despite the fact that the parties historically bargained until at least midnight. *Id.* at 1235-36. The union requested to continue bargaining into the night and expressly emphasized that it was willing to further compromise on any subject—specifically healthcare and wages—but that it needed additional information to meaningfully analyze the employer’s proposals. *Id.* at 1234-35, 1238. The employer refused to continue bargaining and instead implemented its final offer the next day without responding to the union’s information request. *Id.* at 1234-36, 1239-42.

In *CBC Industries*, the employer never explained that economic necessity required greater speed in negotiations, never announced that the parties had reached an impasse or deadlock, never identified any proposal as its “last, best, and final offer,” and never informed the union of its intent to unilaterally implement any terms before doing so when the contract expired. *Id.* at 127. In fact, the parties met regularly, exchanged proposals and counter offers, and reached tentative agreement on several key economic aspects of the new contract, including a wage freeze and discontinuation of the Christmas bonus. *Id.* at 124, 127. Accordingly, the record was “devoid of any objective evidence of a failure of the bargaining process to work as intended to narrow differences between the parties” and “devoid of any evidence that either party . . . regarded the process as taking too long, at deadlock, at impasse or that any party expressed unhappiness with the pace or progress of bargaining.” *Id.* at 127.

This case presents far different facts than those in *Newcor* and *CBC Industries*. From the outset of negotiations, Mike-sell’s voluntarily took initiative to provide the Union with a great deal of financial data to support its concessionary proposals. (Tr. 36-39, 48-50, 74-75, 97-101, 138-40, 144, 240-45, 251-52, 404-05, 435-36, 438-42; RX-4; GX-8; GX-14; GX-22.) The Union took this financial data at “face value” and did not ask for additional information. (Tr. 242.) Mike-sell’s tried unsuccessfully to schedule additional bargaining sessions and twice attempted to enlist the help of a federal mediator, whereas the Union cancelled at least two meetings, delayed in providing dates for bargaining, and twice refused to participate in mediation. (Tr. 136, 189-90, 258-62, 412, 458-60, 468-69; GX-32; RX-5.) At the last pre-implementation bargaining session, the Union ended the meeting by admitting that the parties had not “moved the ball very far” and declined to provide any more dates until some unidentified point in the future (which did not occur until almost two weeks later on November 26th).

(ALJD, p. 12; Tr. 189-90, 342, 412, 456-57, 468-69, 657-58; RX-5.) Perhaps most important, unlike in *Newcor* and *CBC Industries*, the Union neither stated nor implied that it was willing to further compromise its position, and the parties had not reached tentative agreements on any of the three key economic issues. (Tr. 460-64.) Accordingly, the ALJ's reliance on *Newcor* and *CBC Industries* is misplaced.

Moreover, while Mike-sell's did emphasize its unwillingness to extend the route sales contract, contrary to the ALJ's finding based on *Newcor*, this announcement did not equate to an "artificial" or "arbitrary" deadline for negotiations. (ALJD, pp. 17, 19.) The Company never stated nor implied any particular course of action beyond its general unwillingness to extend the terms of the expired agreement, as it was impossible to do so. Mike-sell's understood that the parties might not reach an agreement by the time the route sales contract expired. In such case, the Company's options would depend on whether the parties were at impasse. If the parties were not at impasse, then Mike-sell's would be required to continue to tolerate the Union's delay tactics. If the parties were at impasse, then Mike-sell's would be prepared for an implementation or a lockout. The ALJ's Decision reflects an improper assumption of fact that, from the very beginning, Mike-sell's intended to implement whatever offer it had on the table when the route sales agreement expired, regardless of the existence or absence of an impasse. This improper assumption of fact contributed to the ALJ's incorrect conclusions of law. (ALJD, pp. 17-19.)

The ALJ also improperly relied on the irrelevant fact that "on November 14, both parties were willing to schedule additional meetings to continue working towards an agreement." (ALJD, p. 19.) Although each party may have announced an intent to comply with its legal obligation to continue negotiations, neither party gave any indication that it was willing to actually change its substantive bargaining stance on any of the key issues. (Indeed, the evidence

is to the contrary.) It was improper for the ALJ to assume that Mike-sell's had reason to be optimistic about breaking the deadlock based merely on each party's offer to continue bargaining, as there was nothing "magical" or "promising" about such an offer; a willingness to bargain is simply required by federal law. Mike-sell's was anxious to have as many meetings as possible before the route sales labor agreement expired because the Company actually wanted to reach an agreement rather than being forced to resort to a lockout or implementation. The Union, on the other hand, was obviously quite content to prolong negotiations, given the Company's concessionary proposals. The parties' respective motives are amply demonstrated by the Company's repeated suggestion of specific dates for bargaining and the Union's repeated delay in providing available dates and in cancelling dates. (Tr. 189-90, 412, 459-61, 464-66, 469; RX-5; RX-6.) Accordingly, the parties' willingness to continue bargaining as of November 14th was a legal obligation that had little to do with whether the parties were at impasse when Mike-sell's implemented its Final Offers.

In addition, based on *Grinnell Fire Protection Sys. Co.*, 328 NLRB 585, 586 (1999), the ALJ improperly assumed that, when the Union agreed to a net sales commission concept for the first time on November 14th, the Union "opened the door to possible compromises on other issues." (ALJD, p. 18.) This finding is unwarranted, particularly in light of the Union's failure to respond with available dates for bargaining. In *Grinnell*, the union not only expressly declared an intent to remain "flexible" during the final bargaining session, but the union also repeatedly emphasized that its most recent offer was not its last; proposed significant economic concessions and asked where additional concessions were needed before the final meeting ended; followed up with the employer the very same day that the final meeting ended, asking to meet again the next day; and urged the parties to engage a federal mediator. *Id.* at 585-86, 594-95, 598-99.

However, the employer refused to mediate and “broke off bargaining . . . without testing [the union’s] stated willingness to make even more concessions” *Id.* at 586.

This case stands in stark contrast to *Grinnell*. Although the Union did agree to entertain the concept of net sales commissions on November 14th, the Union proposed net commission rates that were too high and that were not conditioned on an increase in sales volume. (ALJD, p. 11; Tr. 266-67, 312-13, 338-39, 349, 450-51, 453-55, 648-49.) The Union did not indicate that its proposals were “flexible,” nor did it suggest that additional concessions would be considered. The Union had already twice rejected the Company’s proposal to mediate, and the Union provided no dates to continue negotiations. (Tr. 189-90, 258-61, 282, 344-45, 451-52, 458-60, 464, 652; GX-32; RX-5.) In fact, Maddy stated that he saw “no point” in taking the Company’s proposal to the membership and that the parties were “just spinning their wheels.” (Tr. 448.) Doll similarly admitted that the parties “didn’t move the ball very far.” (ALJD, p. 12; Tr. 189, 342, 456-57.) Mike-sell’s offered to meet again on November 16th—or any other date before the labor agreement expired—but the Union declined to schedule another session at that time. (ALJD, p. 12; Tr. 189-90, 451-52, 464, 652.) The meeting ended with Maddy and Doll saying that they would get back to Mike-sell’s later. (ALJD, p. 12; Tr. 189-90, 282, 344-45, 452.) The Union did not contact Mike-sell’s to offer any available dates until November 26th, when the Union finally proposed a session for December 5th (i.e., 18 days after the contract expired). (Tr. 189-90, 469.) These facts pale in comparison to those presented in *Grinnell*, so the ALJ was not justified in finding that the Union’s net sales proposal on November 14th “opened the door to possible compromises on other issues.”

In summary, a preponderance of the relevant, undisputed evidence reflects that the parties were deadlocked on the three key issues of commissions, healthcare, and pensions at the time the

route sales labor agreement expired. The mere fact that the Union made some movement on its commissions proposal during the parties' last pre-implementation bargaining session does not mean that no valid impasse existed on November 19th, after both parties refused to move any further and the Union provided no potential dates to resume bargaining. The Company's healthcare proposal has never changed, and its pension proposal has not changed since November 14th, when Mike-sell's agreed to split any future cost increases with employees. (Tr. 271-72.) The Union has never made a single change to its pension proposal; nor has the Union made a palatable healthcare proposal, refusing to budge on its demand to continue retiree healthcare. (Tr. 270, 272-73, 555-58, 671-72, 739-40.) There was also a huge difference between the parties on the issues of commissions, and neither party indicated a willingness to further move on this issue. (Tr. 266-67, 312-13, 338-39, 349, 450-51, 453-55, 648-49, 680-81.) None of the Union's proposals were acceptable to Mike-sell's. (Tr. 556, 671-72.)

The Union sought to avoid impasse by simply not meeting with Mike-sell's and postponing discussion of key issues, hoping to delay the bargaining process and extend the labor agreements for its benefit. The Union also flatly refused the Company's request to take its Final Offers to a vote. But the Union's strategy of inaction only serves to highlight the fact that an impasse existed on the three key economic issues when Mike-sell's implemented the terms of its Final Offers. *See, e.g., In Nat'l Gypsum Co.*, 2013 NLRB LEXIS 319, *78-81 (2013) (existence of impasse was supported by union's refusal to take ratification vote or to otherwise indicate willingness to further yield in its position on vital issues).

B. The ALJ erred in admitting evidence about post-implementation bargaining sessions. (Relates primarily to Exception 10, but relevant to all Exceptions.)

The parties' post-implementation bargaining sessions are irrelevant to whether an impasse existed on November 19th. The mere fact that negotiations continue does not mean that

an impasse does not exist. *See, e.g., Hi-Way*, 206 NLRB 22, 23. When an impasse in bargaining is reached, the duty to bargain is not terminated but only suspended. *Id.* Impasse, in effect, temporarily suspends the usual rules of collective bargaining by permitting the interjection of new terms and conditions into the employment relationship even though no agreement was reached through negotiations. *Id.* The impasse doctrine is designed, in part, to allow an employer to exert unilateral economic force by establishing new terms and conditions of employment as set out in the employer's proposals. *Id.*; *see also McClatchy Newspapers, Inc.*, 321 NLRB 1386, 1389-92 (1996). In short, unilateral implementation of an employer's last, best, and final offer is a lawful (and often successful) method for breaking an impasse. *Id.*

It was improper for the ALJ to admit evidence of the parties' post-implementation bargaining sessions. Mike-sell's vehemently objected to the introduction of such evidence during the hearing in this matter. (ALJD, p. 19; Tr. 15-17, 202-05, 221-23.) The Union's sudden willingness to meet and make slow movement after the labor agreement expired, and after Mike-sell's had implemented the terms of its Final Offers—as well as to raise new issues to quibble over for the first time—is not evidence that the parties were not at impasse on November 19th. If post-implementation bargaining concessions were probative of whether an impasse existed, then a union would always be able to invalidate an employer's unilateral implementation by waiting until after implementation to make serious movement on key issues. Instead, the Union's post-implementation concessions support a finding of an impasse on November 19th and further demonstrate that, since that impasse and implementation, the Union has tried desperately to show some movement (however superficial) between the parties at each juncture in order to support its unfair labor practice charges.

Not only did the ALJ improperly admit evidence of post-implementation bargaining sessions, but he also failed to properly analyze that evidence. The post-implementation evidence, for example, sheds further light on the Union's bad behavior. During the four-month time period after Mike-sell's implemented its Final Offers, the Union raised 14 new issues for the very first time and reinstated many of its original proposals from October 10th. (Tr. 471-72, 518-19; RX-11, pp. 4-5.) It was especially suspicious for the Union to raise new issues for the first time after implementation, given that both Maddy and Doll testified that they viewed these particular subjects to be some of the most important issues from the beginning. (Tr. 246-47, 392-94.) In addition, in the post-implementation bargaining sessions, the Union suggested for the first time that it may decide not to honor the warehouse and OTR tentative agreements that the parties had previously reached on discrete issues. (Tr. 234-40, 588-89.)

The ALJ also failed to recognize that the post-implementation evidence served to reveal the parties' second bargaining impasse, which cuts off the Company's liability (if any) in this case. (ALJD, p. 20.) That is, even if the parties somehow were not at impasse on November 19th (which they were), it is clear that the parties did reach impasse on February 13, 2013. The parties reached a few tentative agreements on February 13th, but no progress was made on the key issues of wages, healthcare, and pensions.²¹ (Tr. 270-71, 485, 584-86; GX-45, pp. 3, 5-7, 9, 14; RX-11, p. 5.) The ALJ reasoned that "there [wa]s no evidence that [Mike-sell's] notified the

²¹ The ALJ seems to have paid no heed to the fact that the Union has continued to demand healthcare for retirees, thereby forcing the parties to impasse on a permissive subject of bargaining. In *NLRB v. Wooster Div. Of Borg-Warner Corp.*, the Supreme Court held that mandatory subjects of bargaining are those designated in Section 8(d) of the National Labor Relations Act ("Act"). See 356 U.S. 342, 348-49 (1958). Non-mandatory or permissive subjects of bargaining are those not involving wages, hours, or other terms and conditions of employment under Section 8(d) of the Act. The Supreme Court explained that there is no statutory duty to bargain about non-mandatory subjects of bargaining, and a party may not insist to impasse or condition negotiations or overall agreement on the other party's acceptance of a non-mandatory subject. *Id.* Subsequently, in *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, the Supreme Court confirmed that retirees are not "employees" under the Act and that the issue of retiree benefits is a permissive subject of bargaining to which an employer may make unilateral changes. See 404 U.S. 157, 176-88 (1971).

Union that it was declaring a new impasse . . . and reimplementing the terms of its full and final offers.” (ALJD, p. 20.) However, it is undisputed that, during the February 13th meeting, Kazer expressly informed the Union that the parties had “nothing left to discuss;” that “[the offer just presented] was [the Company’s] last, best, and final offer;” that Mike-sell’s would prepare the offer in written form and present it later that week; and that Mike-sell’s “wanted [the Union] to take it to [the membership] for a vote.” (Tr. 584-86.) Whether or not these announcements included the word “impasse,” their collective import was the equivalent of declaring an impasse. This conclusion is supported by the fact that, after the February 13th bargaining session (and before any others), the Union took a strike vote for both bargaining units. (Tr. 294-95.)

Furthermore, February 13th is the last bargaining session when the parties reached agreement on anything; no additional tentative agreements were reached on February 27th or March 20th. (GX-45.) Mike-sell’s made no movement on any issues nor changed its position at all (whether on the three key issues or otherwise) after February 13th. (Tr. 270-71, 586, 589-91.) As of the date of hearing in this matter, the parties had around 30 open issues, and all but the three key issues have been raised or revived by the Union since implementation. (Tr. 562-80, 589-91; RX-11.) Thus, even if the parties were somehow not at impasse on November 19th (which they were), any alleged damages must be cut off as of February 13th, as there was plainly an impasse on that date. In *Dependable Bldg. Maintenance Co.*, 276 NLRB 27, 29-30 (1985) (recognizing that parties can reach more than one impasse in bargaining and that, while initial implementation of employer’s final offer was premature, it later became proper due to subsequent impasse, which cut off damages).

V. **CONCLUSION**

For the reasons stated above, the Company's exceptions should be granted, the ALJ's ruling should be reversed, and the General Counsel's Complaint should be dismissed because (A) the record as a whole does contain a preponderance of evidence that the parties were at impasse on November 19th; (B) the ALJ did err in admitting evidence about post-implementation bargaining; and as a result, (C) the record as a whole does not contain a preponderance of evidence to support the ALJ's credibility assessments, factual findings, conclusions of law, remedy, and order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2013, Respondent Mike-sell's Snack Food Company's Exceptions to the Decision of Administrative Law Judge Geoffrey Carter was electronically filed through the National Labor Relations Board website (www.nlrb.gov), with copies sent to the following in the manner described below:

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