

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

**NEW NGC, INC. d/b/a NATIONAL GYPSUM
COMPANY**

and

**UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION, (USW)
AFL-CIO, CLC**

**Case 25-CA-031825
Case 25-CA-031898
Case 25-CA-065321**

And

**UNITED STEELWORKERS LOCAL UNION
NO. 7-0354, a/w UNITED STEEL, PAPER AND
FORESTRY, RUBBER, MANUFACTURING,
ENERGY, ALLIED INDUSTRIAL AND
SERVICE WORKERS INTERNATIONAL
UNION (USW), AFL-CIO, CLC,**

**RESPONDENT NATIONAL GYPSUM COMPANY'S REPLY IN SUPPORT OF
LIMITED EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE'S DECISION**

Pursuant to Section 102.46(h) of the National Labor Relations Board's Rules and Regulations, Respondent National Gypsum Company ("National Gypsum" or the "Company") hereby files its Reply to the Union's Answering Brief to Respondent's Limited Exceptions to Administrative Law Judge Jeffrey D. Wedekind's ("ALJ") Decision dated September 7, 2012.

The Union's Answering Brief acknowledges the Company's primary concern that the ALJ's proposed "order is improper because it contains no limits on the requirement of bargaining to impasse or agreement on employees' terms and conditions of employment and does not permit otherwise lawful unilateral changes by the Company." Union's Answering Brief ("Un. Brief"), p. 4. Indeed, the Company asserts in its Limited Exceptions and Supporting Brief that the ALJ's

proposed language leaves no room for other lawful unilateral changes by the Company (whether by virtue of past practice, waiver, or otherwise lawful conduct under Board precedent, as explained more fully in the Company's Supporting Brief to its Limited Exceptions), particularly where the ALJ's proposed Order already requires Respondent to take such affirmative action to rescind the specific unlawful unilateral changes and comply with its collective bargaining obligations under the Act.¹ The Union's objection, however, appears to be one of form over substance, as the Union concedes in its Answering Brief that, notwithstanding the language used by the ALJ, the proposed cease and desist language at issue should not be interpreted to interfere with the Company's right to implement otherwise lawful unilateral changes. Un. Brief, p. 11. For this additional reason, the proposed cease and desist language (and corresponding Notice language) warrants modification in a manner to properly reflect the Company's right to engage in otherwise lawful conduct, and eliminate any unnecessary ambiguity.

At the outset, the Union asserts that "it is not uncommon for the Board to provide the exact relief that the ALJ included in his recommended order in the context of specific 8(a)(5) violations." Un. Brief, p. 14. However, it points to only one decision, *North Star Steel Co.*, 305 NLRB 45 (1991), which contains similar language to the ALJ Wedekind's Cease and Desist Order to which the Company excepts. That specific cease and desist language was *not* at issue in the *North Star* case, and accordingly was not even addressed by the Board – the Board simply adopted the ALJ's proposed language. This one case hardly is sufficient to conclude, as asserted by the Union, that "it is not uncommon" for the Board to provide the "exact relief that the ALJ

¹ The Company's concerns are further highlighted by the fact that the parties have now concluded and reached agreement on a successor collective bargaining agreement. The portions of the ALJ's proposed remedy to which the Company excepts should not be interpreted to require bargaining to agreement or impasse on all terms and conditions of employment, even after the parties have reached an agreement, if unilateral changes are otherwise permitted by Board precedent.

included.” Indeed, the case provides no guidance as to whether a cease and desist order requiring bargaining on all terms and conditions of employment “to an impasse or agreement” in the circumstances presented is warranted or appropriate. Similarly, the one other decision relied upon by the Union, *Sunrise Mountainview Hosp., Inc.*, 357 NLRB No. 122 (2011) is also inapposite, where the Board neither assessed nor addressed the propriety of the ALJ’s cease and desist order language (which, in that case, simply required the employer to refrain from making changes to terms and conditions “without first bargaining with the Union,” and contained no requirement of bargaining to impasse or agreement), but rather adopted the proposed language of the ALJ without discussion. 357 NLRB No. 122, slip op. at 1. In fact, the Union fails to cite to a single decision discussing the appropriateness or scope of cease and desist language to support its position.

The Union’s attempt to discredit the cases upon which the Company relies in its Limited Exceptions also is without merit, where in each of these cases, the Board affirmatively addressed and articulated principles to define the proper scope of cease and desist orders. The cases illustrate the instances in which the Board not only discussed the scope of an ALJ’s cease and desist order, but also determined that modifications were appropriate in light of the overbroad scope of the order. *Famous Castings Corp.*, 301 NLRB 404 (1991) (finding merit to respondent’s exceptions that the judge’s cease and desist order was too broad, and should be modified, where there was no widespread misconduct as to demonstrate a general disregard for employees’ statutory rights), *Retail Clerks Union, Local 770*, 145 NLRB 307 (1963) (modifying overly broad cease and desist order to correspond to violations actually found), *Glendale Associates*, 335 NLRB 27 (2001) (finding merit to respondent’s exception that judge’s cease and desist order was overly broad where it required employer to cease and desist from maintaining

rules and guidelines prohibiting activities not protected under the Act), *Omaha World-Herald*, 357 NLRB No. 156 (2011) (modifying cease and desist order from violating Act “in any other manner” to more narrow “in any like or related manner” where broad order not warranted under circumstances of case), *Kingsbridge Heights Rehabilitation and Care Center*, 353 NLRB 631 (2008) (concluding that ALJ’s cease and desist order was too broad and unwarranted, and modifying same). Thus, the *rationale* for such modifications by the Board in the decisions cited support the Company’s Limited Exceptions to the ALJ’s proposed Order (and Notice) at issue – which the Union fails to address in its Answering Brief.

The Union’s further assertion that the Board’s orders in the *Kingsbridge* and *E.I. DuPont De Nemours* decisions cited by the Company actually support the propriety of the ALJ’s Proposed Order also is unfounded. The portion of the Board’s Order in *Kingsbridge* identified by the Union is hardly comparable to the disputed language used by ALJ Wedekind as asserted by the Union. Rather, the *Kingsbridge* order affirmatively required the employer “Pay into the Union’s Funds those contributions that it failed to make on behalf of its unit employees, as set forth in the remedy section of this decision, and continue to make the required timely contributions until such time as it bargains with the Union in good faith to an agreement or the parties reach an impasse.” *Id.* at 631. The language is very specific as it is limited to the unlawful unilateral change at issue, and it is immediately distinguishable from the case presented because it does not require bargaining to impasse or agreement *on all other terms and conditions of employment*, but limits the requirement to the specific unlawful unilateral benefits contribution change. The Union ignores this important distinction and in conclusory fashion submits that ALJ Wedekind’s incorporation of the requirement that the Company bargain “to impasse or agreement” is thus appropriate. Un. Brief, p. 13. In doing so, the Union disregards the simple

fact that language of the Order in *Kingsbridge* does *not* interfere with the employer's right to implement otherwise lawful unilateral changes with respect to other terms and conditions of employment, as does ALJ Wedekind's proposed cease and desist order.

For the same reason, the Union's attempt to distinguish *E.I. DuPont de Nemours*, 355 NLRB 1084 (2010), also is without merit. The cease and desist order in that case is not, as asserted by the Union, "very similar to the relief the ALJ [Wedekind] recommended." Un. Brief, p. 10. The order in *DuPont* also is very specific, and does not prohibit otherwise lawful unilateral change by the Company, but only requires the employer to refrain from "Making unilateral changes to the benefits of unit employees during periods when the parties are engaged in negotiations for a collective-bargaining agreement and have not reached impasse." *Id.* at 1086. The language also is limited to the specific issue to which the unlawful unilateral change pertained, and requires bargaining to impasse *while the parties are engaged in negotiations* for a successor agreement. No such limiting language is present in the ALJ's proposed cease and desist order, and the absence of such language renders the order overly broad and punitive.

More importantly, and regardless of the analysis set out by the Union in its Answering Brief, the Union clearly concedes that the ALJ's proposed Cease and Desist Order should not interfere with the Company's right to engage in otherwise lawful unilateral action. Notably, while the Union opposes modification of the ALJ's proposed Cease and Desist Order in the manner sought by the Company, it confirms that the disputed language would not serve to prevent the Company from exercising rights it has under the Act, such as implementing unilateral change pursuant to waiver or past practice. Un. Answering Brief, p. 11. Specifically, in attempting to distinguish the *E.I. DuPont Nemours* decision cited by the Company, the Union explains:

The Company suggests that the ALJ's order requires it to bargain over terms and conditions of employment where the Union has waived its right or in instances where unilateral changes are consistent with past practice. Like the ALJ's order, the *E.I. DuPont De Nemours* order does not speak to such changes. The *E.I. DuPont De Nemours* cease and desist order does not include language expressly stating that the employer could institute unilateral changes pursuant to a past practice or in the instances of waiver. This is true even though the issue in *E.I. DuPont De Nemours* was whether there was a valid past practice that would have permitted the employer to institute unilateral changes. **The Company's contention that the ALJ's cease and desist order encroaches on its right to exercise rights it has under the Act is therefore incorrect.**

Un. Brief, p. 11 (citations omitted; emphasis added). The Union is correct in its admission that nothing in ALJ Wedekind's proposed cease and desist order should interfere with the Company's right to exercise its rights under the Act, which includes the right to make otherwise lawful unilateral changes. However, to the extent that the proposed Cease and Desist Order creates ambiguities absent from the Board's order in *DuPont* -- which specifically requires bargaining only over benefits (and not *all* terms and conditions of employment), and only during periods when the parties are engaged in negotiations for a collective bargaining agreement and have not reached impasse (and not indefinitely to impasse or agreement regardless of the status of negotiations) -- the proposed Order, along with the corresponding Notice language, warrants modification. The Company is seeking nothing more than a modification to the proposed language to properly reflect that the Order (and corresponding Notice language) is not intended to proscribe otherwise lawful unilateral conduct, by virtue of waiver, past practices, or other instances in which the Board has recognized an employer's right to implement unilateral changes short of impasse or agreement.

III. CONCLUSION

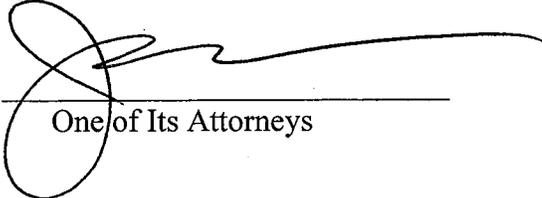
For the reasons cited above, the Union's arguments set forth in its Answering Brief are without merit. Indeed, the Union has (properly) conceded that the ALJ's Cease and Desist

Order, and corresponding Notice language, should not prohibit the Company's lawful conduct permitted under the Act. Consistent with its Limited Exceptions and Supporting Brief, the Company accordingly requests that the Board strike the ALJ's proposed "cease and desist" order set forth in Paragraph 1.a. of the "Order," and the corresponding language in the Notice to Employees set forth in the Appendix, and modify it in such manner as to conform to the violations found, and not prohibit Respondent from engaging in otherwise lawful conduct, by only requiring the Company to cease and desist from unilaterally modifying the procedures for paying health insurance contributions to the USW Health & Welfare Fund and from unilaterally changing its lockout/tagout policy by requiring employees to carry two locks on their person, at a time when the parties are engaged in bargaining over a successor contract, until such time the parties are at impasse or the Company has otherwise satisfied its bargaining obligations under the Act. Alternatively, and at the very minimum, should the Board deem the ALJ's order generally encompassing all terms and conditions of employment appropriate, it should nonetheless only prohibit changes to such terms and conditions while the parties are engaged in bargaining over a successor contract, until such time the parties are at impasse or the Company has otherwise satisfied its bargaining obligations under the Act.

Dated January 3, 2013

Respectfully submitted,

NATIONAL GYPSUM COMPANY

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CERTIFICATE OF SERVICE

Jason C. Kim, an attorney for the Employer, hereby certifies that a true and correct copy of the foregoing Respondent National Gypsum Company's Reply Brief in Support of Its Limited Exceptions to the Administrative Law Judge's Decision was served upon the following on this 3rd day of January, 2013:

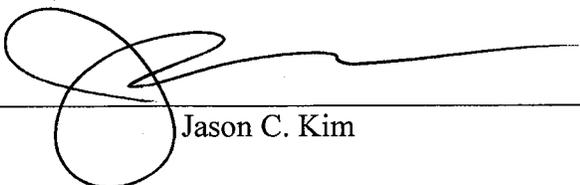
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