UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

REDBURN TIRE COMPANY,

and

GENERAL TEAMSTERS (EXCLUDING MAILERS), STATE OF ARIZONA, LOCAL UNION NO. 104, AN AFFILIATE OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS.

Cases 28-CA-023527
28-CA-061437

Redburn Tire Company's Answering Brief

Respectfully submitted,

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Redburn Tire Company's Answering Brief

Redburn Tire Company ("Redburn") hereby files its response to the exceptions and supporting brief of the Acting General Counsel ("GC") and in support of the decision by Administrative Law Judge Gerald Wacknov ("ALJ").

I. THERE WAS A LAWFUL BARGAINING IMPASSE

There is a wealth of record evidence supporting the ALJ's factual findings and resultant conclusion that the parties were at a bargaining impasse over Redburn's proposal to eliminate free medical insurance when Redburn declared impasse on May 25, 2011 and implemented its final offer on June 1.[1]

According to both parties, the dominant issue throughout the negotiations had been the free medical insurance benefit for employees with ten or more years of service who had opted for some form of dependent coverage (the "free medical benefit") (T 187, 232, 305-306).[2] Seven of the eight Union employees who had elected medical coverage had been eligible for this free

[1] All dates herein are in calendar year 2011 unless otherwise indicated.

[2] The following designations are used herein: "T" - hearing transcript; "ALJD" - Administrative Law Judge's Decision; "GCB" – Acting General Counsel's Brief in Support of Exceptions to the Decision of the Administrative Law Judge, dated 21 May 2012; "GCX" – Acting General Counsel's Exhibits; "JX" – Joint Exhibits; "RX" – Respondent Redburn's Exhibits.

medical benefit.[3] Indeed, it is undisputed that the medical benefit was the only unresolved issue both times Redburn had presented the Union with a final offer.[4]

The GC makes several arguments, often supported by distortion of the record evidence, to seek reversal of the ALJ's findings and conclusions on impasse. Consider:

1. The GC argues that the parties met only ten times before Redburn had declared impasse. (GCB4) The record demonstrates, however, that the parties had met thirteen times during that period, including eleven formal meetings and two meetings without the full Union committee present. (T 24, 167; JX1) The ALJ found that the parties had met "approximately" ten times during that period. (ALJD 2)[5]

2. The GC contends that Redburn had not modified its initial proposal on the free medical benefit by the time it presented its first "final" offer on March 1. (GCB9) The same, however, can be said of the Union. On that date, the Union was still clinging to its initial proposal to expand eligibility for the benefit by making it available to all employees with three or more years of service. (GCX19) Furthermore, the Union had been adamant that it was not going to voluntarily give up the prior arbitration victory it had won over this same issue arising out of the parties' prior negotiations. Union spokesman Jerry Ienuso ("Ienuso") verbally and in writing

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[3] None of the three employees who had waived medical coverage had ten years of service or would reach that level under a new three year contract covering through the end of 2013. (GCX2)

[4] It is undisputed that the language in Article 23(A)(2) of the contract (JX2) historically had been applied such that no premium had been paid by employees with ten or more years of service who had opted for any of the three forms of employee plus dependents coverage, i.e., that employees' own coverage was part of the free benefit.

[5] The General Counsel also contends at GCB4 that one of Redburn's two co-owners, who were its bargaining committee, had been absent for one-third of the meetings. Actually, one was absent for each of the first two formal bargaining sessions held before May 25 and the March 29 session. (JX1) The absence of one member of Redburn's committee at three of the thirteen meetings certainly cannot be said to demonstrate that the parties were not at impasse on May 25 or June 1.

throughout the negotiations, dubbed Redburn's proposal "retaliation" for the Union's arbitration victory and Redburn's insistence on the issue as "bad faith" bargaining (GCX20, tab 19; GCX40, p. 2; T 187-188, 229).

3. The GC's brief is replete with arguments that the Union had bargained in good faith and Redburn had not. There is, however, no allegation in the complaint that Redburn engaged in surface bargaining or otherwise bargained in bad faith. Nor could there reasonably be such an allegation on the record facts. When Redburn presented its "final" offer on March 1, the parties had reached agreement on all of the numerous proposals (including wage increases), except for employee medical insurance premiums. (GCX18, tab 5, p. 1; T 179-180) When, following the first failed ratification attempt on March 15, the Union proposed additional wage increases and made a new proposal on personal days, Redburn accepted those proposals again leaving only the medical issue in dispute. (GCX18, tabs 6, 7; GCX19, tab 5; T 204)

Furthermore, following the first failed ratification attempt, Redburn co-owner Don Leffler ("Leffler") met one-on-one with Ienuso at the suggestion of the FMCS mediator and softened Redburn's proposal to eliminate the free medical benefit by phasing in the employee premium sharing so that the bargaining unit employees would "catch up" with the non-unit employee premiums over the life of a new three-year contract rather than all at once. (T 209, 213, 306-307)

At the April 11 bargaining session, Redburn again softened its proposal on the free benefit by phasing in employee premiums so that the bargaining unit employees would, *in three years*, be paying the same premiums Redburn's non-unit employees were *currently* paying without adjustment for future premium increases that non-unit employees would be expected to absorb over the three-year period. (GCX18, tab 6)

In essence, the GC is simply contending that, because the parties failed to reach agreement on Redburn's proposal to eliminate the free medical benefit, Redburn must have intended that result from the outset and, therefore, bargained in bad faith. The record simply will not support that contention.

4. The GC contends that the Union's change in its medical premium proposal on March 29 demonstrated that the parties were not at impasse when Redburn declared impasse on May 25 or implemented its final offer on June 1. (GCB10-11) The parties met three times after March 29 and before Redburn declared impasse and the developments at those meetings amply demonstrated the existence of impasse over the free medical benefit issue. Movement by the Union on March 29 certainly does not preclude the possibility of impasse two months and three meetings later.

Furthermore, the changes made by the Union in its medical proposal on March 29 were not of a nature that made resolution of the free medical benefit issue more likely. On March 29, the Union dropped its initial proposal for free medical coverage after three years of employment for all employees with covered dependents and returned to the ten-year qualifier in the old contract – the exact provision Redburn had been insisting be deleted. (GCX19, tab 5; T 180-182)

The Union also proposed a three-year escalating premium schedule for employees who did not qualify for the free medical benefit that was identical to the escalating schedule in the old contract. In other words, the Union was proposing to regressively revert to the 2007 employee medical premium contribution when the new contract was to take effect.[6] (JX2, Art. 23; GCX19,

[6] Local 104 did propose to increase the employee-only premiums by $4.00 over the 2007-2009 schedule, but the $4 monthly increase would have only matched in 2011 what the lone employee with employee-only coverage had been paying since 2009 under the old contract. (JX2, Art. 23; GCX19, tab 5)

tab 5) This, of course, was not conducive to reaching agreement on medical premiums, generally, and had no relationship to the overriding issue, i.e., free medical coverage for more senior employees with covered dependents.

The Union also added by hand to its March 29 proposal, "Over 10 years each employee will pay 'employee only' costs." (GCX19, tab 5, 1st document, which is the same as GCX43) The Union later "cleaned up" this proposal and presented it at the April 11 meeting, changing this language to say "Employees with ten (10) years of service or greater will pay 'employee only' costs." (GCX19, tab 5, 2nd document; T 203-205) This ambiguous language does not identify to which of the optional forms of coverage it applies. The GC seems to contend that this was meant to apply to all employees, including those with more than ten years of service with covered dependants (GCB10 and 15), but that is neither consistent with Ienuso's testimony that the Union was still proposing "free" coverage for the more senior employees (T 219) nor the Union's subsequent clarifying email that it meant for current employees to be "red-circled" so that new hires would not have the "10-year dependent benefit." (GCX19, tab 8) That the GC's interpretation of the Union's proposal is erroneous is further underscored by the fact that the Union was not proposing deletion or even modification of the free medical benefit language in the contract. In reality, the Union's proposal that employees would pay the "employee-only" premium would have affected only the one employee on employee-only coverage.

5. The GC erroneously states that the premium schedule in Redburn's April 11 proposal was for the optional higher deductible plan. (GCB11) There is no evidence to support that and a comparison with either the old contract language or Redburn's prior proposals shows that the premium schedule was for the regular, not the higher deductible, options. A schedule of premiums for the higher deductible options was not in the old contract or in any of the proposals

made by either party for the new contract.

6. The GC states that Redburn's April 28 proposal "continued the same terms" as its April 11 proposal. (GCB11) The GC seems to suggest that this is evidence of bad faith by Redburn. As noted by the ALJ, however, Redburn's April 28 proposal was not presented as an all-or-nothing proposal, as the April 11 "package" had been. (ALJD5) Redburn dropped the package designation and expressly pointed that out in pre-prepared comments it read to the Union at the table. (GCX20, tab 16; T 310) Elimination of the package designation on April 28 meant that, with no strings attached, Redburn was then accepting the Union's enhanced wage proposal and offering a premium phase-in schedule that would not achieve parity by the end of the new contract[7] with the premiums paid by Redburn's non-unit employees.

7. The GC contends that following, and because of, a heated discussion at the table on April 28, Redburn "turned its April 11 proposal into a firm and final offer." (GCB12) The undisputed record evidence is to the contrary and the ALJ so found. (ALJD 6, at n. 6)

While Redburn presented the Union with a final offer at the April 28 meeting after the verbal altercation, the evidence is uncontroverted that Redburn had planned to make a final offer at the meeting and Leffler, reading from a statement he prepared before the meeting, informed the Union that the offer was final. (GCX20, tab 16; T 311)[8]

Furthermore, even had Redburn decided to convert its April 28 offer into a final one as the GC contends, that is neither evidence of bad faith nor could it undermine the ALJ's conclusion that an impasse existed one month later. Additionally, the GC here is directly

[7] Both parties had been proposing a three-year contract. (T 307)

[8] At the suggestion of FMCS mediator Peter Cinquemani, who was substituting for Ron Collotta that day, Leffler wrote at the top of the copy of the proposal he handed to Jerry Ienuso, "this is a firm and final proposal." (GCX51; T 310) He did not make the same notation on the copies he presented to the other members of the Local 104 bargaining committee. (T 310)

attacking a credibility resolution made by the ALJ without even attempting to satisfy the stringent test of *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F. 2d 362 (3d Cir. 1951).

8. Following the April 28 meeting and before the Union held a ratification vote on the final offer presented by Redburn at that meeting, Ienuso asked Redburn's two co-owners to attend a meeting at the Union hall with Andy Marshall, Local 104's Secretary-Treasurer (highest ranking officer) and Ienuso's boss. The GC's factual representations about this critical meeting are inaccurate and incomplete. The undisputed evidence simply will not support the GC's contention that Marshall was "flexible and open to creative ideas" and did not "express a rigid position." To the contrary, as the ALJ found (ALJD 6), Marshall told Leffler and Chastain that: (1) the Union would not agree to concessions that would reduce net take home pay;[9] (2) the Union would not recommend Redburn's proposal at the upcoming ratification meeting; (3) there would be no new contract unless Redburn changed its position on the free medical benefit; and (4) the Union intended to tell Redburn's customers that its ability to provide them with tires might be disrupted. (T 313-316) There was absolutely no give-and-take discussion of the sole open issue. Redburn responded to Marshall's diatribe by stating that, despite what Marshall had said, the Union had Redburn's final offer and Redburn would not further compromise its position on the free medical benefit. (T 315) Ienuso, while present, deferred to Marshall throughout the meeting and did not contribute anything meaningful. Indeed, Ienuso did not testify about what

[9] Under Redburn's final offer, five of the eleven bargaining unit employees would have had greater take-home pay than previously. The remainder would have seen an average decrease of approximately 1% in their take-home pay at the commencement of the new contract. (RX1, p. 2)

had been said at the May 9[10] meeting and Marshall did not testify at all at the hearing.

As they drove back to their office after the meeting with Marshall, Leffler and Chastain discussed Marshall's statements and acknowledged to each other that those statements meant that there was not going to be a new contract. (T 316-317, 336)

In a transparent attempt to infuse an appearance of reasonableness in Marshall's May 9 statements, the GC disingenuously recites considerable detail from Ienuso's "notes." (GCX12-13) Those notes, however, were not notes of the May 9 meeting but, instead, had been prepared by Ienuso before the meeting for Marshall's eyes. (T 115-116; GCX52)

There can be no doubt that the parties were at impasse as of May 9 over the free medical benefit. The Union had drawn a line in the sand – it would not agree on a new contract unless Redburn changed its position on the issue and Redburn had told the Union that it would not do so again.

Ienuso later reiterated the Union's intransigence on the issue, contrary to the GC's characterization of the Union's position as one of flexibility. On May 20, he notified Redburn that its final offer had been rejected by the membership and Leffler, by letter dated May 25, advised Ienuso that the parties' unwillingness to compromise on the medical premium issue meant that they had reached impasse, that Redburn would not change its position on it, and that Redburn would implement its last offer effective June 1. Leffler expressly encouraged Ienuso to nevertheless work with Redburn on maintaining the parties' relationship and requested that the Union call another ratification meeting to re-vote the Redburn final offer. (GCX54) Ienuso responded on June 1 with a letter which concluded with, "We do not vote the same offer twice as

[10] The GC excepts to the ALJ's apparent typographical error on p. 12, at line 14, of his decision where he states that this meeting was held on May 29. The ALJ earlier correctly found that this meeting had occurred on May 9 as the undisputed evidence shows. (T 313-314; ALJD p. 6, l. 9)

you suggested . Should the Company return to negotiations and the offer is changed another vote would be taken." (GCX55) In other words, as Marshall had stated previously, Ienuso proclaimed that the Union would not ratify a new contract unless Redburn backed down from its proposal to eliminate the free medical benefit, which proposal Ienuso's letter again characterized as "pure retaliation" for the prior arbitration award. (GCX55) See, also, Ienuso's testimony. (T 238, 245)

In determining whether an impasse exists, the Board considers several factors: "[t]he 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." *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1969). Here every factor underscores the existence—as of May 25th—of an impasse between the parties:

- The length of negotiations: The parties met 13 times between December 10, 2010 and May, 25, 2011 (a period of nearly six months). This was more than sufficient to reach impasse. *California Pacific Medical Center*, 356 NLRB No. 159 at p. 6 (2011) (five months was "a sufficient amount of time for the parties to discuss whatever they wanted to discuss"); *ACF Industries LLC*, 347 NLRB 1040 (2006) (impasse reached where the parties "engaged in hard but good-faith bargaining in 12 bargaining sessions over a 2-month period," notwithstanding union statement that it had more proposals to offer).
- Bargaining in good faith. The complaint does not allege surface bargaining and the record amply demonstrates that Redburn's owners were always willing to meet, made many compromises and tentative agreements and produced all requested information

even if not legally obligated to do so. *See, e.g., G. Zaffino & Sons, Inc.*, 275 NLRB 456 (1985) (employer bargained in good faith where it was willing to meet and confer with union, exchanged proposals, and modified its position). Redburn's good faith is also underscored by its agreement to raise wages after the first failed attempt at ratification and its agreement to pay vacation pay to the strikers.

- The importance of the issue as to which there is disagreement. Both parties testified that the central issue throughout the negotiations, and the only open issue on May 25, was employee contributions to medical premiums. (T 204, 215-216, 305-306) *California Pacific Medical Center*, 356 NLRB No. 159 (2011) (affirming conclusion that parties were at impasse where, among other things, union stubbornly adhered to its healthcare proposal while professing to be flexible and where parties remained far apart on the key issue of healthcare); *E.I. du Pont de Nemours & Co.*, 346 NLRB 553 (2006) (employer did not violate the Act when it declared impasse where parties were deadlocked on two core issues of health care premiums and overtime pay); *Quirk Tire*,330 NLRB 917, 925 (2000), enfd. in part 241 F.3d 41 (1st Cir. 2001) (impasse over medical insurance).
- The contemporaneous understanding of the parties as to the state of negotiations: The parties knew they were at impasse. The head of the Union, Marshall, told Redburn that the Company would have to compromise further on the free medical benefit issue if there was going to be a new contract. Ienuso told Redburn that the Union would not hold another ratification meeting unless Redburn backed off its position. Redburn repeatedly told the Union that it would not compromise further on that issue. As such, "neither party, at that point, had anything further to offer." *California Pacific Medical*

Center, supra, at p. 7. *See, also, AMF Bowling Co.,* 314 NLRB 969, 978 (1994) (impasse reached at a point in time when further bargaining would be futile).

Cases cited by the GC are readily distinguishable. The principle case upon which the GC relies on the impasse issue is *Laurel Bay Health & Rehabilitation Center*, 353 NLRB 232 (2008), which actually supports the ALJ's decision. There, during what would become the parties' last bargaining session, the Union advised that it would be presenting a counter proposal on medical insurance and that it would consider adopting the company's medical plan for non-unit employees, and the parties agreed to meet again. Thereafter, however, the employer refused to continue bargaining, declared impasse and implemented. The Board concluded that there had been no impasse. By contrast, immediately before Redburn declared impasse, Marshall, in no uncertain terms, advised that there would be no contract unless Redburn backed down on free medical and there was no agreement to meet again. Leffler's and Chastain's conclusion that an impasse had been reached was clearly warranted.

Similarly, *Newcor Bay City Division*, 345 NLRB 1229 (2005), is inapposite. There, after only one month of bargaining, the employer presented a new offer and simultaneously declared impasse while announcing its intent to implement the next day.

In *Titan Tire Corp.*, 333 NLRB 1156 (2001), the employer made numerous 8(a)(1) threats during the course of bargaining and unilaterally transferred out unit work, thereby reducing the bargaining unit. The Board found that the employer's unremedied unfair labor practices contributed to the parties' failure to reach agreement on a new contract and, therefore, that a good-faith impasse had not occurred.

The GC has cited no case which suggests that there had not been a good faith impasse here.

9. In an effort to avoid the obvious conclusion that the parties were at impasse when Redburn implemented its offer on June 1, the GC intimates (but never quite says) that implementation of Redburn's proposal to eliminate the free medical benefit was not effective until deductions would be taken for employee premiums on the June 9 paychecks. (GCX15) [11] Leffler's May 25 letter clearly stated that implementation would occur on June 1 (GCX54) and, on June 2, Leffler confirmed to the Union that implementation had occurred the day before. (T 261, 283) Even the General Counsel's own witnesses recognized that implementation had occurred on June 1 including both the higher wages and elimination of the free medical benefit. (GCX20, tab 23; GCX77, p. 1; T 261, 283) Paydays were weekly and reflected any applicable deductions for medical premiums. (T 37)

The GC's intimation is designed to render the parties' June 2 meeting, requested by the Union, relevant to the question of impasse. Obviously, developments on June 2 could not alter whether there had been an impasse on May 25 or June 1, so the GC argues that, even had there been an impasse before June 2, the Union's June 2 proposal on the free medical benefit broke that impasse. (GCB32) This postulation is sheer folly as the June 2 change in the Union's proposal on the free medical benefit was meaningless and would be of no consequence during the life of a new contract or several contracts thereafter. This modification would have no impact during the life of the next contract since all of the employees with free medical coverage

[11] Inconsistently, the GC concedes in footnote 5 of his brief that implementation occurred mid-payroll week (i.e., June 1) but also states that there was not "full" implementation until the employees received a full week's deduction for medical premium with the paychecks they received on June 16. (GCB17).

already had more than 12 years of seniority. (GCX2; T 318-319)[12] Leffler, by reply email, rejected the Union's June 2 proposal, stated that it represented no change in the Union's position, and reminded Ienuso that Redburn had already said it would not change its position. (RX5)

Similarly, the GC argues that another change in the Union's position on the free medical benefit, made at a bargaining session six weeks after implementation of Redburn's offer, somehow demonstrates that there had been no impasse on June 1. (GCB20) The change made by the Union to its position on the free medical benefit on July 14 was also immaterial and could be of no consequence for many years to come, thereby again demonstrating the Union's intransigence on the issue for purposes of any new contract and undercutting the GC's contention that the Union had remained flexible on the free medical benefit issue.

On July 14, the Union again proposed to concede the sleeves out of its vest. Local 104 verbally (and later by email) proposed that, if Redburn would agree to continue the free medical benefit for current employees with more than ten years of service, the Union would accept Redburn's phase-in schedule for medical premiums for employee-only coverage. Future hires, however, would not have the free medical benefit. (GCX19, tabs 7, 8; T 331-332, 138-139)[13] Again, the cosmetic change in the Local 104 position was without substance and had no realistic prospect of breaking the deadlock. (T 331-332) As Leffler had explained to Ienuso on multiple occasions and in his July 19 response to the Union, the cost savings associated with Redburn's

[12] The Union also included in its June 2 proposal the previously agreed upon provisions on wages and personal days. (T 224) Ienuso testified that he continued to include these items after they had previously been accepted by Redburn "for no reason." (T 224)

[13] The Union corrected its initial email, which had concluded with a statement that all employees would pay toward medical coverage, by a second email that same day which stated that current employees would be "red-circled" and only future hires would not have free medical coverage after 10 years of service and would, therefore, pay toward dependent coverage regardless of length of service. (GCX19, tabs 7, 8)

medical proposal was directly tied to the elimination of the free medical benefit for the employees with more than 10 years of service who had dependent coverage. (GCX64) The Union could not have reasonably believed that its concession on the medical premium for one employee would induce Redburn to abandon what had been its principal objective from the beginning of the negotiations. Similarly, the Union's proposal that future hires would not be eligible for the free medical benefit could not possibly be of any value to Redburn for ten years after such future hirings since the benefit, by definition, was available only to employees with ten or more years of service. (GCX64)

The record evidence amply supports the ALJ's findings and conclusions that Redburn's May 25 declaration of impasse and implementation of its final offer on June 1 were lawful. Accordingly, the GC's Exception No. 3 should be rejected. GC Exceptions Nos. 4 and 5, therefore, must also fail as they are premised upon a conclusion that the June 1 implementation had been unlawful.

II. REDBURN'S MAY 25 LETTER WAS NOT AN UNLAWFUL THREAT

The GC's Exception No. 1 also fails because the ALJ correctly concluded that the parties were at impasse when Redburn sent its May 25 letter.

The cases cited by the GC are inapposite. In *Eagle Transport Corporation*, 338 NLRB 489 (2002), no violation was found where the employer had already been discussing a work schedule change with its employees before the union won a representation vote and the employer abandoned its plan to implement the change before the first bargaining session. In *ABC Automotive Products Corp.*, 307 NLRB 248 (1992), the employer announced and implemented substitution of its proposed medical plan for the pre-existing union plan and told striking employees they would be permanently replaced if they remained on strike. The Board, finding

no impasse, rejected the employer's argument that it was merely communicating a final offer that could be implemented once impasse was reached.

Furthermore, the GC does not explain how the May 25 letter, which was addressed and sent only to Ienuso, could have threatened statutory employees in violation of 8(a)(1).

III. THE SIGN WAS LAWFUL

The GC's Exception No. 2 must also be rejected. The ALJ correctly concluded that the sign, which merely informed striking employees of the number of replacement applications that had been received by Redburn, had not been unlawful. *River's Bend Health & Rehabilitation Service*, 350 NLRB 184, 184-187 (2007), cited by the ALJ (ALJD 13) is only one of numerous Board decisions standing for the proposition that an employer may inform employees about the possibility it may hire striker replacements provided that the employer's information does not misrepresent employees' reinstatement rights. *See, e.g., Eagle Comtronics,* 263 NLRB 515, 515-516 (1983) ("an employer does *not* violate the Act by truthfully informing employees that they are subject to permanent replacement in the event of an economic strike); *Quirk Tire, supra*, at 926 ("The Board has long held that an employer may address the subject of striker replacement without fully detailing the protections numerated in the Act, so long as it does not threaten that, as a result of a strike, employees will be deprived of their rights in a manner inconsistent with those detailed in *Laidlaw.*"); *Sierra Bullets LLC,* 340 NLRB 242 (2003) ("the Respondent did not violate Section 8(a)(1) of the Act, as alleged, by informing its employees that they could be permanently replaced while on strike.").

Nothing in the sign addressed reinstatement rights, much less misrepresented the rights of strikers. The sign simply made a factual statement. Contrary to the GC's erroneous characterization (GCB24), the sign did not even suggest whether any replacements, if hired,

would be permanent or temporary. Furthermore, unlike cases cited by the General Counsel where employers misrepresented the rights of strikers to return to work in an effort to discourage the commencement of an economic strike, the employees here were already on strike.

Sygma Network Corp., 317 NLRB 414 (1995), cited by the GC, does not support his contention. The Board there found that the employer's letter to employees advising that they could be permanently replaced had been unlawful "[i]n the total context" including a statement in the same letter that a striking employee "could lose your job" and amidst unlawful threats of plant closure, reprisals for selecting the union, and that bargaining would not improve terms and conditions. In *Trading Port, Inc.*, 219 NLRB 298 (1975), the employer's threat to "permanently" replace strikers was unlawful because the strike was an unfair labor practice strike.

The General Counsel's Exception No. 2 is utterly without merit and is contradicted by clear and abundant Board authority.

IV. POTPOURRI

1. Redburn renews its motion, made in footnote 9 on p. 7 of its brief to the ALJ and not specifically ruled on by the ALJ, to correct the obvious error in the transcript where, on p. 224, l. 9, "not" should be "now." See the Union's notes at GCX56, GCX20, tab 23, GCX77, p. 1. Accordingly, Redburn hereby moves that line 9 on p. 222 of the transcript be amended to read, "… they were now charging the employees the -- for dependent…."

2. Redburn hereby incorporates its brief to the ALJ in its entirety.

3. Redburn objects to participation in the Board's decision in this case by members ostensibly appointed to the Board as recess appointments when the Senate had not, in fact, been in recess. The Board, therefore, lacks the necessary quorum.

V. CONCLUSION

Redburn respectfully submits that the ALJ's decision must be sustained in all respects based on the record evidence and the ALJ's credibility findings and the GC's Exceptions Nos. 1 through 5 must be rejected in their entirety. GC Exception No. 6 merely seeks to correct an inadvertent typographical error.

DATED this 1st day of June 2012.

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I hereby certify that on June 1, 2012, I electronically transmitted the attached document to the National Labor Relations Board using the NLRB E-Filing System and transmitted a copy via email to:

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