

Carey Salt Company, a subsidiary of Compass Minerals International, Inc. and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union and Local Union 14425. Cases 15–CA–019704 and 15–CA–019738

September 12, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On August 1, 2011, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The Respondent filed exceptions with supporting argument. The Acting General Counsel filed an answering brief and cross-exceptions with supporting argument. The Charging Party filed a brief in opposition to the Respondent's exceptions, as well as cross-exceptions with supporting argument. The Respondent also filed a reply brief to the Acting General Counsel's answering brief and answering brief to the Acting General Counsel's cross-exceptions.

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

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions, as modified, and to adopt the recommended Order as modified and set forth in full below.³

This case presents numerous unfair labor practice allegations arising from the parties' negotiations for a collec-

tive-bargaining agreement to succeed one that expired on March 31, 2010.⁴ We affirm the judge's findings that the Respondent violated Section 8(a)(5) of the Act by: (1) implementing its final offer on March 31 when the parties were not at a valid impasse in bargaining;⁵ (2) failing to bargain in good faith from March 31 through April 30;⁶ (3) unilaterally implementing new operating procedures on May 22; (4) presenting the Union with a regressive bargaining proposal on May 25;⁷ (5) conditioning bargaining over mandatory subjects of bargaining on the Union's concessions to the Respondent's bargaining demands on June 3 through 22; and (6) implementing another final offer in the absence of impasse on June 27.

We also affirm the judge's findings that: (1) the Respondent's March 31 implementation of its final offer caused an unfair labor practice strike which began on April 7 and lasted until June 15; (2) the strike was prolonged by the Respondent's unfair labor practices on May 25 and June 3; (3) the Respondent violated Section 8(a)(1) by threatening to permanently replace unfair labor practice strikers;⁸ (4) the Respondent violated Section 8(a)(3) by failing to reinstate former unfair labor practice strikers promptly upon receipt of their offer to return to work; (5) the Respondent violated Section 8(a)(5) by changing the seniority-based recall procedures

⁴ All dates are 2010, unless otherwise indicated.

⁵ In finding no valid impasse, we do not rely on the judge's finding that, by giving the Union a regressive proposal on March 19, the Respondent effectively ensured that no meaningful negotiations could follow. Nor do we find that proffering regressive proposals is per se unlawful. Instead, we find that the proposal here was part of the Respondent's overall plan to frustrate agreement, and thus there was no lawful impasse under these circumstances.

We further agree with the judge that, even if there had been an impasse on the morning of March 31, the impasse was broken by the Union's response throughout the day. Member Hayes finds it unnecessary to pass on this alternative ground for finding no impasse.

⁶ Member Hayes finds it unnecessary to pass on this issue.

⁷ As to the regressive bargaining violation, we base our finding on evidence that the Respondent presented its proposal in an intentional effort to frustrate agreement. Regarding the violation based on conditioning bargaining, in addition to the Respondent's conduct being unlawful in itself, its refusal to bargain unless the Union first agreed on its core issues frustrated reaching agreement. We thus find that, by these unlawful actions, the Respondent further violated Sec. 8(a)(5) by engaging in overall bad-faith bargaining in May and June.

Member Hayes agrees that the Respondent's offering its regressive proposal and conditioning bargaining on the Union's acceptance of the Respondent's demands demonstrates overall bad-faith bargaining, and finds it unnecessary to pass on whether the Respondent's conduct regarding each of these matters constitutes a discrete violation of Sec. 8(a)(5), as alleged in the complaint and found by his colleagues.

⁸ The Respondent did not except to this finding. We find it unnecessary to pass on contentions by the Acting General Counsel and the Charging Party that the Respondent's failure to bargain from March 31 through April 30 was an independent cause of the unfair labor practice strike or that the threats to permanently replace strikers were an additional factor prolonging that strike.

¹ Both the Acting General Counsel and the Charging Party contend that several of the exceptions filed by the Respondent should be disregarded or overruled because they fail to conform to Sec. 102.46 of the Board's Rules and Regulations. We find that the exceptions are in substantial compliance with the requirements of that section.

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 1083 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ The Acting General Counsel and the Charging Party contend that the Respondent should be ordered to reinstate any bargaining unit employees who may have lost their employment as a result of the Respondent's unlawful unilateral changes or their effects. We find merit in that contention, and we shall modify the Order accordingly, and also to provide for make-whole relief to be computed in the same manner as that for previously reinstated unfair labor practice strikers, as set forth in the judge's decision.

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 also modify the recommended Order and notice to conform to the Board's standard remedial language and the violations found.

for unit employees when recalling former strikers to work; (6) the Respondent violated Section 8(a)(5) by continuing to honor job offers it made to replacement workers after the strike; and (7) the Respondent violated Section 8(a)(5) on October 21 when it unilaterally changed the time period for unit employees to accept an offer of re-employment.

In sum, with the minor analytical differences previously noted, we affirm all of the judge's unfair labor practices save one. We do not adopt her finding that the Respondent violated the Act since May 25 by insisting on bargaining proposals that leave the Union without any representational rights and employees in a worse position than if they did not have the Union as their collective-bargaining representative. Although the Respondent's May 25 proposal and those that followed offered dramatically less to the Union than in the Respondent's prior offers and in the parties' expired collective-bargaining agreement, they still maintained provisions that allowed the Union to represent its members. For example, the proposals included set wages, benefits, and grievance and arbitration provisions. Taken as a whole, the proposals cannot fairly be described as leaving the Union and the employees it represents with substantially fewer rights and less protection than would be provided by law without a contract. See *Regency Service Carts, Inc.*, 345 NLRB 671, 675 (2005); *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487-488 (2001), enf'd. 318 F.3d 1173 (10th Cir. 2003).

ORDER

The National Labor Relations Board orders that the Respondent, Carey Salt Company, a subsidiary of Compass Minerals International, Inc., Cote Blanche, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge because they engaged in an unfair labor practice strike.

(b) Failing and refusing to reinstate employees because they engaged in an unfair labor practice strike.

(c) Failing and refusing to bargain in good faith with United Steel, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union and Local Union 14425 (the Union) as the exclusive collective-bargaining representative of employees in the following appropriate unit:

All production and maintenance employees, including storeroom clerks, truck drivers, and dock employees employed at the Cote Blanche Mine.

(d) Unilaterally changing the terms and conditions of employees in the absence of a valid impasse.

(e) Conditioning bargaining over mandatory subjects of bargaining on the Union's concessions to Respondent's bargaining demands.

(f) Presenting the Union with regressive bargaining proposals for the purpose of frustrating the negotiation of a collective-bargaining agreement.

(g) Refusing to use seniority as the basis for recalling unit employees who engaged in an unfair labor practice strike.

(h) Continuing to honor job offers made to replacement workers after the end of an unfair labor practice strike.

(i) Unilaterally changing the seniority-based recall procedure for unit employees.

(j) Unilaterally changing the time period for unit employees to accept offers of reinstatement.

(k) 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 with the Union as the exclusive representative of the employees in the above unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Upon request by the Union, restore the terms and conditions of employment of unit employees as they existed prior to March 31, 2010, and continue those terms in effect until the parties have bargained to a new agreement or a valid impasse, or the Union has agreed to changes, as provided in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, offer to reinstate to their former jobs any bargaining unit employees who may have lost their employment because of the Respondent's unlawful unilateral changes or their effects or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges of employment, discharging, if necessary, any replacements hired in the interim.

(d) Make the unit employees whole for all losses, including loss of employment, they may have suffered as a result of the unlawful unilateral changes to terms and conditions of employment that were implemented beginning on or about March 31, 2010, as provided in the remedy section of the judge's decision.

(e) Within 14 days from the date of this Order, offer to reinstate all former unfair labor practice strikers to their former jobs, or if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges of employment, discharging, if necessary, any replacements hired during the strike.

(f) Make all former unfair labor practice strikers whole for any loss of earnings or other benefits that they may have suffered by reason of Respondent's failure to promptly offer them reinstatement after they unconditionally offered to return to work.

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

(h) Within 14 days after service by the Region, post at its Cote Blanche, Louisiana facility, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 15, 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 March 31, 2010.

(i) 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 at-

testing 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 threaten our employees with termination because they engage in an unfair labor practice strike.

WE WILL NOT refuse to reinstate employees who have engaged in an unfair labor practice strike.

WE WILL NOT refuse to bargain in good faith with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union and Local Union 14425 (the Union) as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All production and maintenance employees, including storeroom clerks, truck drivers, and dock employees employed at the Cote Blanche Mine.

WE WILL NOT unilaterally implement bargaining proposals and change terms and conditions of employment in the absence of a valid impasse in bargaining.

WE WILL NOT condition bargaining over mandatory subjects of bargaining on the Union's concessions to our bargaining demands.

WE WILL NOT make regressive bargaining proposals in order to frustrate good-faith bargaining.

WE WILL NOT unlawfully refuse to use seniority to recall our employees who have engaged in an unfair labor practice strike.

WE WILL NOT continue to honor job offers we made to replacement workers after the end of an unfair labor practice strike.

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."

WE WILL NOT unilaterally change the seniority-based recall procedure for our employees.

WE WILL NOT unilaterally change the time period for our employees to accept an offer of reemployment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, upon request by the Union, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the above bargaining unit.

WE WILL, upon request by the Union, retroactively rescind any and/or all terms that we unilaterally imposed beginning on March 31, 2010, and restore, honor, and continue the wages, hours, terms, and conditions of employment that were set forth in the collective-bargaining agreement that expired on March 24, 2010, and WE WILL maintain the restored terms and conditions of employment until such time as the parties complete a new collective-bargaining agreement, good-faith bargaining leads to a valid impasse, or the Union agrees to such changes.

WE WILL, within 14 days from the date of this Order, offer to reinstate to their former jobs any bargaining unit employees who may have lost their employment because of our unlawful unilateral changes or their effects or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges of employment, discharging, if necessary, any replacements hired in the interim.

WE WILL make bargaining unit employees whole for all losses, including loss of employment, suffered as a result of our unlawful unilateral changes.

WE WILL, within 14 days from the date of the Board's Order, offer to reinstate all former unfair labor practice strikers to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges of employment, discharging, if necessary, any replacements hired during the strike.

WE WILL make the former strikers whole for losses resulting from the failure to reinstate them after their unconditional offer to return to work.

CAREY SALT COMPANY, A SUBSIDIARY OF
COMPASS MINERALS INTERNATIONAL, INC.

Stephen C. Bensinger, Esq. and *Andrew T. Miragliotta, Esq.*,
for the Acting General Counsel.

Stanley E. Craven, Esq. and *Shawn M. Ford, Esq.*, of Overland Park, Kansas, for the Respondent.

Louis L. Robein, Esq. and *Julie Spencer, Esq.*, of Metairie, Louisiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. The hearing in this case was opened telephonically on March 21, 2011. The hearing resumed on March 23, 2011, in New Iberia, Louisiana, and continued on March 24, 25, 28, and 29, 2011. The charge in Case 15-CA-019704 was filed by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy Allied Industrial and Service Workers International Union and Local Union 14425 (the Union) on August 6, 2010. The charge in Case 15-CA-019738 was filed by the Union on September 1, 2010, and amended on October 29, 2010. Based upon the allegations contained in Cases 15-CA-019704 and 15-CA-019738, the Acting Regional Director for Region 15 of the National Labor Relations Board (the Board) issued an order consolidating cases, consolidated complaint and notice of hearing on December 30, 2010.

The complaint alleges that Carey Salt Company, A Subsidiary of Compass Minerals International, Inc.¹ (Respondent) engaged in various actions in violation of Section 8(a)(5), (3), and (1) of the National Labor Relations Act (the Act). Generally, the complaint² alleges that Respondent engaged in a series of unlawful actions over the course of collective bargaining with the Union in March, April, May, and June 2010, and that some of these initial unlawful actions resulted in employees engaging in an unfair labor practice strike from April 7, 2010, to on or about June 15, 2010. Furthermore, the complaint alleges that Respondent's unlawful actions prolonged the strike. The complaint additionally alleges that Respondent implemented two final bargaining proposals without bargaining with the Union to a good-faith impasse. The complaint further alleges that Respondent has not only failed and refused to reinstate the employees who engaged in the strike to their former positions of employment, but has also refused to use seniority to recall

¹ The parties stipulated that Respondent is also referred to as North American Salt Company and/or some variation or abbreviation of that name, such as North American Salt or NASC.

² On the second full day of the hearing, counsel for the Acting General Counsel moved to amend the complaint to allege that on or about May 22, 2010, Respondent failed to bargain in good faith by implementing its May 22, 2010 operating procedures and unilaterally changing terms and conditions of employment. On March 29, 2011, the Acting General Counsel filed a motion to amend the complaint to allege that on or about April 30, 2010, Respondent, acting through Victoria Heider threatened employees with termination because they engaged in an unfair labor practice strike. Both motions were granted and the complaint was amended to include the additional allegations.

striking employees and has continued to honor job offers that were made to replacement workers. Finally, the complaint alleges that Respondent threatened employees with termination because they engaged in an unfair labor practice strike.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent, with an office and place of business in Cote Blanche, Louisiana, has been engaged in the operation of a rock salt mine. Annually, Respondent purchases and receives at its Cote Blanche, Louisiana facility goods valued in excess of \$50,000 directly from points outside the State of Louisiana. During the same time period, Respondent sells and ships from its Cote Blanche, Louisiana facility goods valued in excess of \$50,000 directly to points outside the State of Louisiana. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

This case involves collective-bargaining negotiations between the Union and Respondent that began in February 2010 and the Respondent's conduct related to these negotiations during a time period between March 31 and October 21, 2010. Over the course of bargaining, Respondent implemented two final offers and the employees engaged in a strike between April 7 and June 15, 2010. Respondent takes the position that because the parties were at impasse on March 31, 2010, Respondent was justified in implementing its final offer of March 19, 2010.

The parties stipulate that if Respondent's March 31, 2010 implementation of its final offer is found to be unlawful, the April 7, 2010 strike was an unfair labor practice strike from the onset. The parties also stipulate that if Respondent's May 25, 2010 regressive bargaining proposal is found to be unlawful, the strike was prolonged by the unfair labor practice. Finally, the parties also stipulate that if Respondent's bargaining on June 3, 2010, is found to be unlawful, the strike was thereafter prolonged by such unfair labor practices. The parties further stipulate that following the strike and on or about June 21 and 28, 2010, the Respondent continued to honor job offers made to replacement workers without notice to, or bargaining with, the Union.

Thus, whether the strike was an unfair labor practice strike or an economic strike rests with the determination as to whether the parties were at impasse on March 31, 2010. Additionally, there is the issue of whether Respondent's conduct in negotiations following the March 31, 2010 implementation of its final offer prolonged the strike. Respondent does not dispute that it made additional changes in terms and conditions of employment in June and October 2010. If these changes were made

without the parties having been at a valid impasse, such changes are also unlawful.

B. Description of Respondent's Operation

Carey Salt is a subsidiary of Compass Minerals International, Inc. and operates an underground salt mine located in Cote Blanche, Louisiana. Respondent's corporate headquarters is in Overland Park, Kansas. The Cote Blanche mine is divided into separate "rooms" or "drifts." The drifts range in height from 30 to 70 feet, depending upon the underground area being mined. The mining levels can extend down into the earth's surface for thousands of feet. Respondent is currently mining its third mine level; which is 1300 feet below sea level. The equipment used in the mine operation includes off-road trucks, large haulage trucks, and large caterpillar loaders. Respondent also uses specialized mining equipment to drill holes, to cut the salt, and to load explosives into the drilled holes. Large crushers grind the salt and miles of conveyor belts move the salt underground.

The majority of the bargaining unit employees work below the surface, leaving only a few employees working above ground. Because of the unique layering of the salt deposit, the salt is a very strong conductor of heat causing the temperature in the mine to be approximately 95 degrees.

C. Principal Witnesses

During the 2007 and 2010 negotiations, Victoria Heider (Heider), vice president of human resources for Compass Minerals International, Inc. served as Respondent's chief spokesperson and lead negotiator. Heider first began working for Respondent in 2004 and joined the collective-bargaining negotiations between Respondent and the Union toward the end of the bargaining in 2004. Heider served as Respondent's chief spokesperson during the 2007 and 2010 negotiations. Heider has had experience in negotiating collective-bargaining agreements (CBA) for employers since 1974. Heider directly reports to Respondent's CEO; Angelo Brisimitzakis (Brisimitzakis). Her office is in Respondent's headquarters in Overland Park, Kansas.

Gord Bull (Bull) is Respondent's mine manager for the Cote Blanche, Louisiana facility. In his capacity as mine manager, Bull is responsible for all mine operations. Bull also served with Heider on the Respondent's negotiating committee in 2010.

Gary Fuselier (Fuselier) has been an International representative for the Union for approximately 8 years. Fuselier first began negotiating contracts with employers in or about 1982. He estimates that he has negotiated 50 to 75 contracts over that period of time. Fuselier testified that with the exception of one instance where employees in Aruba initiated a strike without union authorization, every negotiation has resulted in a contract.

D. Evidence and Conclusions Relating to Bargaining Allegations

1. Background

Respondent and the Union have had a bargaining relationship for approximately 40 years. The most recent agreement covered the period from March 25, 2007, through March 24,

2010. The parties began bargaining for a new contract on February 8, 2010. At the beginning of the 2010 contract negotiations, there were approximately 100 employees in the bargaining unit. Between February 8 and March 18, 2010, the parties met for 14 bargaining sessions. In March 2010, the Union's director contacted Fuselier and asked him to take over the negotiations with Respondent as the previous staff representative had chosen to retire. Fuselier agreed to do so and he attended his first bargaining session on March 10, 2010. Other than Fuselier, the Union's bargaining committee included Local Union President Mark Migués, as well as employees O'Neal Robertson, Rickey Olivier, Dean Pontiff, and Terry Gaddison. Heider and Bull represented the Respondent in all of the bargaining sessions and they were accompanied by Human Resources Representative Toyla Charles and Operations Manager Don Brumm for part of the sessions.

2. Whether Respondent unlawfully implemented its March 19, 2010 final offer

a. Evidence presented

(1) March 10, 2010 negotiations

When Fuselier's joined the negotiations on March 10, 2010, Heider gave him a negotiations summary; outlining the status of the bargaining thus far. The summary indicated that there were 15 open issues for the Union and 3 open issues for the Respondent. The summary also reflected that the parties had already reached agreement on 13 contract items and there were 13 other issues that had already been settled or withdrawn by either party prior to March 10. The three open issues for the Respondent included overtime distribution, alternate shift schedules, and a Letter of Understanding (LOU) concerning cross-assignments for employees.

Respondent presented the Union with a number of counterproposals on the Union's open issues. The counterproposals included such items as shift differential, holidays, accident and sickness benefits, safety allowance, severance, hazard pay, life insurance, and accidental death and dismemberment insurance. The Union accepted the Respondent's counterproposal on accident and sickness benefits and severance and dropped its previous proposal seeking bonus compensation for tonnage. Later in the bargaining, Respondent accepted the Union's proposal on life insurance and accidental death and dismemberment insurance. Respondent additionally added the classification of roof bolter for hazard pay coverage.³ Tentative agreements were reached on accident and sickness benefits, severance, and uniform replacement.

(2) Respondent's open issues on March 10, 2010

(a) Overtime distribution proposal

Under the prior contract, permanently assigned employees in the job or classification requiring overtime were first offered the overtime. If they declined, the overtime was awarded to employees based upon their ability to perform the work and their aggregate overtime hours. Under the Respondent's 2010 proposal, the overtime work would be performed by a utility

person who would be ready and available to perform the work if the overtime was initially declined. There would be no need to call in employees from the overtime list.

Under the prior contract, employees were given approximately 20 minutes at the end of their shift to shut down their equipment, walk to the lunchroom, and secure their ride from underground to the surface. Respondent's 2010 proposal included a provision for "hot seating;" which would require the employees to continue to operate their equipment at the end of their shift without regard for overtime until they were relieved by an employee from the next shift.

Additionally, under the prior contract, an employee was paid for the overtime hours that he did not receive; but should have received. Under Respondent's 2010 proposal, the employee who was overlooked for overtime would have the opportunity to make up the overtime rather than receive payment for the work that he missed.

(b) Alternate shift proposal

Under the previous contract, employees were paid overtime for hours worked in excess of 8 hours on any given shift. Respondent proposed that overtime would be paid for hours worked beyond 40 hours a week. Respondent also proposed that employees would work 11-hour shifts rather than 8-hour shifts. Under the prior contract, maintenance employees were scheduled to work from Monday through Friday. Under the 2010 proposal, maintenance employees would begin their work each week on Sunday and work through Thursday. Thus, under Respondent's proposal, production employees would be required to work 11-hour shifts underground and maintenance employees would be required to work every Sunday.

Although the union committee was not receptive to Respondent's alternating shift proposal, Fuselier nevertheless suggested a modification of the proposal. He suggested that the Union would accept the proposed schedule, provided there was a 1-year trial period, after which either party could serve notice to revert to the previous schedule. In a counterproposal submitted to the Union at 5:15 p.m., Respondent incorporated the Union's proposal for a 1-year trial period with the option to revert to the previous schedule with notice.

(c) Cross-assignment proposal

The contract expiring on March 24, 2010, contained a Letter of Understanding (LOU) that set out the conditions in which an employee could be assigned work in a different classification. Respondent's 2010 proposal eliminated the LOU and gave Respondent unlimited managerial discretion to assign bargaining unit employees to any job regardless of their title or skills. The Union opposed this proposal expressing their concerns that employees might not be able to perform the work to which they were randomly assigned.

(3) March 11, 2010 negotiations

When the parties began bargaining on March 11, 2010, Heider presented a summary of negotiations based upon the negotiations the previous day. The summary reflected the same three open issues for Respondent. The summary also reflected that the Union's open issues were reduced to 10 issues. Additionally, there were 17 tentative agreements identified and 14

³ The 2007/2010 collective-bargaining agreement provided for hazard pay for only the classification of Giraffe/cherry picker.

items identified as settled or withdrawn. The Union submitted counterproposals to the Respondent, modifying their position on shift differential and vacation and accepting the Respondent's proposal on life insurance and Accidental Death and Dismemberment (AD&D) insurance. Later in the bargaining session, the Union withdrew its proposal concerning retirees' life insurance and accepted the Respondent's proposal. The Union had initially proposed two 15-minute breaks for employees on each shift and Respondent rejected the proposal in its entirety. On March 11, 2010, the Union resubmitted, agreeing that it would withdraw the proposal with the understanding that the Union and Respondent could agree that the employees should have the opportunity to take a break. A tentative agreement was prepared concerning safety.

(4) March 12, 2010 negotiations

As with the prior bargaining sessions, the parties did not discuss wages on March 12. The Union presented its proposals with a modification to reduce the amount of Christmas bonus previously proposed. Respondent agreed to add the classification of powder man to the classifications covered for hazard pay. The same three open issues remained for the Respondent. Although the parties exchanged proposals, there were no major agreements and the bargaining session was relatively short compared to previous sessions.

(5) March 18, 2010 negotiations

Fuselier testified that prior to the negotiations on March 18, 2010; he had discussed the status of the negotiations with the union committee. The committee discussed the fact that they were getting close to the contract expiration of March 24, 2010, and they wanted to get something wrapped up and back to the membership before the expiration of the contract. At that point, the committee came to the conclusion that they would probably have to accept an alternate shift schedule. With the possibility of an escape clause and a trial period, they were close to accepting the alternate shift proposal. As far as the overtime issues, the committee accepted the use of the utility employee, but they were concerned about the proposed "hot seat" procedure. Fuselier recalled that the committee believed that they could probably get the makeup overtime without creating more overtime problems. Fuselier also recalled that he had not believed that the Respondent was really serious about the removal of the cross-assignment LOU and he thought that this issue could be resolved in order to get the contract. Fuselier talked with the committee about the viability of some of the Union's open issues and how noneconomic issues might affect economic issues. Based upon their discussions, the union committee decided to initiate wage discussions that had been tabled thus far.

When the parties met on March 18, Fuselier explained that the committee was concerned about the contract expiring on March 24. He proposed that the parties extend the terms of the previous contract while they continued to negotiate. He explained that the Union would be willing to continue to work under the terms of the existing contract during continued bargaining. Fuselier recalled that Heider told him that such a plan would "just prolong the process."

The Union's initial bargaining proposal included a proposal for an 8-percent increase in wages. When the union committee told Respondent on March 18, 2011, that they wanted to discuss wages, Heider responded with a proposal for a zero-percent wage increase. She said that since the Union's proposal was ridiculous, Respondent's proposal would be equally ridiculous. Fuselier recalled that Heider's remark had inflamed his committee. During the break following the Respondent's proposal on wages, Fuselier and the committee again talked about getting an offer that they could take to the membership.

When the parties resumed after the break, Fuselier told Respondent's committee that if those proposed items were all that was going to be on the Company's final proposal, Respondent needed to give the Union a final proposal. Fuselier testified that because of the approaching deadline of March 24, 2011, he felt that it was important for the membership to hear Respondent's proposal directly from Respondent and not just from the union committee. Fuselier further testified that he asked for the final offer for the membership's review. He testified that if the offer was rejected by the membership, he expected that he could go back to the bargaining table and share the true feelings of the membership with Respondent.

(6) March 19, 2011

When the parties met again on March 19, 2011, Heider presented the Union with Respondent's final offer. Despite Heider's earlier comments about proposing no increase in wages, Respondent's final offer included a proposal for a 2.5-percent wage increase. Fuselier noticed however, that there were other items omitted from the proposal that he had expected. Fuselier testified that there were a number of issues to which he believed there had been "agreement," however, the written tentative agreements had not been prepared. Fuselier testified that during the negotiations, the Union had proposed, and Respondent had agreed, to an inclusion of the 1-year trial period, a 30-day escape clause, and a 45-day implementation period for Respondent's proposed alternative work schedule. Although Respondent had incorporated these modifications in their earlier counterproposals, the modifications were not included in Respondent's final offer. Additionally, the Union had proposed hazard pay for the classifications identified as powder man, roof bolter, and cherry picker. Although it was Fuselier's understanding that these inclusions were accepted by Respondent, the final offer did not include these additions. Fuselier testified that Respondent's proposals on March 18, 2011, were better than those included in Respondent's final offer of March 19, 2011. Respondent's March 19, 2010 final offer not only deleted the previous LOU restricting cross-assignment, but also included Respondent's new contract language changing overtime distribution. The final offer also provided for rotating 11-hour shifts for the production employees and support maintenance employees and established the workweek for maintenance employees to run from Sunday to Thursday as initially proposed by Respondent. In testifying about Respondent's final offer of March 19, Bull acknowledged that Respondent deleted the Union's suggestions that had earlier been incorporated into Respondent's proposals. He also admitted that in doing so, he was aware that Respondent was making the proposal less at-

tractive and harder for the Union's negotiating committee to present to the membership.

Fuselier recalled telling Respondent's representatives that this was an unusual contract offer and the Union would need additional time to present this kind of offer to the membership. He explained that Respondent's offer contained profound changes for both the maintenance and production employees. For the maintenance employees especially, the proposal was life changing as they would have to work every Sunday. He explained that the Union would need to have an informational meeting with the membership to explain the proposals and answer questions. He asked that someone from the Company be available by telephone to answer any questions that employees might raise in the meeting and the Union could not answer. Bull agreed to be available by telephone for this purpose.

Respondent's offer expressly stated that it would expire at 11:59 p.m. on March 24, 2010. If not accepted by that time, the offer would be withdrawn in its entirety. Heider testified that the Union should have understood that if the offer was not accepted by the deadline, there was no longer any offer on the table.

(7) The March 23, 2010 membership vote

The Union held the informational meeting with the membership on March 23, 2010. When the membership voted on March 24, 2010, the offer was rejected. Fuselier contacted Heider and informed her of the results of the vote. He told her that the membership rejected the Company's final offer and that the Union was prepared to get back to the bargaining table at Respondent's convenience. He also told her that the Union was willing to continue working under the existing collective-bargaining agreement. Heider told him that while Respondent was available to meet again on March 31, 2010, the contract would only be extended without a no-strike clause and an arbitration clause. She said that Respondent did not want any "shenanigans" and that if Respondent had to fire someone, they did not want to defend themselves in arbitration. In a later telephone conversation, however, Heider explained that she had spoken with Bull and that Respondent agreed to extend the existing contract until March 31, 2010.

(8) March 30, 2010 negotiations

Prior to coming to New Iberia for the March 31, 2010 negotiations, Heider booked not only her flight to Louisiana, but also her return flight to Kansas City. Heider arrived at approximately 4:43 p.m. at the Lafayette-New Iberia, LA airport on March 30, 2010, with a reservation for a return flight for 2:20 p.m. on March 31, 2010.

During a conference call on March 30, Heider informed CEO Brisimitzakis concerning the status of the bargaining. In a followup email⁴ to Heider on March 30 entitled "CB Game Plan/End Game," CEO Brisimitzakis stated:

Confirming our call this morning . . . please find below the specific steps that will play out on Wednesday and beyond:

⁴ The copy of this email and other internal corporate correspondence was submitted into evidence by the Acting General Counsel.

Wed 9–11 am—Victoria and Gord attempt to get union to agree to our "last and final" Offer . . . if unsuccessful, they declare "impasse" based on guidance from Bob/legal team.

Wed 11:01 am Victoria presents union with letter (prepared by Bob/legal team) confirming impasse and that there will be no further negotiations.

Wed 11:02 am: Gord communicates in writing with all Supervisors/Management what just happened, what is impasse, terms of our last & final offer and that NO ONE is to negotiate anything etc. (letter prepared by legal team) . . . okay to copy exempt/non union work force.

Wed 11:03 am- General/kind letter from Gord to entire CB work force (union & non Union is available and can be handed out with a brief summary as to where we stand, confirming that they are all welcome to work at new/higher wages on their current shift but subject to the terms of our "last & final" offer (letter to be prepared by Bob/legal team).

Wed 11:04 am: a hard copy of revised CBA (incorporating all the "last & final" terms) is distributed to CB management/supervisors.

Obviously, the times of 11:01–11:04 am are approx and only indicate the sequence of events. We are entering an "100% legal phase" right now and we all need to work thru Bob/legal team. I will set up a call for tomorrow afternoon for all of us to discuss/review our status.

Hang tough and stay safe . . . good luck!

(9) March 31, 2010 negotiations

Fuselier acknowledged that when the union committee returned to the negotiating table on March 31, they did not have any written proposals to give to the Respondent. In a discussion prior to the meeting, the committee discussed their plan to try to get some of the March 18 agreements back on the table when they began negotiating on March 31. The committee had also discussed dropping some of the union issues and trying to get some "softer" language on overtime and the cross-assignment Letter of Understanding (LOU) issues.

Fuselier testified that in previous negotiation sessions, Heider usually brought a large binder containing her bargaining notes and various documents that she used in negotiations. When Heider arrived on March 31, however, she carried only a small portfolio. She placed the portfolio on the table and crossed her hands over it. Fuselier recalled that when he noticed that she did not bring her bargaining notes, he had surmised "this is probably not going to be good." The meeting began with the union committee's explanation as to the basis for the membership's rejection. Fuselier told Heider about the membership's response to the alternate shift proposal requiring the maintenance employees to work on Sunday, as well as their concerns about the hot seating and the removal of the LOU. Fuselier explained that the membership had voiced the same kinds of concerns that had been previously voiced by the union committee during negotiations. Fuselier recalled that Heider told him "that's what we have already heard." Respondent suggested a break. Fuselier recalled that when Heider returned to the room approximately 30 minutes later she asked the

committee if they were prepared to accept Respondent's final offer. The committee confirmed that they were not. Heider replied, "Our final is our final; you asked for it and you got it. We are not prepared to move on any of our issues." Heider told the Union that Respondent did not have anything else to offer. Fuselier recalled telling Heider that the Union had some open issues and some things that they would like to discuss. Heider replied that Respondent's offer was their final offer and they were at an impasse.

Fuselier told Heider that they were not at impasse. He recalled telling her, "You know that we have some things we want to talk about. Are you going to sit there and tell me that you're not going to listen to any proposals that the Union wants to give you?" Heider again told him that Respondent's final offer is final and the parties were at impasse. Fuselier asserted that they were not at impasse. He also testified that he told Heider that he had spoken with Federal Mediator Sherman Bolton earlier that morning as well as the day before. Fuselier explained that he had tried to get the mediator up to speed as to the status of the negotiations. Fuselier recalled telling Heider that the mediator had telephoned him that morning; explaining that he was in a nearby city and asking if he should come to New Iberia. Fuselier testified that he told Heider that the mediator was en route and he asked if the Company would at least meet with the mediator. Heider told him that this should have been done a week earlier and Respondent was not prepared to meet with anyone. Fuselier told her that he expected the mediator to be there shortly and he said that the Union would like for her to at least meet with the mediator. Heider told him that they were finished with bargaining and she began to leave.

Before she left, Fuselier asked Heider about the contract. When she explained that the contract had expired, Fuselier asked if the employees would be locked out. Although Heider confirmed that the employees would not be locked out of the facility, she also confirmed that there would not be a no-strike clause or an arbitration clause. Additionally, she told the Union that Respondent was going to implement its final offer. Shortly thereafter, Heider and Bull left the negotiations session.

When Fuselier telephoned Mediator Bolton to determine his location, Bolton told him that he was nearing New Iberia. Fuselier told him that Respondent had declared impasse and suggested that Bolton might be able to speak with Respondent's representatives. After speaking with Bolton, Fuselier asked bargaining committee member Terry Gaddison to check the parking lot⁵ to see if Respondent's vehicles were still there. When Gaddison confirmed that Respondent's vehicles were still present, Fuselier then telephoned Bull and told him that the mediator was expected within a few minutes. Fuselier asked Bull if Respondent would at least meet with the mediator. Fuselier recalled that Bull told him that Heider had a plane to catch and that Respondent had already put their final offer on the table.

Fuselier recalled telling the committee that if the Federal mediator could get Respondent back to the bargaining table, he wanted the committee to prepare a substantial proposal to give Respondent. Although the committee began working on the

written proposal as suggested by Fuselier, Bolton arrived shortly thereafter. After Bolton met with the union committee for a few minutes, he left the meeting room and telephoned Heider. When he returned to the room, he told the union committee that the Company did not want to meet with him. Although Respondent's vehicles had been in the hotel parking lot before Fuselier spoke with Bull, the vehicles were no longer in the parking lot after Bolton's conversation with Heider.

Heider recalled that as she was traveling to the airport on March 31, she received the telephone call from the mediator. She confirmed that Bolton asked her to return to the hotel to meet with the Union and with him. Upon review of the affidavit that she gave to the investigating Board agent, she recalled that the mediator told her that the Union had some proposals for movement. Heider told the mediator that the Union had asked for a final offer and Respondent had given the Union a final offer. She told the mediator that "final means final" and she was on her way back to Kansas City. She acknowledged that even though the mediator had told her that the Union had proposals, she had not wanted to know what the proposals were and she had not suggested an alternative date to meet with the Union and the mediator.

Being unable to contact Heider by telephone, Fuselier sent a number of emails to Heider later in the day. At 12:41 p.m., Fuselier sent the following:

This email will confirm the Union's statements today in response to your incorrect and unlawful statement that the parties are at a bargaining impasse and that the Company will unilaterally implement its "final proposal." The parties are not at impasse. The Union renews its request that the Company agree to the presence of the assigned FMCS mediator to help the parties reach a fair and equitable contract. The Union renews its offer to extend the current CBA until such time as the parties reach a new successor CBA or either party provokes 48 hours written notice to the other party to terminate this extension.

The Union is preparing a new proposal that will significantly move toward the Company's position on the scheduling issue. The Union's new proposal will make additional movement toward the Company's position on other issues. The Union remains flexible on all other open issues. The Union is available to bargain over its new proposal this afternoon or in the morning. Please advise as to the Company's availability.

In the event the Company refuses to bargain with the Union we will take appropriate action. In the event the Company unilaterally implements some or all of its "final Proposal" we will take appropriate action.

Please advise me as to the Company's position on these matters immediately.

At 1:17 p.m., Heider responded in her email to Fuselier:

You have said the Company's final offer will be voted on again by the membership this afternoon, March 31, 2010. I very much hope that it will be accepted. If it is not accepted, however, as I have advised you, final means final and there is nothing more the Company can or will offer. Accordingly,

⁵ Heider was staying in the hotel where the negotiations were held.

another rejection will make it clear we are at impasse, so effective with the rejection vote the Company will be implementing the terms of its final offer. As a practical matter, this means that beginning with this evening's 11:30 shift, the employees will either be working under the terms of a new contract or they will be working under the terms of the implemented proposals. Either way, I hope that you will explain to your membership that the wage increases will be taking effect immediately. In any event, absent contract acceptance, the arbitration obligation, as well as the no-strike clause, will no longer be in effect. With regard to your suggestion that the Union still has room to move towards the Company position, as I told you this morning, that does not change anything. The Company has made its final offer, something you asked for prior to the last vote, and it is not going to move from that, so the question is whether you will, or will not, accept that offer. Please let me know the results of the vote.

At approximately 1:30 p.m., and while at the airport waiting to board her plane, Heider participated in a conference call with CEO Brisimitzakis and reported the results of the bargaining as was planned the previous day.

At 2:54 p.m., Fuselier sent a response to Heider's earlier email. He again told Heider that the parties were not at impasse and in the event that the membership rejected Respondent's offer, the parties would still not be at impasse. Fuselier reiterated that the Union was working on a new proposal that would "move in a meaningful way toward the Company's position on the scheduling issue and other open issues" and that the Union was flexible on all open issues. Fuselier pledged that the Union was available to resume bargaining that same evening in the event that the membership rejected Respondent's offer and that Mediator Bolton had been informed of such offer to bargain. Fuselier continued to suggest that the parties extend the current CBA until a new contract could be reached.

When Heider responded to Fuselier in an email at 4:08 p.m., she clarified that Respondent had met with the Union earlier that day to reiterate to the Union that Respondent's final offer was final and that Respondent had nothing else to offer. Heider compared the status of negotiations to that of parties negotiating for the sale of a house. In further explaining the analogy, she stated; "If you want to buy the house, you need to pay the price." She explained, "Here, if you want a contract, you need to accept our offer." Heider rejected Fuselier's offer to extend the existing contract and explained that Respondent would implement its final proposal if the proposal was not accepted by the membership.

At 4:35 p.m., Fuselier again told Heider that the parties were not at impasse and that the Union had another proposal ready to submit to Respondent in the event that the membership rejected Respondent's final offer. He again explained that the proposal would be a significant move toward Respondent's position on scheduled and other open issues and that the Union remained flexible on all other open issues. He again stated that if the membership rejected Respondent's offer, the Union was available to meet for bargaining that same day or the next day or any other time that Respondent would be available. Again, he offered to extend the existing CBA.

At 4:51 p.m., Heider replied: "I am not trying to be insulting, but, really what part of 'final' do you not understand? I stand by my previous response."

(10) The March 31, 2010 membership vote

Later in the day on March 31, President Migues called for a special meeting of the membership. The committee met with the membership and explained the status of the negotiations and suggested that the membership reconsider and revoke Respondent's offer. The membership, however, rejected the offer. At 9:54 p.m., Fuselier emailed Heider to let her know that the membership had rejected Respondent's final offer. He reiterated that the parties were not at impasse and that the Union had a new proposal "that moves in a meaningful way toward the Company's position on scheduling and other open issues." He explained that the Union was available to meet immediately and asked that Respondent notify him of their availability in order that he could notify Mediator Bolton. He assured Heider that the membership was not on strike. He told Heider that if Respondent refused to agree to an extension of the CBA, the membership would work under the continuing terms and conditions of employment as set forth in the CBA and in past practice.

At 10:11 p.m., Bull sent Fuselier an email informing him that as Respondent's final offer was again rejected by the membership, Respondent was implementing its final offer without an arbitration and no-strike clause.

b. Conclusions

(1) Whether there is a valid impasse

There is no dispute that on March 31, 2010, Respondent unilaterally implemented numerous changes to the terms and conditions of employment for the bargaining unit employees. The most significant changes included in the implementation were the removal of the previous restrictions on cross-assignment, the changes in the method for overtime distribution, and the new plan for rotating and extended shifts. Respondent asserts that such implementation was lawful because the parties were at impasse.

Generally, an employer may be found to violate the Act, if, when negotiations are in progress, the employer unilaterally institutes changes in existing terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Nevertheless, if the parties have reached a valid impasse in bargaining, the employer does not violate the Act by making "unilateral changes that are reasonably comprehended within the employer's preimpasse proposals." *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enfd. sub nom. Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). In its decision in *Taft*, the Board also opined that impasse occurs "after good-faith negotiations have exhausted the prospects of concluding an agreement." *Ibid*.

The Board has further cautioned, however, that an impasse exists only where there is a valid deadlock to the point where future bargaining at that point is futile and the assertion of an impasse must be made in good faith and not merely designed to frustrate the bargaining process. *Outboard Marine Corp.*, 307 NLRB 1333, 1363 (1992). Moreover, the burden of proof rests

with the party asserting impasse. *Area Trade Bindery Co.*, 352 NLRB 172, 176 (2008); *CJC Holdings, Inc.*, 320 NLRB 1044 (1996), *affd.* 110 F.3d 794 (5th Cir. 1997).

The parties all appear to agree that the Board's decision in *Taft* is the leading case that establishes the criteria for determining whether parties have reached a valid impasse. The Board identified a number of "relevant factors" when considering the existence of an impasse. These factors include (1) the bargaining history; (2) the good faith of the parties in negotiations; (3) the length of the negotiations; (4) the importance of the issue or issues as to where there is a disagreement; and (5) the contemporaneous understanding of the parties as to the state of the negotiations. *Taft*, *supra* at 478. The Board further explained that the determination of whether an impasse exists is a matter of judgment that requires a careful balancing of all of the relevant factors. *Ibid.*

(a) *Bargaining history length of negotiations and the good faith of the parties*

There is no question that the parties have had an extended history of bargaining. Respondent asserts that there have been successive contracts agreed upon without a work stoppage for a period of approximately 40 years. As Respondent also points out, there is no evidence of a history of unfair labor practices or the Board's involvement in the parties-relationships. In the instant case, there is no complaint allegation of any bad faith or violative conduct prior to the March 31, 2010 implementation of the March 19, 2010 final offer. Thus, the parties' conduct and bargaining history prior to Respondent's final offer might be said to be supportive of Respondent's position. The bargaining history and Respondent's conduct just prior to the implementation of Respondent's final offer is not, however, supportive of Respondent's position.

Respondent contends that the negotiations prior to the alleged impasse were "exhaustive," consisting of mostly all-day bargaining on February 8, 9, 10, 11, 12, 15, 17, 19, and 20 and March 9, 10, 11, 12, 18, and 19. Counsel for the Acting General Counsel, however, asserts that while there were 14 bargaining sessions between February 8 and March 19, 2010, these sessions were sometimes short, particularly the last three meeting dates, which occurred at a critical time in bargaining. As counsel for the Acting General Counsel points out, wages were never discussed by the parties until the session on March 18 when Respondent offered the Union a zero-percentage increase.

Furthermore, it was during the March 19, 2010 bargaining session; the last session before Respondent declared impasse, that Respondent presented the Union with a markedly new proposal package. The March 19, 2010 final offer not only included a new wage proposal, but also eliminated a number of items to which the parties had agreed, but had not yet formally signed off with a "tentative agreement." Specifically, Respondent omitted the three classifications for hazard pay that had been agreed upon by the parties as well as the Union's suggestions on the alternate scheduling issue. Not only was the March 19 proposal less attractive to the Union, but Respondent admits that the regressive changes in the March 19, 2010 proposal made it less attractive and harder for the union bargaining committee to present to the membership.

Additionally, the record evidence reflects that when the parties met on March 31, there was essentially no bargaining and that such failure to bargain was by design. As evidenced by Respondent's email of March 30, 2010, Respondent scheduled its declaration of impasse at 11 a.m. on March 31, giving the Union only 2 hours to report the membership's response to the regressive proposal of March 19. Based upon CEO Brisimitzakis' email of March 30, 2010, Heider and Bull were directed to declare impasse after 2 hours if the union committee did not accept Respondent's March 19, 2010 final offer in its entirety. Upon declaring impasse, Heider was directed to present the Union with a letter that had been prepared by Respondent's legal team confirming impasse and confirming that there would be no further negotiations. The record reflects that Heider and Bull kept to the schedule as they were directed, resulting in no actual bargaining concerning Respondent's new and regressive proposal prior to Respondent's declaration of impasse.

Respondent submits that while the Acting General Counsel may assert that one of Respondent's goals on March 31 was to establish impasse, Respondent contends that such a goal would not be a violation. Respondent further maintains that every reasonable employer will always seek to avoid the circumstance of having to continue negotiations "indefinitely." In essence, Respondent's argument implies that an employer is justified in attempting to force an impasse as a practical and efficient means of ending bargaining. Such practical efficiency, however, does not comport with the purpose of bargaining as viewed by the Board and the Court. In a very early decision, the Supreme Court referenced the first annual Board report declaring: "Collective bargaining is something more than the mere meeting of an employer with the representatives of his employees; the essential thing is rather the serious intent to adjust differences and to reach an acceptable common ground." *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 485 (1960). Noting that the Board had repeatedly asserted that good faith on the part of the employer is an essential ingredient of collective bargaining, the Court opined that collective bargaining is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of "take it or leave it," but it presupposes a desire to reach ultimate agreement and to enter into a collective-bargaining agreement. *Ibid.* Admittedly, when Respondent met with the Union on the morning of March 31, Respondent was aware that the final offer of March 19 was less attractive than its previous proposals and that its modifications in the offer from March 18 to 19 made it harder for the Union to present to the membership. While a party's adamant insistence on a bargaining position may not in itself evidence a refusal to bargain in good faith,⁶ the Board has nevertheless found that other conduct may be indicative of bad faith. Such conduct would include a party's withdrawal of already agreed-up provisions. *Valley Oil Co.*, 210 NLRB 370, 385 (1974). By giving the Union a regressive proposal on March 19, 2010, Respondent effectively insured that no meaningful negotiations could follow. In doing so, Respondent's attempt to create an impasse reflected only its desire to end negotiations and to provide a means to unilaterally

⁶ *Neon Sign Corp v. NLRB*, 602 F.2d 1203 (5th Cir. 1979).

implement its desired changes in terms and conditions of employment. Clearly, Respondent's conduct did not evidence a desire to reach an agreement.

Counsel for the Acting General Counsel submits that the CEO's email to Heider on March 31, 2010, shows that Respondent's bargaining committee did not approach the bargaining table on March 31, 2010, with any desire to reach an agreement. Counsel maintains that the email confirms that Respondent's committee came to the table with instructions as to how and when to declare impasse. Heider conceded that while the CEO's instructions were detailed as to how the committee would declare an impasse, there was nothing in his instructions to address how Respondent's committee would deal with reaching an agreement on March 31, 2010. Heider even admitted that she had no expectation that the Union would accept Respondent's proposal.

Accordingly, while there may have been a period of uneventful bargaining for previous contracts, the immediate bargaining history and Respondent's conduct prior to Respondent's declaration of impasse negates any finding of impasse.

(b) The importance of the issues to which there is disagreement

There is no question that Respondent's three open issues on March 31, 2010, were significant because of their potential impact upon the bargaining unit. Respondent's proposal to eliminate all restrictions on cross-assignments represented a significant change to bargaining unit employees. With the elimination of the previous LOU, Respondent had the unfettered discretion to assign employees to jobs for which they had no experience or skills. Understandably, the Union opposed the elimination of this LOU because its absence could allow Respondent to justify terminating any employee for his job performance by simply assigning him to work that he could not do. Respondent's overtime distribution proposal and the alternate shift proposal were significant because of their impact in reducing employees' pay. Respondent's new overtime distribution policy would eliminate an overtime opportunity that had previously been available to employees based upon their ability to perform the job and their aggregate number of overtime hours. The policy also eliminated overtime for employees who were required to remain on their job at the end of their shift until they were relieved by another employee. The proposed alternate work shift required the employees to work an additional 3 hours on each shift without overtime and required maintenance employees to work every Sunday as a regular workday.

The record is replete with testimony from both Heider and Bull concerning the importance of these three issues to Respondent. Respondent maintains that the issue involving the alternate shift has been a matter of concern for a considerable period of time and was even discussed in prior contract negotiations. Additionally, the Union does not dispute that the amount of overtime was substantial. Respondent asserts that management had the responsibility to do what it deemed best for all stakeholders and they were committed to "fixing" the problem of excessive overtime. Certainly, no party is required to "make concessions or to yield any position fairly maintained" in collective bargaining. *NLRB v. Blevins Popcorn*, 659 F.2d 1173,

1187 (D.C. Cir. 1981). Respondent appears to argue that the parties were at impasse on March 31, because these three "core" issues were of such importance to Respondent and because Respondent was unrelenting in seeking the Union's agreement on these issues. Despite Respondent's assertion that it held tight and did not waiver in its pursuit of these three core issues, the record also indicates that just prior to Respondent's March 19, 2010 final offer, the Union suggested modifications to Respondent's alternative shift proposal and the Union's suggestions were incorporated into Respondent's bargaining proposals. Although Respondent withdrew those suggestions from its final offer, such action does not negate that there was movement by the parties relating to Respondent's core issues. Thus, despite the fact that the three core issues were of paramount importance to both parties, this importance does not overshadow the other *Taft* factors in the impasse analysis. Furthermore, even though Respondent chose to disregard the concessions made by the Union with respect to the alternative shift issue in its final offer, the record nevertheless reflects that there was movement in this regard. Although Respondent ignored the Union's prior concession on the alternative shift issue and conveniently omitted it from its final offer, the Union did not withdraw this suggestion at any time prior to Respondent's declaration of impasse. Accordingly, a "concession by one party on a significant issue in dispute precludes a finding of impasse even if a wide gap between the parties remains because under such circumstances there is reason to believe that further bargaining might produce additional movement." *Saunders House v. NLRB*, 719 F.2d 683, 688 (3d Cir. 1983).

(c) Contemporaneous understanding of the parties

Although the Board did not state that any one factor in its analysis was more significant than the others, it is apparent that the contemporaneous understanding of the parties is a crucial factor. The determination of impasse depends upon the mental state of the parties and is a highly subjective inquiry. *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982). In order for there to be a valid impasse, both parties must believe that they are at the "end of their rope." *Newcor Bay City Division of Newcor, Inc.*, 345 NLRB 1229 (2005); *PRC Recording Co.*, 280 NLRB 615, 635 (1986). Because a determination of the mental status of the parties is essential, bargaining devices or scare words such as "impasse" or "deadlock" used by the parties are legal conclusions and are not binding on the Board. *Ibid.*

For an impasse to occur, neither party must be willing to compromise. *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). A genuine impasse in negotiations is reached only when the parties have discussed a subject or subjects in good faith, and despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position. *Anderson Enterprises*, 329 NLRB 760, 762 (1999). Even if an employer has demonstrated that it was unwilling to compromise any further, there must also be evidence that the union is also unwilling to compromise any further. *Ibid.* Essentially, one party cannot unilaterally establish or create an impasse. Both parties must have the same

understanding and find themselves at the same point in negotiations. The overall evidence in this case does not establish that there was a contemporaneous understanding of impasse by the parties.

Based upon the record evidence, it is apparent that the Union was genuinely surprised and essentially caught off guard when Respondent declared impasse after only 2 hours into the March 31, 2010 bargaining session. The Union immediately protested Respondent's assertion of impasse and continued to do so not only during the bargaining session on March 31, but also in subsequent telephone calls and emails.

Although it could not be said that the parties were on the verge of an agreement, the union committee's conduct contradicts their having reached an impasse or deadlock. The fact that the union committee had already contacted the Federal mediator represents not only an element of optimism, but also evidences a desire to continue to bargain toward an agreement. Respondent does not dispute that in response to the Union's request, the Federal mediator not only came to the bargaining site on March 31, 2010, at the Union's request, but he also telephoned Heider to ask her to return to the bargaining table. Had the Union believed that the parties were at a deadlock, it would have been illogical to involve the Federal mediator on March 31. Additionally, I note that almost all of the 2 hours in the March 31, 2010 bargaining session were consumed with the union committee explaining in detail why the membership had rejected the Respondent's final offer. One can only conclude that they did so to elicit additional bargaining. Had the Union believed that the parties were hopelessly deadlocked, there would have been no reason to "educate" Respondent on the membership responses and concerns. Furthermore, I do not find the Union's failure to submit any new written proposals on March 31, 2010, and prior to the impasse declaration to demonstrate the Union's sense of deadlock. Although Respondent may have demonstrated that it was unwilling to compromise any further, the Union's overall conduct does not demonstrate a similar mindset. Furthermore, a party's failure to provide a new counteroffer at a specific time or in response to the other party's request does not in and of itself, establish a valid impasse. *New Seasons, Inc.*, 346 NLRB 610, 622 (2006).

Respondent asserts that the Union's request for a final offer is the most compelling evidence of the "contemporaneous understanding" of the parties as to the status of negotiations. Respondent explains after searching the law, it has not found any case "where it has been alleged by the General Counsel or found by the Board that the parties were not at impasse after an employer was asked to give, thereafter gave, and then stuck to, a final offer." Respondent submits that the closest case on this question is the decision in *Presto Castings Co.*, 262 NLRB 346 (1982), where Respondent asserts that the Board found impasse after only two bargaining sessions and where each side pushed the other to a final offer. Obviously, this case is immediately distinguishable from the facts of the instant case based upon the assertion that both parties sought final offers from each other. The case is further distinguished by the fact that the administrative law judge had no problem in finding an impasse based upon the testimony of the lead negotiators and the fact that they considered themselves to be at impasse.

Respondent also cites the Board's decision in *Industrial Electric Reels, Inc.*, 310 NLRB 1069 (1993), to show that "the Board appears to accept as a given that a request for a final offer permits an employer to give, and to stand on, such offer." In *Industrial Electric Reels, Inc.*, the union requested a final offer from the employer to take to the membership for ratification. Because the employer representative feared that the employer could not withstand a strike, the employer representative structured the offer to make it attractive to a majority of the bargaining unit employees. When the employees rejected the employer's offer, the employer immediately requested additional bargaining and when the parties resumed bargaining, the employer modified its final proposal. Although the Board ultimately found no unlawful conduct on the part of the employer in declining to modify its final offer until after the membership vote, the case is clearly distinguishable from the instant case. *Industrial Electric Reels*, supra at 1073. Unlike the circumstances involved in *Industrial Electric Reels*, Respondent did not structure the final offer to make it attractive to the bargaining unit. On the contrary, Bull acknowledged that because Respondent's March 19 final offer was less attractive than its March 18 proposals, it was going to be harder for the union committee to sell the proposal to the membership. The case is also distinguished by the fact that the employer in *Industrial Electric Reels* resumed bargaining and actually modified its final offer.

Thus, I do not find that either *Presto Casting Co.* or *Industrial Electrical Reels, Inc.* provides authority to conclude that a party's request for a final offer assures a finding of impasse. In the instant case, the parties were nearing the contract deadline. Fuselier credibly testified that he told Respondent that he was requesting a final offer in order to take something to the membership before the deadline. He explained to Heider that if the membership rejected the offer, the parties could return to the bargaining table and the Union could explain the sentiments of the membership. There is no credible record evidence to demonstrate that the Union's request for a final offer directly communicated or even implied that they did not intend to continue bargaining to reach agreement. Consequently, the record as a whole reflects no contemporaneous understanding as to the state of the negotiations as of the date of the declaration of impasse.

(2) Conclusions on impasse

Respondent argues that its position is supported by the Board's decision in *California Pacific Medical Center*, 356 NLRB 1283 (2011). In *California Pacific*, the Board sustained the judge in finding that the parties were at impasse. Respondent asserts that this case is noteworthy because of the Board's reliance on the union's failure to propose anything of substance in response to an impasse declaration by the employer. I note, however, that the facts of *California Pacific* are significantly different than those of the instant case. In *California Pacific*, the employer declared impasse on October 27, 2009, and at a time in bargaining when the parties were far apart on the issue of healthcare. Despite the declaration of impasse, the parties met again for bargaining on November 18 and December 14, 2009. The union did not offer any new proposals on the issue

of healthcare during the November and December meetings. Noting that the union did not take the opportunity to offer any new healthcare proposals, the Board found that the parties were at impasse on January 1, 2010, when the employer implemented its bargaining proposal.

In *California Pacific*, the Board's decision was apparently influenced by the fact that the union proposed nothing for more than 2 months in response to an employer's declaration of impasse. Thus, the impasse that provided the basis for the employer's lawful implementation of its bargaining proposals occurred only after this stagnant 2-month period. In the instant case, Respondent declared impasse on the morning of March 31 with a prearranged plan to immediately implement its final offer. Unlike the circumstances in *California Pacific*, Respondent gave the Union no opportunity to submit proposals in response to the declaration of impasse. Despite the requests of the Union and the Federal mediator, Heider proceeded to the airport to catch her flight and to follow the plan outlined the previous day by her CEO.

Furthermore, even if there had been an impasse at 11 a.m. as planned by Respondent, the impasse would have been broken by the Union's response throughout the day on March 31, 2010. The Union not only brought in the Federal mediator on March 31, 2010, but confirmed that it had additional proposals to make if only the parties could resume their negotiations. Heider admits that when she spoke with the mediator, he told her that the Union had additional proposals. Heider and Bull ignored both the Union and the mediator and followed the CEO's plan and instructions. Historically, the Board has not required major changes in circumstances to find that an impasse has been broken. *Airflow Research & Mfg. Corp.*, 320 NLRB 861 (1996). The Court of Appeals for the Fifth Circuit, in enforcing the Board's finding that impasse had been broken, explained, "Anything that creates a new possibility of fruitful discussion (even if it does not create a likelihood of agreement) breaks an impasse." The court went on to suggest that even implied bargaining concessions would be sufficient to break the impasse. *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1393 (5th Cir. 1983). Thus, any alleged impasse would have been quickly broken by the later communications and events on March 31, 2010.

Having applied the *Taft* analysis and reviewing the evidence as a whole, I find that Respondent implemented its final offer on March 31, 2010, in the absence of impasse and as alleged in complaint paragraph 18(a). Furthermore, I find merit to complaint paragraph 25 that alleges that on or about March 31, 2010, the Union requested that Respondent bargain collectively about scheduling and all other open issues. Merit is also found to complaint paragraph 15 that alleges that on or about March 31, 2010, the Union, by email, requested that Respondent bargain collectively with the Union as the exclusive collective-bargaining representative of the unit.

3. The March 31, 2010 changes in terms and conditions of employment

Respondent admits that in implementing its March 19, 2010 offer on March 31, 2010, the following changes were made:

- (a) Changes to the overtime distribution procedure for Unit employees.

- (b) Changes to cross assignment restrictions for Unit employees.
- (c) Changes to the shift schedules for Unit employees.
- (d) Changes to the "unable to report to work" notification requirements for Unit employees.
- (e) Changes to the probationary period for Unit employees.
- (f) Changes to the probationary period for Unit employees recalled from layoff.
- (g) Changes to the lay-off and bumping procedure for Unit employees.
- (h) The addition of a new provision regarding vacation benefits for Unit employees.
- (i) A change in the method Unit employees are compensated for serving on the safety committee.
- (j) A change in the safety allowance provision for Unit employees.
- (k) A change in the "bereavement leave" provision for Unit employees.
- (l) A clarification of the lunch period for Unit employees.
- (m) A change in the procedure for printing new agreements for Unit employees.
- (n) The addition of a new severance pay provision for Unit employees.
- (o) A change in the provision for removing discipline from the files of Unit employees.
- (p) A change in the "injured employee physician visit" provision for Unit employees.
- (q) A change in the life insurance and accidental death and dismemberment benefits available to Unit employees.
- (r) A change in the accident and sickness benefits available to Unit employees.
- (s) An addition of a new uniform exchange program for Unit employees.
- (t) A change in the wage rates for Unit employees.

Unilateral action by an employer concerning subjects of mandatory bargaining is a violation of the duty to bargain in good faith, in the absence of a true impasse in negotiations. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). The changes listed above cover a full range of terms and conditions of employment. Because there was no impasse at the time these changes were implemented, Respondent did so at its own peril. As the Board has previously noted, "unilateral change not only violates the plain requirement that the parties bargain over 'wages, hours, and other terms and conditions,' but also injures the process of collective bargaining itself." *Priority One, Services, Inc.*, 331 NLRB 1527 (2000), quoting *NLRB v. McClatchy Newspapers*, 964 F.2d 1153, 1162 (D.C. Cir. 1962). In its decision in *Priority One*, the Board pointed out that it is well settled that the real harm in an employer's unilateral implementation of terms and conditions of employment is to the union's status as bargaining representative and in effect undermining the union in the eyes of the employees. As the Board went on to point

out, such unilateral changes are not “simply benign technical” changes, but are the kinds of changes that would undermine a union’s perceived authority as the bargaining representative of the employees. *Ibid.*

Clearly, the vast array of changes that were implemented on March 31, 2010, represented far more than benign technical changes. Such changes essentially gutted the terms of the prior contract and significantly altered the previously established terms and conditions of employment. As has been noted, such unilateral action “detracts from the legitimacy of the collective-bargaining process by impairing the union’s ability to function effectively, and by giving the impression to members that a union is powerless.” *Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60, 64–65 (1st Cir. 1979) (citing *NLRB v. General Electric Co.*, 418 F.2d 736, 748 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970)).

4. Whether Respondent engaged in unlawful conduct between March 31 and April 30

Complaint paragraph 16 alleges that from March 31 to on or about April 30, 2010, Respondent failed and refused to bargain collectively with the Union as the exclusive collective-bargaining representation of its unit employees. Paragraph 18(b) of the complaint alleges that from on or about March 31 to on or about April 30, 2010, Respondent conditioned bargaining over mandatory subjects of bargaining on the Union’s concessions to Respondent’s bargaining demands.

a. Evidence presented

Heider responded to Fuselier’s last email of 3–31–10 at 9:24 a.m. on April 1, 2010. She reminded Fuselier that it was the Union who had asked for a final offer from Respondent and that she had done exactly as he had asked. She again explained that she had come back to negotiations on March 31 to make it as clear as she could that “final means final.” She explained that as Respondent’s offer had been rejected, it made no sense to have more meetings like the one on March 31 where she could only repeat that Respondent had given its final offer. She rejected his assertion that the parties were not at impasse, stating: “The Company is not interested in meeting somewhere between our final offer and your current position, whatever that is.”

Later in the day at 1:55 p.m., Fuselier again informed Heider that the Union had a new proposal to submit to Respondent on the open issues. He again asked about Respondent’s availability for bargaining in order that he could notify Mediator Bolton. When Heider replied at 4:32 p.m., she explained: “As I told both you and Mediator Bolton yesterday, there is no reason to meet again unless you are willing to accept the pending final offer.”

The parties had no further negotiations until April 30, 2010. Although the parties met in person on April 20, 2010, no negotiations were held. The in-person meeting on April 20 was initiated at the request of Union Director Mickey Breaux. Fuselier contacted Heider and told her that Breaux wanted to have an off-the-record meeting to speak with Respondent and listen to Respondent’s position. He explained that because none of the committee members would be included, there would be no negotiations or proposals. The meeting was held

at a restaurant in the Houston Airport. The only persons attending the meeting were Heider, Bull, Fuselier, and Breaux. Heider and Bull gave Fuselier and Breaux some documents to substantiate Respondent’s claims concerning excessive overtime and absenteeism. Breaux agreed that the overtime and absenteeism was high. He also asked questions about the three big issues that were important to the Company. There was no discussion during the meeting about resuming negotiations.

b. Conclusions concerning Respondent’s conduct in April 2010

Assuming that a valid impasse had been reached by the parties on March 31, 2010, the overall evidence supports a finding that Respondent unlawfully failed to bargain with the Union and conditioned bargaining over mandatory subjects of bargaining on the Union’s concessions to Respondent’s bargaining demands as alleged respectively in complaint paragraphs 16 and 18(b). As the Board has noted, even when an impasse in bargaining is reached, the duty to bargain is not terminated. It is merely suspended. *McClatchy Newspapers, Inc.*, 321 NLRB 1386, 1389 (1996), enf.d. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998). Furthermore, as the Board pointed out in its decision in *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973), the duty to bargain about the subject matter of the impasse merely becomes dormant until changed circumstances indicate that an agreement may be possible. Specifically, the Board pointed out that such circumstances may include the union’s engaging in a strike, the employer’s engaging in a lockout, and the employer’s hiring of replacements to counter the loss of striking employees, as well as the employer’s changing terms and conditions of employment that are consistent with the offers rejected by the union. As the Board explained, these kinds of economic pressures usually break the stalemate between the parties, change the circumstances of the bargaining atmosphere, and revive the parties’ duty to bargain. As the Board noted, “[A]n impasse is but one thread in the complex tapestry of collective bargaining, rather than a bolt of a different hue. In short, a genuine impasse is not the end of collective bargaining.” *Hi-Way Billboards*, supra at 23. In a later decision in *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 412 (1982), the Supreme Court reiterated the Board’s decision in *Hi-Way Billboards*, noting that impasse is only a temporary deadlock or hiatus in negotiations that is eventually broken in almost all cases through either a change of mind or the application of economic force. *Id.*

There is no dispute that the Union requested bargaining after the implementation and confirmed that it had new proposals to offer on the open issues. At 10:11 p.m. on the evening of March 31, 2010, Bull notified the Union that Respondent was immediately implementing its final offer. As described above, Heider responded by telling the Union that it made no sense to have any additional meetings. She made it clear that Respondent was not interested in meeting somewhere between Respondent’s final offer and the Union’s current position, “whatever that is.” In a later email on April 1, 2010, Fuselier reiterated that the Union had a new proposal to submit to Respondent on the open issues. He asked Respondent’s availability for bargaining in order that the Union could notify the mediator.

Within hours, Heider responded: "As I told both you and Mediator Bolton yesterday, there is no reason to meet again unless you are willing to accept the pending final offer."

The Union argues that once an impasse is broken and the bargaining obligation is restored, there is no "grace period" that allows an employer the right to continue what it enjoyed during the period of impasse or its suspension of its 8(d) obligations. The Union asserts that any impasse that may have existed on March 31 ended when Respondent exercised its "economic force" and unilaterally implemented terms and conditions of employment by implementing the March 19 proposal at 10:11 p.m. The Union further submits that once Respondent imposed this unilateral implementation, it was no longer permitted to summarily reject the Union's request to return to the bargaining table and resume the bargaining process. I find merit to the Union's argument. Assuming that there had been a valid impasse on the morning of March 31, 2010, the impasse was broken that same day either by the Union's request to bargain as discussed above or by Respondent's implementation of its final offer. The fact that Respondent had indeed broken any stalemate in negotiations is evidenced by the Union's request to return to the bargaining table and its assertion that it had new proposals concerning the open issues. Heider summarily rejected the offer without even knowing the nature of the new proposals. She made it clear that the only thing that Respondent would accept from the Union was total acceptance of Respondent's final offer. Although Heider and Bull met with Fuselier and the union director in Houston on April 20, there was no bargaining. Although Heider and Bull explained why they wanted the terms of the final offer, there is no evidence that Heider or Bull expressed any interest in the Union's new proposals that Fuselier referenced in his April 1, 2010 email. Thus, through Heider's April 1, 2010 email and continuing through the April 20, 2010 meeting, Respondent refused to bargain with the Union at a time when there was no bargaining impasse.

Accordingly, Respondent's refusal to bargain with the Union from March 31, 2010, to on or about April 30, 2010, constitutes a refusal to bargain in good faith in violation of Section 8(a)(5) of the Act as alleged in complaint paragraph 16. Moreover, Respondent's insistence that there would be no further bargaining unless the Union accepted Respondent's pending final offer is also a violation of Section 8(a)(5) of the Act as alleged in complaint paragraph 18(b).

5. Whether the employees engaged in an unfair labor practice strike

On April 7, 2010, Fuselier and the union committee met with the membership for a special-called meeting. As of that date, Respondent had implemented its final offer. As the primary spokesperson for the committee, Fuselier explained the concept of impasse. He told the membership that it was the committee's position that Respondent had simply refused to continue to bargain and had illegally declared an impasse. He told the membership that because the parties were not at bargaining impasse; Respondent had unlawfully implemented its offer. There was discussion about the difference in unfair labor practice strikes and economic strikes. Fuselier told the membership

that if they went on strike because Respondent illegally implemented its offer, the strike would be an unfair labor strike and they would be protected. He added, however, that this determination would be up to the Board. He explained that if the Board determined that their strike was an economic strike and not an unfair labor practice strike, they could be permanently replaced. After additional discussion, the membership voted to strike. Fuselier immediately notified Bull that the membership had voted to go out on an unfair labor practice strike. He told Bull that the evening shift would not report to duty.

In its April 9, 2010 press release, the Union reported that the employees at Respondent's facility had initiated a strike because the employees believed that Respondent had acted illegally when it refused to bargain with the Union and chose to impose portions of its rejected contract proposal. The strikers' signs included the wording: "USW on ULP strike against NASC." The Board has used various phrases to determine whether a strike is an economic strike or an unfair labor practice strike. The Board has concluded, however, that all phrases look to the "subjective reactions" and the "state of mind" of the strikers in going on strike. *Pennant Foods Co.*, 347 NLRB 460, 459 (2006). Thus, if the strike is caused in part by an employer's unlawful conduct, the strike is an unfair labor practice strike. *Child Development Council of Northeastern Pennsylvania*, 316 NLRB 1145, 1145 (1995). Furthermore, a causal connection between an employer's unlawful conduct and a strike may be inferred from the record as a whole. *Id.* at fn. 4.

The record as a whole reflects that Respondent's unilateral implementation of its final offer on March 31, 2010, was a significant factor in the employees' decision to go on strike on April 7, 2010. Furthermore, Respondent admits that if the March 31, 2010 implementation of its final offer is determined to be unlawful, the April 7, 2010 strike is an unfair strike. Inasmuch as I have found that there was no valid impasse at the time of the March 31, 2010 implementation of the final offer, I find that the April 7, 2010 strike was an unfair labor practice strike. Accordingly, I find merit to complaint paragraph 9 with respect to the inception of the strike.

6. The parties return to the bargaining table on April 30, 2010

Following the parties' meeting on April 20, 2010, Fuselier received a telephone call from Mediator Bolton concerning a discussion that he had with Heider. Bolton explained that he had spoken with Heider to inquire if there was an opportunity for the parties to get back together. With Bolton's involvement, the parties agreed to meet again on April 30, 2010. In addition to the representatives from Respondent and from the Union, Mediator Bolton also attended.

Fuselier recalled that the meeting began with a discussion of Respondent's bargaining issues. He recalled that the union committee specifically inquired as to what Respondent wanted to do and could not do under the LOU that had been a part of the 2007/2010 contract. Bull clarified for the Union that Respondent wanted employees operating equipment to be able to do some of the maintenance related to that equipment. The parties also discussed overtime, hot-seating, and the issue involving an employee's missing his opportunity for overtime.

After a joint discussion, the parties separated to separate rooms to prepare responses or counterproposals. These responses were termed “supposals” because the parties’ proposals were filtered through the Federal mediator to the other party. During this negotiation session, the Union submitted a “supposal” concerning cross-assignment. Fuselier testified that the proposal gave Respondent some latitude for employees to do other work that was incidental to the job they were performing. He explained that under the counterproposal, Respondent could assign employees to do work with equipment within the scope and ability of their training that was consistent with the job they were performing. The Union also submitted a counterproposal to Respondent concerning overtime distribution. Specifically, the Union proposed language relating to hot-seating and addressing errors in assigning overtime. During the course of the day, the Union also gave Respondent a counterproposal concerning the alternative shift issue and concerning wages. Later in the afternoon, Respondent presented the Union with what was termed a “modified final proposal.” The document specifically noted that its language modified Respondent’s March 19, 2010 final offer. The modified final offer contained proposed modifications for two of the outstanding issues. The first section of the document modified the previous March 19 final offer concerning the LOU on cross-assignment. Fuselier testified that the April 30, 2010 modified language put the Union in a better situation than the language proposed on March 19. The second portion of the modified final offer included new proposed language concerning overtime distribution. The language incorporated the Union’s counterproposal for hot-seating and for the procedure for offering overtime to an employee who had erroneously been omitted from overtime. Additionally, Heider gave the Union a copy of a no-fault absence policy that Respondent planned to implement. She clarified that the policy was not part of negotiations.

At the close of the day, Heider told the Union’s negotiating committee that if the Union rejected Respondent’s modified final offer, two things were going to happen. The first thing was that Respondent would step up the hiring of permanent replacement workers and the second thing was that Respondent would re-evaluate the Union’s proposals in their entirety.

On or about May 6, 2010, the union committee presented Respondent’s modified final offer to the membership. The membership rejected the offer and continued its strike. On May 18, 2010, Heider sent an email to Brisimitzakis and other management officials at 5:58 p.m. and enclosed a text of an email that she planned to send to Fuselier and which was actually sent to Fuselier later that same day. The text of the email to Fuselier suggested meeting again for negotiations on May 25, 26, and 27. The email to Fuselier also confirmed that Respondent wanted to reopen negotiations for the purpose of discussing changes to Respondent’s previously tendered final offer.

In her email to her boss and others, she explained that she had discussed the situation with Respondent’s counsel and it was her belief that the meetings dates that she was proposing to the Union should forestall the Union’s calling off the strike before the suggested dates. She acknowledged during her testimony that she proposed these dates to the Union with the hope that the employees would continue striking.

7. Whether Respondent changed terms and conditions of employment on May 22, 2010, in the absence of an impasse

On May 22, 2010, Respondent distributed a letter to its employees and attached a copy of new operating procedures. The letter informed employees that the attached operating procedures would be followed during the strike. Employees were directed to their foreman or other management if they had any questions. Bull testified that the operating procedures were distributed to all employees working on May 22, 2010, and to any other employees who were hired between May 22 and June 15, 2010.

In his testimony, Bull confirmed that there were terms of employment in the May 22, 2010 operating procedures that were different than terms included in Respondent’s March 31, 2010 implementation of the March 19, 2010 final offer. Specifically, Bull acknowledged that Respondent’s March 19, 2010 final offer did not have a provision concerning seniority. The May 22, 2010 operating procedures, however, provided that with respect to demotions, filling vacancies, layoffs, and recall, Respondent would select employees based upon merit. Seniority would be the deciding factor only if there was no discernible difference in employees. At the conclusion of the strike on June 15, 2010, employees were recalled according to the May 22, 2010 operating procedures. Bull further confirmed that under the expired contract, Respondent would have had to recall employees after the strike based upon seniority. Bull also admitted that the operating procedures contained a loss of seniority for employees.

Additionally, Respondent incorporated mine and safety rules into the May 22, 2010 operating procedures. These rules had been a separate document and had not been a part of the prior contract. Bull also acknowledged that these rules remained as a “stand-alone” document and had not been included in the March 19, 2010 proposal that was implemented on March 31, 2010. Before the expiration of the 2007–2010 collective-bargaining agreement, the Safe Track safety program was a voluntary program for employees. With the implementation of the May 22, 2010 operating procedures, the program became mandatory for employees.

Furthermore, Respondent incorporated a new no-fault attendance policy with the May 22, 2010 operating procedures. This was also an attendance policy that was discussed briefly with the Union on April 30, 2010, and again on May 22 and 23, 2010. Bull acknowledged that although Respondent talked about the new attendance policy with the Union on May 22 and 23, 2010, Respondent had already implemented the attendance policy on May 22, 2010. When asked on cross-examination if Respondent ever told the union representatives at the bargaining table that they were discussing something that had already been implemented, Bull responded that he was “not sure.” Fuselier testified that at no time during negotiations in May or June did Respondent’s representatives ever inform the Union that Respondent had put into effect the May 22, 2010 operating procedures. Fuselier testified that not only did Respondent fail to mention this implementation in negotiations, Respondent failed to do so in emails, written correspondence, or telephone calls.

Counsel for the Acting General Counsel argues that Respondent's admission of its unilateral implementation of the operating procedures during negotiations on May 22, 2010, is a prima facie violation of its obligation to bargain in good faith under Section 8(a)(5) of the Act. This particular allegation was not in fact alleged in the initial complaint. It was only after there was record testimony concerning the implementation of the operating procedures that counsel for the Acting General Counsel moved to amend the complaint for the inclusion of the allegation. The Acting General Counsel's motion was granted.

There is no dispute that Respondent unilaterally implemented changes in terms and conditions of employment in its May 22, 2010 operating procedures. Certainly, the changes that brought about a loss of seniority for employees with respect to layoff, recall, promotions, demotions, and the filling of vacancies in addition to the imposition of a new attendance policy were significant. Although the parties were bargaining at the time of the implementation, there is no claim that the parties were at impasse concerning these issues. There is, in fact, no evidence that Respondent notified the Union of the intended implementation in advance of the implementation or even following the implementation. Citing *Service Electric Co.*, 281 NLRB 633 (1986), the Respondent argues that this allegation should be dismissed because an employer is not required to bargain with respect to terms and conditions applicable to replacements during a strike. Respondent further argues that on the face of the May 22, 2010 announcement, the terms were limited in application to the period of the strike and that the changes in the attendance policy were put into effect to keep absenteeism at a minimum during the period of the strike. Respondent asserts, "Management is entitled to get through the difficulties of a strike about any way it can and need not rely on the unlikelihood of obtaining union agreement to such changes."

Respondent is correct in that the Board in *Service Electric Co.*, supra, held that an employer may lawfully hire replacements in the event of a strike and may unilaterally set the terms and conditions of employment for those replacements. The Board has noted, however, that an employer may not exercise that right in a manner designed to undermine the Union. *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 638 (2001); *Service Electric Co.*, supra at fn. 11. The changes in the operating procedures were not simply isolated changes brought about by the strike. These were additional unilateral changes that were implemented following Respondent's March 31, 2010 unlawful implementation of the March 19, 2010 bargaining proposal and after refusing to bargain with the Union on April 1, 2010. All conduct which clearly undermined the Union's ability to represent the unit employees. Furthermore, the changes included in the May 22, 2010 operating procedures did not just relate to temporary changes in attendance that were necessitated by the strike situation. The record also reflects that the operating procedures contained significant changes in the employees' seniority rights that were applied to returning strikers and not just the replacements. Additionally, the unilateral changes included in the operating procedures remained in place after the strike and until they were displaced by another unilateral implementation on June 27, 2010. Accordingly, I find that

Respondent unilaterally implemented the operating procedures on May 22, 2010, in violation of Section 8(a)(5) of the Act as alleged.

8. Whether Respondent engaged in unlawful conduct related to its bargaining with the Union on May 25, 2010

a. *Negotiations on May 25, 2010*

On May 25, 2010, the parties met again for negotiations and in the presence of the Federal mediator. Prior to the meeting, Heider sent Fuselier a document entitled "Company Proposal May 24, 2010." At the beginning of the meeting, Heider read a statement of position to the union committee. The statement of position informed the Union that the management team had learned a lot of lessons through the process of continuing operations during the strike and such lessons were reflected in the May 24, 2010 contract proposals. In her statement, Heider acknowledged that she expected the Union's initial impression would be negative because the proposal represented change. She assured the Union, however, that pay rates, future increases, key fringe benefits, and just cause for discipline and all fundamental union rights had not been changed. She specifically explained:

The management team hopes that over the course of these reopened negotiations, all on the union side will keep an open mind and that we can get a new agreement that recognizes the realities of the current job marketplace, especially the fact that management has learned that it easily can hire an excellent workforce on the terms it is offering.

Fuselier testified that when the union committee read the May 24, 2010 proposal, their initial impression was that Respondent's latest proposal was retaliatory and regressive. Fuselier told his committee that things were getting worse rather than better. He suggested that they ask Respondent to put their April 30, 2010 bargaining proposal back on the table. He asked the committee if they would go back to the membership with a positive recommendation to accept the April 30, 2010 proposal if he could get Respondent to agree to return the April 30, 2010 proposal. The committee agreed that they would do so.

After consulting with the mediator, Fuselier met with Heider for a sidebar conference. Fuselier told her that he had spoken with the committee and the committee would be willing to go to the membership with a recommendation to accept Respondent's April 30, 2010 proposal. When Heider asked why the sudden change for the Union, Fuselier explained that the new proposal was 55 pages of "take-away items." He shared with her his impression that the new proposal was retaliatory and regressive. Heider told him that the new proposal was what management wanted; what they deserved; and what they were going to get. Fuselier recalled telling Heider that if Respondent wanted to continue the strike, the Union would do so.

During the remainder of the day, Heider explained the various sections of the proposed May 24, 2010 proposal. The format of the proposal was a copy of the 2007-2010 CBA with various additions and deletions. One of the first and most noticeable changes to the previous contract was Respondent's proposal to remove the classifications of storeroom clerk, sur-

face truckdrivers, janitors, and hoistmen from the coverage of the contract. The proposal also expanded the management-rights clause to require the Union's agreement with the new mine and safety rules that included a no-fault absence policy.

The proposal deleted the requirement to post union bulletin boards. Under the new proposal, Respondent's liability for backpay in an arbitration award was limited to 12 months. Fuselier testified that the May 24, 2010 proposal placed all employees into various grades. If there were a number of different jobs within a particular grade, each employee in the grade would be required to train and to work all the jobs within that grade. If an employee could not qualify on all the jobs within the grade, the employee would be demoted. The amount of call-in pay for employees was reduced from 6 to 4 hours. Fuselier also testified that under the terms of the new proposal, Respondent would have more discretion in making temporary assignments to employees and would also have the discretion to assign supervisors to do bargaining unit work or to assign employees to perform work that would otherwise be nonbargaining unit work. The proposal also allowed Respondent greater discretion in contracting out bargaining unit work.

Under the prior contract, employees were assigned to one of three 8-hour shifts. Under the new proposal, the three prior shifts were deleted and Respondent had the discretion to determine the shifts, the hours of work, and the duration of the shifts, however, no one would be required to work more than 16 hours at one time. The proposal allowed Respondent the discretion to not only establish, eliminate, and change the workweek, but also the discretion to establish, eliminate, and change how and when overtime is offered and assigned to employees.

In the March 19, 2010 final offer, Respondent proposed 45 minutes for an employee to remain at his workstation under "hot-seating." In Respondent's May 24, 2010 proposal, however, the employee would remain at his workstation for an hour. While the May 24, 2010 proposal included a grievance/arbitration procedure, the proposal limited the amount of backpay that could be award an employee to 12 months.

A number of the proposed changes in Respondent's May 24, 2010 proposal dealt with seniority. During the discussion on May 25, 2010, Respondent's representatives explained that under the May 24, 2010 proposal, all matters relating to promotions, demotions, layoffs, and recalls would be merit-based rather than seniority-based. Under the prior contract, an employee would lose his seniority if he was absent from work for more than 36 months because of a nonoccupational illness or injury. Under the new proposal, the employee would lose his seniority after 6 months. Under the previous contract, an employee would lose his seniority if he had been on layoff for more than 26 months. Under the new proposal, the employee would lose his seniority after 6 months on layoff. Under the new proposal, seniority would no longer determine recall to employment after layoff. Seniority had also been a determining factor for layoff and for bumping rights under the prior contract. The new proposal deleted the seniority language; using merit as a basis for determining layoff and bumping.

b. The bargaining session on May 27, 2010

The Respondent continued to explain its new proposal during the meeting on May 25, 2010, and into the day on May 26, 2010. Fuselier testified that at the beginning of the bargaining session on May 27, 2010, Heider noted that there were a lot of issues on the table and the Company had some room to move on some of these issues. Heider then explained that in addition to the original three core issues, Respondent had added four additional core issues. Respondent's three core issues that had been open when Fuselier joined the bargaining on March 10, 2010, dealt with alternate shifts, overtime distribution, and the removal of the LOU on cross-assignment. The additional core issues that Heider added on May 27, 2010, were identified as: (1) replacing seniority with merit-based criteria; (2) eliminating restrictions on supervisors performing bargaining unit work; (3) removing restrictions on contracting out bargaining unit work; and (4) inclusion of the safety and mine safety procedures.

c. Conclusions concerning May 25, 2010 bargaining

Complaint paragraph 18(c) alleges that on or about May 25, 2010, Respondent presented the Union with a regressive contract proposal. Paragraph 18(d) alleges that since on or about May 25, 2010, Respondent insisted on bargaining proposals that left the Union without any representational rights and employees in a worse position than if they did not have the Union as their collective-bargaining representative.

Citing the Board's decision in *Hickinbotham Bros. Ltd.*, 254 NLRB 96, 103 (1981), Respondent asserts it did not engage in regressive bargaining because it was permissible to add new proposals after the commencement of a strike. The circumstances before the Board in *Hickinbotham Bros.* involved an employer's making a number of concessions in order to avoid a strike. The employer's action was unsuccessful, however, and a strike commenced. Thereafter, the employer dropped some of the proposals that it had made in an effort to avoid the strike. The Board affirmed the judge in finding that the employer's actions were lawful. In his rationale, the judge opined that a strike is a two-edged sword. He explained that depending upon how it affects the employer's operations, the strikers may gain concessions or they may lose concessions previously obtained. Certainly, the Board has held that absent full agreement, either party is free to withdraw from tentative proposals as long as the withdrawal is not motivated by intent to frustrate bargaining or prevent an agreement. *Barclay Caterers*, 308 NLRB 1025 (1992). In the instant case, the circumstances are quite distinct from those before the Board in *Hickinbotham Bros.*, *supra*. Respondent's May 24, 2010 proposal did not reflect a withdrawal of prior concessions or simply a withdrawal of prior tentative proposals. In its May 24, 2010 proposal, Respondent upped the ante and knowingly added more demands that would not be acceptable to the Union. When she presented the proposal to the Union, Heider's statements revealed that this was her expectation. Whereas Respondent had three core or "must have" provisions when it implemented its final offer on March 31, 2010, Respondent had now increased the number of core issues to seven.

Counsel for the Acting General Counsel points out that while a regressive proposal is not a per se violation of the Act, it may

nevertheless be considered as a sign of bad-faith bargaining. *Reliable Tool Co.*, 268 NLRB 101,101 (1983). In general, an employer may be found to violate the Act if its entire pattern of conduct is such as to warrant the conclusion that it is seeking to avoid an agreement rather than reach one. *Central Missouri Electric Cooperative*, 222 NLRB 1037, 1042 (1976). Certain undisputed facts in this case support such a finding.

The undisputed facts in this case suggest that Respondent's objective was the continuation of the strike and the avoidance of reaching an agreement. Respondent does not dispute that Heider concluded the bargaining on April 30, 2010, by telling the union committee that if the Union rejected Respondent's modified final offer, Respondent would step up the hiring of replacement workers as well as to reevaluate the Union's proposals in their entirety. The membership, however, rejected the modified final offer.

On May 18, 2010, Heider sent an email to CEO Brisimitzakis, other managers, and legal counsel. She attached a proposed email that she planned to send to Fusilier concerning a reopening of bargaining to discuss changes to Respondent's previously tendered final offer. Heider planned to suggest to Fusilier that the parties meet May 25 through 27. In her comments to CEO Brisimitzakis and others, Heider referenced a detailed discussion of the situation and she added, "... we believe that the meeting dates proposed for next week should forestall the union calling off the strike before then."

On May 27, 2010, Heider sent an email to CEO Brisimitzakis detailing the bargaining sessions that occurred between May 25 and 27. She began by confirming that the sessions had gone "according to plan" and that Respondent would reach the "perfect contract" or an impasse within the 30-day timeframe. She explained to her boss that when Fusilier had told her that the union committee would now recommend Respondent's expired final offer if Respondent would make some change in the Sunday schedule for maintenance employees, she had rejected the offer and had told Fusilier that the final offer was not on the table. She further confirmed that Respondent's negotiating committee had been instructed to try to move the Union along a little quicker "by trying to force them to focus on five key issues, on which we knew they could not agree but on which, without agreement, there could be no contract." She acknowledged that after CEO Brisimitzakis authorized Respondent's committee "to go to the bargaining table with these 7 "have to have issues," the tactic had "worked as expected." She reported that when Respondent's committee outlined the seven new issues that Respondent had to have in the contract, the union committee had responded that the Respondent wanted to break the Union. Heider confirmed that at every turn and in response to the Union's comments, she had responded: "No, we just want a contract on our terms." In her email, she referred to the fact that Respondent's committee had received instruction that "everything that could be accomplished this week had been accomplished according to plan" and that Respondent's committee was instructed to "head home." In reading the entire one-page report, it is apparent that Respondent's representatives came to the negotiations on May 25, 2010, with a plan that was authorized by the CEO to frustrate and prolong the negotiations. Based upon Heider's remarks, Respondent obvi-

ously expected the union committee to react as they did and to reject the additional "must have concessions." As Heider stated, everything went "as planned."

It is well settled that the withdrawal of previous proposals does not per se establish the absence of good faith, but is but one factor to be considered in the totality of circumstances test. *White Cap, Inc.*, 325 NLRB 1166, 1168 (1998); *Aero Alloys*, 289 NLRB 497, 497 (1988). Furthermore, the Board has acknowledged that while it cannot force an employer to make a concession on any specific issue or to adopt any particular position,⁷ the employer is nevertheless "obliged to make some reasonable effort in some direction to compose his differences with the union if § 8(a)(5) is to be read as imposing any substantial obligation at all." *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984), citing *NLRB v. Reed & Prince Mfg. Co.*, supra at 135. The courts have long held that in evaluating the parties' good faith, the Board is not precluded from examining the substantial proposals put forth and that "if the Board is not to be blinded by empty talk and by mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by the employer in the course of bargaining negotiations." *NLRB v. A-1 King Size Sandwiches, Inc.*, 732 F.2d 872, 874 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984); *NLRB v. F. Strauss & Son, Inc.*, 536 F.2d 60, 64 (5th Cir. 1976); *NLRB v. Reed & Prince Mfg. Co.*, supra at 134. Sometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered to by a party. *NLRB v. Wright Motors, Inc.*, 603 F.2d 604 (7th Cir. 1979).

In *Hydrotherm, Inc.*, 302 NLRB 990, 994 (1991), the employer's proposals on key issues were found by the Board to amount to little more than a demand for the surrender of representational rights that a union has even in the absence of a contract. The Board specifically looked to the interacting operation of four of the proposals in particular as a basis for their finding. Under the employer's proposals, the union essentially lost its voice with respect to discipline as well as almost every other aspect of wages and working conditions. The Board found that in sum, the employer's proposals, considered as a whole, would have left the employees and their representative with less than they would enjoy by simply relying on the certification without a contract. The Board went on to point out that this is not the conduct of an employer sincerely attempting to reach an agreement, and it is not good-faith bargaining. *Hydrotherm, Inc.*, supra at 995.

By applying the *Hydrotherm* analysis to the interacting operation of Respondent's May 25, 2010 proposals, it is apparent that Respondent's "must-have" concessions would not only have immobilized the Union, but would have diminished its ability to represent the employees concerning a broad range of significant terms and conditions of employment, as well as wages. First of all, the proposal's extensive management-rights clause in conjunction with other proposal sections would allow Respondent to have the unfettered right to establish, eliminate, and change the workweek schedules. Furthermore, the pro-

⁷ *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir. 1953), cert. denied 346 U.S. 887 (1953).

posal gave Respondent sole discretion to establish, eliminate, and change overtime. Although the prior contract had specific restrictions concerning contracting out bargaining unit work, Respondent's May 24, 2010 proposal gave Respondent the right to contract out work "as it deems appropriate." The proposal also eliminated the previous contractual restriction on cross-assignment, thus, giving Respondent complete discretion to move and assign bargaining unit work to supervisors and nonrepresented employees. The removal of the restriction on cross-assignment would also give Respondent the opportunity and right to move employees into jobs for which they did not have experience and expertise; thereby providing Respondent a basis to discipline or terminate for poor performance. One of the most sweeping changes in Respondent's proposal dealt with the virtual elimination of seniority in employment decisions. Respondent proposed "all matters related to promotions, demotions, filling of vacancies, layoffs, and recall from layoff" would be based upon Respondent's discretion as to the employee's "relative merit." Finally, although Respondent kept the "no-strike" provision in its proposed contract, Respondent's proposal significantly restricted the arbitration provision. As counsel for the Acting General Counsel points out, Respondent's added language in its provision restricted the breadth of issues that an arbitrator could consider, prohibited the arbitrator from changing, modifying, or altering the agreement in construing any grievance and put new restrictions on potential backpay awarded by the arbitrator.

Thus, Respondent's new and expanded "must-have" concessions would have essentially given Respondent total discretion with respect to work schedules, overtime, and assignment of work. Bargaining unit work could be given to supervisors, nonbargaining unit employees, or simply contracted out without restriction. By using a new criterion of "relative merit," employees could be promoted, demoted, laid off, recalled, or assigned to vacancies based upon management's subjective preferences and without regard to seniority except when employees were otherwise deemed equally qualified. Even if the Union filed grievances, the issues that could be presented to the arbitrator would be restricted and the arbitrator could not change, modify, or alter the agreement in construing any grievance. Furthermore, the proposal limited the amount of backpay that the arbitrator could award even if the Union was successful before the arbitrator.

Thus, it is apparent that the new proposals given to the Union on May 25, 2010, when viewed as a whole, would leave the Union and the employees with substantially fewer rights and less protection than provided by law without a contract. This does not appear to be the conduct of an employer that is sincerely attempting to reach an agreement; but is evidence that it is not seeking to bargain in good faith. *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487, 489 (2001), *enfd.* 318 F.3d 1173 (10th Cir. 2003); *Hydrotherm, Inc.*, 302 NLRB at 995. Accordingly, I find merit to complaint allegations 18(c) and (d) as alleged.

9. The parties' negotiations on June 2 and 3, 2010

a. Negotiations on June 2, 2010

When the parties met again for bargaining on June 2, 2010, the parties discussed Respondent's seven core issues. Fuselier recorded in his notes Heider's statement that if there was no movement on the core issues, there would be no contract. During the course of the session, the Union submitted counterproposals concerning the absentee policy, seniority, and contracting out work. Specifically, the Union proposed four steps for the progressive discipline system rather than the three steps proposed by Respondent. The Union also proposed an adjustment of the point system proposed by Respondent. Fuselier testified that Respondent wanted merit to be a basis for filling jobs and the Union wanted seniority as a basis for such action. He testified that in order to give the Respondent some latitude, the Union proposed the application of seniority after other factors were considered. With respect to contracting out work, the Union proposed that certain subcontracting could be used as long as it did not adversely affect the basic security of the regular employees or be used as a way to eliminate regular employees by substituting contractors. The Union also submitted a counterproposal on wages and provided a written assurance that it was agreeable to discussing a 4- to 5-year agreement. The Union additionally requested in writing that the parties work to address the issue of whether the maintenance day shift had to start the workweek on Sundays as proposed by Respondent. Fuselier recalled that the Union suggested that rather than having all maintenance employees begin their workweek on Sunday, employees could stagger the day that they would begin the workweek and then rotate the Sunday starting day. Fuselier explained that this proposal would not only give employees an opportunity to have Sundays off to attend church for part of the month, but it would also allow for maintenance coverage for 7 days a week rather than simply Sundays through Thursdays. With respect to Respondent's proposal of removing the LOU on cross-assignment, the Union proposed that employees could be cross-assigned within their respective pay grades but not cross-assigned to any jobs anywhere within the mine.

Fuselier recalled that after the Union submitted their counterproposals, the parties took an afternoon break. When the parties returned to the bargaining table, Heider told Fuselier that Respondent rejected the Union's counterproposals. She told him that the Union's counterproposals were inconsistent and the Union needed to work on them. Fuselier also recalled that he told Heider that the Union had made a lot of movement to address Respondent's issues and Respondent had made none. Accusing Respondent of bargaining in bad faith, Fuselier suggested that they go through their notes and Heider could identify where there had been no movement by the Union. Heider told Fuselier that Respondent had learned a lot during the strike and these were the things that Respondent needed in the contract. Heider also countered that Respondent had in fact moved on the issue of the length of the contract by considering a 3- to 4-year contract rather than the 5-year contract initially proposed by Respondent.

b. Negotiations on June 3, 2010

Fuselier recalled that the session on June 3, 2010, began with Heider addressing the Union's accusations that Respondent was trying to break the Union. She told the union committee that there was nothing antiunion about merit; the 2-1/2-percent pay raise that Respondent had proposed, or other proposed changes. She went on to add, however, that the Union would have to accept Respondent's proposals on the seven core issues or there would be no contract. Heider acknowledged that while the Union had not made any proposals during the bargaining sessions in late May, the Union presented proposals on June 2 and 3. Heider testified that she told the Union that Respondent had "lots of movement," but Respondent would not use it unless the Union accepted Respondent's priorities. She also testified that she told the Union that Respondent was sticking with their proposal and that the Union's failure to agree to Respondent's core proposals would prevent a contract. She further added that there was no incentive to talk about other things that were not Respondent's priorities because it made no sense for Respondent to make gestures with those.

During the course of the meeting on June 3, 2010, Bull mentioned that Respondent had already hired as many as 55 replacement workers and Respondent anticipated having as many as 100 by the end of the month. Fuselier recalled that Heider told the union committee that Respondent had learned from the strike that it needed to take more responsibility in running the mine. Respondent no longer feared strikes and for that they thanked the Union. At the end of the bargaining session on June 3, Heider told the Union that Respondent needed their seven core issues or the parties were at "loggerheads." Fuselier recalled that this was the first time that Heider had used the phrase "loggerhead."

10. Emails between the parties on June 9, 2010

In an email on June 9, 2010, Heider informed Fuselier that the replacement workers hired during the strike were permanent replacements. She explained that if, and when, the strike ended, it was unlikely that all of the striking employees would be able to return at once to their jobs. She suggested the establishment of a preferential recall list and confirmed that Respondent was available to meet and to discuss such a list at the Union's earlier convenience. She suggested basing the preferential recall on Respondent's last contract proposal. The proposal based recall on relative merit, including qualifications, ability, and dependability. Heider sent the email to Fuselier at 2:59 p.m. on June 9. Later that same day at 6:09 p.m., Union Representative Mike Tourne sent Bull an email with a copy to Fuselier. Tourne stated that several times during the negotiations, Bull had referenced the replacement workers hired during the strike. Tourne asked for clarification as to whether these replacement workers were temporary or permanent. At 9:25 p.m. that same evening, Heider responded to Tourne's inquiry. Heider explained that while she could not give a precise breakdown in numbers, Respondent had hired a substantial number of replacement workers in both categories. She identified, however, that the only temporary employees were contractor employees.

11. The end of the strike on June 15, 2010

On June 15, 2010, the Union notified Respondent that it was ending the strike and that the striking employees were unconditionally offering to return to work. In an email to Tourne on June 16, 2010, Heider reminded the Union that no preferential recall list had been established. She suggested that while the Union would likely desire strict seniority as the recall criteria, Respondent believed that it was imperative that the best employees return as soon as possible. While she again suggested Respondent's latest contract proposal for recall, she acknowledged that this issue was a bargainable issue. She explained that Bull was developing a proposed recall order based on the Respondent's proposed recall criteria and would get the proposed recall order to the Union by the end of the day. She asked that the Union get back with her as soon as possible so that final decisions could be made and recall telephone calls placed to the appropriate individuals. When Tourne responded to Heider, he explained that the Union objected to Respondent's failure to take back the returning unfair labor practice strikers. He added that it was illegal for Respondent to permanently replace the unfair labor practice strikers and the Union did not agree to the recall order as proposed by Respondent. He confirmed the Union's availability to negotiate over these terms and the pending open matters.

Later in the day, Bull sent a proposed recall list for the 27 employees in issue. Tourne immediately responded that the Union would only agree to the recall of the unfair labor practice strikers in a manner consistent with the expired collective-bargaining agreement. He confirmed that any other recall would be viewed as another unilateral change in the absence of impasse and the Union would file additional unfair labor practice charges. The following day, Bull sent the Union another proposed recall list. Although Bull's email suggests that the recall order varied from the one proposed on June 16, the record is silent as to how it varied.

12. The parties' bargaining on June 22, 2010

On June 17, 2010, and prior to the bargaining on June 22, 2010, Heider sent Fuselier an email. Heider proposed that Respondent would accept the prior March 19 language for everything except for the proposals on merit, shared work, and contracting; which she termed as the current most important items to Respondent. She further added that if the Union gave her the merit, shared work, and contracting language, this would "open up things" on her end.

Fuselier recalled that Heider began the meeting on June 22, 2010, by telling the committee that Respondent was going to focus on the core issues to which Respondent's top management was committed. She also explained that Respondent had some new proposals that were not final, but close to final. She explained that their proposals would give Respondent the freedom to operate the mine. Heider presented the union committee with its latest proposals. Basing the prior CBA as a template, the June 22, 2010 proposal contained colored additions or deletions to indicate the proposed changes to the CBA. The additions or deletions in blue print represented the changes included in Respondent's May 25, 2010 proposal. The additions or deletions in red print represented the changes in the

June 22, 2010 proposal. Heider testified that when she told the Union that Respondent had made changes to their May 24 proposal, she also said that it was not a final proposal and that there was room to move.

In its June 22, 2010 proposal, Respondent proposed changing the name of the Union from United Steelworkers of America, AFL-CIO/CLC; the name of the contracting party in the prior CBA, to simply United Steelworkers. With respect to other contract sections, Respondent's proposal reverted back to language that was included in the expired CBA. Specifically, and in contrast to the May 25, 2010 proposal, Respondent's June 22, 2010 proposal put the classifications of storeroom clerk, truckdrivers, dock employees, and hoistmen back into the collective-bargaining unit. Additionally, Respondent's new proposal reverted back to the language in the expired CBA with respect to bulletin boards, call-in pay, injured employees, loss of seniority, and union leave. Fuselier testified that while these sections of Respondent's June 22, 2010 proposal were an improvement to Respondent's May 25, 2010 proposal, the proposals were not in response to the Union's counterproposals on these subjects. Fuselier testified that basically there were some things that Respondent took away in the May 25, 2010 proposal that were given back in the June 22, 2010 proposal. Everything else remained the same as in the May 25, 2010 proposal.

During the bargaining on June 22, 2010, Fuselier told Respondent that it was the Union's position that Respondent had unlawfully declared impasse, refused to bargain, and had engaged in unlawful and regressive bargaining. He also asserted that Respondent had illegally refused to take back the striking employees. Fuselier asked Heider the purpose for all of the new proposals that had not been needed before. He described the proposal as 55 pages of "take-away stuff." He recalled that Heider told him that Respondent had re-evaluated its position and that management had determined that they needed the proposal items. The Union again requested that Respondent take back the striking employees. The Respondent declined.

Following the bargaining session on June 22, 2010, Heider sent Fuselier an email captioned "June 22/23 Bargaining Sessions." In the email, she confirmed that she had spoken with management about the Union's request for the strikers' immediate return to work and management was inalterably opposed to any such course. She also addressed Fuselier's request for additional time to review Respondent's proposals; telling him that he had had since May 25 to "do all the review" that he wanted. She expressed her irritation in having traveled to the meeting and then finding that Fuselier wanted the additional time for review that day and the next day. She told Fuselier: "Tomorrow morning, with the help of the mediator, I will be looking for acceptance from you of the Company's proposals on merit, work restrictions, and contracting. If you and your team continue to reject all three of these proposals, I do not see much prospect for a contract."

13. The parties' bargaining on June 23, 2010

Fuselier recalled that the meeting on June 23, 2010, began with Heider asking if the Union was going to agree to Respondent's seven core issues. When Fuselier asked if Respondent was going to take back the striking employees, Heider

replied, "No." She again asked about the agreement on the core issues. Fuselier recalled that he told Heider that the Union was considering Respondent's proposals but reminded her that there were other things on the table in addition to the seven core issues. Heider told Fuselier that if Respondent could not get the seven core issues, there would not be a contract. After a break in the session, Heider returned to the session with the June 22, 2010 proposal. Handwritten at the top of the first page were the words:

Final Offer-dated June 23, 2010. (final offer is the proposal presented to the Union on June 22, 2010). This offer will remain open until midnight Friday, June 25, 2010. If not accepted by Friday, June 25, 2010 midnight this offer is considered to be withdrawn.

Fuselier recalled that Miguez made the statement that they had begun with three core issues and now there were seven core issues. Fuselier asked Heider if Respondent was refusing to negotiate. He recalled that she told him, "We see no reason to continue if you don't accept our offer." Heider testified that at the end of the bargaining session on June 23, she told the Union that the bargaining session was over unless the Union said they would accept three of the Respondent's core proposals. There was no further bargaining on June 23, 2010. Heider testified that in providing this offer, the Union should have understood that as of midnight on 25, 2010, there was no longer any offer on the table.

14. Whether Respondent conditioned bargaining over mandatory subjects of bargaining on the Union's concessions to Respondent's bargaining demands

Complaint paragraph 18(e) alleges that since about June 3, 2010, Respondent conditioned bargaining over mandatory subjects of bargaining on the Union's concessions to Respondent's bargaining demands. The evidence reflects that at the beginning of the bargaining session on June 3, 2010, Fuselier testified that Heider told the Union that if Respondent's proposals were not met, there would be no contract. Fuselier further testified that Respondent rejected the Union's proposals, continued to insist upon the seven core issues, and declined to talk about any of the other issues. Heider also testified that toward the end of the bargaining session on June 23, 2010, she told the Union that the negotiation session is over unless the Union agreed to accept three of the seven core proposals. Citing the Board's very early decision in *General Electric Co.*, 150 NLRB 192, 194 (1964), counsel for the Acting General Counsel argues that Respondent's "take it or leave it" attitude is violative of the Act. In this regard the Board stated:

It is true that an employer does violate Section 8(a)(5) where it enters into bargaining negotiations with a desire not to reach an agreement with the union, or has taken unilateral action with respect to a term or condition of employment, or has adamantly demanded the inclusions of illegal or nonmandatory clauses in the collective bargaining contract. But, having refrained from any of the foregoing conduct, an employer may still have failed to discharge its statutory obligation to bargain in good faith. *Ibid.*

The Board went on to explain that a party who enters into bargaining with a “take it or leave it” attitude violates its duty to bargain even though the party may go through the forms of bargaining, doesn’t insist upon any illegal or nonmandatory bargaining proposals, and wants to sign an agreement. *Id.*

The overall evidence supports a finding that on or about June 3, 2010, Respondent conditioned bargaining over mandatory subjects of bargaining on the Union’s concessions to Respondent’s bargaining demands. Although the Union presented a number of counter-proposals on June 2 and 3 to address Respondent’s core issues, the proposals were rejected in their entirety, with the pronouncement that there would be no contract unless the Union accepted Respondent’s seven core issue proposals. Thus, I find merit to complaint paragraph 18(e) with respect to the bargaining on June 3, 2010. When the parties met again on June 22, 2010, Respondent presented the Union with proposals that were different than those proposed on May 25, 2010. Fusilier even acknowledged in his testimony that with respect to some contract sections, Respondent reverted back to contract language that had existed in the expired collective-bargaining agreement and some of the regressive proposals that had been presented on May 25, 2010, were withdrawn. Although Fusilier contended that Respondent had not responded specifically to the Union’s proposals, the proposals of June 22, 2010, were nevertheless an improvement to Respondent’s May 25, 2010 proposals. Furthermore, the record reflects that at the end of the June 23, 2010 bargaining session, Heider modified her position to insist that the Union must agree to only three of the core issues in order to obtain a contract rather than all seven as she had previously insisted.

Thus, the record reflects that for the period of time from June 3 until June 22, 2010, Respondent conditioned bargaining over mandatory subjects of bargaining on the Union’s concessions to Respondent bargaining demands. As evidenced by Respondent’s internal email communication, Respondent’s bargaining strategy involved prolonging the strike. While Respondent seemed to lessen its insistence on the Union’s acceptance of its seven core issues on June 22 and 23, 2010, the employees had already ended the strike and unconditionally offered to return to work. Accordingly, while Respondent engaged in the unlawful conduct alleged in paragraph 18(e) only during the period of time between June 3 and 22, 2010, Respondent’s overall conduct in May as alleged in complaint paragraphs 18(c) and (d) and on June 3, 2010, as alleged in complaint paragraph 18(e) was sufficient to prolong the strike as alleged in paragraph 9 of the complaint.

15. Whether Respondent implemented changes in terms and conditions of employment on June 27, 2010, in the absence of an impasse

The complaint alleges that Respondent implemented changes and conditions of employment on June 27, 2010, in the absence of a valid impasse. Although Respondent admits that it unilaterally implemented numerous changes to the terms and conditions of employment for bargaining unit employees, Respondent asserts that it did so because the parties were at impasse as of June 23, 2010.

As discussed above with respect to the issue of Respondent’s implementation of its final offer on March 31, 2010, the question of whether a valid impasse exists is a “matter of judgment” and relevant factors include (1) the bargaining history; (2) the good faith of the parties in negotiations; (3) the length of negotiations; (4) the importance of the issue or issues as to which there is disagreement; and (5) the contemporaneous understanding of the parties as to the stated negotiations. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enfd. sub nom. Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

While Respondent acknowledges that the application of the *Taft* standards to the claimed impasse on June 23 shows a closer case with respect to several criteria than for the March 31 impasse, Respondent nevertheless asserts that the application shows impasse. With respect to bargaining history, Respondent contends that while the asserted impasse of March 31 was broken by the strike, the additional proposals put the parties further apart than they were previously. With respect to the importance of the issue as to which there is no agreement, Respondent also asserts that because there were the same and even more issues in disagreement than on March 31, 2010, this criterion is even stronger for the Respondent than in March. While Respondent acknowledges that there were only 7 days of negotiations as contrasted with the 16 days before the alleged March 31, 2010 impasse, Respondent asserts that additional days of negotiations “would have led nowhere.” With respect to the contemporaneous understanding of the parties, Respondent contends that because the Union did not indicate that it would accept any of Respondent’s core proposals, there was no basis for continuing the effort to have the Union change their mind.

The application of the *Taft* factors to the facts in this case strongly counters a finding of a valid impasse on June 23, 2010. Aside from the fact that the bargaining period was only 7 days and there was no evidence that there was a contemporaneous understanding of the parties, the two factors that are most at odds with the existence of a valid impasse is the bargaining history and the absence of good faith.

Although there is no presumption that an employer’s unfair labor practices automatically preclude the possibility of meaningful negotiations and prevent the parties from reaching good-faith impasse,⁸ the Board has also noted that a finding of impasse presupposes that the parties prior to the impasse have acted in good faith. *White Oak Coal Co.*, 295 NLRB 567, 568 (1989). In its decision in *Lafayette Grinding Corp.*, 337 NLRB 832 (2002), the Board adopted the rationale of the court in *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 138 (D.C. Cir. 1999), in recognizing two alternative situations in which an unfair labor practice can contribute to the parties’ inability to reach an agreement. First of all, an unfair labor practice can increase friction at the bargaining table. Secondly, by changing the status quo, a unilateral change may move the baseline for negotiations and alter the parties’ expectations about what they can achieve, making it harder for the parties to come to an agreement.

⁸ *Intermountain Rural Electric Assn. v. NLRB*, 984 F.2d 1562, 1569–1570 (10th Cir. 1993).

There is no question that as of June 23, 2010, and after 4 months of negotiations, there was increased friction at the bargaining table. It is, however, the second prong of the *Alwin* analysis that is most relevant to the instant case. As of June 23, 2010, and at the time of the alleged impasse, Respondent had twice unlawfully implemented changes in terms and conditions of employment in the absence of a valid impasse. With each implementation, Respondent's proposals became more regressive and more employees' rights were eliminated. As of June 23, 2010, Respondent had continued to insist on bargaining proposals that left the Union without any representational rights and left employees in a worse position than if they had no collective-bargaining representative at all.

Thus, Respondent's conduct for the period of time from March 31 until June 27, 2010, clearly moved the baseline on issues over which the parties were bargaining and altered the parties' expectations about what they could achieve, preventing a valid impasse on June 23, 2010. *Titan Tire Corp.*, 333 NLRB 1156, 1159 (2001).

Accordingly, the record evidence does not support a finding of a valid impasse on June 23, 2010.

a. June 26 and 27, 2010 emails

The union committee did not take Respondent's June 23, 2010 final offer to the membership for a vote. Fuselier testified that because of the regressive nature of the proposal, there was no need to present it to the membership. On June 26, 2010, Heider informed the Union that because it had not accepted Respondent's June 23, 2010 final offer, it would implement the terms of the offer on June 28, 2010. The implementation would not, however, include the no-strike/no-lockout provisions, dues checkoff, and the obligation to arbitrate. She explained that while there would be a grievance procedure in place, Respondent's final step would be binding. She confirmed that Respondent would continue to recognize the Union as the bargaining representative for those employees hired during the strike and those employees on the preferential hire list.

The following day, Fuselier responded to Heider's email. He reiterated that the parties were not at an impasse and that the implementation of this proposal would be unlawful, just as the Respondent's March 31, 2010 implementation had been unlawful. Fuselier explained that the Union objected to the unilateral changes in the terms and conditions of employment and that the Union demanded to bargain over every change Respondent intended to make involving mandatory subjects of bargaining. He explained that the Union was making a continuing demand to bargain and he requested that Respondent return to the terms and conditions of employment that existed prior to the Respondent's March 31, 2010 implementation of its bargaining proposal. He additionally requested the immediate reinstatement of the illegally replaced strikers and requested that they be made whole under the Act.

In an email later in the day on June 27, Brisimitzakis wrote Heider: "They asked for further meetings . . . will we refuse??? Doesn't sound quite right from PR perspective." When Heider responded simply: "Unless they agree to our core issues we will not meet." Brisimitzakis then asked if there was a more PR

friendly position that they might consider taking. Heider responded:

Probably not without jeopardizing the case we're building. No agreeing to core issues is what we used as the rationale to give the union a final offer Thursday. We went this route to be able to make the case that the core issues were the most important to the Co which the Co would have "no movements ["] If the union could not accept these core issues there would be no contract. Because we were so aggressive with little movement on other issues, we stuck to the "core" issues as fundamental. Stan⁹ will make his case that we would have moved on 90-95% of those non core issues . . . And no one can disprove this.

b. Respondent's June 29, 2010 notification

On June 29, 2010, Bull informed Fuselier that Respondent was implementing its entire June 23, 2010 proposal with the exception of the items identified by Heider in her June 26, 2010 email to the Union. Bull attached a copy of the implemented terms; entitled "June 27, 2010 Operating Procedures." Fuselier testified that there were differences, however, between the June 23, 2010 final offer and the June 27, 2010 operating procedures. He testified that the language in the management-rights section of the June 27, 2010 operating procedures was different than any language that he had seen proposed previously in bargaining. Specifically, the new management-rights language provided: "The Company reserves all rights not expressly restricted by the terms set forth herein, including the right to modify or amend this document from time to time as circumstances warrant."

Fuselier also pointed out that the issue resolution portion of the June 27, 2010 operating procedures in essence replaced a grievance and arbitration procedure with an open door policy. Section 15.01 of the June 23, 2010 final offer included a reference to Respondent and the Union cooperating in enforcing safety rules and regulations. It provided for the establishment of a committee composed of three union representatives and three respondent representatives to make recommendations on matters affecting the safety and health of employees. In contrast, the June 27, 2010 operating procedures included no reference to the Union. Under the operating procedures, only Respondent would make provisions for the safety and health of the employees and the safety committee would include hourly, supervisory, and management employees.

The operating procedures also provided that Respondent could establish new jobs or make material changes to existing jobs, including the setting of applicable pay rates. Fuselier testified that at the time that he was presented with the June 27, 2010 operating procedures, Respondent had not informed him or the Union that the new classification scheme had already been implemented as of May 22, 2010.

c. Conclusions

Respondent admits that on or about June 27, 2010, it took the following action:

⁹ This reference appears to refer to Respondent's counsel; Stanley Craven.

- (a) made changes to the management rights provisions for Unit employees.
- (b) added a provision granting Respondent the right to establish and change jobs and pay rates for Unit employees.
- (c) made changes to the shift schedules and differential pay rates for Unit employees.
- (d) made changes to the temporary assignment provision for Unit employees.
- (e) made changes to the work restriction provision or Unit employees.
- (f) added a provision giving Respondent the option to use a leadman to perform the work of Unit employees.
- (g) made changes to the work shifts, work week and overtime provisions for Unit employees.
- (h) made changes to the overtime distribution procedure for Unit employees.
- (i) made changes to the seniority based job selection procedure applicable to Unit employees.
- (j) made changes to the loss of seniority provision for Unit employees.
- (k) made changes to the contract work provision for Unit employees.
- (l) made changes to the schedule of wages for Unit employees.
- (m) added an attendance/absence policy for Unit employees.
- (n) added safety rules applicable to Unit employees.

As discussed above, the overall evidence reflects that on or about June 27, 2010, Respondent unlawfully implemented changes in terms and conditions of employment in the absence of a valid impasse. Accordingly, I find merit to complaint paragraphs 18(h), 22, and the corresponding portions of paragraphs 27 and 30.

E. Whether Respondent Unlawfully Threatened Strikers

The Acting General Counsel alleges that on two occasions during negotiations, Heider unlawfully threatened to permanently replace unfair labor practice strikers. Heider testified that toward the end of the bargaining session on April 30, 2010, she told the union bargaining committee that if the Union rejected Respondent's modified final offer, two things were going to happen. The first thing would be that Respondent would step up the hiring of replacement works and the second thing would be Respondent's reevaluation of its proposals their entirety. Respondent also stipulated that on or about June 3, 2010, Heider told its employees, including the employee members of the Union's bargaining committee, that Respondent had employed a substantial number of "permanent replacements" for striking employees, as confirmed in a June 9, 2010 email that Heider sent to Fuselier. In the June 9, 2010 email, Heider also informed Fuselier that "if and when" the strike ended, it was unlikely that all strikers would be able to return to work at once as a result of the hiring of permanent replacements and therefore many strikers would have to go on a preferential hire list for recall.

As discussed above, I find that the strike that began on April 7, 2010, was an unfair labor practice strike. Accordingly, Respondent's threat to fill the strikers' jobs with permanent replacements constitutes an unlawful threat to discharge the unfair labor practice strikers in violation of Section 8(a)(1) of the Act. *Grinnell Fire Protection Systems Co.*, 328 NLRB 585, 606 (1999); *Cagle's Inc.*, 234 NLRB 1148, 1150 (1978).

F. Evidence and Conclusions Concerning Respondent's Conduct Toward Strikers

As previously discussed in this decision, the total record evidence reflects that Respondent's unlawful changes in terms and conditions of employment on March 31, 2010, were a contributing cause in the employees' strike on April 7, 2010. Furthermore, Respondent admits that if the March 31, 2010 implementation is found to have been unlawful, the subsequent strike was an unfair labor practice strike from the outset. Respondent additionally admits that if the May 25, 2010 regressive bargaining proposal is found to have been unlawful as of that date, the strike was prolonged by reason of such unfair labor practice. Having found that Respondent unlawfully implemented its final offer on March 31, 2010, and thereafter engaged in regressive bargaining on May 25, 2010, I find that the strike was an unfair labor practice strike from its inception on April 7, 2010, and that Respondent's regressive bargaining proposals of May 25, 2010, and Respondent's conduct in bargaining on June 3, 2010, contributed to the prolongation of the strike.

On June 15, 2010, the Union made an unconditional offer to return to work on behalf of the employees who initiated a strike on April 7, 2010. The complaint allegations relating to Respondent's conduct toward those strikers after their unconditional offer to return is discussed below.

1. Whether Respondent unlawfully failed and refused to reinstate strikers

Counsel for the Acting General Counsel alleges that since on or about June 15, 2010, Respondent has failed and refused to reinstate the striking employees to their former positions. Article XI of the parties' 2007–2010 collective-bargaining agreement provides:

Seniority shall be the controlling factor in cases in which the employees have the ability to perform the work involved. Subject to the foregoing, seniority shall be applied in matters of promotions, demotions, reductions in force and recall of employment.

In an amended answer, Respondent admits that it offered reinstatement to returning strikers based upon the terms and conditions of its final offer that was implemented on March 31, 2010, rather than the terms of the expired 2007–2010 collective-bargaining agreement. Respondent asserts, however, that it appropriately treated the strikers as economic strikers and properly applied the terms of the March 31, 2010 final offer to everyone upon return and that it did the best it could in the circumstances to get all strikers reinstated to appropriate positions at the earliest opportunity.

Upon an unconditional offer to return to work, unfair labor practice strikers are entitled to immediate reinstatement to their

former jobs or, if such jobs no longer exist, to substantially equivalent positions, even if striker replacements must be terminated to make room for the returning strikers. *Maestro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956); *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). On June 16, 2010, and after the Union's unconditional offer to return to work, Respondent notified the Union that all of the production positions and approximately half the maintenance positions had been filled with "permanent replacements." Heider informed the Union that any striker who could not promptly be reinstated because there was no available position would be on a preferential hire list for recall as positions opened. She told the Union that Bull was preparing a proposed recall order and schedule based upon the criteria in Respondent's last proposal. Although the unconditional offer to return to work was made on behalf of the employees on June 15, 2010, the record contains no evidence that Respondent made any attempt to offer immediate reinstatement to the striking employees or that replacement employees were terminated to make jobs available for the strikers.

As counsel for the Acting General Counsel points out, only 23 out of approximately 120 strikers were called back to work for Respondent on or before June 20, 2010. Any offers of reinstatement for the remaining strikers occurred only as their names appeared on Respondent's preferential hire list. Some strikers did not receive calls to return to work until December 20, 2010, and others have as yet to receive such a call. While an employer is generally entitled to a grace period of up to 5 days to reinstate strikers to accommodate its administrative preparations, the Board has also determined that no grace period is permitted where the employer "unduly ignores, rejects, or unduly delays making a valid reinstatement offer." *La Corte ECM, Inc.*, 322 NLRB 137, 137 fn. 2, 140-141 (1996); *Drug Package Co.*, 228 NLRB 108, 113 (1977), modified 570 F.2d 1340 (8th Cir. 1978), on remand 241 NLRB 330 (1979).

An employer is simply not at liberty to delay reinstatement of strikers until positions become available through attrition in the ranks of the replacement workers or until the volume of business expands. *NLRB v. Gulf-Wandes Corp.*, 595 F.2d 1074 (5th Cir. 1979). Respondent does not deny that offers of reinstatement to strikers were based upon merit rather than seniority. The Board has long held that an employer is not free to pick and choose among the returnees or to determine the order of priority in which they would be entitled to reinstatement. The strikers are entitled to reinstatement as a group, not piecemeal. *Orbit Corp.*, 294 NLRB 695, 699 (1989).

Furthermore, strikers were offered reinstatement to jobs with significant changes in terms and conditions of employment caused by Respondent's unlawfully implemented final offers, as well as the unlawfully implemented operating procedures on May 22, 2010. When offers of reinstatement contemplate reinstatement to positions with unlawfully imposed terms and conditions of employment, the offers are not considered to be valid. *White Oak Coal Co.*, 295 NLRB 567, 572 (1989); *PRC Recording Co.*, 280 NLRB 615, 615 fn. 2 (1986), enfd. 836 F.2d 289 (7th Cir. 1987).

Accordingly, I find that any offers of reinstatement to the strikers did not constitute valid offers of reinstatement and the

recommended order shall include an order of reinstatement for those strikers as described in the remedy section. Inasmuch as there was undue delay in offering reinstatement to the strikers, backpay for the strikers should commence on June 15, 2010, rather than after the 5-day grace period on June 20, 2010.

Counsel for the Acting General Counsel presented the testimony of 28 strikers who resigned their employment either before or after receiving offers of reinstatement. The testimony of these strikers indicates that job offers were not immediate and were not offers to return to the jobs the strikers held prior to the strike. Some of the strikers testified that they resigned their employment during the strike or immediately after the strike because they were opposed to the changes in the terms and conditions of employment that had been unilaterally implemented by Respondent. Some strikers testified that they resigned because of the economic hardship caused by the extended strike. Other strikers accepted the offers to return to work and then resigned because of the changes in terms and conditions of work imposed by Respondent's unilateral changes.

Striker Irvin Boutte is 73 years old and prior to the strike he had worked for Respondent for 42 years. Two other employees at the mine had worked even longer for Respondent. At the time of the strike, he had been a truckdriver working above the surface of the mine and working 8-hour shifts. On December 13, 2010, Respondent offered Boutte reinstatement to a production job in the mine. When he met with Bull about the job offer, Bull explained that he would go into mine production without a classification; which meant that he would have been assigned to any job where Respondent wanted to place him. As a production employee, Boutte would be required to work 11-hour shifts and to work 1550 to 1650 feet below the surface. Boutte recalled telling Bull that he didn't understand why the Company wanted to put him into production when he had worked in maintenance for 25 or 30 years. Boutte testified that he would not have been familiar with any of the production equipment on which he would have been required to work. Boutte declined the offer. Striker Dean Pontiff testified that he resigned his employment before Respondent extended any offer of reinstatement. He did so because of Respondent's implementation of its final offer on March 31, 2010. He testified that the change to 11-hour shifts, the loss of seniority, and the requirement for cross-assignment were all factors that led to his resignation.

Strikers Gary Jeansonne, Chris Dugas, Phillip Simon Jr., Cardell Jumonville Sr., and Christopher Higgins testified that they were forced to resign because of economic hardships that resulted from the strike. Dugas, Simon, Jumonville, and Higgins testified that they had to resign in order to obtain money from their 401(k) retirement plan. Jeansonne testified that he had to take a job with another company in order to obtain medical insurance benefits for his wife who was hospitalized. He later lost his wife on June 25, 2010.

Although there is record evidence that some of the strikers declined Respondent's offer of reinstatement or resigned their employment, such resignations do not necessarily eliminate them as striking employees or relieve Respondent of its obligation to make a valid offer of reinstatement. *S & M Mfg. Co.*, 165 NLRB 663 (1967). While an employer is not required to

offer reinstatement to strikers who have abandoned their employment, the employer must present “unequivocal evidence of intent to permanently sever the employment relationship.” *Harowe Servo Controls, Inc.*, 250 NLRB 958, 964 (1980), quoting *S & M Mfg. Co.*, supra. In *Augusta Bakery Corp.*, 298 NLRB 58, 59 (1990), enfd. 957 F.2d 1467 (7th Cir. 1992), the Board found that an employer unlawfully denied reinstatement to strikers who had applied for their pension benefits. The strikers in issue testified that they had an economic need to obtain the pension funds and that their resignation was the only way that they could obtain their pension money. The Board did not find unequivocal evidence of the strikers’ intent to permanently sever the employment relationship.

In the instant case, there was no evidence that rebutted the testimony of the resigning strikers concerning their respective resignations. It is apparent that they resigned their positions either because of Respondent’s unlawful changes in terms and conditions of employment or because of economic hardships that necessitated their need for their 401(k) retirement plan funds. In the case of striker Jeansonne, the resignation was caused by his immediate need to obtain medical insurance coverage for his gravely ill spouse. Overall, I do not find that the strikers’ resignations reflect their intention to permanently abandon their jobs. Accordingly, the strikers who resigned are also included in the reinstatement order recommended herein.

2. Whether Respondent unlawfully failed to use seniority to recall striking employees

Complaint paragraph 18(f) alleges that on or about June 15, 2010, Respondent refused to use seniority to recall unit employees who had engaged in the strike. Complaint paragraph 21 alleges that on or about June 18, 2010, Respondent changed the seniority-based recall procedure for unit employees. In its amended answer, Respondent acknowledges that the 2007/2010 collective-bargaining agreement provided for recall by seniority and also acknowledges that in years past, Respondent has used seniority to recall employees. Furthermore, Respondent admits that it did not recall strikers by seniority and that it changed the seniority based recall procedure for unit employees.

The 2007/2010 collective-bargaining agreement provided that seniority would be the controlling factor in matters of promotions, demotions, reductions in force, and recall of employment. The March 19, 2010 final offer that was implemented by Respondent on March 31, 2010, included a number of specific changes, including changes in overtime distribution, deleting existing limitations on cross-assignment changes in shift hours. The unilaterally implemented final offer contained no provision relating to changes in seniority for recall or other terms and conditions of employment.

Generally, implemented changes after impasse must be consistent with an employer’s final offer. *Litton Systems*, 300 NLRB 324, 334 (1990); *Park Inn Home for Adults*, 293 NLRB 1082, 1087 fn. 9 (1989). *Royal Himmel Distilling Co.*, 203 NLRB 370, 370 fn. 3 (1973). An employer is not free to make any changes which were not encompassed in or consistent with its last rejected offer. *Rockland Lake Manor, Inc.*, 263 NLRB 1062, 1070 fn. 29 (1982).

As I have discussed above, I do not find that there was a valid impasse at the time that Respondent implemented its final offer on March 31, 2010. Furthermore, even if there had been a valid impasse that would have allowed Respondent to implement its final offer on March 31, 2010, there was nothing in the March 19, 2010 final offer that dealt with removing seniority as a basis for recall. Thus, Respondent’s failure to use seniority as a basis for recall and its change in the seniority-based recall procedure were not changes that were encompassed in or consistent with Respondent’s final offer. Accordingly, I find merit to complaint allegations 18(f) and 21.

3. Whether Respondent unlawfully continued to honor job offers to replacement workers

Complaint paragraphs 18(g) and (i), allege that on or about June 21 and 28, 2010, respectively, Respondent continued to honor job offers it made to replacement workers.

In an email dated June 16, 2010, Heider informed the Union that while she was happy to hear that the strike was over, there were not enough open positions to which all strikers could immediately return. She explained that all of the production positions and approximately one-half of the maintenance positions had been filled with “permanent replacements.” She went on to state that while she expected the Union’s preference for recall to be strict seniority, she proposed using the merit criteria that was included in Respondent’s May 24, 2010 contract proposal. She also added that Bull was developing a proposed recall order and schedule based upon the merit criteria and that the list would be forwarded to the Union for review. Later that same morning, the Union responded to Heider. Union Representative Mike Tourne informed Heider that the Union opposed Respondent’s refusal to take back the returning unfair labor practice strikers and he asserted that it was illegal for Respondent to permanently replace the strikers. He also confirmed that the Union was not agreeable to the proposed schedule for recall; however, the Union was available to negotiate over these items and the pending open items. Later in the day, Bull forwarded a list of 27 strikers with proposed times for the recall on either June 20 or 21, 2010.

The following day Heider wrote: “Sorry we could not work out anything on the recall issue but I understand the position that you are in. Gord will be making calls today for return next Monday.” Respondent does not dispute that these initial returning strikers were recalled according to Respondent’s May 24, 2010 bargaining proposal rather than by seniority. The remaining strikers who later received reinstatement offers were also considered for reinstatement based upon merit rather than seniority.

As discussed above, unfair labor practice strikers are entitled to immediate reinstatement to their former or substantially equivalent positions of employment on their unconditional offer to return to work. *Caterair International*, 309 NLRB 869, 880 (1992). Furthermore, an employer has the duty to reinstate former strikers even where replacement workers have been hired to perform their jobs and the replacement workers must be terminated, if necessary, to make room for the reinstatement of the strikers. *Honda*, 321 NLRB 482, 493 (1996); *Capitol Steel & Iron Co.*, 317 NLRB 809, 814 (1995).

As evidenced by the email exchanges described above and the record as a whole, it appears that Respondent made no effort to remove any strike replacements in order to return the striking employees to their former employment or to substantially equivalent positions. Although 27 strikers were recalled on either June 20 or 21, 2010; they were recalled to open positions that were not filled by the strike replacements. Moreover, Respondent admits that it continued to honor job offers to replacement workers on both June 21 and 28, 2010. Accordingly, inasmuch as Respondent had a duty to immediately reinstate the unfair labor practice strikers in accordance with existing Board authority, I find merit to complaint paragraphs 18(g) and (i).

4. Whether Respondent unlawfully changed the time period for employees to accept offers of re-employment

Complaint paragraph 23 alleges that on or about October 23, 2010, Respondent changed the time period for unit employees to accept an offer of re-employment. Fuselier testified that at no time did he ever receive any telephone calls, emails, or other communication from Respondent concerning an intention to change the period of time for which an employee could respond to a notice of recall. Section 11.04 of the 2007/2010 collective-bargaining agreement provides that an employee will initially receive notice of recall by a telephone call to the employee's last known telephone number filed with Respondent. If the employee is not reached by telephone, a certified letter will be sent to the employee's last known address filed with Respondent. Any employee who fails to accept an offer for re-employment within 10 days following the notice by telephone or certified mail shall forfeit his seniority rights and his status as an employee shall cease.

On or about October 21, 2010, Gord Bull sent a letter to the unreinstated strikers who were on the preferential hire list for recall. Bull explained in the letter that its purpose was to ascertain if Respondent had correct contact information for the employees and to determine if the employee recipient of the letter was still interested in returning to work for Respondent. If the employee wanted to remain on the preferential hire list, he did not have to do anything. If he was not interested in returning to work, he could contact Respondent and Respondent would forward any accrued vacation pay to the employee.

The letter also outlined the process which Respondent would use to recall employees from the preferential hire list. Bull explained that when Respondent was ready to recall an employee to his former job or a substantially equivalent position, the employee would be called at the telephone number on file with Respondent. If Respondent could not reach the employee by telephone within 72 hours, Respondent would send a Federal Express letter to the employee at the address on file with Respondent. If the employee did not accept the recall or contact Respondent within a 72-hour period, the position would be offered to another employee and the employee's name would be removed from the preferential hire list. If the offer of recall was not an offer to return to the employee's former position or a substantial equivalent position, the employee's name would not be removed from the preferential hire list. The letter also

contains a clarification that the 72-hour response requirement can be waived based upon an "employee's particular circumstances," provided that the employee makes every reasonable effort to keep Respondent apprised of those circumstances.

Counsel for the Acting General Counsel asserts that at no time during bargaining, emails, telephone calls, or other communication did Respondent notify the Union of its intention to reduce the response time by approximately 7 days. Additionally, counsel for the Acting General Counsel points out that in Respondent's third unilateral implementation of its June 22, 2010 proposal on June 27, 2010, the recall provision still provided for 10 days for employees to respond to recall.

In its amended answer, Respondent admits sending the October 21, 2010 letter to the strikers and admits that it did not follow the procedures or practices of the expired contract governing recalls from layoff. Respondent denies, however, that such is evidence of any violation of the Act. The Board has long held that a unilateral change in the method of recalling employees is violative of the Act. *Caravelle Boat Co.*, 227 NLRB 1355, 1356 (1977); *Hamilton Electronics Co.*, 203 NLRB 206 (1973). Respondent contends that the letter at issue did not represent a change. Respondent submits that it merely advised individuals as to how Respondent was handling recall logistics and asked employees to keep Respondent advised as to their contact information. Respondent adds that the letter further expressly advised that the 72-hour response requirement could be waived provided the employee kept Respondent advised as to his circumstances.

While the letter includes a statement that the 72-hour response requirement can be waived, there is no explanation as to what kinds of circumstances would trigger such a waiver. Because there is no additional explanation of such circumstances, a striker would have to assume that the waiver would be based upon Respondent's discretion and subjective analysis of the purported circumstances. The controlling provision of the 2007/2010 collective-bargaining agreement as well as Respondent's last bargaining proposal that was unilaterally implemented on June 27, 2010, gives a specific time period of 10 days to respond to a notice of recall. Accordingly, the 72-hour time limit for an employee's response to recall is substantially different than what is included in the expired collective-bargaining agreement or anything that Respondent proposed during negotiations. Therefore, inasmuch as the 72-hour response requirement is a unilateral change in terms and conditions of employment, I find merit to complaint paragraph 23.

CONCLUSIONS OF LAW

1. The Respondent, Carey Salt Company, a subsidiary of Compass Minerals International, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, including storeroom clerks, truck drivers, and dock employees employed at the Cote Blanche Mine constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times since March 25, 2007, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

5. Respondent violated Section 8(a)(1) of the Act by threatening its employees with termination because they engaged in an unfair labor practice strike.

6. Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate unfair labor practice strikers to their former positions of employment.

7. Respondent violated Section 8(a)(5) of the Act by failing to bargain with the Union as the exclusive collective-bargaining representative of the unit from March 31 to on or about April 30, 2010.

8. On or about March 31, 2010, the Union requested that Respondent bargain collectively about scheduling and all other open issues.

9. Respondent violated Section 8(a)(5) and (1) of the Act on March 31, 2010, by unilaterally changing terms and conditions of employment and implementing its final offer in the absence of a valid impasse.

10. The strike that commenced on or about April 7, 2010, is an unfair labor practice strike.

11. The strike was prolonged by Respondent's unfair labor practices on or about May 25 and June 3, 2010.

12. Respondent violated Section 8(a)(5) and (1) of the Act by conditioning bargaining over mandatory subjects of bargaining on the Union's concessions to Respondent's bargaining demands from on or about March 31 to April 30, 2010.

13. Respondent violated Section 8(a)(5) and (1) by unilaterally implementing its May 22, 2010 operating procedures in the absence of a valid impasse.

14. Respondent violated Section 8(a)(5) and (1) by presenting the Union with a regressive contract proposal on or about May 25, 2010, for the purpose of frustrating the negotiation of a collective-bargaining agreement.

15. Respondent violated Section 8(a)(5) and (1) of the Act on May 25, 2010, by insisting on bargaining proposals that left the Union without any representational rights and left employees in a worse position than if they did not have the Union as their collective-bargaining representative.

16. Respondent violated Section 8(a)(5) and (1) of the Act on or about June 3, 2010, by conditioning bargaining over mandatory subjects of bargaining on the Union's concessions to Respondent's bargaining demands.

17. Respondent violated Section 8(a)(5) and (1) the Act by refusing to use seniority to recall unit employees who engaged in the unfair labor practice that began on June 7, 2010.

18. Respondent violated Section 8(a)(5) and (1) of the Act on or about June 21, 2010, by continuing to honor job offers it made to replacement workers.

19. Respondent violated Section 8(a)(5) and (1) of the Act on or about June 28, 2010, by continuing to honor job offers it made to replacement workers.

20. Respondent violated Section 8(a)(5) and (1) of the Act on or about June 18, 2010, by changing the seniority based recall procedure for unit employees.

21. Respondent violated Section 8(a)(5) and (1) of the Act on June 27, 2010, by unilaterally changing terms and conditions of employment when it implemented its final offer in the absence of impasse.

22. Respondent violated Section 8(a)(5) and (1) of the Act on or about October 21, 2010, when it unilaterally changed the time period for unit employees to accept an offer of re-employment.

REMEDY

Having found that 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.

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by unlawfully implementing the terms of its contract proposals of March 19 and June 22, 2010, as well as unilaterally implementing its May 22, 2010 operating procedures, I shall recommend that it be ordered to restore the terms and conditions of employment of unit employees as they existed prior to March 31, 2010, continue them in effect until the parties reach an agreement or a good-faith impasse and make whole all employees for all losses they may have suffered as a result of its unlawful conduct, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Having found that Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate the unfair labor practice strikers to their former positions or substantial equivalent positions, I shall recommend that Respondent be ordered to offer each of the former unfair labor practice strikers,¹⁰ full and immediate reinstatement to his former position or, if such job no longer exists, to a substantially equivalent position, without loss of seniority or other rights or privileges, discharging, if necessary, any replacements hired. Respondent's obligation of reinstatement arose as of June 15, 2010, the date the employees made an unconditional offer to return to work. Additionally, Respondent must make the strikers whole for any loss of earnings and other benefits they may have suffered by reason of Respondent's discrimination, including its failure to promptly offer reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *Kentucky River*, supra.

[Recommended Order omitted from publication.]

¹⁰ The complete and appropriate list of all strikers requiring a valid offer of reinstatement is best determined through the Board's compliance process.