

Erie Brush & Manufacturing Corporation and Service Employees International Union, Local 1.
Case 13–CA–043530–1

August 9, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE
AND HAYES

On January 26, 2007, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions, a supporting brief, a reply brief, and an answering brief to the General Counsel's cross-exceptions. The General Counsel filed cross-exceptions and an answering brief to the Respondent's exceptions. The General Counsel also filed a motion to expedite consideration of the judge's decision, and the Respondent filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.¹

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,² and conclusions and to adopt the recommended Order as modified.³

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to meet and bargain with the Union from May 10, through June 21, 2006,⁴ and by withdrawing recognition from the Union on July 6, based on an employee petition. As discussed below, we agree with the judge's findings.

I.

The Board certified the Union as the exclusive representative of the Respondent's production and maintenance employees in July 2003. The Union requested bargaining for an initial collective-bargaining agreement, but the Respondent refused. Almost 2 years later, the Respondent agreed to bargain with the Union after the

United States Court of Appeals for the Seventh Circuit enforced the Board's order requiring it to do so.

The parties commenced negotiations in June 2005. They informally agreed to discuss noneconomic issues before economic ones, and did so between June 28, 2005, and March 31. They reached agreement on nearly all noneconomic issues, except whether the contract would contain a union security clause and provide for arbitration of unresolved grievances. The Union initially insisted on both provisions, even stating that there would not be a contract without union security. The Respondent wanted neither provision.

On March 31, the Union's chief negotiator, Charles Bridgemon, observed to the Respondent's chief negotiator, Irving Geslewitz, that there was an "impasse" on those two issues. Simultaneously, however, Bridgemon suggested that the parties enlist the aid of a mediator. The parties still had not discussed any economic items.

On April 5, Geslewitz advised Bridgemon that the Respondent would not agree to enter mediation. Geslewitz asserted that mediation was pointless because the Union had no flexibility on union security or arbitration.

On May 10, Bridgemon requested that the parties discuss economic issues, and revisit noneconomic issues later. The Respondent refused on May 26. Geslewitz again asserted that there was no point in meeting further given the Union's demands for union security and arbitration.⁵ Bridgemon replied with assurances that he would continue to discuss those issues with the Union, and again suggested that the parties return to those issues after discussing economic ones.

On June 1, Geslewitz asserted that the parties were at "impasse" and reaffirmed that the Respondent would not meet unless the Union changed its position on union security and arbitration. The next day, Bridgemon rejected Geslewitz' assertion of impasse, stated that he now had some flexibility on arbitration, and requested a resumption of bargaining.

The Respondent, however, refused to resume bargaining, asserting both that the Respondent needed more specific information about the Union's position on arbitration and that the parties remained at impasse on union security in any event.

On June 17, the Union's attorney threatened to file an unfair labor practice charge if the Respondent continued its refusal to bargain. The Respondent called Bridgemon to schedule another bargaining session, which was ultimately set for July 24.

¹ Member Becker has recused himself and took no part in the consideration or disposition of this case.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice. We shall also modify the recommended Order to conform to the violations found.

⁴ All dates are in 2006, unless stated otherwise.

⁵ The Respondent did not invoke the parties' agreement to first discuss noneconomic issues as a reason it would not discuss economic issues.

The July 24 bargaining session never occurred, however. On about July 5, the Respondent received an employee petition indicating that a majority of unit employees no longer wanted to be represented by the Union. Based on that petition, the Respondent canceled the July 24 meeting, and withdrew recognition from the Union. It has refused to bargain with the Union ever since.

II.

The judge found that the Respondent unlawfully refused to bargain with the Union from May 10, through June 21, reasoning that the Respondent could not insist that the Union drop its demand for union security as a precondition to bargaining over economic items. Further, the judge found that the Respondent's unlawful conduct presumptively tainted the employee decertification petition, rendering the Respondent's withdrawal of recognition based on that petition unlawful as well. As stated, we agree with those findings, for the reasons given by the judge and for those discussed below.

III.

There is no dispute that the Union requested bargaining over economic items on May 10, and that the Respondent refused to do so until the Union changed its position on union security. As the judge explained, absent a valid defense, the Respondent's action violated the Act. See, e.g., *John Wanamaker Philadelphia*, 279 NLRB 1034, 1034–1035 (1986) (employer unlawfully refused to discuss economic items until the union agreed to no-strike and binding arbitration provisions). The Respondent maintains that it was privileged to suspend negotiations from May 10, through June 21, because there was an impasse on the single issue of union security. The judge rejected that defense, and so do we.

The applicable Board law is clear. Under Section 8(d) of the Act, an employer and a union are mutually obligated “to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” The duty to bargain may be suspended temporarily, however, where the parties reach a lawful impasse. The party asserting impasse has the burden of proof on the issue. *L.W.D., Inc.*, 342 NLRB 965, 965 (2004); *CalMat Co.*, 331 NLRB 1084, 1097–1098 (2000); *Outboard Marine Corp.*, 307 NLRB 1333, 1363 (1992), enfd. mem. 9 F.3d 113 (7th Cir. 1993); *North Star Steel*, 305 NLRB 45 (1991), enfd. 974 F.2d 68 (8th Cir. 1992). Further, it is not enough that the party asserting impasse believes that it has been reached. There must be a “contemporaneous understanding” by the parties that further bargaining would be futile. See, e.g., *Newcor Bay City Div.*, 345 NLRB 1229, 1238 (2005), enfd. mem. 219 Fed.Appx. 390 (6th Cir. 2007).

Although impasse typically requires an overall deadlock in bargaining, the Board has recognized that an impasse on a single critical issue may cause such a complete breakdown in negotiations that a suspension of bargaining is justified. See *CalMat Co.*, 331 NLRB at 1098. The party asserting a single-issue impasse must establish three things: “first, the actual existence of a good-faith bargaining impasse; second, that the issue as to which the parties are at impasse is a critical issue; third, that the impasse on this critical issue led to a breakdown in the overall negotiations—in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved.” *Id.* Here, the Respondent has failed to establish the first and third elements of the defense.

A.

The Respondent did not establish the first element of its defense: that the parties had reached good-faith impasse on union security by May 10. Although the parties were having difficulty resolving that issue, that alone does not establish impasse. Impasse occurs when there is “no realistic possibility that continuation of discussion at the time would have been fruitful.” *Sacramento Union*, 291 NLRB 552, 557 (1988), enfd. mem. sub nom. *Sierra Publishing Co. v. NLRB*, 888 F.2d 1394 (9th Cir. 1989), quoting *Television Artists AFTRA v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968). The perceived deadlock, moreover, must be mutual. “Both parties must believe that they are at the end of their rope.” *PRC Recording Co.*, 280 NLRB 615, 635 (1986), enfd. 836 F.2d 289 (7th Cir. 1987). Considering all the circumstances, we find that the parties had not reached that point.

The parties were bargaining for an initial contract, which the Board has long recognized presents “special problems, . . . which are not present if a bargaining relationship has been established over a period of years and one or more contracts have been previously executed.” *N. J. MacDonald & Sons*, 155 NLRB 67, 71–72 (1965). In a new relationship, union security can present one of those “special problems” that takes somewhat longer to resolve. The parties’ bargaining here must be viewed in that context.

It is significant that when Union Representative Bridgemon stated at the parties’ March 31 bargaining session that the parties were “at impasse” on union security and arbitration, he simultaneously suggested that they seek a mediator’s assistance on those issues. That suggestion shows that he did not believe that further bargaining over either issue would be futile. See *Grinnell Fire Protection Systems Co.*, 328 NLRB 585, 585 (1999), enfd. 236 F.3d 187 (4th Cir. 2000), cert. denied 534 U.S. 818 (2001) (union “showed [its] continued will-

ingness to bargain by raising the possibility of Federal mediation”). Simply stated, Bridgemon was not at the end of his rope.

Moreover, although early in the negotiations the Union insisted that union security and arbitration were essential to an overall agreement, the record establishes that by the end of March, the Union’s position was gradually softening. In addition to suggesting mediation on March 31, Bridgemon assured Geslewitz that he would continue to discuss those issues with the Union. Those assurances were significant, as demonstrated by the Union’s new flexibility regarding the Respondent’s position that unresolved grievances be left to the courts.⁶

The Respondent and our dissenting colleague make much of Bridgemon’s use of the phrase “at impasse” to describe the status of negotiations (as of March 31) on union security and arbitration. The Board, however, “is careful not to ‘throw back in a party’s face remarks made in the give-and-take atmosphere of collective bargaining,’ because to do so would frustrate the Act’s policy of encouraging free and open communications between the parties.” *Industrial Electric Reels*, 310 NLRB 1069, 1072 (1993), quoting *Sage Development Co.*, 301 NLRB 1173, 1176 (1991) (citations omitted); see also *PRC Recording*, supra, 280 NLRB at 635 (“The use of words like ‘impasse’ or ‘deadlock’ by the parties, even relating to overall issues, does not necessarily imply that future bargaining would be futile” and “are legal conclusions not binding on the Board”). Accord: *Tom Ryan Distributors*, 314 NLRB 600, 605 (1994) (a “declaration of impasse, in any event, is not determinative”). Such care is certainly warranted in this case for all of the reasons discussed above.

We do not share our dissenting colleague’s view of Bridgemon’s conduct as “an empty and classic ruse to attempt to stave off impasse.” Nor do we treat the “mere invocation” of mediation, as our colleague asserts, as a “talisman [that] somehow magically wards off a deadlock.” The dissent views the bargaining process with too jaundiced an eye. Impasse and deadlock are not the natural and inevitable end of every significant disagreement in negotiations, and an attempt to work around such a disagreement is not a ruse or a resort to magical thinking. Adding to the subjects on the bargaining table, instead of focusing on a single issue, can permit the tradeoffs and compromises that produce an overall agreement. This is particularly true here where the parties had not yet com-

menced negotiations over economic issues. Similarly, mediation may well help the parties deal with each other more productively. Absent some actual evidence that Bridgemon was acting in bad faith, we are unwilling to treat his objectively reasonable proposals as empty gestures.

Citing *Pepsi-Cola–Dr. Pepper Bottling Co.*, 219 NLRB 1200 (1975), our dissenting colleague asserts that where “the parties have reached lawful impasse, a respondent is then entitled to ‘a sufficient indication of changed circumstances to suggest that future bargaining might be fruitful’ before becoming obligated to return to the bargaining table.” He also contends that, under *Holiday Inn Downtown–New Haven*, 300 NLRB 774, 776 (1990), the Respondent was permitted to rely on the Union’s “‘clear message’ that ‘nothing else that might happen in negotiations could persuade [it] to move’ from its position.” Neither case is apposite.

As indicated, the basic issue in both *Pepsi-Cola* and *Holiday Inn* was whether there had been a change in circumstances sufficient to break a preexisting valid impasse. Thus, both cases presuppose the very issue presented here: whether the parties were at impasse in the first place. That difference is crucial. Whether an employer has justified its unilateral cessation of bargaining under *CalMat* cannot be answered by asking whether, assuming a valid impasse, the union might later demonstrate a substantial change in circumstances warranting a resumption of bargaining. Given the stated policy in Section 1 of the Act of “encouraging the practice and procedure of collective bargaining,” those questions implicate different considerations. Compare *CalMat*, supra at 1097 (articulating employer’s three-part burden to establish impasse) with *Airflow Research & Mfg. Corp.*, 320 NLRB 861, 862 (1996) (reviewing factors that indicate whether circumstances have changed sufficiently to break a lawful impasse). For those reasons, we find our colleague’s reliance on *Pepsi-Cola* and *Holiday Inn* misplaced.⁷

⁷ In any event, we would find that, even if the parties were at a momentary impasse on May 10, it was broken well before the Respondent finally agreed in late June to resume bargaining. It is well settled that “[a]nything that creates a new possibility of fruitful discussion (even if it does not create a likelihood of agreement) breaks an impasse.” *Airflow Research & Mfg.*, 320 NLRB 861, 862, quoting *Gulf State Manufactures v. NLRB*, 704 F.2d 1390, 1399 (5th Cir. 1983). Here, any momentary impasse was broken by Bridgemon’s assurance in late May that he would continue to discuss union security and arbitration with the Union while the parties negotiated over economic items. At the latest, any impasse was broken on June 2, when Bridgemon informed the Respondent that, after further discussions with the Union, he indeed had room to move on the arbitration issue.

⁶ The Respondent erroneously dismisses the Union’s stated “flexibility” as being insufficiently specific. See *Newcor Bay City Division*, 345 NLRB at 1239 (finding no impasse “even though the Union had not yet offered specific additional concessions, but only declared its intention to be flexible and continue bargaining”).

B.

In sum, the Respondent has not established that the parties reached a good-faith impasse on the issue of union security. But even assuming that there was an impasse on union security, the Respondent has not established the third element of its defense: “that the impasse on this critical issue led to a breakdown in the overall negotiations—in short, that there can be no progress on any aspect of the negotiations until the impasse relating to the critical issue is resolved.” *CalMat*, 331 NLRB at 1098. As described, after the Respondent refused in early May to negotiate economic issues, Bridgemon assured the Respondent that he would continue to discuss union security and arbitration with the Union, and, again, the Union actually moved on arbitration. That movement confirmed that progress on issues other than union security was possible, yet the Respondent still refused to meet.

Had negotiations continued, it is entirely possible that Bridgemon would have obtained some flexibility on union security, too, especially with the assistance of a mediator. The parties also might have moved closer to an agreement had the Respondent agreed to discuss economic issues, which in turn might have altered the Union’s position on union security.⁸ The Respondent, however, unilaterally cut off those possibilities by its refusal to meet and bargain with the Union.⁹

The Respondent argues that its position is supported by *CalMat*, supra, and *Richmond Electric Services*, 348 NLRB 1001 (2006). To the contrary, those cases show that the Respondent’s defense falls short here. In *CalMat*, the Board found that an impasse on a single issue—an employee pension plan—was sufficient to create an overall bargaining impasse. 331 NLRB at 1099. There, the parties had a fundamental disagreement over the pen-

sion issue, each side adamantly refused to waver from its position, both sides repeatedly used language expressly communicating that they were “hung up” on that issue and that they would not yield, and in fact their positions never changed. *Id.* at 1098–1099. By contrast, here Bridgemon proposed mediation of the union security and arbitration provisions, assured the Respondent that he would continue discussing those issues with the Union, suggested that the parties return to those issues after discussing economic ones, and the Union actually moved on the arbitration issue, signaling that movement on union security might also be possible.

In *Richmond Electrical Services*, supra, the Board found that a bargaining deadlock over the employer’s demand for wage concessions created an overall impasse. 348 NLRB at 1003. There, as the Board found, the parties’ “course of bargaining” demonstrated that the “considerable gulf between the parties’ wage proposals presented what proved to be an insurmountable obstacle to an agreement.” *Id.* at 1002–1003. The union adamantly adhered to the wage rates in a multiemployer agreement with a “most-favored nation” clause, while the employer insisted on wage concessions. The facts here simply do not show that union security was an “insurmountable obstacle to an agreement.”¹⁰

For all of those reasons, we affirm the judge’s finding that the Respondent has not established that it was privileged to suspend negotiations with the Union from May 10, through June 21, and that, by doing so, it violated Section 8(a)(5) and (1) of the Act.¹¹

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, Erie Brush & Manufacturing Corp., Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order as modified.

1. Substitute the following for paragraph 1(b):

¹⁰ Chairman Liebman dissented in *Richmond Electrical Services*, but agrees that the case is factually distinguishable from this one.

⁸ The Respondent excepts to the judge’s statement that “the Board has never sanctioned the refusal of a party to continue negotiations without ever engaging in bargaining over economic issues.” We find no need to pass on that exception or the judge’s statement. The fact here is that the Respondent never bargained over economic issues, and such bargaining could have proved fruitful.

⁹ Our dissenting colleague contends that the Respondent’s refusal to discuss economic issues was privileged by the parties’ “agreed-upon protocol for their negotiations” under which they agreed not to discuss economic issues until all language issues—including union security and arbitration—had been resolved. Contrary to our colleague’s view, the parties’ “agreed-upon protocol” was no more than an informal understanding, as opposed to a binding ground rules agreement. As described in the judge’s decision, when the Union’s initial proposal contained some economic proposals, Geslewitz suggested that discussion of those issues be deferred, and Bridgemon (who may have suggested the idea first) agreed. Such an informal agreement about bargaining “protocol” could hardly preclude Bridgemon from changing his mind, particularly if he believed that bargaining over economic issues might move the parties closer to an overall agreement.

¹¹ We also adopt the judge’s findings, for the reasons he states, that the Respondent’s refusal to bargain tainted the employees’ decertification petition and that the Respondent’s withdrawal of recognition based thereon violated Sec. 8(a)(5) and (1). *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177–178 (1996), *affd.* in part and remanded in part 117 F.3d 1454 (D.C. Cir. 1997). With regard to the appropriate remedy, the judge recommended that the Respondent be required to bargain in good faith with the Union for a reasonable period of not less than 6 months. See *Lee Lumber & Building Material Corp.*, 334 NLRB 399, 402 (2001), *enfd.* 310 F.3d 209 (D.C. Cir. 2002). The General Counsel argues that the judge should have extended the Respondent’s bargaining obligation for at least 1 year. We adopt the judge’s recommendation, as it appears the parties engaged in good-faith bargaining for more than 10 months from June 28, 2005, to May 2006.

“Until an agreement has been reached on a collective-bargaining agreement or lawful impasse has occurred, failing and refusing to bargain with the Union unless the Union agrees to withdraw any specific proposal, including a union security clause.”

2. Substitute the following for paragraph 2(b):

“Within 14 days after service by the Region, post at its Chicago, Illinois facility copies of the attached notice marked “Appendix” in both English and Spanish.¹² Copies of the notice, on forms provided by the Regional Director for Region 13, 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, 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 May 10, 2006.”

MEMBER HAYES, dissenting.

The primary issue in this case is whether, after having been told repeatedly and adamantly that its counterpart has no room for movement on issues both sides agree are critical to negotiations, a party to collective bargaining violates the Act when it declines to incur the time and expense of additional meetings absent some assurance that the deadlock can be broken. I say no. Because I would dismiss that complaint allegation, I would also reverse the judge’s finding that the alleged unfair labor practice tainted the Respondent’s subsequent withdrawal of recognition, which was predicated upon a decertification petition showing an overwhelming loss of union support. I therefore dissent.

¹² 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.”

Facts

The parties began bargaining on June 28, 2005.¹ By mutual agreement, they addressed noneconomic issues first. After eight meetings, they had reached consensus on all issues save two: union security and arbitration of unresolved grievances. Throughout the negotiations, the parties were adamant and unbending in their opposing views on both subjects, which each deemed critical to a final agreement. At their seventh meeting, the lead negotiators informed each other that neither had room for movement. Each reiterated that stance at the next session, in which the Union’s representative, Charles Bridgemon, stated specifically that union security and arbitration were “make or break on the whole contract.” Bridgemon added that he “felt we [were] at impasse on those two issues” and suggested mediation. The Respondent’s representative, Irving Geslewitz, demurred, citing Bridgemon’s representation that he had no “give” on either issue.² Geslewitz wrote Bridgemon:

At our last negotiation meeting, you stated, and I concurred, that the parties are at impasse due to the union security and court versus arbitration issues. . . . I had specifically asked if there was anything short of a union security clause that you were willing to agree to, and you made it absolutely clear several times that you had to have a union security clause and nothing less.

As you know, the Company will not agree to a union security clause.

The Union did not dispute Geslewitz’ assessment of where the parties stood. Instead, almost 6 weeks later, on May 10 (the first date of the alleged refusal to bargain), Bridgemon informed Geslewitz that, contrary to their established ground rules for the negotiations, he now wanted to meet on economic issues and that they could “revisit the language issues later.” Geslewitz responded on May 26, seeking clarification from the Union. He wrote:

If we are at loggerheads on union security and court vs. arbitration issues and you have made clear many times that you have no “give” in your position, what are we accomplishing by going to the economic issues? It seems we will be right

¹ Contrary to the majority’s implication, the Respondent’s initial challenge to the Union’s certification in 2003, resulting in an 8(a)(5) violation, has no bearing on its good faith at the bargaining table, as an employer seeking to contest certification has no recourse to the courts except by refusing to bargain and litigating its challenge in the context of an unfair labor practice proceeding. See *American Federation of Labor v. NLRB*, 308 U.S. 401, 411 (1940).

² From April 5, through June 7, all communications between the parties were via email.

back to where we are no matter what, unless you are saying that you are now willing to move with respect to your position on union security and court vs. arbitration depending on what happens on economics. Has your position changed?

Bridgemon did not answer. Instead, on May 31, he simply emailed that he was willing to continue to discuss the outstanding language issues with the local union while he and Geslewitz moved on to economic items. Geslewitz pressed, replying on June 1 that “your email is not responsive” and asking, specifically, whether the local union was authorizing Bridgemon to compromise on union security or arbitration. Geslewitz repeated that the parties were at impasse, noting:

You told me many times . . . that on union security and arbitration your hands are tied and there is no give. I still have not heard anything suggesting otherwise. You know our position. I do not want to schedule a meeting if we are going to wind up where we now are anyway on union security and arbitration.

On June 2, Bridgemon wrote back but again evaded Geslewitz’ question. Instead, he backtracked from his prior position and asserted that “we are not at impasse.” He also stated that “after continued discussions with the union, I do have some give on the arbitration issue,” and claimed he was willing to negotiate on that subject. But he also said that “I don’t have a counter [on arbitration] at this point. But will have one after we negotiate the economics.” On union security, Bridgemon confirmed that he still did not “have any give at this point,” although he added that he was “continuing discussions” with the local even though he added he was “not sure” if the Union’s position would change.

On June 7, Geslewitz thanked Bridgemon for his “more informative response this time” and his “expression for the first time of a willingness to move” on arbitration. However, Geslewitz indicated his reservations given the Union’s previously stated position and sought clarification regarding the purported room for movement on arbitration:

I would first like to hear what your new proposal is on [arbitration]. The reason I say this is because at one time you had stated that you would agree to court instead of arbitration provided we give up the no-strike clause, which I told you was unacceptable and would not break the impasse on that issue. Also, I don’t understand why you don’t have a counter at this point. . . . If you say you will have one after we negotiate economics, why don’t you have one now? You will excuse me if I have to say this makes me

suspicious whether you [are] really being frank or are just jockeying for resuming negotiations just to make a claim that we are not really at impasse. If you have a proposal, let me know what it is. If it is truly a shift from your previous position, we can discuss it further. But let’s do that now.

On union security, Geslewitz added that “nothing in your e-mail changes that we are at impasse” and that “it seems you offer no real prospect that this will ever change.” He stressed that his negotiation notes showed “over and over again statements from you stating that [union security] is a deal breaker and how the union has never to your knowledge agreed to a contract without a union security clause. You also have rejected every suggestion short of a union security clause that we have proposed.” He repeated the company’s unwillingness to agree to a union-security clause, but said that he “was *not* ruling out meeting” (emphasis in original) and asked Bridgemon to call, saying that he needed “some degree of comfort that we may be going somewhere that your e-mails don’t quite provide.”

Bridgemon did not respond. Instead, the Union’s counsel wrote a June 16 letter advising that the Union might file an unfair labor practice charge if the Respondent did not negotiate. Geslewitz emailed Bridgemon on June 21, stating “[a]t this stage, rather than continue to debate these matters, I am willing to set up a meeting to continue negotiations but would still just like to talk to you first.” A meeting was never held, however, because the Respondent subsequently received a decertification petition, signed by 18 of the 21 unit employees. Based on that petition, the Respondent withdrew recognition from the Union on July 6.

Analysis

The General Counsel alleges that the Respondent’s refusal to meet in response to the Union’s May 10 request violated the Act. However, the Respondent and the Union had deadlocked by that point on two issues each side agreed was critical to the negotiations. As my colleagues concede, the Board has long recognized that impasse over even a single issue may create an overall bargaining impasse when the issue is “‘of such overriding importance’ to the parties that the impasse on that issue frustrates the progress of further negotiations.” *Richmond Electrical Services*, 348 NLRB 1001, 1002 (2006), citing *CalMat Co.*, 331 NLRB 1084, 1097 (2000), and cases cited there at fn. 49. To establish such a single-issue impasse, a party must show: (1) the existence of a good-faith bargaining impasse on the issue, (2) that the issue is critical to the negotiations, and (3) that the impasse over the issue led to a breakdown in the overall

negotiations. *CalMat*, 331 NLRB 1084, 1097–1098 (2000). All three elements are satisfied here.

First, there can be no reasonable doubt that the parties had reached a bona fide impasse as of May 10 on union security and arbitration. The Union’s negotiator admitted as much, and the Respondent’s representative concurred. Second, the record clearly establishes that both parties viewed the two issues, particularly union security, as central to any agreement. Bridgemon stated unequivocally and repeatedly that the inclusion of a union-security clause was a “make or break” issue and that there would be no contract without it. Again, the Respondent’s representative concurred as to the importance of the issue and was equally adamant that it would sign no contract that included such a clause. Finally, the deadlock over these two issues clearly led to a breakdown in the overall negotiations because neither party wavered from the position that an overall agreement was impossible absent capitulation by one side or the other on these subjects.

My colleagues assert that the Board “is careful not to throw back in a party’s face remarks made in the give-and-take atmosphere of collective bargaining,” however, the cases they cite for that proposition dealt with whether isolated, off-hand statements demonstrated bad faith, not the issue of whether the parties had reached a bona fide impasse. As to the latter issue, the Board’s impasse standard has long considered the “contemporaneous understanding of the parties as to the state of the negotiations,”³ which is obviously evidenced by statements of the parties concerning impasse.⁴

In the instant case, the Union’s repeated and unequivocal statements demonstrated that the parties were at impasse and that there would be no agreement absent a union security clause, and the Respondent was entitled to take those assertions at face value. Indeed, the Board has made clear that a party may rely on the steadfast bargaining assertions of its counterpart even if those assertions may not reflect the other party’s true intent. See *Holiday Inn–Downtown New Haven*, 300 NLRB 774, 776 (1990) (holding that the employer was entitled to rely on the “clear message” sent by the union that “nothing else that might happen in negotiations could persuade the union to move” from its position and break a deadlock, even though the union’s statements were “possibly not reflective of its true intent.”). Moreover, the Board also has made clear that where, as here, the parties have reached

lawful impasse, a respondent is then entitled to “a sufficient indication of changed circumstances to suggest that future bargaining might be fruitful” before becoming obligated to return to the bargaining table. *Id.* at 775–776, citing *Pepsi-Cola–Dr. Pepper Bottling Co.*, 219 NLRB 1200 (1975).

In *Holiday Inn–Downtown New Haven*, as here, the Board found that the respondent lawfully refused to return to the bargaining table after reaching impasse over a single issue of critical importance to both parties—subcontracting—despite the union’s generalized promises of new proposals and asserted “flexibility” on open issues. *Id.* at 776. In the Board’s view, given the union’s consistent and clear message that nothing would move it from its opposition to subcontracting, “bare assertions” and “generalized promises” were insufficient to show “any change, much less a substantial change” in the union’s bargaining position. *Id.* (internal quotations omitted). The same result obtained in *Pepsi-Cola–Dr. Pepper Bottling Co.*, *supra*, where the Board found no break in impasse despite the union’s offer to adjust the contract language to meet the needs of the employer. 219 NLRB at 1200. Absent more detail concerning the proposal, the Board was unable to discern whether there had been a sufficiently substantial change in position to break the impasse and require the employer to return to the bargaining table. *Id.*

The facts here present an even stronger case for finding no violation because the Respondent never actually refused to bargain; rather it merely sought, but never received, an assurance that the Union was prepared to compromise from its previously intransigent position on union security and arbitration. Indeed, the Respondent agreed to the scheduling of an additional session on July 24, despite its reservations, and only cancelled after receiving the decertification position signed by an overwhelming majority of its employees. Moreover, the Union’s purported flexibility here was even more amorphous and transparently superficial than that found wanting in *Holiday Inn–Downtown New Haven* and *Pepsi-Cola–Dr. Pepper Bottling Co.* Here, the only commitment made with respect to union security was that the union representative would continue to discuss the issue with his principals, with no assurance that those discussions would result in movement. Similarly, while Bridgemon professed to have “flexibility” on arbitration, when pressed, he refused to discuss the details of any counteroffer, insisting, contrary to the parties’ prior agreement on bargaining protocol, that he would only discuss arbitration after the parties bargained over economic issues. In short, Bridgemon’s conduct is properly viewed for what it was: an empty and classic ruse to at-

³ *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967).

⁴ See 1, Higgins, *The Developing Labor Law* 989–990 (5th ed. 2006), and cases cited therein citing statements or understandings of the parties concerning impasse as factors to be analyzed in determining whether an impasse exists.

tempt to stave off impasse. Nothing in his statements established any change, much less a substantial one, in the Union's position on either union security or arbitration. Thus, there was no break in the previously declared impasse and the Respondent was free, under well-established precedent, to decline to engage in a futile exercise of additional bargaining. Since it was free to refuse to meet, it could clearly take the lesser step of simply requesting meaningful assurances of a break in the deadlock before scheduling additional face-to-face bargaining sessions.

My colleagues—despite the Union's own admission of an “impasse” over “make or break” issues—contend that the parties never actually reached one. However, the evidence they offer in support of that view is as ephemeral as the Union's purported room for movement. According to the majority, no impasse was reached because the union negotiator suggested mediation, as if the mere invocation of that talisman somehow magically wards off a deadlock. But an expressed willingness to mediate does no such thing; mediation cannot compel movement and a party can remain as steadfast in that forum as at the bargaining table. Here, despite the early offer to mediate, Bridgemon never wavered in the position that there would be no contract without a union-security clause, nor did he proffer any actual proposal reflecting movement on arbitration.

The forgoing facts distinguish *Grinnell Fire Systems, Inc.*, 328 NLRB 585 (1999), *enfd.* 236 F.3d 187 (4th Cir. 2000), *cert. denied* 534 U.S. 818 (2001), cited by the majority. There, two members of the panel, over a vigorous dissent, found no overall impasse⁵ where the employer simply assumed that the union would not budge from the terms of a national agreement, despite the union's bargaining representative's assertions to the contrary, his denial of an impasse, and his repeated offers of actual proposals that varied from the national agreement. In the context of that not only stated, but demonstrated, willingness to compromise (through significant concessions from the national agreement), the panel majority found that the union's offer to consider mediation buttressed the conclusion that no impasse had been reached. Here by contrast, both parties had acknowledged reaching impasse over discrete but significant issues, and the Union never put forward any actual proposal that varied from its previously stated position on union security or arbitration. Under those circumstances, rather than evince the absence of impasse, the suggestion of mediation merely reflected what the dissent in *Grinnell* aptly described as: “the time-honored tactic of trying to keep a

ball rolling when its own inertia has brought it to a halt.” Bridgemon's transparent efforts to stave off impasse, while a common bargaining strategy, does not mean that a deadlock on critical issues did not in fact exist.

My colleagues also assert that even though the Union conceded impasse on security and arbitration early in the negotiations, “the record establishes that by the end of March, the Union's position was gradually softening.” And what evidence do they cite? The fact that Bridgemon assured Geslewitz that he would continue to discuss those issues with the Union, and the Union's purported “new flexibility” on arbitration. As to the former, I fail to see how a stated willingness to continue to discuss a position internally demonstrates the absence of impasse. Bridgemon presumably had discussed union security with his principals before and the answer was a steadfast refusal to execute a contract that did not contain a union-security clause. Moreover, Bridgemon himself confessed that he could give the Respondent no assurances that the union's position on union security would ever change. As to the stated “flexibility” on arbitration, it proved to be an empty promise, as Bridgemon conceded he had no actual proposal and would only discuss arbitration after bargaining over economics.⁶ In short, my colleagues cite no persuasive evidence to countermand the parties' mutual assessment that an impasse had been reached over issues critical to agreement, or to establish a change in the status of that deadlock by May 10, the date of the alleged unlawful refusal to bargain.

⁶ The majority cites *Newcor Bay City Div.*, 345 NLRB 1229, 1239 (2005), *enfd. mem.* 219 Fed.Appx. 390 (6th Cir. 2007), in response to the Respondent's assertion that the Union's stated “flexibility” was insufficiently specific to indicate the absence of impasse. However, *Newcor* was not a limited-issue impasse case, and the Respondent there unilaterally declared impasse over the union's objections, in part based on a deadline it had imposed on bargaining, at a time when the union had made actual “concessions that eliminated or narrowed the divide between the parties on many economic and noneconomic issues.” *Id.* at 1238. Further, the union assured the respondent that it “was prepared to make further concessions on central issues and that more extreme movement would be possible in the future.” *Id.* at 1238–1239. Finally, no union representative had “ever stated that the Union would not make further movement towards the Respondent's position on any issue, or even foreclosed the possibility that the Union would eventually accept the Respondent's initial ‘ugly’ proposal.” *Id.* at 1239. Only under those circumstances did the judge discount the fact that “the union had not yet offered specific additional concessions, but only declared its intention to be flexible and continue bargaining.” The majority's reliance on *Airflow Research*, 320 NLRB 861 (1996), is also unavailing. There, the Board found impasse broken after 1 year had passed since impasse, the union had selected a new negotiator and made new proposals that included reduced demands on wages and vacation time, but the respondent had simply refused *any* further bargaining on the ground that it had made its best and final offer. *Id.* at 862–863. There, unlike here, there were concrete changes in the Union's position to break impasse.

⁵ *Grinnell* was not a single-issue impasse case.

Finally, my colleagues assert that even if, as the parties acknowledged, a good-faith impasse had been reached over union security, that issue did not cause a breakdown in the overall negotiations. As a preliminary matter, the Respondent contends, and the record supports that contention, that the impasse encompassed arbitration as well as union security. Further, the record demonstrates that neither party ever moved in any significant way from their fixed positions on both issues. As noted above, with respect to arbitration, all Bridgemon ever said was that he had flexibility on that issue. However, he admitted he had no counteroffer and refused to provide one unless and until the Respondent negotiated economic issues, which the parties mutually had agreed would not be addressed until all language issues, including union security and arbitration, had been resolved. Bridgemon also conceded that he could make no assurances that his ongoing internal discussions with the Union would result in any movement whatsoever on union security. He explicitly stated—and Geslewitz agreed—that the two issues were “make or break” on reaching a contract. Thus, it is clear from the parties’ statements and the overall course of negotiations that union security and arbitration were keystones to the possibility of an agreement and remained so throughout the negotiations. And while my colleagues speculate that the parties might possibly have moved from their respective positions on those critical issues after negotiating economics, speculation is no substitute for record evidence.⁷ Moreover, it is not the Board’s role to compel parties to abandon agreed-upon protocol for their negotiations or to engage in a futile charade of endless negotiation.

CONCLUSION

No one knows better than the parties to collective bargaining what issues are central to their negotiations. Here, the parties declared union security and arbitration to be just that—deal breakers—and acknowledged the existence of a bona fide impasse over both issues. The record reflects no meaningful movement on either issue

⁷ Indeed, Geslewitz specifically asked Bridgemon whether the Union would be prepared to move on union security “depending on what happens” in bargaining over economic issues, and Bridgemon offered nothing to suggest that the Union might change its position. Further, on June 7, Geslewitz asked Bridgemon for a proposal on arbitration and stated that, if there were truly a shift from the Union’s previous position, he wanted to discuss it. Bridgemon simply failed to respond. Contrary to my colleagues’ characterization of my position, I do not contend that Bridgemon was precluded from changing his mind regarding the order of negotiation topics. At that point, the parties were at impasse, and the Respondent was entitled to rely on Bridgemon’s failure to make any substantive, specific statement indicating that the Union’s position might change or that discussing economics could be fruitful.

at any point over the course of the negotiations. Under those circumstances, I believe, and Board law reflects, that a party is entitled to take at face value its counterpart’s assertion of an insurmountable deadlock, and to require some meaningful objective assurance that the impasse can be broken before being compelled to return to the bargaining table. No such assurance was provided here. I would dismiss the allegation. Because I find that the Respondent did not unlawfully refuse to bargain, that refusal could not have tainted the later employee decertification petition and the Respondent did not violate the Act by relying on that petition as the basis of its withdrawal of recognition from the Union.⁸

Jessica Willis Muth, Esq., for the General Counsel.

Irving M. Geslewitz and Lorne T. Saeks, Esqs. (Much Shelist Freed Denenberg Ament & Rubenstein, P.C.), of Chicago, Illinois, for the Respondent.

Alexia M. Kulweic, Esq., of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Chicago, Illinois, on November 29, 2006. The Union, Service Employees International Union, Local 1 (SEIU), filed the charge in this matter on July 28, 2006, and the General Counsel filed his complaint on October 24, 2006.

The General Counsel alleges that Respondent, Erie Brush & Manufacturing Corp., violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) in failing and refusing to bargain with the Union. More specifically, he alleges that beginning about May 10, 2006, Respondent demonstrated a fixed intent to delay bargaining by insisting that the parties agree to all noneconomic issues before it would bargain over economic issues. Additionally, the General Counsel alleges that as a result of the conduct above, Respondent violated the Act by withdrawing recognition from the Union and refusing to bargain with it after July 6, 2006.

⁸ While it is not necessary for me to reach the issue, it strains credibility to suggest that the particular hiatus in bargaining caused by the Respondent’s refusal to meet between May 10 and June 21 (the conduct the majority finds unlawful) led to employee disaffection and tainted the employees’ decertification petition: The parties met for bargaining on June 28, August 9 and 25, September 23, and October 26, 2005; and on January 18, March 3 and 31, 2006. After the Respondent’s April 5 email to the Union, the Union was silent until May 10. Thus, the many breaks between bargaining sessions, caused by both parties, were of similar duration to the break at issue here. Further, as the Union conceded that it had not communicated with employees for more than 1 year by the time of these events, there is no evidence that the employees were aware of the Respondent’s actions or even that the parties were still negotiating. The far more likely conclusion is that the disaffection was caused by the Union’s lack of contact with its members and failure to deliver a contract.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT¹

I. JURISDICTION

Respondent manufactures car wash and polishing brushes at its facility in Chicago, Illinois. It 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. *The Certification of the Union and Prior Litigation*

On January 14, 2003, the National Labor Relations Board (the Board) conducted a representation election at Respondent's facility in an appropriate bargaining unit consisting of all full-time and regular part-time production and maintenance employees. Twenty five out of 27 eligible voters participated in the election. Eighteen voted in favor of representation by the Union; 5 voted against such representation, and there were 2 challenged ballots.

Respondent filed three objections to conduct allegedly affecting the results of the election. The Board conducted a hearing on these objections on February 13 and 14, 2003. The hearing officer recommended that all three objections be overruled. Respondent filed exceptions to the hearing officer's report. The Board also overruled the objections, although modifying the hearing officer's rationale with respect to two of the three. As a result, the Board certified the Union as the exclusive bargaining representative of unit employees on July 18, 2003. The Union requested bargaining on August 18, 2003, but Respondent refused to do so. The Union thereafter filed an unfair labor practice charge and the General Counsel issued a complaint alleging an 8(a)(5) and (1) violation, which the Board found in a decision issued on December 31, 2003 (340 NLRB 1386).

The Board sought enforcement of its order in the United States Court of Appeals for the Seventh Circuit. The court issued its opinion on May 2, 2005, *NLRB v. Erie Brush & Mfg. Corp.*, 406 F.3d 795 (7th Cir. 2005), enforcing the Board's Order requiring Respondent to bargain with the Union.

B. *The Instant Litigation*

Following the court of appeals' decision, the Union renewed its bargaining demand to Respondent on May 18, 2005. Bargaining commenced on June 28, 2005. Union Vice President Charles Bridgemon was the principal spokesman for the SEIU and Respondent's attorney, Irving Geslewitz, was the principal spokesman for Erie Brush. Oscar Sandoval, a union business representative, also participated in the negotiations. No bargaining unit employee attended any of the meetings.

The parties met on eight occasions between June 28, 2005, and March 31, 2006. They agreed to discuss noneconomic

¹ The General Counsel's December 15, 2006 and Respondent's January 15, 2007 motions to correct the transcript are granted.

issues first.² Respondent and the Union reached tentative agreement on all these issues, except whether the contract would include a union-security clause and whether unresolved grievances should go to arbitration, or conversely through the court system. On March 31, 2006, Bridgemon observed that the parties were at impasse with respect to these two issues.

At the March 31 meeting, Bridgemon suggested the parties go to mediation. On April 5, 2006, Geslewitz informed Bridgemon by email that Respondent would not agree to a union-security clause and that it saw no point in going to mediation since the Union did not have flexibility on this issue.

On May 10, Bridgemon asked Geslewitz via email to begin negotiations on economic issues.³ Geslewitz responded on May 26, that there was no point to meeting further due to the Union's lack of flexibility on the union-security and arbitration issues. Bridgemon replied that he would be willing to discuss the two issues with his principals and suggested that the parties bargain about economic issues and revisit the union-security and arbitration issues later.

On June 1, Geslewitz again reiterated his view that further negotiations were pointless unless the Union authorized Bridgemon to change position with regard to union-security and an arbitration clause. The next day, Bridgemon emailed Geslewitz advising that he had some flexibility on the arbitration issue and reiterated his request for a resumption of negotiations.

On June 16, 2006, Union Counsel Alexia Kulwicz wrote Geslewitz opining that Respondent's refusal to meet further unless the Union agreed to an open shop was a violation of its duty to bargain in good faith. She advised Geslewitz that the Union might file an unfair labor practice charge if Respondent continued to refuse to negotiate further with the Union. On June 22, Geslewitz called Bridgemon to schedule a bargaining session for July 12, 2006.⁴ The parties subsequently postponed the meeting until sometime after July 24, due to Geslewitz' and Union Representative Sandoval's schedules.

C. *The Decertification Petition*

On or about July 5, 2006, bargaining unit employee Miroslava Onofre handed a petition to Respondent's president, Daniel Pecora. This document (R. Exh. 8) contains the names of 18 of the 21 unit employees and states in Spanish that the employees no longer wish to be represented by the Union. Pecora called Attorney Geslewitz, who called Bridgemon to inform him that Respondent was withdrawing recognition from the Union. Geslewitz followed up the telephone call with a letter to this effect (GC Exh. 16), which also canceled the pending resumption of collective-bargaining negotiations.

² The Union's initial proposal contained some economic proposals. On June 28, 2005, Geslewitz suggested discussion of these issues be deferred. Bridgemon, who may have initially suggested that the parties discuss noneconomic issues first, agreed.

³ There was no contact between Respondent and the Union between April 5 and May 10, 2006.

⁴ Geslewitz indicated a willingness to resume negotiations in a June 21 email and had left Bridgemon a telephone message sometime before that email.

Neither the General Counsel nor the Union has challenged the authenticity or validity of the decertification petition and neither presented the testimony of any bargaining unit employees at this hearing. Indeed, the General Counsel's position is that the circumstances under which the petition was developed is totally irrelevant to this case. Nevertheless, I note that on the face of the document, it appears that one or more employees put more than one name on the document in several instances.

It is clear that from the testimony of unit employees Miraslava Onofre and Margarita Salgado that the idea for the decertification petition originated on or about the day on which the Union's certification year expired and not from bargaining unit employees. On the other hand, it appears that the Union had virtually no contact with any bargaining unit employees during the certification year. In light of this and the lack of evidentiary development surrounding the decertification petition, I am compelled to take the petition at face value. The issue before me then is whether Respondent is entitled to withdraw recognition of the Union on the basis of this petition.

Analysis

The General Counsel litigated the instant case solely on the theory that Respondent violated Section 8(a)(5) and (1) in refusing to negotiate on economic issues, unless the Union dropped its demand for a union-security clause. Further, the General Counsel contends that Respondent was not privileged to withdraw recognition due to this violation. He also argues that since Respondent refused to bargain, it is irrelevant as to whether there is any evidence of a causal relationship between Respondent's unfair labor practice and the Union's loss of majority support.

It is black letter Board law that an employer may not condition bargaining over economic issues upon resolution of all noneconomic issues. Thus, an employer may not legally insist that a union agree to an open shop before agreeing to negotiate economic issues, *Vanderbilt Products*, 129 NLRB 1323 (1961), enfd. 297 F.2d 833 (2d Cir. 1961); *John Wanamaker Philadelphia*, 279 NLRB 1034 (1986); *South Shore Hospital*, 245 NLRB 848 (1979), enfd. 630 F.2d 40 (1st Cir. 1980); also see *Eastern Maine Medical Center*, 253 NLRB 224, 245 (1980), enfd. 658 F.2d 1 (1st Cir. 1981); *Northwest Graphics, Inc.*, 342 NLRB 1288 fn. 24 (2004). In the instant matter, after refusing to do so for 6–7 weeks, Respondent agreed to negotiate regarding economic issues in late June, a few days before the expiration of the certification year and the gathering of signatures for the decertification petition. However, no bargaining sessions were held between May 10, 2006, when Respondent unlawfully refused to bargain with the Union and its withdrawal of recognition.

The instant case is governed by the Board's Decision in *Lee Lumber & Material Corp.*, 322 NLRB 175 (1996), and thus the absence of evidence of a causal relationship between the loss of majority support and Respondent's unfair labor practice is, as the General Counsel asserts, irrelevant.

In *Lee Lumber*, supra, the employer violated the Act in refusing to bargain on the basis of a decertification petition tainted by its unfair labor practices. Then the lumber company reconsidered and bargained with the union on five occasions during a

2-month period. Afterwards, it refused to bargain further on the basis of a second decertification petition. It determining that the second refusal to bargain was unlawful, the Board stated:

Not every unfair labor practice will taint evidence of a union's subsequent loss of majority support; in cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support. In cases involving an 8(a)(5) refusal to recognize and bargain with an incumbent union, however, the causal relationship between the unlawful act and subsequent loss of majority support may be presumed. [322 NLRB at 177.]

The Board went on to hold that while it was not adopting a per se rule, it would allow an employer to rebut this presumption in limited circumstances. The Board's rationale in limiting the ability to rebut the presumption was stated in this quotation from its decision in *Karp Metal Products*, 51 NLRB 621, 624 (1943):

[E]mployees join unions in order to secure collective bargaining. Whether or not the employer bargains with a union chosen by his employees is normally decisive of its ability to secure and retain its members. Consequently, the result of an unremedied refusal to bargain with a union, standing alone, is to discredit the organization in the eyes of the employees, to drive them to a second choice, or to persuade them to abandon collective bargaining altogether.

The Board also noted in *Lee Lumber* that lengthy delays in bargaining deprive the union of the ability to demonstrate to employees the tangible benefits to be derived from union representation. Thus, delays in bargaining caused by an employer's unlawful refusal to bargain will foreseeably result in loss of employee support whether or not employees know what caused the delay. Thus, the Board found that the presumption of unlawful taint caused by a general refusal to bargain can only be rebutted by a showing that employee disaffection arose after the employer resumed its recognition of the union and bargained for a reasonable period of time without committing any additional unfair labor practices, 322 NLRB at 177–178.

Respondent argues that it did not violate the Act because the parties had reached a lawful impasse by March 31, 2006, and that therefore it did not violate the Act by refusing to bargain further. Citing *Richmond Electrical Services*, 348 NLRB 1001 (2006), and *CalMat Co.*, 331 NLRB 1084, 1097 (2000), Respondent argues that the deadlock regarding a union-security clause was of "such overriding importance" that it was entitled to refuse further bargaining. However, the Board has never sanctioned the refusal of a party to continue negotiations without ever engaging in bargaining over economic issues. There can be no lawful impasse when a party refuses to engage in negotiations concerning wage rates.⁵

⁵ Respondent's position, as set forth in fn. 9 of its brief, amounts to the proposition that the Union was required to agree to an open shop

Moreover, the cases cited by Respondent are situations in which the employer had bargained over both economic and noneconomic issues, and then implemented its final offer due to a deadlock on a single issue. Respondent's situation is distinguishable. It could not have implemented a final proposal because it had never made one that covered wages.

Respondent has not rebutted the presumption enunciated in *Lee Lumber*, supra. It has not established that the Union lost support of a majority of employees after it notified the Union of its willingness to resume bargaining. Indeed, unlike the employer in *Lee Lumber*, Respondent never resumed bargaining with the Union and thus had never cured its unfair labor practice.

The Board stated in *Lee Lumber* that one of the reasons for its presumption and rule limiting an employer's ability to rebut the presumption was to "to remove from the employer the temptation to avoid its bargaining duties in the hope that delay will undermine employees' support for the union." While there is no way of knowing whether Respondent's employees would have sought to decertify the Union had Respondent not violated the Act, its refusal to bargain certainly delayed the consideration of economic issues until the expiration of the certification year.

Although this record suggests a lack of diligence on the part of the Union in staying in touch with unit employees, it is possible that had the employer engaged in good-faith bargaining with the Union when it requested negotiations on economics, that the Union could have reaffirmed the support of a majority of unit employees by reporting to them progress on such issues. Moreover, one cannot presume that in the face of overall agreement on economic issues that the Union would not rethink its position regarding a union-security clause.

Therefore, Respondent must be required to recognize the Union and bargain in good faith with it for a reasonable period of time of not less than 6 months.⁶ Then, if unit employees still choose to dispense with union representation, they can initiate another decertification petition.⁷

CONCLUSIONS OF LAW

1. Between May 10 and June 21, 2006, Respondent was in violation of Section 8(a)(5) and (1) by refusing to bargain with the Union unless the Union agreed to an open shop.

2. Unit employees' decertification petition of July 3, 2006, was tainted by Respondent's aforesaid violation of the Act.

3. Respondent was therefore not privileged to withdraw recognition of the Union on July 6, 2006, on the basis of the July 3 petition and has been in violation of Section 8(a)(5) and (1) ever since.

before Respondent was required to engage in bargaining over economic issues. There is no Board precedent to support such a proposition.

⁶ *Lee Lumber*, 334 NLRB 399 (2001).

⁷ Conversely, there is no adverse consequence to unit employees, in terms of their free choice, in requiring Respondent to bargain with the Union for an additional reasonable period—other than the fact that Respondent may not be able to make unilateral changes in the terms and conditions of their employment during this period.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Affirmative Bargaining Order

The Board has previously held that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." *Caterair International*, 322 NLRB 64, 68 (1996). In several cases, however, the United States Court of Appeals for the District of Columbia Circuit has required the Board to justify, on the facts of each case, the imposition of an affirmative bargaining order. See, e.g., *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Building Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent Industrial Plastics*, supra, the court stated that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 7 rights; (2) whether other purposes of the Act over-ride the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." 209 F.3d at 738. A balancing of the three factors warrants an affirmative bargaining order.

First, an affirmative bargaining order vindicates the employees' Section 7 rights by providing the employees, who were denied the benefits of collective bargaining by the Respondent's unlawful withdrawal of recognition, with the opportunity to negotiate and execute an initial collective-bargaining agreement. The May 2005 court of appeals order required Respondent to bargain in good faith for at least 1 year in order to vindicate the Section 7 rights of employees who chose union representation in the January 2003 representation election. Respondent failed to accord these employees the benefit of their free choice.

At the same time, an affirmative bargaining order does not unduly burden the Section 7 rights of employees who might oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the Respondent's unlawful withdrawal of recognition and unlawful refusal to bargain.

Second, an affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it gives the parties a reasonable period of time to resume negotiations and to execute a collective-bargaining agreement if those negotiations are successful. It also ensures that the Union will not be pressured, by the possibility of another challenge to its majority status, to achieve immediate results at the bargaining table—results that might not serve the best interests of the bargaining unit employees.

Third, a cease-and-desist order without the temporary bar on challenges to the Union's majority status attendant to an affirmative bargaining order would be inadequate to remedy the Respondent's withdrawal of recognition and refusal to bargain

violations because it would allow another such challenge to the Union's majority status before the taint of the Respondent's previous unlawful withdrawal of recognition dissipated. Allowing another challenge to the Union's majority status without a reasonable period for bargaining would be particularly unfair in light of the Union's need to reestablish its representative status with unit. These circumstances outweigh the temporary impact an affirmative bargaining order will have on the rights of those employees who oppose continued union representation.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, Erie Brush & Manufacturing Corp., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the Union as the exclusive representative of a bargaining unit of all full-time and regular part-time production and maintenance employees at its Chicago facility.

(b) Until a lawful impasse has been reached, failing and/or refusing to bargain with the Union unless the Union agrees to withdraw any specific proposal during collective-bargaining negotiations, including, but not limited to, a union-security clause.

(c) 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, bargain for a reasonable period of time, of not less than 6 months, with the Union as the exclusive representative of its full-time and regular part-time production employees and, an understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days after service by the Region, post at its facility in Chicago, Illinois, copies of the attached notice marked "Appendix"⁹ in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representa-

⁸ 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.

⁹ 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."

tive, 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. 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 May 10, 2006.

(c) 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.

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 condition bargaining with the Union, the Service Employee International Union, Local 1 (SEIU), on the Union's withdrawal of any specific proposals, including, but not limited to a proposal for a union-security clause.

WE WILL NOT fail and refuse to bargain with the Union until either agreement has been reached on a collective-bargaining agreement or a lawful impasse has occurred.

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

WE WILL recognize and, on request, bargain for the Union for a reasonable period of time, of not less than 6 months, until either an agreement has been reached on a collective-bargaining agreement or a lawful impasse has occurred.

ERIE BRUSH & MANUFACTURING CORPORATION