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Mike-Sell's Potato Chip Co. and General Truck Drivers, Warehousemen, Helpers, Sales and Service, and Casino Employees, Teamsters Local Union No. 957. Case 09–CA–094143

January 15, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA,
AND SCHIFFER

On June 18, 2013, Administrative Law Judge Geoffrey Carter issued the attached decision. The Respondent filed exceptions and a supporting brief. The Acting General Counsel and the Charging Party each filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Mike-Sell's Potato Chip Co.,

¹ We agree with the judge that the record evidence does not establish that the parties had bargained to a good-faith impasse prior to the Respondent's unilateral implementation, on November 19, 2012, of the terms of its full and final offers. See *Day Automotive Group*, 348 NLRB 1257, 1263-1265 (2006); *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enfd. sub. nom. Television Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). We would reach the same result even without relying upon the judge's finding that the Respondent set November 17, 2012, as an arbitrary deadline for reaching a new agreement, or upon any consideration of subsequent offers of bargaining concessions by the Union.

Dayton, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. January 15, 2014

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Naima Clarke, Esq., for the Acting General Counsel.

Jennifer Asbrock, Esq., for the Respondent.

John R. Doll, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEOFFREY CARTER, Administrative Law Judge. This case was tried in Cincinnati, Ohio, on April 15–17, 2013. General Truck Drivers, Warehousemen, Helpers, Sales and Service, and Casino Employees, Teamsters Local Union No. 957 (the Union) filed the initial charge on November 30, 2012,¹ and filed an amended charge on February 1, 2013. The Acting General Counsel issued the complaint on February 21, 2013.

The complaint alleges that Mike-Sell's Potato Chip Co. (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by, on or about November 19, 2012, unilaterally implementing the content of its last collective-bargaining agreement offer to the Union for the warehouse and driver bargaining units, without first bargaining with the Union to a good-faith impasse. Respondent filed a timely answer denying the alleged violations in the complaint. On the entire record,² including my observation of the demeanor of the

¹ All dates are in 2012, unless otherwise indicated.

² The transcripts in this case are generally accurate, but I hereby make the following corrections to the record: p. 53, L. 4 should read "Exhibit 38"; and p. 631, L. 12 should read "inconsistency there."

I also emphasize that although I have included several citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather are based on my review and consideration of the entire record for this case.

witnesses, and after considering the briefs filed by the Acting General Counsel, the Union, and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation based in Dayton, Ohio, that engages in the business of manufacturing and distributing potato chips and other snack foods. On an annual basis, Respondent purchases and receives goods at its Dayton, Ohio facility that are valued in excess of \$50,000 and come directly from points outside of the State of Ohio. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A..Background Facts

1. Company overview

Respondent distributes not only snack foods that it manufactures, but also snack foods that are manufactured by other companies. To carry out its operations, Respondent relies on the following groups of employees (among others)³: route sales drivers, who deliver the product from the warehouse to local stores, stock and rotate product, collect payments, and work to increase sales at the stores on their route;⁴ over-the-road drivers, who deliver product from the warehouse to regional distribution centers; and warehouse employees, who package product in the warehouse for distribution by the over-the-road drivers. (Transcript (Tr.) 26–28, 602–604.)

For several years, Respondent has recognized the Union as the exclusive collective-bargaining representative of Respondent's route sales drivers, over-the-road drivers, and warehouse employees. Specifically, Respondent has recognized the Union as the exclusive collective-bargaining representative of the following appropriate bargaining units:

[A]ll Sales Drivers, and Extra Sales Drivers at [Respondent's] Dayton Plant, Sales Division and at [Respondent's] Sales Branch in Cincinnati, Columbus, Greenville, Sabina and Springfield, Ohio and all over the road drivers employed by [Respondent], but excluding all supervisors, security guards, and office clerical employees employed by [Respondent] (the drivers unit); and

³ On March 19, 2013, the Board issued a decision in which it found that Respondent violated Sec. 8(a)(5) and (1) of the Act by failing to follow contractual reopening procedures when it made midterm modifications to the health and welfare terms of its collective-bargaining agreement covering 22 maintenance and production department employees represented by the Bakery, Confectionary, Tobacco, Workers and Grain Millers International Union, Local 57, AFL–CIO–CLC. *Mike-Sell's Potato Chip Co.*, 359 NLRB No. 86 (2013). The issues addressed in that case do not have any bearing on this case.

⁴ For example, a route sales driver might attempt to expand sales at a particular store by arranging for a special display of Respondent's snack foods on a pallet or an "end cap" (shelves at the end of a grocery store aisle). (Tr. 603.)

All warehousemen employed by [Respondent] at its Dayton, Ohio facility, excluding all supervisors, security guards, and office clerical employees employed by [Respondent] and all other employees (the warehouse unit).

(GC Exhs. 2, 3 (art. I); see also GC Exhs. 1(e) and (g), pars. 5–7.) Respondent's recognition of the Union has been embodied in a number of successive collective-bargaining agreements, with the most recent drivers unit agreement being in effect from November 17, 2008, to November 17, 2012, and the most recent warehouse unit agreement being in effect from October 26, 2008, to October 26, 2012. (GC Exh. 1(g), par. 7; see also GC Exhs. 2–3.)

2. The expiring collective-bargaining agreements—key provisions

Respondent's collective-bargaining agreements with the drivers and warehouse units covered a broad range of issues, but three areas (employee healthcare, pension, and commissions for route sales drivers) would prove to be pivotal when the parties began negotiating for successor agreements in 2012, because they affect Respondent's bottom line.

Both expiring agreements addressed employee health care by providing full-time employees and certain retirees with the opportunity to participate in Respondent's Health Savings Account (a plan that Respondent administered, though Blue Cross/Blue Shield provided the actual healthcare services). Under the Health Savings Account, employees and retirees paid a weekly administrative fee (\$10 for single coverage; \$20 for family coverage), and were responsible for all healthcare expenses until they reached their annual deductible (\$2000 for single employees/retirees, of which Respondent paid \$500, and \$4000 for families, of which Respondent paid \$1000).⁵ Respondent was responsible for all expenses above the deductible. (GC Exhs. 2, art. XVII (and Exh. D thereto); 3, a. XIV.)

Regarding pension, the expiring agreements called for Respondent to participate in the Central States Southeast and Southwest Areas Pension Plan, and make weekly contributions to the pension plan for each employee who worked 1 or more days during the applicable week. In 2008, Respondent paid a weekly contribution of \$133.90 for each employee in the drivers unit, and \$91.80 for each employee in the warehouse unit. By 2011–2012, Respondent's weekly pension contribution per employee had risen to \$168.70 for each employee in the drivers unit and \$115.60 for each employee in the warehouse unit. Employees did not make their own contributions to the pension plan. (GC Exh. 2, art. XVIII; GC Exh. 3, art. XV; see also Tr. 37–38.)

And, regarding route sales driver commissions, the expiring drivers unit agreement called for Respondent to calculate commissions based on gross sales (i.e., the bag price⁶ multiplied by

⁵ In January 2012, Respondent reduced its annual payments towards insurance deductibles to \$250 for single employees/retirees, and \$500 for families. The parties do not dispute that Respondent was permitted to make those changes. (Tr. 61–63, 667–668.)

⁶ As Respondent explained, the "bag price" is the price stamped on each bag of snack food. Respondent, however, customarily sells its products to stores at a lower price than the bag price. That practice in

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the total number of snack food bags sold). Specifically, route sales drivers earned the following commissions on gross sales of the following products:

Mike-Sell's manufactured products:	13%
Non-manufactured products:	9%
Private-label products:	7%
Mike-Sell's Chocolate Covered Potato Chips	3%

(GC Exh. 2, art. IV.)

As the expiration dates for the 2008–2012 collective-bargaining agreements approached and the prospect of negotiating new agreements arose, Respondent had lost almost \$5.5 million in the last 4 years, and was still in the midst of financial difficulty. Respondent was struggling to compete with Frito Lay, which had the ability to offer lower prices (to the point of taking a temporary loss) because of its larger size and lower operating costs.⁷ In addition, Respondent was concerned about the cost of providing health care insurance to its employees, and uncertainty about whether Respondent would incur new expenses as a result of the Affordable Care Act. And, Respondent faced increasing contributions to the employee pension plan, because the pension contributions were slated to increase between 4–8 percent each year for the next 5 years.⁸ All of those factors led Respondent to have a keen interest in negotiating successor collective-bargaining agreements that would reduce Respondent's operating expenses. (Tr. 404–409, 416–423; GC Exhs. 8, 14, 22.) By contrast, the Union believed that it had sacrificed wages and other benefits in past years, and accordingly was aiming to restore some of those lost wages and benefits in the successor collective-bargaining agreements. (See R. Exh. 8, pp. 1–2 (October 10 remarks of JM and RV, members of the Union's negotiating team).)

B. Summer/Fall 2012—Negotiations for Successor Collective-Bargaining Agreements

1. Initial communications

On July 2, 2012, Michael Maddy, the Union's business representative, notified Respondent by mail that the Union intended to negotiate new collective-bargaining agreements for the drivers and warehouse units before the existing agreements expired in fall 2012. Maddy also stated that the Union's negotiating committee would like to meet with Respondent's representatives in the near future for negotiations. (Tr. 410–411; GC Exhs. 4, 5.)

turn allows the store to set a “shelf price” that is lower than the “bag price,” to entice consumers to buy the snack because it is “on sale” for less than the bag price. (Tr. 423–425.) Thus, if store on a driver's route sold 100 bags of Respondent's potato chips that bore a bag price of \$5, the commission would be 13 percent of \$500 (\$5 x 100 bags), even if the shelf price for the bag was \$4 and Respondent's price to the store was \$3.

⁷ While Respondent had to buy its supplies (e.g., potatoes, corn meal, etc.) on the open market, where prices were increasing, Frito Lay owned farms that produced many of the commodities that it needed. (Tr. 407–408; GC Exh. 8.)

⁸ Respondent faced a significant penalty of approximately \$20 million if it opted to withdraw from the pension plan altogether. (Tr. 269, 417.)

In letters dated August 13, Sharon Wille, Respondent's director of human resources, responded to Maddy's letters by advising him that Respondent also wanted to negotiate new collective-bargaining agreements, and would like to begin negotiations in late August or early September. (Tr. 410–411; GC Exhs. 4, 5; see also R. Exh. 1, p. 4 (Wille proposed beginning negotiations on August 31, but Maddy responded that he was not available to meet at that time due to other obligations).) The parties agreed to hold separate negotiation sessions for the following groups: route sales drivers; over-the-road drivers; and employees in the warehouse unit. (Tr. 35.)

2. Warehouse unit negotiations

On September 12, Respondent's and the Union's respective negotiating teams met to begin talks about a successor collective-bargaining agreement for the warehouse unit. At the meeting, Respondent spoke about its financial status, and asserted that it was paying above-average wages and pension for the warehouse unit in comparison to other employers in the area; and faced increasing prices on commodities like potatoes and cooking oil. (Tr. 36–39; GC Exh. 8.) The parties also exchanged initial contract proposals, with both Respondent and the Union using the expiring collective-bargaining agreement as the foundation for their suggested modifications. (Tr. 36, 39–45; GC Exhs. 7, 9; see also GC Exh. 3.)

Between October 3 and November 15 (with negotiation sessions held on October 3, 25, and 26, and on November 13 and 15), the parties exchanged various proposals and reached tentative agreements in all areas except for pension and healthcare. (Tr. 234, 415; GC Exhs. 9, 12–13, 15, 23, 37–38, 43.)

On the issue of the pension plan, Respondent's opening offer called for both Respondent and each individual employee to pay 50 percent of the weekly pension plan contribution.⁹ (Tr. 66; GC Exh. 15.) The Union, by contrast, sought to maintain the current practice of Respondent paying the entire amount of the weekly pension plan contribution. (Tr. 64–65; GC Exh. 9 (regarding art. XV); see also GC Exh. 14 (listing the pension plan contribution increases for the 5 years following 2012).) On October 25 and November 15, however, Respondent offered a 1-year contract extension in which Respondent offered to continue paying the weekly pension plan contribution at the 2012 rate, with employees taking on the responsibility of paying the amount in excess of the 2012 rate. (Tr. 141–142; GC Exh. 44; see also Tr. 142 (Union opposed having employees pay for the cost of pension plan contribution increases).)

Meanwhile, on the issue of employee healthcare, Respondent requested discretion to “annually review medical insurance plans and coverage to determine what, if any, health plan or plans will be offered to employees,” because Respondent was unsure about what would be required if the Affordable Care Act went into effect. In addition, Respondent proposed that it

⁹ Because the pension plan did not allow employees to make payments directly to the plan, this 50-50 split would be accomplished by Respondent paying the entire weekly pension plan contribution for each employee, who would in turn reimburse Respondent for half of the pension contribution via automatic deduction from their paycheck. (Tr. 66–67; GC Exh. 15.)

stop providing health insurance coverage to current and future retirees. (Tr. 70; GC Exh. 15; see also Tr. 68–69 (the Union opposed Respondent’s proposal).) The Union, by contrast, wanted Respondent to continue providing employee health insurance, but switch to the insurance plan provided by the Central States Southeast and Southwest Area (Central States) health and welfare funds.¹⁰ (Tr. 60–61, 152–153; GC Exh. 9 (regarding art. XIV).) In the 1-year contract extension that it proposed on October 25 (and again on November 15), however, Respondent offered to continue using the existing employee healthcare plan, albeit with no current or future retirees covered after December 31, 2012. (Tr. 141–142; GC Exh. 44.)

After reviewing Respondent’s proposed 1-year contract extension on November 15, Maddy advised Respondent that the Union would wait until the route sales drivers’ negotiations concluded. If the route sales drivers’ negotiations produced an agreement on pension and employee healthcare, Maddy planned to return to the warehouse unit to see if they would agree to the same terms on those issues. (Tr. 195, 234.) When one of Respondent’s negotiators asked Maddy if he was aware that the drivers unit’s collective-bargaining agreement would be expiring in a few days, Maddy responded yes, noted that the warehouse unit’s agreement had already expired, and stated that the Union was continuing to bargain. (Tr. 195–196.)

3. Over-the-road driver negotiations

The parties held their first negotiation session regarding the over-the-road drivers on October 12. As it did in the warehouse unit negotiations, Respondent began negotiations by providing financial information to show that it had been losing money in recent years due to competition from Frito Lay and the increasing price of commodities necessary to manufacture Respondent’s snack foods. Respondent also presented data indicating that Respondent’s over-the-road drivers earned higher wages¹¹ and received higher pensions than employees at similar companies. (Tr. 97–100; GC Exh. 22.) Based on that financial background, Respondent presented the Union with a contract proposal that, among other things, would cut the wages of over-the-road drivers by paying a lower mileage rate (45 cents per mile instead of 57 cents), and reducing the number of times that a driver would earn additional money for loading or unloading freight (for example, by paying drivers for loading/unloading work per trailer instead of per stop). (Tr. 101–106; GC Exh. 25 (referencing proposed changes to language in the existing collective-bargaining agreement).) The Union

¹⁰ Respondent, through Wille, advised the Union that it would be willing to look at any healthcare plan that might save Respondent money. (Tr. 64, 70.) However, Respondent was skeptical of the Central States plan not only because of its cost (which Respondent believed would exceed its current health savings account plan), but also because Respondent was not happy with the cost of the pension plan that Central States administered. (Tr. 664–665.)

¹¹ Under the expiring collective-bargaining agreement, over-the-road drivers were paid \$0.57 per mile, plus a \$20 payment for each time that the driver had to load or unload any freight from the trailer. Drivers did not receive any additional payments (beyond mileage) for “drop and hook” deliveries, where the driver merely unhooked the trailer from the truck and hooked up another trailer to take to a different location. (Tr. 104–106; GC Exh. 2, art. IV, sec. 5.)

countered with its own contract proposal, which included: a proposed increase in the payment that drivers earn for loading and unloading freight (from \$20 to \$25 per stop); the requirement that Respondent continue making weekly payments to the pension plan on behalf of employees (with no employee contributions or offset for pension plan contribution increases); and a proposal that Respondent begin using the employee healthcare plan offered by Central States. (Tr. 107, 110–111; GC Exh. 24.)

In negotiation sessions on October 29 and November 5, the parties exchanged and discussed various proposals that covered a range of issues, including wages, healthcare and pension. (Tr. 112–120; GC Exhs. 24–25, 29 (including handwritten notes that indicate the parties’ responses and counteroffers to each other’s initial proposals).) On the issue of healthcare, the Union provided Respondent with information about Central States’ employee health care plan rates and coverage. (See GC Exh. 27 (employee healthcare rates and plan information that the Union received from Central States and forwarded to Respondent on October 30).) After reviewing the Central States healthcare plan proposal, Respondent maintained that the plan would be more expensive than the health savings account plan that Respondent currently was providing. (Tr. 117–118.)

Ultimately, the parties reached a tentative agreement that covered all areas except for pension and healthcare, which would be tabled: (a) to see if the route sales driver negotiations could produce viable healthcare and pension proposals (since route sales was the largest bargaining unit); and (b) to allow the parties to meet with health insurance representatives about healthcare plan costs and options. (Tr. 123–125, 232–233, 239, 248, 415–416; see also Tr. 124–125; GC Exh. 30 (tentative agreement for over-the-road drivers reduced to writing and signed on November 15).) As part of the tentative agreement, the Union and Respondent agreed that over-the-road drivers would continue to receive \$20 for loading or unloading freight from a single trailer, but set a maximum of \$40 for loading/unloading work per trailer.¹² (GC Exh. 30.)

Through the tentative agreement with the over-the-road drivers, Respondent was able to achieve some cost savings. (Tr. 675.) Indeed, on November 6, Vice President of Operations David Smith applauded the work of Respondent’s negotiating team in reaching the tentative agreement by stating as follows in an email to CEO Charles Shive:

Language and Wage Related issues excluding Pension and Health Care were resolved in yesterday’s 3rd Bargaining Session with the Over-The-Road Drivers. There is no wage increase or benefit increases in the Agreed to Contract Language. Conversely, the OTR Drivers have agreed to reductions in stop pay that will reduce Mikesell’s costs (wages paid) by 6.4% annually or about \$11,000 each 52 week period of the new [bargaining agreement]. The annual OTR Driver Pay is about \$172,000. The savings will be greater as wage

¹² Thus, if a driver made four stops with a single trailer and loaded or unloaded the trailer at each stop, the driver would earn \$40 under the tentative agreement (\$20 per stop, but with a \$40 maximum for a single trailer), instead of \$80 under the expiring collective-bargaining agreement (\$20/stop, with no maximum).

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related taxes, holiday pay, and vacation pay will be based on smaller wages going forward with the lower stop pay.

The OTR Drivers remain in the same Agreement with the Route Sales Drivers and will have to vote on the same Pension and Health language/costs negotiated with Route Sales next week. Health Care costs with the OTR are minimal as 2 of the 3 drivers are opt-outs.

I can't say enough about the team approach in reaching the first phase of the Agreement with Pension and Health Care to follow; Sharon and Steve were excellent.

(GC Exh. 47; see also Tr. 675-676.)

4. Route sales driver negotiations

a. October 10 bargaining session

On October 10, the parties met for their first bargaining session concerning route sales drivers. Charles (Chuck) Shive, Respondent's CEO, began the discussions by outlining Respondent's increasing costs and declining sales, and then asked the Union's negotiating team what proposals they had that would help the Company return to profitability. The Union responded that the Company needed to improve the quality of its product and become more organized with its sales to avoid having items out of stock. The Union also asserted that it had made concessions to Respondent every year, and thus made proposals aimed at getting the bargaining unit back to where it was before those concessions. (Tr. 73-75, 252-253, 435-436; R. Exh. 8, pp. 1-3.)

The proposals that the parties exchanged on October 10 reflected their contrasting perspectives about what terms should be included in any successor collective-bargaining agreement. For example, on the issue of route sales driver commissions, the Union proposed increasing route sales driver commissions to 15 percent of gross sales on all products. By contrast, Respondent proposed changing from using gross sales to "net sales" when calculating commissions (using the same commission rates paid under the expiring agreement), a change that would reduce the commission that drivers would earn for each individual bag of snack food sold on their routes.¹³ (Compare GC Exh. 17 (discussing art. IV, sec. 1) with GC Exhs. 18-19 (same); see also Findings of Fact (FOF), sec. II(A)(2) (under the expiring collective-bargaining agreement, route sales drivers earned a 13-percent commission on gross sales of Mike-Sell's manufactured products, 9 percent on nonmanufactured products, 7 percent on private label, and 3 percent on chocolate covered potato chips); Tr. 77-78.))

¹³ To illustrate, assume that a single bag of Mike-Sell's potato chips has a "bag price" (the price stamped on the bag) of \$5, a shelf price (the price set by the store) of \$4, and a net price (the wholesale price that the store pays Respondent for the bag) of \$3. Under the expiring collective-bargaining agreement, a route sales driver would earn a commission on the bag price (or gross price) for each bag of chips sold (i.e., 13 percent of each \$5 bag). By contrast, under Respondent's proposal to use net sales to calculate commissions, a route sales driver would earn 13 percent of \$3 (the net price) for each bag of Mike-Sell's potato chips. (See Tr. 423-428, 615-616.)

Similarly, the parties had contrasting proposals for employee health care. Specifically, the Union proposed that Respondent switch from its self-administered health savings plan to health coverage under Central States Southeast and Southwest Areas Health and Welfare Fund. (GC Exh. 17, art. XVII, sec. 1 (noting that rates and benefits would be discussed at a later date).) Respondent, by contrast, saw an uncertain future regarding employee health care (as a result of the Affordable Care Act), and thus was hesitant to commit to offering any kind of employee health insurance. Accordingly, in its proposal, Respondent only offered to "annually review medical insurance plans and coverage to determine what, if any, health plan or plans will be offered to employees." In addition, Respondent proposed that it no longer provide medical or any other form of insurance to current and future retirees. (GC Exh. 19, art. XXI, secs. 1, 4; Tr. 88.)

And, regarding the employee pension plan, the Union proposed that Respondent continue paying the entire cost of weekly contributions to the pension plan, including the increased payments that the pension plan would require for the next 5 years. (GC Exh. 17 (discussing art. XVIII, sec. 7 of the contract, and noting that the weekly contribution would be \$182.20 per employee in the first year, and would rise to \$225.70 per employee by the fifth year).) Respondent, meanwhile, proposed that its portion of the weekly pension contributions be frozen at \$91.10 per employee (50 percent of the total weekly contribution in year one), with each employee taking on the responsibility of also paying \$91.10 per week, plus the full amount of the yearly increases established by the pension plan. (GC Exh. 19, art. XXII, sec. 5; Tr. 89.)

Respondent's general reaction to the Union's proposals was that it did not see how it could possibly afford the increased costs associated with the Union's proposals. (Tr. 93, 250, 442.)

b. October 24 bargaining session

On October 24, the parties resumed negotiations for a successor collective-bargaining agreement. When Respondent confirmed that it was going to sell routes and distribution centers in the Columbus, Sabina, and Cincinnati, Ohio areas to independent operators and layoff approximately 30 route sales drivers who serviced those areas (effective November 12), the parties tabled contract negotiations temporarily to focus on establishing the severance packages that the affected employees would receive.¹⁴ (R. Exh. 8, pp. 27-28; see also Tr. 91-92, 126-127, 245, 255, 436, 443.)

Later in the afternoon, the Union and Respondent resumed contract negotiations and exchanged responses about the contract proposals that the parties presented on October 10. (Tr. 127; R. Exh. 8, p. 28.) While the parties were able to agree on some issues,¹⁵ they did not reach any agreements or make new

¹⁴ Respondent first mentioned its plan to sell the Columbus, Sabina, and Cincinnati routes and distribution centers in the October 10 bargaining session. (Tr. 91, 436.) The parties agree that in light of a prior arbitrator's decision, Respondent was permitted to eliminate (or sell) routes and distribution centers. (Tr. 96-97.)

¹⁵ For example, the parties agreed to: modify contract language about "pull up" (stocking) work performed on holidays; allow 3 days

proposals regarding route sales driver commissions, pension contributions, or employee health care. Specifically, regarding driver commissions, the Union indicated that it would be hard for employees to accept the losses in wages that would potentially arise if the Union agreed to change from using gross sales to net sales to calculate commissions. Similarly, the Union thought it would be hard for employees to accept Respondent's proposal that they pay for 50 percent (or more) of the weekly pension plan contributions. Regarding health care, the Union requested that the parties hold off on discussing that issue until the Union could bring someone in from Central States to provide information about the cost of its health care plan. (GC Exh. 18; Tr. 128, 134, 255–257, 263, 444–446; see also Tr. 256 (Maddy explained that he used the term “hard to accept” as a polite way of saying “no”).)

In light of the parties' limited progress in several areas, Maddy stated that the parties were “worlds apart.” (Tr. 136.) Maddy also announced that the Union would not be able to meet on October 31, and would get back to Respondent to propose dates for the next bargaining session (to which the Union planned to bring one of its attorneys). Wille reminded the Union that the route sales drivers' collective-bargaining agreement would reach its end date in 24 days. (Tr. 257–258, 446–447; R. Exh. 8, p. 28; see also R. Exh. 5 (November 2 letter from Wille to Maddy to propose dates to resume route sales driver bargaining sessions); Tr. 231, 259260 (explaining that the Union was not available to meet on November 7, 8, or 9 due to scheduling conflicts).)

c. November 14 bargaining session

The parties began their November 14 bargaining session by taking stock of the status of negotiations for a new agreement covering the route sales drivers. Since the Union determined that it would be hard for its members to accept Respondent's contract proposal, the Union suggested that Respondent consider extending the expiring collective-bargaining agreement by 1 year (with the same health savings plan for employee healthcare, and with Respondent paying the increased pension contribution) to see if Respondent's financial condition improved as a result of the various changes it had already implemented. In response, Respondent made it clear that it was not interested in extending the old agreement. Respondent did, however, counter with an offer for a 1-year agreement that would be based on its October 10 contract proposal, except that (a) route sales driver commissions would be calculated based on net sales using the following (higher) percentages: 14.5 percent for Mike-Sells manufactured products, 9 percent for nonmanufactured products; and 3 percent for chocolate covered chips;¹⁶ and (b) Respondent would freeze its weekly pension contribution at \$168.70 per employee, and employees would

for employees to provide a doctor's excuse for sick days (instead of 1 day); and extend the funeral leave policy to apply to the death of a brother-in-law or sister-in-law. (GC Exh. 17 (identifying tentative agreements reached on October 24 regarding route sales drivers); see also Tr. 79–81, 85, 446.))

¹⁶ Commissions on private label products were not mentioned, but presumably would have stayed at 7 percent under Respondent's proposal. (See Tr. 162.)

pay the amount that the pension plan contribution increased above Respondent's contribution (\$13.50/week in 2013, to make a total weekly amount of \$182.20). Ultimately, the Union and Respondent rejected each other's proposed 1-year contract extensions. (Tr. 159–161, 311–312, 332–333, 448–449, 610, 646–648; GC Exh. 39, pp. 1–2; R. Exh. 8, pp. 37–38.)

Next, Respondent turned the discussion to explaining why it was proposing changes to route sales driver commissions and the pension plan. On the issue of the pension plan, Respondent explained that it was looking to its employees to help with pension contributions because Respondent faced increasing pension liabilities that exceeded the liabilities of comparable employers in the area. The Union did not dispute that claim, but responded that its members had foregone wage increases in the past to compensate Respondent for paying the increasing pension contributions. (Tr. 163, 449–450; R. Exh. 8, p. 39.) On the issue of commissions, Respondent maintained that if commissions were based on net sales instead of gross sales, Respondent would be in a better position to increase profits because it would have more flexibility to manipulate the bag price for snack foods to entice consumers to buy its products (e.g., because a larger difference between the bag price and the shelf price might make the snack foods seem like a good value in the store), and would be able to manipulate the bag price without that resulting in a higher commission for route sales drivers.¹⁷ (Tr. 163, 334, 449; R. Exh. 8, p. 38; see also Tr. 423–425, 427.)

In the latter part of the November 14 bargaining session, both Respondent and the Union presented new offers related to commissions, healthcare and pension. Regarding commissions, the Union agreed for the first time to use net sales figures to calculate commissions, and proposed the following commission rates:

Mike-Sell's manufactured products:	15%;
Nonmanufactured products	10%;
Private label products:	7%; and
Mike-Sell's chocolate covered potato chips:	3%

(GC Exh. 40, p. 3; R. Exh. 8, p. 39; Tr. 169–170, 313, 336.) Respondent countered with its own improved offer on commissions based on net sales, which included the following commission rates:

Mike-Sell's manufactured products:	14.5% in the first year, with an increase to 15% if the dollar value of sales increased by 3%;
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¹⁷ Respondent also maintained that since its ability to manipulate the bag price would lead to higher sales, route sales drivers would receive a similar amount of total commissions even if net sales were used to calculate commissions. (Tr. 313–314, 428.) The evidentiary record includes an exhibit (GC Exh. 39) that Respondent provided to the Union during negotiations to support its position that total driver commissions would stay the same or increase under net sales commission framework, but I have given little weight to the content of that exhibit since none of the parties presented reliable evidence to explain the information in the exhibit. (See GC Exh. 39; Tr. 592–596.)

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Nonmanufactured products:	9%;
Private label products:	7%; and
Mike-Sell's chocolate covered potato chips:	3%

(GC Exh. 40, p. 5; Tr. 171, 338, 454, 626–627, 663.)

Similarly, the Union presented a new offer regarding employee health care, as it proposed that Respondent use Central States as its health care provider, with a composite (per employee) rate of \$272.80 per week. The Union added that employees would agree to pay \$30/week of the composite rate, but Respondent rejected that proposal because it believed the Central States plan would still be more expensive than Respondent's health savings account plan.¹⁸ (Tr. 178–179, 315; GC Exh. 40, p. 4; R. Exh. 8, p. 41.) And, regarding pension, Respondent rejected the Union's suggestion that Respondent should pay the entire weekly pension contribution (\$182.20/week per employee in the first year), and instead proposed that the parties freeze Respondent's weekly pension contributions at \$168.70, and that employees reimburse Respondent for any pension contribution increases above the \$168.70 amount.¹⁹ (Tr. 180, 188, 339, 455; GC Exh. 40, pp. 5–6 (discussing art. XVIII, sec. 7 of the expiring collective-bargaining agreement); see also GC Exh. 35, art. 22, sec. 5 (implementing Respondent's pension proposal).)

The parties concluded the November 14 bargaining session at approximately 8 p.m. without agreeing on any of the new proposals for commissions, health care and pension, prompting Union Attorney John Doll to remark that he did not believe the parties “moved the ball very far” in negotiations.²⁰ Phil Kazer, a member of Respondent's negotiating team and also Respondent's vice president of sales, replied that “we made good movement today.”²¹ Respondent offered to meet again on November 16 (before the route sales drivers' collective-bargaining agreement expired), and noted that it did not intend to extend the expiring collective-bargaining agreement. The Union declined a November 16 meeting because it was not certain that its representatives would be available, but promised to get back to Respondent to propose some dates to resume negotiations

¹⁸ Previously, the Union had proposed that Respondent offer separate health insurance rates through Central States for individual (\$128.60) and family coverage (\$306.90). (GC Exh. 27; see also Tr. 159.)

¹⁹ As noted above, Respondent made a similar proposal earlier in the day regarding pensions, but that proposal was limited to a 1-year contract extension based on Respondent's contract proposal. Later (as noted here), Respondent offered to have employees pay for pension contribution increases in the context of a multiyear agreement.

²⁰ The parties did agree on contract language regarding the following areas, among others: holiday schedule (art. VII, sec. 1 of the expiring contract); setting minimum weekly pay for route sales drivers and extra sales drivers as \$450 or the commission from the route, whichever is greater (art. IV, sec. 2(A)); and increasing the number of days that route sales drivers would have to return to work after being recalled from a layoff (art. VIII(A), secs. 2–3). (Tr. 170, 173–174, 176; GC Exh. 40, pp. 5–6; see also Tr. 276–282 (noting that the parties had reached a similar agreement regarding layoff recalls for OTR drivers).)

²¹ There is some ambiguity about whether Kazer was referring to both parties or just Respondent when he used the term “we,” but that ambiguity is not material to my analysis. (See Tr. 283, 457, 657–658.)

(and later advised Respondent that it could meet on November 27). (Tr. 189–190, 282–283, 341–345, 451–452, 456–457, 463–464, 664; GC Exh. 40, p. 6; R. Exh. 8, p. 42.)

C. Respondent Declares Impasse and Unilaterally Implements its Final Offers

1. November 16—Respondent presents its full and final offers

On November 16, Respondent notified the Union that its most recent contract proposals for the warehouse unit and the drivers unit (including both over-the-road drivers and route sales drivers) would stand as Respondent's full and final contract offers. Wille stated as follows in a letter (dated November 15, but delivered on November 16) to Maddy:

This letter will confirm our conversation of yesterday in which the Company asked to meet with your Union and your Union committee with regard to our Labor Agreement for the Sales/Over-the-Road group, which is due to expire on November 17, 2012. Since you indicated that you would not be available to meet either today or tomorrow, I wish to inform you that our last proposal to you, which was made on Wednesday, November 14, 2012 (see attached) is the Company's full and final offer. We have also attached a full and final offer for the Warehouse group. We would request that you take these Final Offers to a vote of the Union membership before the Labor Agreement expires.

If you have any questions concerning the above, please do not hesitate to contact me. We do remain available to meet any time before the current Labor Agreement expires.

(GC Exh. 34; see also Tr. 197–198, 284–285, 464–465; GC Exhs. 35–36 (full and final offers for route sales drivers and the warehouse unit).)

Wille and Maddy spoke briefly on November 16 when Wille delivered the letter to Maddy. Upon hearing that Respondent was presenting full and final offers because the Union was not willing to meet, Maddy responded that the Union was willing to meet, but simply had scheduling conflicts. Maddy also disagreed with Wille's assertion that the parties were at impasse, and stated his belief that the parties were still negotiating and would ultimately work out an agreement. (Tr. 199–200, 285; see also Tr. 465.)

2. November 18–19—Respondent declares impasse and implements its full and final offers

On November 18, Wille sent another letter to Maddy to notify him that Respondent was declaring an impasse in negotiations, and thus would be implementing its full and final contract offers. Wille advised Maddy as follows:

As you know, the Labor Agreement between Mike-Sell's and your Union covering the Sales/Over-the-Road group expired on November 17, 2012, and the Company's full and final offer, which was given to the Union on November 16, 2012, was not accepted by the Union. Likewise, the Union did not accept the Company's full and final offer for the Warehouse group, which was made by the Company on November 16,

2012, that Labor Agreement having expired on October 26, 2012.

Given the above, and all the events that have transpired over the bargaining of replacement labor agreements for these units, an impasse exists in each of these negotiations. Accordingly, the Company intends to implement the terms of its full and final offers for both units (the Sales/Over-the-Road group and the Warehouse group) effective Monday, November 19, 2012.

(GC Exh. 33; see also Tr. 466–468; R. Exh. 10 (Wille’s email to Maddy dated November 18, 2012, with impasse letter attached).)

On November 19, Respondent implemented the terms of its full and final offers to the Union regarding the drivers unit and warehouse unit. (Tr. 468.) Those terms incorporated:

- (a) Respondent’s original proposal to have the authority to decide what health plan to offer each year (if any), but with the commitment to continue Respondent’s existing health savings account plan for 2013 (see GC Exh. 35, Article 21, Section 1; GC Exh. 36, Article XIV, Section 1);
- (b) Respondent’s November 14 proposal to have employees pay for any pension plan contribution increases above the frozen contribution amount that Respondent would pay (see GC Exh. 35, Article 22, Section 5; GC Exh. 36, Article XV, Section 6); and
- (c) Respondent’s November 14 proposed commissions for route sales drivers (see GC Exh. 35, Article 4, Section 1).

(GC Exhs. 35–36; see also Findings of Fact (FOF), sec. II(B)(4)(c), supra).

D. Postimplementation Negotiations

After Respondent declared impasse and unilaterally implemented the terms in its full and final contract offers, the parties returned to the bargaining table for a series of negotiation sessions from December 5, 2012, to March 20, 2013,²² regarding route sales drivers. (Tr. 206.) Although those negotiations touched on a variety of topic, two noteworthy developments occurred when the parties met on December 5. First, the Union made a new offer for route sales driver commissions by proposing the following commission rates on net sales:

Mike-Sell’s manufactured products:	15%;
Nonmanufactured products:	9.5%;
Private label products:	7%; and
Mike-Sell’s chocolate covered potato chips:	3%

(R. Exh. 8, p. 43; see also Tr. 207, 351.)

Second, the Union made a new offer regarding employee health care. The Union maintained its request that Respondent use Central States as its health insurance provider and the composite rate of \$272.80 per week for each employee. However, the Union also proposed that employees contribute \$40 per

week towards the composite rate in the first year, with the employee portion increasing to \$44 in year two, and \$48 in year three. (R. Exh. 8, p. 43; see also Tr. 207–208, 351–352, 553.)²³ The parties did not reach an accord on either of these proposals, or on any of the modifications thereto that were proposed in bargaining sessions between December 5, 2012, and March 20, 2013. (Tr. 215, 353; see also Tr. 519–522, 678–679, 711–712; R. Exh. 8, pp. 43–44, 53–54, 57, 62–63, 65, 67, 71 (additional proposals and responses regarding route sales driver commissions); Tr. 553–557; R. Exh. 8, pp. 43, 50, 53, 57, 60, 62–63, 65, 67, 70 (additional proposals and responses regarding employee health care).)²⁴

Discussion and Analysis

A. Credibility Findings

A credibility determination may rely on a variety of factors, including the context of the witness’ testimony, the witness’ demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences

²³ I do not credit Wille’s testimony that on December 7, the Union revoked all of its previous offers and reinstated its October 10 proposal. (Tr. 486, 518–519, 552, 554, 639–643, 706–707.) Wille’s notes, on which she relied for much of her testimony, erroneously state that the Union referred back to its proposals from October 5, a date on which no bargaining session occurred. (R. Exh. 8, p. 49.) That error, coupled with the fact that there was a bargaining session on December 5, the fact that Wille’s notes do not reflect any objection to what Wille now characterizes as a regressive proposal from the Union, and the fact that on later dates the parties discussed proposals that the Union allegedly revoked on December 7, renders Wille’s testimony and notes unreliable on this issue. (See Tr. 641–644, 706–707; R. Exh. 8, pp. 49–50.)

²⁴ After December 5, the parties made the following proposals regarding route sales driver commissions: (a) January 22, 2013—Union offered 14.5 percent on Mike-Sell’s manufactured products in the first year, and 15 percent in the second and third years (with no required increase in sales to trigger the higher commission rate); (b) February 13, 2013—Respondent offered to have higher commission rates on Mike-Sell’s manufactured products triggered by a 3-percent increase in the number of “units” (bags) sold (instead of a 3-percent increase in the total dollar value of net sales); (c) February 27, 2013—Union offered to have higher commission rates triggered by a 1-percent increase in unit sales for the entire bargaining unit, and later in the day offered a 1.5-percent increase in unit sales as the trigger for higher commission rates; and (d) March 20, 2013—Union offered to have higher commission rates triggered by a 1.75-percent increase in unit sales for the entire bargaining unit. (R. Exh. 8, pp. 53–54, 57, 62–63, 65, 67, 71.)

Similarly, after December 5, the parties made the following proposals regarding employee health care: (a) December 7 – Union proposed to use the Central States health care plan, but allow that issue to be reopened upon request in the second or third year of the contract; (b) January 22, 2013 – Union proposed to continue using Respondent’s existing health care plan, with certain modifications; and (c) February 27, 2013 – Union proposed maintaining Respondent’s existing health care plan for 2013, and then allowing employees and retirees the opportunity to opt out of the plan in exchange for monthly payments of \$1400. Later in the day, the Union reduced the opt-out payments to \$1200 for employees and \$1000 for retirees. (R. Exh. 8, pp. 50, 53, 65, 67, 70.)

The record does not indicate that the parties discussed any new pension proposals after Respondent implemented its full and final offers on November 19. (See Tr. 215; R. Exh. 8, pp. 50, 53.)

²² The parties met on the following dates after implementation: December 5 and 7, 2012; January 3 and 22, February 13 and 27, and March 20, 2013. (Tr. 288; R. Exh. 8.)

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that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622.

In this case, credibility is generally not at issue because all three witnesses (two called by the Acting General Counsel and one called by Respondent) provided testimony that generally was corroborated by documentation admitted into evidence and the testimony of other witnesses. The findings of fact accordingly incorporate the testimony of all three witnesses who testified at trial, to the extent that their testimony was based on their personal knowledge and was corroborated by other evidence. To the extent that credibility issues did arise, I have stated my credibility findings in the findings of fact above.

B. Did Respondent Violate the Act When it Unilaterally Implemented its Full and Final Offers on November 19, 2012?

1. Complaint allegations and applicable legal standards

The Acting General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act when, on or about November 19, 2012, it unilaterally implemented its full and final offers for the driver and warehouse units without first bargaining with the Union to a good-faith impasse. (See GC Exh. 1(e), pars. 9–10.)

“Under the unilateral change doctrine, an employer's duty to bargain under the Act includes the obligation to refrain from changing its employees' terms and conditions of employment without first bargaining to impasse with the employees' collective-bargaining representative concerning the contemplated changes.” *Lawrence Livermore National Security, LLC*, 357 NLRB No. 23, slip op. at 3 (2011). The Act prohibits employers from taking unilateral action regarding mandatory subjects of bargaining such as rates of pay, wages, hours of employment and other conditions of employment. *Garden Grove Hospital & Medical Center*, 357 NLRB No. 63, slip op. at 1 fn. 4, 5 (2011). Notably, an employer's regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even if those practices are not required by a collective-bargaining agreement. *Id.*; see also *Palm Beach Metro Transportation, LLC*, 357 NLRB No. 26, slip op. at 4–5 (2011) (noting that the party asserting the existence of a past practice bears the burden of proof on the issue, and that the evidence must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis), enfd. 459 Fed. Appx. 874 (11th Cir. 2012).

On the issue of whether the parties bargained to an impasse, the Board defines a bargaining impasse as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile because both parties believe they are at the end of their rope. See *Whitesell Corp.*, 357 NLRB No. 97, slip op. at 64 (2011); *Daycon Products Co.*, 357 NLRB No. 92, slip op. at 11 (2011), enfd. 494 Fed. Appx. 97 (D.C. Cir. 2012). The question of whether an impasse exists is a matter of judgment based on the following factors: the bargaining history; the good faith of the parties in negotiations; the length of the negotiations; the importance of the issue or issues as to which there is disagreement; and the contemporaneous understanding of the parties as to the state of negotiations. *Id.* The party asserting impasse bears the burden of proof on the issue. *Daycon Products Co.*, 357 NLRB No. 92, slip op. at 11.

2. Analysis

As described in the findings of fact, the parties began contract negotiations for the warehouse unit on September 12, and began separate negotiations with two different parts of the drivers unit (over-the-road drivers and route sales drivers) on October 3 and 10, respectively. Despite having conflicting goals (with Respondent looking to cut costs and the Union looking to restore lost benefits and wages), the parties worked out tentative agreements for both the warehouse unit and over-the-road drivers on all issues except for the pension plan and employee healthcare. By its own admission in a November 6 email, Respondent was particularly pleased with its tentative agreement with the over-the-road drivers, because Respondent avoided any wage increases, and negotiated a cut in the amount that it would pay drivers for loading and unloading items at various delivery stops (resulting in a yearly savings of \$11,000). (FOF, secs. II(B)(1)–(3), *supra*.)

With tentative agreements for the warehouse unit and over-the-road drivers in place, the parties turned to route sales drivers, with the hope of working out a comprehensive agreement that would not only resolve all issues specific to route sales drivers, but also resolve the parties' disagreements about the pension plan and employee healthcare (two issues that were tabled in the warehouse unit and over-the-road driver bargaining sessions). Once again, the parties initially staked out conflicting positions. Indeed, on October 10: (a) Respondent proposed using net sales to calculate driver commissions (a change that would lower the commission paid on each item of snack food), while the Union proposed higher commission rates based on gross sales; (b) Respondent proposed having employees pay half of the cost of weekly pension plan contributions (plus any future increases in the required contribution amount), while the Union proposed having Respondent continue paying the entire weekly pension plan contribution; and (c) Respondent proposed assigning itself significant discretion to select its health care plan each year (including the option to decide not to offer a health care plan), while the Union proposed using Central States as the employee health care provider, with Respondent paying all premiums. (FOF, sec. II(B)(4)(a), *supra*.)

On November 14, however, the parties made significant moves to advance negotiations. On the issue of commissions, the Union agreed for the first time to use net sales to calculate

commissions, while Respondent increased some of the commission rates that it would be willing to pay under a net sales framework. Meanwhile, on the issue of pensions, Respondent dropped its proposal of a 50–50 split in costs with employees, and instead offered to pay a frozen weekly amount of \$168.70 per week, with the employees only responsible for any amounts over the \$168.70 floor. And, on employee healthcare, the Union presented a new Central States plan based on a composite (per employee) rate of \$272.80, and attempted to sweeten its offer by proposing that employees pay \$30 per week towards the composite rate (with Respondent paying the remainder). In short, while the parties did not reach a final agreement on November 14, they made significant progress that included concessions from both sides. Instead of continuing to negotiate, however, Respondent (on November 16) converted its existing proposals into “full and final” offers because it did not wish to continue operating under the expiring collective-bargaining agreements. (FOF, secs. II(B)(4)(c) and (C), *supra*.)

With that factual backdrop, I find that the parties were not at impasse when Respondent implemented the terms of its full and final offers on November 19. The evidentiary record establishes that each party participated in negotiations in good faith before Respondent declared impasse, as they met for bargaining sessions on twelve occasions (combining all groups) in a two-month time period, and hammered out several tentative agreements through their efforts. When the end-date of the expiring collective-bargaining agreement for the drivers unit drew near, however, Respondent set the November 17 expiration date as an artificial deadline for working out a new agreement, and subsequently declared impasse without regard to the significant concessions that each party made only a few days earlier (on November 14).

Respondent’s decisions to declare impasse and unilaterally implement its full and final offers under the circumstances described above ran afoul of the Act for multiple reasons. First, the Board has held that “an employer’s declaration of impasse is not valid when it is motivated by an employer’s determination to implement cuts immediately upon the expiration of the contract.” *Newcor Bay City Division*, 345 NLRB 1229, 1240 (2005); see also *CBC Industries*, 311 NLRB 123, 127 (1993) (finding no impasse where the respondent “was determined to abandon certain terms of the contract at its expiration irrespective of the state of negotiations”). Here, Respondent repeatedly declared its intention to move on from the expiring contracts, but acted on that desire well before the parties reached the ends of their respective negotiating ropes.

Second, the Board has recognized that where a party has already made significant concessions indicating a willingness to compromise further, “it would be both erroneous as a matter of law and unwise as a matter of policy for the Board to find impasse merely because the party [that made concessions] is unwilling to capitulate immediately and settle on the other party’s unchanged terms.” *Grinnell Fire Protection Systems Co.*, 328 NLRB 585, 586 (1999) (noting that a finding of impasse under those circumstances “would encourage rigid, inflexible posturing in place of the give-and-take of true bargaining”), *enfd.* 236 F.3d 187 (4th Cir. 2000), *cert. denied* 534 U.S. 818 (2001); see also *Royal Motor Sales*, 329 NLRB 760, 772 (1999) (finding

that the parties were not at impasse, in part because one of the union’s proposals demonstrated flexibility and significant movement, and thus raised the possibility that further negotiation might produce other or more extended concessions), *enfd.* 2 Fed. Appx. 1 (D.C. Cir. 2001). In this case, when the Union agreed on November 14 to calculate route sales driver commissions based on net sales (as Respondent proposed, albeit with different commission rates), the Union opened the door to possible compromises on other issues. Instead of seizing the opportunity for further negotiation towards a potential agreement, Respondent declared impasse only 4 days’ later.

In its defense, Respondent alleges that the Union engaged in dilatory tactics to avoid reaching a new agreement that would likely include assorted cuts to bargaining unit wages and benefits. (R. Posttrial Br. at 17–18.) Respondent’s defense falls short, however, because it is not supported by the evidentiary record. For starters, I find that both parties were responsible for the fact that bargaining sessions did not begin until September. Indeed, Respondent took 6 weeks to reply to the Union’s July 2 notification of its intent to bargain for new contracts. Once Respondent (on August 13) also expressed an interest in such bargaining (with a proposed initial session on August 31), the Union was not available until the parties’ first bargaining session on September 12. (FOF, secs. II(B)(1)–(2), *supra*.)

Further, although Respondent asserts that the Union agreed to a small number of bargaining sessions and canceled two route sales driver bargaining sessions in October, I do not find that the Union engaged in dilatory tactics that would warrant or support declaring impasse. To the contrary, the parties did meet for 12 bargaining sessions in a 2-month period (combining all groups), and the Union remained available to meet for additional sessions when Respondent abruptly converted its proposals into full and final offers, and subsequently declared impasse 2 days’ later when those offers were not accepted. (FOF, secs. II(B)(2)–(4) and (C), *supra*.)

In sum, none of the relevant factors show that the parties reached an impasse in their negotiations. The length of negotiations was relatively brief (12 sessions over 2 months), and notwithstanding the short timeframe, the parties worked out several tentative agreements. The parties did spend some time going back and forth about route sales driver commissions, the pension plan, and employee healthcare, but that was to be expected given the economic importance and complexity of those issues. And, on November 14, both parties were willing to schedule additional meetings to continue working towards an agreement. It was Respondent who brought the process to a halt when it decided to use the November 17 expiration date of the driver’s unit collective-bargaining agreement as the arbitrary deadline for negotiations.

Since the evidentiary record demonstrates that neither party was at the end of its negotiating rope when Respondent declared impasse on November 18, or when Respondent unilaterally implemented the terms of its full and final offers on November 19, I find that Respondent did not carry its burden of showing that the parties reached a good-faith impasse before it

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took unilateral action.²⁵ And, since Respondent did not fulfill its duty to bargain with the Union to a good-faith impasse before it unilaterally implemented the terms of its full and final offers on November 19, and the full and final offers addressed mandatory subjects of bargaining, I find that Respondent violated Section 8(a)(5) and (1) of the Act as alleged in the complaint.

CONCLUSIONS OF LAW

1. By, 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.

2. By committing the unfair labor practices stated in Conclusion of Law 1 above, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent shall immediately put into effect all terms and conditions of employment provided by the warehouse unit contract that expired on October 26, 2012, and the drivers unit contract that expired on November 17, 2012, and shall maintain those terms in effect until the parties have bargained to agreement or a valid impasse, or the Union has agreed to changes. In addition, Respondent must make its employees whole for any loss of earnings and other benefits that resulted from its unilateral and unlawful decision to, on or about November 19, implement its full and final offers for the warehouse and driver bargaining units at its facilities. Backpay for this violation shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in

²⁵ My finding that the parties were not at the end of their negotiating rope on November 19 is supported by the fact that the Union offered additional concessions in its proposals for route sales driver commissions and employee health care on December 5, after Respondent declared impasse. (See FOF, sec. II(D), *supra*.)

In that connection, I note that at the start of trial, I denied Respondent's request to exclude any testimony about negotiations that occurred after November 18, the date of the alleged impasse. Respondent maintained that any such negotiations would be irrelevant to the question of whether a good-faith impasse existed on November 18, but I disagreed because developments in post-implementation negotiations can demonstrate that one or more of the parties still had room to negotiate when impasse was declared. See, e.g., *Hospital San Cristobal*, 358 NLRB No. 89, slip op. at 13 (2012) (both the union and the employer made new, conciliatory proposals in a bargaining session that occurred after the employer had declared impasse). The Union's December 5 proposals in this case (among other post-implementation developments) are relevant to show (and do show) that the Union was not at the end of its negotiating rope when Respondent declared impasse on November 18.

Kentucky River Medical Center, 356 NLRB No. 8 (2010). This includes reimbursing unit employees for any expenses resulting from Respondent's unlawful changes to their contractual benefits, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), *affd.* 661 F.2d 940 (9th Cir. 1981), with interest as set forth in *New Horizons* and *Kentucky River Medical Center*, *supra*. I further recommend that Respondent be ordered to make all contributions to any fund established by the collective-bargaining agreements with the Union which were in existence on November 19, 2012, and which contributions the Respondent would have made but for the unlawful unilateral changes, in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979).²⁶

For all backpay required herein, Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate bargaining unit employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁷

ORDER

The Respondent, Mike-Sell's Potato Chip Company, Dayton, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

²⁶ I am not persuaded by Respondent's argument, based on the Board's decision in *Dependable Maintenance Co.*, 276 NLRB 27 (1985), that even if the parties were not at impasse when Respondent unilaterally implemented its full and final offers on November 19, any damages should be cut off as of February 13, 2013, when the parties (in Respondent's view) did reach impasse. (See R. Posttrial Br. at 19-20.) The Board's decision in *Dependable Maintenance* is distinguishable from this case. First, unlike the respondent in *Dependable Maintenance*, there is no evidence that Respondent notified the Union that it was declaring a new impasse (on February 13, 2013, or otherwise) and reimplementing the terms of its full and final offers. Compare *Dependable Maintenance Co.*, 276 NLRB at 30 (respondents notified the union that they were at impasse and that accordingly respondents were reimplementing the terms of final offers that previously had been implemented prematurely). Second, and perhaps more important, the Board in *Dependable Maintenance* agreed that the respondents reasonably declared a new impasse because the union in that case "failed and refused to make any significant economic proposals which went to the heart of the dispute between the parties." *Id.* In this case, by contrast, Respondent can make no such argument, because the evidentiary record shows that the Union made multiple conciliatory offers between November 19, 2012, and March 20, 2013, and the parties brought in a Federal mediator to facilitate negotiations on March 20, 2013, thereby demonstrating that they were not at the end of their respective negotiating ropes. (See FOF, sec. II(D), *supra* (discussing, among other things, the offers that the Union made between December 5, 2012, and March 20, 2013, regarding route sales driver commissions and employee healthcare).)

²⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Failing to comply with the terms and conditions of employment that are set forth in the warehouse unit collective-bargaining agreement that expired on October 26, 2012, and failing to comply with the terms and conditions of employment that are set forth in the drivers unit collective-bargaining agreement that expired on November 17, 2012, until the parties agree to a new contract or bargaining leads to a good-faith impasse.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request of the Union, restore, honor and continue the terms of the collective-bargaining agreements with the warehouse and drivers units that expired on October 26 and November 17, 2012, respectively, until the parties agree to a new contract or bargaining leads to a good-faith impasse.

(b) Make employees in the warehouse and drivers bargaining units whole for any and all loss of wages and other benefits incurred as a result of Respondent's unlawful unilateral implementation of its full and final offers on November 19, 2012, with interest, as provided for in the remedy section of this decision.

(c) Make contributions, including any amounts due, to any funds identified in the warehouse and drivers unit collective-bargaining agreements that expired on October 26 and November 17, 2012, and which Respondent would have paid but for the unlawful unilateral changes, as provided for in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility Dayton, Ohio, a copy of the attached notice marked "Appendix."²⁸ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event

that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 17, 2012.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 18, 2013

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT fail to comply with the terms and conditions of employment that are set forth in the warehouse unit collective-bargaining agreement that expired on October 26, 2012, or fail to comply with the terms and conditions of employment that are set forth in the drivers unit collective-bargaining agreement that expired on November 17, 2012, until the parties agree to a new contract or bargaining leads to a good-faith impasse.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request of the Union, restore, honor and continue the terms of the collective-bargaining agreements with the warehouse and drivers units that expired on October 26 and November 17, 2012, respectively, until the parties agree to a new contract or bargaining leads to a good-faith impasse.

WE WILL make employees in the warehouse and drivers units whole for any and all loss of wages and other benefits incurred as a result of our unlawful unilateral implementation of our full and final offers on November 19, 2012, with interest compounded daily.

WE WILL make contributions, including any amounts due, to any funds identified in the warehouse and drivers unit collective-bargaining agreements that expired on October 26 and November 17, 2012, and which we would have paid but for the unlawful unilateral changes to bargaining unit employees' terms and conditions of employment.

²⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MIKE-SELL'S POTATO CHIP CO.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate quarters.

WE WILL compensate employees in the warehouse and driver bargaining units for the adverse tax consequences, if any, of

receiving one or more lump-sum backpay awards covering periods longer than 1 year.

MIKE-SELL'S POTATO CHIP CO.