

**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 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.** Cases 25-CA-031825, 25-CA-031898, and 25-CA-065321

May 3, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN  
AND BLOCK

On September 7, 2012, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The Acting General Counsel and the Charging Parties each filed exceptions and supporting briefs, the Respondent filed an answering brief to both the Acting General Counsel's and Charging Parties' exceptions, and the Charging Parties filed a reply brief. The Respondent filed limited exceptions and a supporting brief, the Charging Parties filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order as modified.<sup>1</sup>

The judge found that the parties reached a lawful bargaining impasse on September 2, 2011, which was caused by their deadlock over the Respondent's proposals to replace the defined benefit pension with a defined contribution plan and to allow the Respondent to unilaterally suspend matching contributions to employee 401(k) accounts.<sup>2</sup> In adopting the judge's finding, we highlight two significant sets of circumstances that support his conclusion. First, the Charging Parties (the Union) attempted to induce the Respondent to withdraw its economic proposals by offering several economic con-

<sup>1</sup> There are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally refusing to pay an increase in health insurance premiums and by unilaterally changing its "lock-out/tagout" safety procedures. The Respondent has excepted to the cease-and-desist provisions in the judge's Order and notice, contending that these provisions would prevent it from making certain lawful changes, such as those privileged by union waiver of bargaining or those consistent with an established past practice. We have modified the judge's Order and notice to conform to our standard remedial language.

<sup>2</sup> All dates are in 2011, unless otherwise noted.

cessions in its March 28 contingent proposal. The Respondent flatly rejected that proposal and gave no indication that it would accept any concessions in return for withdrawing its 401(k) and defined contribution proposals. Second, at the September 2 meeting, the Union brought in Jim Robinson, an international union representative and director of its Illinois/Indiana district, to speak against the Respondent's retirement proposals. Robinson spoke at length about the two proposals, stating that the Union would not accept them and that such proposals were "wrong," "shortsighted," "self-destructive," and "an attack on the middle class." When the Respondent's chief negotiator responded that the Union had accepted the same proposals at four other facilities, Robinson said that they should not have been accepted and that the Steelworkers Union was going to do everything it could to "reverse the trend . . ." Robinson left shortly thereafter, and Union Negotiator Chris Bolte advised the Respondent that Robinson's statements represented the Union's position on the Respondent's proposals.

These two events, taken together with the judge's analysis of the *Taft*<sup>3</sup> factors, show that the Respondent lawfully declared impasse on September 2. The Respondent had steadfastly held to its two proposals and made clear that it was unwilling to accept concessions on other issues in return for dropping them. The Union, in turn, made it clear on September 2 that it would not accept the two proposals and that it was intent on "revers[ing] the trend" toward defined-contribution retirement plans. The Acting General Counsel and the Union contend that the Union's negotiator was Bolte, not Robinson, but Bolte's statement that Robinson spoke for the Union on those issues justified the Respondent's reliance on Robinson's words. Therefore, we adopt the judge's finding that the parties were at impasse on September 2, and we further adopt his dismissal of the refusal-to-bargain and unlawful-impasse allegations.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, New NGC, Inc. d/b/a National Gypsum Company, Shoals, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Unilaterally changing the terms and conditions of employment of its unit employees."

<sup>3</sup> *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enf. sub. nom. *Television Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

2. Substitute the attached notice for that of the administrative law judge.

#### 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 unilaterally change the terms and conditions of your employment.

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, to the extent we have not already done so, on the Union's request, rescind our unlawful unilateral changes regarding health insurance premiums and "lock-out/tagout" safety procedures and restore and maintain the status quo ante until such time as we have complied with our collective-bargaining obligations under the Act.

WE WILL, to the extent we have not already done so, make all required payments to the union health and welfare fund that we failed to make from April 1 through June 30, 2011, including any additional amounts due the fund, and make whole the unit employees for any loss of wages, benefits, or expenses resulting from the unlawful unilateral changes.

NEW NGC, INC. D/B/A NATIONAL GYPSUM  
COMPANY

*Derek A. Johnson, Esq.*, for the General Counsel.  
*Howard L. Bernstein, Esq.* and *Jason C. Kim, Esq.* (*Neal, Gerber & Eisenberg, LLP*), of Chicago, Illinois, for the Respondent.  
*Anthony Alfano, Esq.* (*United Steelworkers*) and *Richard J. Swanson, Esq.* and *Robert A. Hicks, Esq.* (*Macey Swanson & Allman*), of Indianapolis, Indiana, for the Charging Parties.

#### DECISION

#### STATEMENT OF THE CASE

JEFFREY D. WEDEKIND, Administrative Law Judge. In mid-January 2011, National Gypsum Company and the United Steelworkers Union met to begin negotiating a new labor agreement to replace their most recent 3-year contract at the Company's Shoals, Indiana facility, which expired at the end of the month.<sup>1</sup> In the past, when they had met to negotiate new contracts for the Shoals facility in 2002, 2005, and 2008, the negotiations took only about 1–2 weeks to complete, and the agreements were ratified forthwith. This time, however, a new contract would prove elusive. Although the Company made a "last, best, final offer" in late March, it was voted down overwhelmingly, consistent with the Union's recommendation, by the membership in early April. And the parties had still not reached a new contract as of September, approximately 9 months after negotiations began.

There is no allegation in this proceeding that the Company failed to bargain in good faith during this 9-month period in a sincere attempt to reach a new contract with the Union. However, the consolidated complaint alleges that the Company committed a number of other unfair labor practices during and after that period, both at and away from the bargaining table, in violation of Section 8(a)(5) and/or (3) of the Act.<sup>2</sup> Specifically, the General Counsel alleges that the Company unlawfully made unilateral changes with respect to employee health insurance premiums and safety procedures in April and June 2011, respectively; that about 3 months thereafter, in early September, the Company unlawfully refused to continue bargaining with the Union by prematurely declaring impasse and improperly conditioning an end to the impasse on the Union submitting its "last, best, final offer" to another vote; and that, a few days later, the Company unlawfully locked out all 80–82 unit employees in support of its unlawful bargaining position.

Following a prehearing conference, the foregoing allegations were tried before me on May 7–9, 2012, at the Indiana University Maurer School of Law in Bloomington, Indiana. Thereafter, on July 6, the General Counsel, the Company, and the Union each filed posthearing briefs. After carefully considering the briefs and the entire record,<sup>3</sup> for the reasons fully set forth below, I find that a preponderance of the record evidence supports, in substantial part, the General Counsel's allegations that the Company unlawfully made unilateral changes with respect to health insurance premiums and safety procedures, but not the remaining allegations.<sup>4</sup>

<sup>1</sup> Both the International Union and Local 7-0354 are the recognized bargaining agent of the unit employees and signatory to the contract. They are jointly referred to herein as "the Union."

<sup>2</sup> The underlying charges were filed between April 14 and September 26, 2011, and the General Counsel issued the consolidated complaint on February 23, 2012.

<sup>3</sup> As requested by the General Counsel, the transcript is corrected to accurately reflect receipt into evidence of GC Exhs. 1(a) through (v). As indicated in those exhibits, jurisdiction is admitted and well established.

<sup>4</sup> Factual findings are based on the record as a whole, including but not limited to the transcript pages and exhibits specifically cited. In

## FINDINGS OF FACT

## I. ALLEGED UNILATERAL CHANGES

It is well established that, during negotiations over a successor agreement, an employer is barred by the Act from making unilateral changes in mandatory subjects of bargaining—i.e., it is required to maintain the “status quo” with respect to such matters—until the parties reach a new agreement or valid impasse. See *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991); and *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 fn. 6 (1988). See also *Whitesell Corp.*, 357 NLRB No. 97, slip op. at 90 (2011), and cases cited there (such changes are unlawful if “material, substantial, and significant”). As indicated above, the General Counsel alleges that the Company violated this well-established statutory policy with respect to two subjects: employee health insurance premiums and employee safety procedures.

*A. Employee Health Insurance Premiums*

The first allegation concerns the Company’s refusal to pay a premium increase that the Steelworkers Health and Welfare Fund announced effective April 1, 2011, some 2 months after the collective-bargaining agreement expired. The General Counsel alleges that the Company’s refusal to do so violated the well-established statutory policy above because the status quo at that time was defined by the expired 2008–2011 contract, which required the Company to pay any such premium increases and apportion the cost between itself and the employees based on the amount of the increase.

The Company admits that employee health insurance premiums are a mandatory subject of bargaining. However, it contends that the status quo was defined, not just by the expired collective-bargaining agreement, but also by a coterminous fund participation agreement executed by the parties. The Company contends that it was only obligated under those agreements to pay premium contributions in amounts specified by the Fund during their term, and that the status quo was therefore the contribution rates in effect when both agreements expired on January 31. Indeed, the Company contends that it was prohibited by Section 302(c)(5) of the Labor Management Relations Act (LMRA) from paying the higher premiums to the Fund.

The underlying facts are not in dispute. The unit employees first began receiving health insurance benefits through the Steelworkers Health and Welfare Fund in April 2008 pursuant to the 2008–2011 collective-bargaining agreement. The contract specifically provided that both the “medical plan design” and the “dental plan” would be “USW” (United Steelworkers

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making credibility findings, all relevant and appropriate factors have been considered, including the demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences which may be drawn from the record as a whole. See *Daikichi Corp.*, 335 NLRB 622, 623 (2001), enf. mem. 56 Fed. Appx. 516 (D.C. Cir. 2003), quoting *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996). See also *NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983).

as of that date.

The contract also addressed the amount of employee contributions during each year of the agreement. In the “first year (i.e., April 2008 through March 2009),” the contract specified the exact amount of employee contributions for both medical coverage (\$7.50/week for single person, \$15/week for a member plus 1, and \$22.50/week for a family) and dental coverage (\$0).

“For the second and third year,” the contract provided that the amount of employee medical and dental contributions would depend on the increase in premium costs. Specifically, “for increases in the total premium costs of USW Medical, Rx and VSP vision coverages,” it provided for no change in employee contributions for increases under 3 percent, 85 cents/week for each percentage increase between 3 and 20 percent, and the total amount of the increase if over 20 percent. Similarly, “for increases in the premium cost of USW Dental coverage,” it provided for no change if under 3 percent, 5 cents/week for each percentage increase between 3 and 20 percent, and the full amount of the increase if over 20 percent. (GC Exh. 2(a) (art. 15); Tr. 55, 516–517, 552.)

The premium costs themselves were not spelled out in the contract. Rather, they were addressed in a separate Steelworkers Health and Welfare Fund “Participation Agreement,” which the parties executed “to implement the terms and conditions of [the contract].” Like the contract, the participation agreement set forth the exact dollar amount of the medical, prescription, and dental payments due the Fund per employee for the “initial period [April 1, 2008/nbvafx\–March 31, 2009].” With respect to “subsequent periods,” the participation agreement provided as follows:

*Subsequent Periods.* For the period beginning with the expiration of [the specified rates above] and continuing through the expiration of this Agreement, the Employer shall make payments to the Fund at the rates prescribed by the Board [of Trustees], or its authorized agent . . . Each period for which a particular rate is in effect is considered to be a “Subsequent Period.”

The participation agreement also contained various additional provisions. With respect to “Applicable Law,” it stated that “the Agreement is subject in all respects to the provisions of the Labor Management Relations Act of 1947, as amended, and to any other applicable laws.” Regarding “Fund Obligations,” it stated that the Fund “shall not be obligated to provide benefits . . . with respect to any period for which the Employer does not make the full payments to the Fund [described above].” And with respect to “Term,” it stated:

The provisions of this Agreement shall become effective as of [April 1, 2008] and shall remain in effect until [January 31, 2011]. The termination of this Agreement shall not relieve the parties hereto of any statutory or contractual obligation to continue to provide health and/or welfare benefits to any eligible employee/retired employee covered by this Agreement or to make all contributions owed to the Fund.

(R. Exh. 111; Tr. 518–519.)

The participation agreement also specifically incorporated by

reference the Steelworkers Health and Welfare Fund Agreement and Declaration of Trust, which established the funding vehicle for the Fund and set forth the rights, obligations, and responsibilities of the administrator, the board, and the trustees. As most recently restated by the trustees effective January 1, 2003, the trust agreement provided, in relevant part (art. 7), that “the Employer shall contribute to the Fund the amount required by the Participation Agreement or written agreement accepted by the Board,” and that “all Employer contributions shall continue to be paid as long as the Employer is so obligated pursuant to the Participation Agreement accepted by the Board.” It further provided that “if any Employer fails to make required contributions to the Fund when due, the Board may, in its sole and absolute discretion, terminate the participation of the Employer in the Plan and Fund and the provision of benefits to Employees of such terminated Employer.” (R. Exh. 127).<sup>5</sup>

Pursuant to the provisions of the participation agreement, the Fund did, in fact, change the premium rates for the second and third years beginning April 1, 2009, and April 1, 2010. The Company paid the new rates at that time, apportioning the costs between itself and the participating employees as provided in the contract. Although a dispute arose between the Company and the Union over how the 2010 increases should be apportioned, the dispute was resolved through arbitration. (Tr. 119, 521–523, 547–548; R. Exhs. 112–114.)

In December 2010, the Fund notified the Company that the premium rates would again change effective April 1, 2011. The Fund at that time also enclosed an “updated” participation agreement “providing for continued coverage through the Fund through March 31, 2012.” Like the 2008 participation agreement, the updated agreement stated that it was intended to implement the terms and conditions of the collective-bargaining agreement between the Company and the Union. (R. Exh. 117; Tr. 524.)

As indicated above, however, the parties had not even begun negotiating a new contract at that time. Nor had they reached a new agreement by late January 2011. Accordingly, the Company declined to sign the updated participation agreement and contacted the Fund to inquire what its position would be if no new contract was reached before January 31. The Fund replied that it will continue to provide the current benefits to employees of National Gypsum while contract negotiations are ongoing. A new Participation Agreement will need to be signed once the new [collective-bargaining agreement] has been rati-

fied unless the Fund is otherwise notified in writing that coverage should terminate. (R. Exh. 118; Tr. 526.)

The Company continued thereafter to pay premiums to the Fund pursuant to the terms of the expired contract and participation agreement. It also continued to bargain with the Union over a new contract (including proposed changes in the amount of employee healthcare contributions). However, it eventually became clear that the parties might fail to reach a new contract by April 1, the effective date of the new premium rates announced by the Fund. Accordingly, on March 16, the Company notified the Fund of this possibility and what the Company’s position would be in that event. The Company stated that it would continue remitting premiums to the Fund, but at the rate in effect on January 31, 2011, the date both the labor agreement and the Participation Agreement expired, such rate the rate currently in effect.

It is our expectation that if a new labor agreement and a new Participation Agreement are not in place by April 1, 2011, then any matters concerning what would have otherwise been the Fund premiums effective April 1, 2011, as well as any corresponding change in employee contributions toward the cost of such premiums, will have to be addressed in the new labor agreement upon its completion and ratification. (R. Exh. 119; Tr. 526–527.)

The Fund replied the same day, stating that the new April 1, 2011 premium rates would go into effect and be billed to the Company regardless of whether a new contract was reached, and that the Company’s unpaid balances would be rolled over to future invoices and delinquency charges assessed (R. Exh. 119; Tr. 530). Two days later, the Union, which had been copied on the foregoing correspondence, also responded to the Company. The Union stated that it was “in total disagreement” with the Company’s position, and that it expected the Company to pay the new premium rates to the Fund and deduct the appropriate corresponding contribution amounts from the employees’ weekly pay. (R. Exh. 120; Tr. 121–122, 531.)

Nevertheless, the Company adhered to its position and refused to do either, i.e., beginning April 1, it continued to pay the old premium rates that were in effect as of January 31 and to deduct employee contributions based on those rates. Consistent with its previous letter, the Fund therefore continued to provide healthcare coverage, but began charging the Company the higher premium rates as of April 1 and rolling over the unpaid balances on a month-by-month basis thereafter.

In the meantime, on April 14, the Union filed an unfair labor practice charge over the matter (which later became the basis for the instant complaint allegation). Although the Company disagreed with the charge, following receipt of the Fund’s July invoice it decided to pay the full balance billed up to that time, as well as to pay the higher rates going forward. The Company directly notified both the Union and the employees of this on July 28 and August 9, respectively. The Company did not, however, deduct the higher contribution amounts from the employees’ paychecks, leaving that subject to be addressed in the contract negotiations. (Tr. 56–59, 124–125, 415–416, 427–429, 531–534, 549; GC Exhs. 1(a), 25; R. Exhs. 85, 121.)

As indicated above, the threshold issue in evaluating an employer’s post-contract obligations is what the status quo was

<sup>5</sup> The “Plan” in the 2003 trust agreement refers to the Steelworkers Health and Welfare Plan, which was likewise restated effective January 1, 2003, and provided (art. 3) that contributions “shall be made in such amounts and at such times as required under the terms of the applicable Participation Agreement, and in accordance with Article 7 of the Trust Agreement” (R. Exh. 128). The record also includes an amendment to art. 8 of the trust agreement adopted by the trustees on March 30, 2007, which stated that no amendment could be made to the trust agreement that modifies the provisions of the participation agreement “concerning the amount of Employer contributions or the duration of the period for which contributions are due except as required by law” (R. Exh. 127). However, there is no record evidence regarding the history or meaning of this amendment and no party contends that it has any relevance to the issue here.

prior thereto. The status quo may be determined by the provisions of the parties' expired agreement, *Litton Financial Printing Div.*, 501 U.S. at 206, and/or by past practice, *Courier Journal*, 342 NLRB 1093, 1094 (2004). Further, it may be dynamic (active) as well as static (fixed). See, e.g., *Post-Tribune*, 337 NLRB 1279 (2002) (employer's unilateral increase in the dollar amount of the employees' health insurance costs secondary to a premium increase imposed by the insurance carrier was not unlawful because the employer followed its past practice in allocating the carrier's premium increase to employees on an 80/20 and 60/40-percent basis).

Here, in agreement with the Company, I find that the status quo was defined by both the expired collective-bargaining agreement and the coterminous expired participation agreement between the parties. Neither the General Counsel nor the Union offer any persuasive reason to ignore the participation agreement, and I perceive none. Its express purpose was "to implement the terms and conditions" of the collective-bargaining agreement; it likewise addressed a subject relevant to the employees' terms and conditions of employment (the cost and payment of employee health insurance premiums); and both the Company and the Union were party to it.<sup>6</sup> See *Hinson v. NLRB*, 428 F.2d 133, 139 (8th Cir. 1970) (holding that "the status quo is quite obviously defined by reference to the terms of the substantive terms of the expired contract," but that "the separate trust fund agreements have a continuing viability for [the employer] as marking the framework under which benefit payments will be administered and disbursed"). And cf. *Oak Harbor Freight Lines*, 358 NLRB 328, 328 fn. 2 (2012) (finding that, even though the cancellation language in the executed trust fund documents was dictated by the funds and not specifically bargained over by the parties, the documents established that the unions waived their right to bargain over the employer's cessation of fund payments upon notice after the expiration of the contract).

However, in agreement with the General Counsel and the Union, I find that the status quo was dynamic rather than static. As indicated above, neither the contract nor the participation agreement specified or placed any upper limit on the total premium rates that the Fund could charge or that the Company and/or the employees would pay or contribute following the initial year. As indicated above, the participation agreement simply stated that the Company "shall make payments to the Fund at the rates prescribed by the Board," leaving the amount of the increase to the Board's unfettered discretion. Moreover, the parties obviously anticipated that the Board would exercise its discretion after the initial year, as they specifically provided in the contract that such "increases in the total premium costs" would be apportioned between the Company and the employees depending on the percentage amount of the increase. Cf. *Intermountain Rural Electric Assn.*, 305 NLRB 783, 784-785 (1991), *enfd.* 984 F.2d 1562 (10th Cir. 1993) (employer unlawfully refused to pay increased medical and dental insurance premiums announced by the carriers postexpiration where the

expired contract stated that the employer would "keep in full force and effect during the terms of this Agreement" the employees' medical and dental insurance coverage currently in effect under various plans, and would pay up to 100 percent of the Blue Cross/Blue Shield rates for medical coverage and 100 percent of the premiums under the dental plan, without any other limitation on the employer's liability that would preclude any possible increases).<sup>7</sup>

Further, contrary to the Company's contention, it is neither unusual nor significant in this respect that the Company's obligations under the collective-bargaining and participation agreements had a defined term. Indeed, such circumstances are the genesis or *raison d'être* of the well-established statutory policy discussed above; although written agreements between employers and unions are typically limited to a particular term, the purposes and policies of the Act require employers to continue and maintain their employees' terms and conditions thereunder postexpiration until a new agreement or overall bargaining impasse. See, e.g., *Intermountain Rural Electric Assn.*, above; and *Wayne's Dairy*, 223 NLRB 260, 264-265 (1976) (rejecting employer's similar argument that it lawfully ceased making pension contributions after the coterminous labor and pension fund agreements had expired). See also *Litton Financial Printing Div.*, 501 U.S. at 206-208; *Laborers Health & Welfare Trust Fund*, 484 U.S. at 553; and *General Services Employees Local 73 v. NLRB*, 230 F.3d 909, 913 (7th Cir. 2000).

There is no language, in either the agreements or the incorporated trust declaration, to suggest that the parties did not intend this usual statutory policy to apply, i.e., that the parties did not intend the Company's obligation to "make payments to the Fund at the rates prescribed by the Board" to continue, or that the Union waived its bargaining rights with respect to the Company's obligation, postexpiration. Contrary to the Company's contention, the mere fact that the participation agreement specifically references the February 1, 2008 contract, and/or that the trust agreement references the participation agreement, is insufficient to establish such an intent or waiver. See, e.g., *Schmidt-Tiago Construction Co.*, 286 NLRB 342, 343 fn. 7, 365-366 (1987) (finding that employer unlawfully ceased fund contributions postexpiration, notwithstanding language in the parties' pension certification and/or the declaration of trust stating that "a written labor agreement is in effect," and that contributions would be made "in accordance with a pension agreement"); *KBMS, Inc.*, 278 NLRB 826, 849-850 (1986) (same, notwithstanding language in the fund agreement and declaration of trust stating that contributions would be effective as of the date specified in the collective-bargaining agreements and "shall continue to be paid as long as [the employer] is so obligated pursuant to said collective bargaining agreements"); and *Cauthorne Trucking*, 256 NLRB 721, 722 (1981) (same, notwithstanding references in the health and welfare trust fund

<sup>6</sup> The copy of the participation agreement in evidence (R. Exh. 111) is not signed by any union representative. However, the Union does not dispute that it was a party to the agreement. (See U. Br. at 10, 42.)

<sup>7</sup> The circumstances here are therefore clearly distinguishable from *Clear Pine Mouldings*, 238 NLRB 69, 79-80 (1978) (employer lawfully refused to pay higher premium rates demanded by the trust funds post-contract where the previous contribution amounts were specified in the expired contract).

agreements to the collective-bargaining agreements for the purpose of setting the amount to be paid into the fund for each covered employee), remanded on other grounds 691 F.2d 1023 (D.C. Cir. 1982).<sup>8</sup>

Moreover, as indicated above, the participation agreement specifically stated that it was “subject in all respects to the provisions of the Labor Management Relations Act of 1947, as amended, and to any other applicable laws,” and that termination of the participation agreement would not relieve the Company of “any statutory or contractual obligation to continue to provide health and/or welfare benefits to any eligible employee/retired employee covered by this Agreement or to make all contributions owed to the Fund.” Thus, not only is there no language supporting the Company’s position, there is language supporting the opposite.<sup>9</sup> Compare *Oak Harbor Freight Lines*, above (affirming judge’s finding that language in the health and welfare fund subscription agreements and pension fund certifications expressly stating that the employer could “cancel” its obligations following contract expiration waived the union’s bargaining rights and permitted employer to cease making contributions postexpiration); and *Cauthorne Trucking*, above (finding that the employer lawfully ceased making pension fund contributions postexpiration because, unlike the health and welfare fund agreements, the pension fund trust agreement contained language stating that the company’s obligation under the agreement “shall terminate” when the contract expired).

All of the foregoing circumstances distinguish the primary case relied upon by the Company: *Auto Mechanics Local 701 Welfare & Pension Funds v. Vanguard Car Rental USA*, 502 F.3d 740 (7th Cir. 2007). In *Vanguard*, the funds brought a federal court suit against the employer under Section 502 of ERISA to recoup monies allegedly due as a result of the employer’s refusal, like the Company’s refusal here, to pay a post-contract premium increase. Although the Seventh Circuit held that the funds lacked the authority to raise the contribution rates post-contract, it did so based on the particular language in the expired contract and participation agreements, which was substantially different from the language subsequently adopted by the parties here. Thus, unlike here, the expired contract in

<sup>8</sup> As indicated by the Union, Board precedent requires that a union’s waiver of bargaining rights be “clear and unmistakable.” See *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007). Although this standard has been rejected by some courts of appeals in favor of a less-stringent “contract coverage” test (see *Chicago Tribune Co. v. NLRB*, 974 F.2d 933 (7th Cir. 1992); *Postal Service v. NLRB*, 8 F.3d 832, 837 (D.C. Cir. 1993); and *Bath Marine Draftsmen’s Assn. v. NLRB*, 475 F.3d 14, 25 (1st Cir. 2007)), the cited language of the contract and participation agreement does not support the Company’s position under either.

<sup>9</sup> Contrary to the Company’s contention, the mere fact that the Union’s first contract proposal on January 13 stated, “update insurance with present rates provided by the USW, Health & Welfare (GC Exh. 5, p. 4), does not establish that the Union itself did not believe that the foregoing language of the expired contract and participation agreement required the Company to pay and apportion whatever rates the Fund instituted postcontract. Rather, it simply indicates that, like the expired contract, the Union’s proposed new contract would have stipulated the exact amount of employee contributions during the initial year of the contract based on the current rates established by the Fund.

*Vanguard* stipulated that the employer was obligated to pay exactly \$124 per week to the health and welfare fund and \$48 per week to the pension fund for each employee during the life of the agreement. Further, neither the expired contract nor the expired participation agreements included any similar language expressly or impliedly authorizing the funds to increase the stipulated rates during their terms. Nor did they require the employer to comply with “any statutory or contractual obligation to continue to provide” benefits to employees “or to make all contributions owed” to the funds thereafter.

In any event, *Vanguard* and other similar trust-fund collection cases cited by the Company<sup>10</sup> do not address the statutory issue raised in this case, i.e., whether there was a duty under Section 8(a)(5) of the Act to bargain with the employees’ collective-bargaining representative before refusing to pay the premium increase announced by the health and welfare fund, thereby jeopardizing the employees’ continued medical and dental coverage through the fund under the provisions of the expired contract. Thus, the cases provide no authority on that issue.

As indicated above, the Company also argues that it was actually prohibited by Section 302(c)(5)(B) of the LMRA from paying the increase in premiums following expiration of the contract and participation agreement. That section requires, inter alia, that “the detailed basis” on which payments to the trust fund are to be made must be “specified in a written agreement with the employer.” However, the Board and courts have repeatedly held that this requirement is satisfied by either the expired contract (see *Dugan v. R. J. Corman Railroad*, 344 F.3d 662, 668 (7th Cir. 2003); *Cibao Meat Products v. NLRB*, 547 F.3d 336 (2d Cir. 2008); and cases cited there), the underlying trust fund documents establishing the plan into which the employer contributed during the contract term (see, e.g., *Hinson*, 428 F.2d at 138–139; *Lafayette Grinding Corp.*, 337 NLRB 832 fn. 4 (2002); *Cauthorne Trucking*, 256 NLRB at 722 fn. 6; and *KBMS, Inc.*, 278 NLRB at 849)), or both (see *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 736 (9th Cir. 1981); and *Made 4 Film, Inc.*, 337 NLRB 1152 fn. (2002)). See also *Wayne’s Dairy*, 223 NLRB at 264. There is no substantial basis to distinguish this precedent here.

Finally, the Company does not dispute that its unilateral refusal to pay the premium increases was material, substantial, and significant despite the absence of any interruption in insurance coverage. Nor does the Company contend that its retroactive and ongoing payment of the increased premiums in full since July 1, 2011, has cured or repudiated the alleged violation.

Accordingly, and in the absence of any other asserted defenses to the allegation,<sup>11</sup> I find that the Company’s refusal,

<sup>10</sup> *Central States, Southeast & Southwest Areas Pension Fund v. Chicago-St. Louis Transport Co.*, 535 F.Supp. 476, 480–481 (D.C.Ill. 1982), affd. mem. 720 F.2d 681 (7th Cir. 1983); *Central States, Southeast & Southwest Areas Pension Fund v. Great Materials, Inc.*, 535 F.3d 506 (6th Cir. 2008), cert. denied 129 S.Ct. 1679 (2009); and *Teamsters for Michigan Conference of Teamsters Welfare Fund v. Blue*, mem. 2010 WL 522786 (E.D. Mich. 2010).

<sup>11</sup> The Company does not assert that its unilateral refusal to pay the premium increase was justified because there was an overall bargaining

from April 1 through June 30, 2011, to pay any portion of the increase in health insurance premiums violated Section 8(a)(5) of the Act.<sup>12</sup>

### B. Employee Safety Procedures

The second allegation concerns the Company's so-called "lockout/tagout" policy and procedures for preventing machinery from unexpectedly energizing and causing injury. The General Counsel alleges that the Company made an unlawful unilateral change in these procedures in June 2011 by requiring employees to carry two locks on their person at all times and to maintain at least two additional locks within a reasonable distance of their work area.

Like employee health insurance premiums, the Company admits that its lockout/tagout procedures are a mandatory subject of bargaining. However, it contends that employees have always been required to carry at least two locks on their person. With respect to additional locks, the Company admits that, following a May 2011 fatal accident at another facility, it began requiring employees to keep additional locks nearby. However, it contends that this new requirement "effectuate[d]" the Company's existing lockout/tagout policy rather than changed it, and that, even if it did change the policy, it was a de minimis change having no material, substantial, or significant impact on the employees' terms and conditions of employment.

The relevant facts are as follows. The Company produces gypsum wallboard for residential and commercial construction, and operates 28 manufacturing facilities around the country. The Shoals facility involved here includes both mining and production operations. The gypsum rock is mined from the onsite underground mine and then sent to the onsite mill, where it is crushed, ground, dried, rehydrated with water and chemicals, mixed into a slurry, and sandwiched between paper to form wallboard. The board is then cut, flipped, dried, bundled, and forklifted to the warehouse for shipping. Except for certain specified exclusions (e.g., clerical, professional, and supervisory employees), all of the mine, production, maintenance, and warehouse employees involved in the foregoing operations are included in the bargaining unit. (Tr. 40, 341-343; GC Exh. 2(a) (art. 2).)

For many years, the Company has maintained a lockout/tagout policy for those unit employees who service or maintain the mining and production machinery. The policy is set forth in extensive detail (on over five single-spaced pages) in the Company's Safety & Health Management Manual. Among other things, it describes the type of locks to be used (padlocks

impasse at the time or because of exigent circumstances. See generally *RBE Electronics*, 320 NLRB 80 (1995) (discussing "economic exigency" exception).

<sup>12</sup> In light of this finding, it is unnecessary to address the separate complaint allegation that the Company also violated Sec. 8(a)(5) by its March 2011 correspondence informing the Union that it would not pay any portion of the premium increase if a new contract was not reached by April 1. See *Miron & Sons, Inc.*, 358 NLRB 647, 647 fn. 1 (2012). It is also unnecessary to address whether the employer's ongoing failure since April 1, 2011, to apportion and deduct employee contributions for the premium increase violated the Act, as no such allegation has been made.

with unique keys), the number of locks to be issued to each authorized employee ("one or more . . . as may be needed"), and how the procedures should be performed. Since at least 1999, the Company has also issued "guidelines" on enforcing the policy. The guidelines state that an employee's failure to comply with the proper procedures is considered a "major rule infraction"; that an employee will receive "at least a suspension without pay" for a first violation; and that more severe discipline, including discharge, may be imposed "depending on the employee's record and the particular circumstances." (GC Exh. 19; Tr. 489.)

Neither the written policy nor the disciplinary guidelines, however, specifically address where employees must keep their issued locks. Nor, contrary to the Company's contention here, had the Company ever otherwise adopted or enforced a policy of requiring employees to carry at least two locks on their person prior to June 2011. Most employees, therefore, kept them in their lockers until needed, as the locks are long-shanked and heavy, get caught on equipment, and damage the belt loops on their pants (which are not supplied or paid for by the Company) if carried around on a continuous basis.<sup>13</sup>

Unfortunately, as indicated above, in May 2011 a fatal accident occurred at another of the Company's plants (Mount Holly), reportedly due to an employee's failure to properly lock out a machine. The employee had reportedly locked out the wrong zone, and when he got up on the wet transfer table to clean the photo eyes, the flopper arms activated, pinning and crushing him to death.<sup>14</sup> In response, the Company conducted a companywide review of its procedures. The Company's plant managers got together to discuss what had happened and to share

<sup>13</sup> These findings are based primarily on the testimony of Hawkins, the local union president and a 22-year employee of the Company. See Tr. 284, 287, 292-294, 311. To the extent inconsistent, I discredit the testimony of Gammon, the plant's current administrative manager and former HR manager from 1999 to 2006. Gammon testified that the Company has always required employees to carry two locks on their person (Tr. 494, 502-503). However, a post-accident email dated June 3 from Berry, the Company's then-plant manager, to all Shoals supervisors and managers, indicates otherwise. Thus, it listed "Have your lock with you at all times . . . have your locks on your belt loop at all times" as one of several things that other plants "have been doing after the [accident]" to make sure such an accident did not occur again (GC Exh. 20). Further, there is no record evidence that this policy was ever communicated to either managers or employees prior to the accident, and Gammon admitted on cross-examination that no employee had ever been disciplined for failing to carry the proper number of locks (Tr. 496). See also Tr. 313 (Hawkins). Gammon also acknowledged, consistent with Hawkins' testimony, that the locks are heavy and cumbersome when carried around the waist, and that employee lockers are close enough to the work area that employees could reasonably keep them there until needed (Tr. 498, 506). Finally, both Gammon and May, the Company's labor relations manager, admitted that the Union did, in fact, complain about the Company requiring employees to carry the locks on their person when the Union first raised the issue on June 15, shortly after learning of the requirement (Tr. 63, 498, 503). See also R. Exh. 109; and GC Exh. 21.

<sup>14</sup> The foregoing description of the accident is based on Plant Manager Berry's June 3 email noted above. (The complete fatality report is referenced but not in evidence.) The record does not reveal whether the employee was carrying any locks at the time of the accident.

ideas and things they had been doing since the accident to ensure that nothing similar happened at their facilities. These included adding signs and labels reminding employees to verify that the machine has been locked out, attaching a chain to the flopper arms, color coding zones, installing buttons to verify the energy state, performing training and evaluations—and requiring employees to have locks with them at all times.

Berry, the Shoals plant manager, was particularly supportive of this last requirement. Accordingly, in early June he instructed his supervisors to “make sure you have at least 2 locks . . . on your belt loop at all times,” and to require all affected employees to carry two locks on their person as well. He further directed that at least two additional locks be issued to every affected employee, and that the employees be required to keep the additional locks within a reasonable distance from their work area. (GC Exh. 20; Tr. 288–299, 490–492, 495.)

On June 13, Berry informed the Union about these new requirements. However, he denied the Union’s requests that the Company bargain about the requirements and potential discipline. Berry stated that the requirements were necessary; that violations would be disciplined according to the existing policy; and that the Company was not willing to bargain about the matter. He also denied the Union’s request to put the new requirements in writing. (Tr. 288–291, 294–295, 312–313, 328–329; GC Exhs. 21, 26; R. Exh. 109.)

The Company has since implemented the new requirements as stated. Employees are now issued at least four locks, and some as many as six. In addition, they have been told by their supervisors that they must carry at least two of the locks on their person and keep the remaining locks within a “reasonable distance” from their work area.

Most of the affected employees carry the required two locks on their belt loops. However, Hawkins, the local president, testified that he often carries them in his pockets to avoid wear and tear on his loops. And Gammon, the plant administrative manager, testified that certain maintenance employees who work in the mine actually have to carry three locks, and they carry them on their tool belts.<sup>15</sup> As for the remaining locks, the employees have never been told what a “reasonable distance” from their workstation means, and the record does not reveal where they are keeping them. Indeed, Gammon admitted that she does not know where the employees are keeping them. In any event, as of the date of the hearing, no employee had been disciplined for violating either of the new requirements. (Tr. 292–294, 313, 328, 496–497, 507–508.)

As indicated above, contrary to the Company’s contention, I find that the Company did, in fact, adopt and implement two new requirements in June 2011: first, that employees carry at least two locks on their person at all times; and second, that they keep at least two additional locks within a reasonable distance of their workstations. I also find that the first of these requirements clearly constituted a material, substantial, and significant change in the employees’ terms and conditions of employment requiring bargaining. As discussed above, the requirement had a real impact on the employees’ working con-

ditions, affecting them throughout their workday, and the employees were subject to discipline for failing to comply with it. It is therefore irrelevant that the requirement related to safety, or that it was implemented pursuant to the Company’s existing lockout/tagout policy. See *Kennametal, Inc.*, 358 NLRB No. 68, slip op. at 2–3 (2012) (employer’s institution of new mandatory safety checklist procedure was a material, substantial, and significant change to terms and conditions of employment). See also *J.P. Stevens & Co.*, 239 NLRB 738, 742–743 fn. 6 (1978), *enfd.* in relevant part 623 F.2d 322 (4th Cir. 1980) (employer violated Sec. 8(a)(5) by unilaterally substituting a heavier, nondisposable type of respirator to protect employees from cotton dust). Nor is it relevant that the requirement may have been a reasonable and effective response to the Mount Holly accident, or that no unit employee has actually been disciplined for violating the requirement to date. See generally *Warren Unilube, Inc.*, 358 NLRB 816 (2012); and *Flambeau Airmold Corp.*, 334 NLRB 165, 165 (2001). Accordingly, in the absence of any other defenses to the allegation, I find that the Company violated Section 8(a)(5) of the Act by unilaterally requiring employees to carry at least two locks on their person at all times.

As for the second requirement, however, in agreement with the Company, I find that the General Counsel failed to establish that it independently constituted a material, substantial, and significant change. As indicated above, there was no limitation on the number of locks employees would be issued under the Company’s longstanding policy. Rather, the policy simply stated that employees would be issued “one or more . . . as may be needed.” Further, although not precisely defined, the new June 2011 directive regarding additional locks did not on its face require the employees to do anything more than what they understood they should do before: keep the locks within a reasonable distance so that they could use them when needed. And, unlike with the first requirement, there is no record evidence that this second requirement has impacted the employees in any way. Cf. *North Star Steel Co.*, 347 NLRB 1364, 1367 (2006); and *EAD Motors*, 346 NLRB 1060, 1065 (2006) (likewise finding no violation where the General Counsel failed to present sufficient evidence regarding the impact of the changes on employees). Finally, the record is also insufficient to conclude that the second requirement is collateral to or inextricably intertwined with the first, i.e., that the Company would not have issued employees additional locks and required that they be kept nearby but for the requirement that they carry at least two lock at all times. Accordingly, the 8(a)(5) allegation with respect to this second requirement is dismissed.

## II. ALLEGED REFUSAL TO CONTINUE BARGAINING

As indicated above, the General Counsel also alleges that the Company violated Section 8(a)(5) of the Act by unlawfully refusing in early September 2011 to continue bargaining with the Union over a new contract. Specifically, the General Counsel alleges that the Company: (1) prematurely declared an impasse in the negotiations at that time;<sup>16</sup> and (2) improperly con-

<sup>15</sup> It is not clear from the record why most other employees do not, or cannot, carry their locks on tool belts.

<sup>16</sup> Although the General Counsel asserts that the contract negotiations were “impacted” by the Company’s unlawful unilateral refusal to

ditioned reaching any agreement and ending the impasse on the Union holding a second ratification vote, an internal union matter and nonmandatory subject of bargaining.

The Company disputes that the negotiations were not at impasse on September 2. The Company contends that further bargaining had clearly become futile at that time given the parties' repeatedly stated, disparate and unyielding positions with respect to the employee pension and 401(k) plans, matters critical to both sides. Further, although admitting that ratification votes are a nonmandatory subject of bargaining, and that insisting to impasse on such a vote is therefore unlawful, the Company denies that it did so.

The underlying facts are well documented by the parties' written proposals (GC Exh. 5; R. Exhs. 61–62) and tentative agreements (GC Exh. 10), and the Company's contemporaneous bargaining notes (R. Exhs. 130–133).<sup>17</sup> (The Union's contemporaneous notes were not offered into evidence. See Tr. 37.) The parties first met to begin negotiations for a new Shoals contract on January 13, 2011. Although this was only 18 days before the existing contract expired, the timing was consistent with the negotiations for the last three Shoals contracts in 2002, 2005, and 2008. The negotiations for those contracts had taken only 1–2 weeks to complete, and the agreements were ratified shortly thereafter. (Tr. 176–177, 476–477, 507.) Further, while the circumstances in 2011 were significantly different—business had soured along with the economy, resulting in reduced work schedules and several plant closures, and the Company intended to propose substantial modifications to the existing pension and 401(k) plans—the Company believed the modifications would be accepted, as they had already been negotiated into contracts at many of its other represented facilities, including several represented by the Steelworkers, since 2009. (Tr. 347–353, 447.) As discussed below, however, the Company's expectations would prove overly optimistic.

#### January 13 Meeting

The January 13 meeting lasted about 2 hours. The Union presented a comprehensive proposal, which included approximately 30 individual changes to 11 separate articles of the existing contract. About half of the proposed changes involved economic items—improvements in wages, overtime, holidays, vacations, layoff policies, bereavement pay, and the 401(k) and defined benefit pension plans—and half noneconomic items. The Company, on the other hand, presented only two noneconomic proposals. As in the previous contract negotiations, it

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pay and apportion the health insurance premium increase (Br. at 15–16), the General Counsel does not contend that a valid impasse was precluded by that unlawful conduct (or by the unlawful unilateral change in safety procedures). See generally *Lafayette Grinding Corp.*, 337 NLRB 832, 833 (2002) (discussing circumstances in which prior unlawful unilateral changes may preclude a valid impasse).

<sup>17</sup> Unless otherwise indicated, factual findings are based primarily on this documentary evidence, which is frequently duplicative. Although the documentary evidence is mostly consistent with the testimony, where there are conflicts I have generally given the former greater weight. Where factual findings are based primarily on testimony rather than documents, or on documents other than those mentioned above, the relevant transcript pages or exhibits are cited.

advised the Union that it wished to defer negotiating any economic proposals until the parties had gone through most of the non-economic proposals (Tr. 87, 96, 177, 354, 467–468).

Nevertheless, immediately after the meeting, the Company provided the Union with an advance description of its economic proposal regarding the employees' current defined benefit pension plan. In essence, the proposal substituted a defined contribution plan for current employees under age 40 and new hires. The Company also at that time gave the Union the names of the local staff representatives at four other Steelworkers-represented Company facilities where this proposal had already been accepted. (Tr. 44, 85–87, 98–100, 178–180, 209, 353; R. Exh. 141.)<sup>18</sup>

In response to a union information request, about a week and a half later, on January 24, the Company also provided an advance copy of its proposal regarding the employee 401(k) plan. The proposal added language stating that the Company's matching contributions would be paid in one annual lump sum (instead of every pay period) and could be suspended altogether with 30 days notice. The Union was aware at that time that this proposal had likewise been negotiated into agreements at other Steelworkers-represented company facilities. (Tr. 51, 183–184, 209–210; R. Exhs. 12).

Finally, either during or within a week after the January 13 meeting, the Company also gave the Union an advance copy of its three other economic proposals. The proposals made certain revisions to the articles on health insurance, holidays, and hours and conditions of work.<sup>19</sup>

#### January 24 Meeting

The parties held their next meeting on January 24. Including breaks and caucuses, the session lasted essentially the entire day. The parties agreed to the term of the new contract (3 years, with "dates to be determined pending date of ratification"). In addition, they reached a tentative agreement (TA) on two of the Union's noneconomic proposals, and the Union withdrew three others. The parties also executed a TA on one of the Company's two noneconomic proposals, which the Union had previously agreed to on January 13; however, the Company added a third noneconomic proposal.

Per the Company's preference, only noneconomic items were discussed at the meeting. However, late that evening, the Company provided information to the Union about the defined contribution pension proposal, which the Union had requested on January 21. As indicated above, the Company also provided an advance copy of its 401(k) proposal at that time. (R. Exh.

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<sup>18</sup> The Company had previously advised the Union in mid-December 2010 that it intended to introduce the pension proposal (Tr. 179–180). It also emailed the Union a description of the proposal on December 27, along with a list of the four Steelworkers-represented facilities where the proposal had already been accepted. However, the Union did not receive the email at the time, apparently because there were too many attachments to it. (R. Exh. 4; Tr. 280, 354.)

<sup>19</sup> The Company initially offered the first two proposals along with its two noneconomic proposals; however, it temporarily withdrew them when the Union pointed out that they were economic (Tr. 354). The health insurance proposal was emailed to the Union on January 20 (Tr. 181, 355–356; R. Exh. 9).

10, 12.)

#### January 25 Meeting

The parties met again early the following day. However, while they exchanged and discussed additional counterproposals, there were few concrete results.

As at the previous two meetings, the parties negotiated only noneconomic matters at the January 25 meeting. Nevertheless, in the late afternoon, the Union raised a concern and requested information relating to the existing defined benefit pension plan; specifically, about whether the plan was being adequately funded by the Company. In addition, after the meeting, the Union distributed a “bargaining update” addressing the Company’s economic proposals relating to health insurance and the pension and 401(k) plans (R. Exh. 91). The update described each of the three proposals and advised that the bargaining committee was “opposed to these types of proposals.” Although the update was distributed to the Union’s membership, the Company’s lead negotiator (May) also saw it (Tr. 197, 359).

#### January 26 Meeting

The parties met again the next day. However, the meeting lasted only about 15 minutes and no actual bargaining occurred. Rather, the Union suspended further negotiations until its concerns about the funding level of the defined benefit plan were addressed. As a result, the previously scheduled meetings on January 27 and 28 were also canceled (Tr. 200–201, 361–362).<sup>20</sup>

The following week, by email dated January 31, the Company provided the requested pension-funding information to the Union, which was sufficient to allay the Union’s previously expressed concerns (R. Exh. 20; Tr. 278). Accordingly, by email dated February 2, the Union provided the Company with available dates to continue bargaining (R. Exh. 22).

In the meantime, on January 31, the contract expired as scheduled. The Company therefore notified the Union that any subsequent grievances would not be processed to arbitration. It also advised the Union that there would be “no retroactivity for pay or any other improvements to the new contract upon ratification.” (R. Exh. 19.)<sup>21</sup>

#### February 9 Meeting

The parties next met on February 9. The meeting lasted most of the day and was relatively productive. During the morning, the parties reached a TA on another of the Union’s noneconomic proposals. In addition, late in the afternoon, the Company for the first time responded to the Union’s economic proposals, agreeing with one of them (bereavement pay) and countering or rejecting the rest.

<sup>20</sup> Although the parties did not meet and bargain, the Union requested, and the Company provided, information regarding the Company’s health insurance proposal during this time (R. Exh. 16).

<sup>21</sup> The Company also notified the Union that it would no longer recognize the union-security clause or deduct union dues pursuant to the provisions of the expired contract. However, the General Counsel does not allege that either this or any of the Company’s other actions on January 31 violated the Act or prevented a valid impasse on September 2 as a matter of law.

The Company at that time also formally offered its five economic proposals. It described in detail its proposed new defined contribution pension plan for younger employees and new hires. In addition, it explained why the new language regarding annual payment and suspension of employer contributions to the 401(k) plan was needed: to better manage and control cash-flow during the economic downturn.

The Union, however, did not immediately respond, either to the Company’s counters or to the Company’s own economic proposals. Nor was agreement reached with respect to the Company’s remaining two noneconomic proposals. The parties also disagreed with respect to retroactivity; the Union proposed that benefits would be retroactive to February 1, but the Company rejected this consistent with its previously stated position on January 31.

#### February 10 Meeting

The parties met again the following day. However, no further counterproposals or proposal were exchanged. Rather, the Union gave the Company a written, 17-paragraph request for additional information regarding its economic proposals, including the pension and 401(k) proposals (R. Exh. 24). The Union advised that it would not respond to the Company’s economic proposals and counters until it had received this requested information.

The Company subsequently provided the requested information on February 21 and March 4 (R. Exhs. 29–30).

#### March 9 Meeting

The parties next met on March 9. Although the meeting lasted less than an hour, there was some progress. The Union withdrew two of its economic proposals relating to overtime and the 401(k) plan. It also slightly modified (i.e., lowered) its wage proposal in response to the Company’s wage proposal, and countered the Company’s health insurance proposal.

However, the Union rejected both of the Company’s economic proposals regarding the new defined contribution pension plan and the 401(k) plan. The Union advised that it was “not interested” in either, as there was no guaranteed return with a defined contribution plan, and if the Company suspended the 401(k) match, an employee could lose \$100,000 or more, depending on the employee’s age and how long contributions were suspended.

The Union also rejected the Company’s proposals regarding hours and conditions of work and holidays. Further, it brought several additional items to the bargaining table, including three grievances (given the Company’s previous notice that post-contract grievances would not be arbitrated).

#### March 10 Meeting

The parties met again on March 10. The meeting lasted essentially the full day, and the parties made some further progress. The Company withdrew its economic proposal relating to holidays, as well as one of its two remaining noneconomic proposals. It also countered on wages, health insurance, and the multiplier for the defined benefit pension plan.

The Union likewise withdrew two more of its proposals, one economic and one noneconomic. In addition, although it held

on health insurance, it modified its proposals on wages and the defined benefit multiplier in response to the Company's previous counters. It also modified its position with respect to the Company's remaining noneconomic proposal.

However, the parties failed to reach any new TAs.<sup>22</sup> Further, the Union continued to flatly "reject" the Company's economic proposals regarding hours and conditions of work and the new defined contribution pension plan. And while it offered a "counterproposal" with respect to the Company's proposed 401(k)-suspension language, the counterproposal was essentially the opposite of the Company's proposal, i.e., contrary to the Company's proposal, which permitted the Company to unilaterally suspend its matching contributions with 30 days' notice, the Union's counterproposal provided that "suspension of the 401(k) matching contribution will not be permitted without the express consent of the Union"; that the Company "will meet and provide information" to the Union regarding its financial status, its justification for suspending matching contributions, and the suspension's duration; and that "the Company and the Union will negotiate in good faith and must reach mutual agreement regarding the proposed suspension." The Union also continued to reject the Company's related proposal that the matching 401(k) contributions would be paid only once a year. (Tr. 224-225.) Accordingly, the Company did not consider the Union's counterproposal to be significant movement (Tr. 382-384).

Nevertheless, at the end of the meeting, when discussing future dates for bargaining, Bolte, the Union's lead negotiator, asked May, his company counterpart, if he believed they could "wrap up" the negotiations in one more day (Tr. 384). May agreed that they could.<sup>23</sup> He later explained why he believed this at the hearing:

Q. And why did the company believe that that was possible?

A. Again, with economics, things can break free and start moving quickly and it's also not uncommon in negotiations where a number of things might be, you know, proposal wise, left open by the time the last, best and final offer is proposed and, you know, the last, best and final still be accepted, taken to vote and be accepted.

Q. What about the, what about company economic 4 and 5 [the defined contribution and 401(k) proposals]? If the parties were apart, why did you believe that there was a possibility in wrapping up the contract?

A. Well, a couple of things. There was more discussion yet to come with negotiations on [March] 28th and there had been other company negotiations where the locals had not agreed to it, but . . . it went in the last, best and final and it was ratified. [Tr. 384-385.]

<sup>22</sup> Although the parties executed a TA with respect to bereavement pay on March 9, the Company had previously agreed to the Union's proposal on February 9.

<sup>23</sup> The context in which Bolte asked the question indicates that he believed it was possible to complete the negotiations in one more day. Indeed, the contemporaneous notes taken by Hawk, the Shoals production manager, specifically states, "[Bolte] thinks we can finish in 1 more day." And Bolte never testified to the contrary.

### March 28 Meeting

The parties next met on March 28, as scheduled. The meeting turned out to be the longest yet, lasting from about 8 a.m. until about 7:30 p.m. During the course of the day, the parties each exchanged three additional counterproposals, which moved closer on a number of items, including wages, health insurance, and the defined benefit multiplier. The Union also withdrew one of its miscellaneous economic proposals, and the parties reached TAs on two of the three union grievances.

However, there was little or no movement with respect to the Company's remaining three economic proposals: hours and conditions of work, the defined contribution pension plan, and the 401(k) plan. Both sides stuck to their former positions on the first and second, and the Company moved only slightly on the last, offering to meet and provide information to the Union about suspending the matching contributions, but not to bargain. Although the Union offered a "contingent proposal," whereby it would withdraw seven of its remaining economic and noneconomic proposals (including those relating to holidays, vacations, layoff policies, and lowering the retirement age for the defined benefit plan) if the Company withdrew all three of the above economic proposals (and agreed to the Union's language with respect to health insurance), the Company rejected the contingent proposal.

Eventually, in the late afternoon, the Company advised that it was "approaching [its] limits." It asked whether the Union was willing to take a last, best, final offer (LBFO) to a vote. The Union said it would depend on the LBFO. The Company asked what the Union's main "sticking points" were. The Union told the Company to look at its contingent proposal, and specifically mentioned the following: the defined benefit multiplier, the Company's proposal to replace the defined benefit plan with a defined contribution plan for younger employees, the Company's proposal to permit unilateral suspension of 401(k) matching contributions, the health insurance increase structure, and three of the Union's noneconomic proposals dealing with dues deductions, posting schedules, and clearing employee personnel files of disciplinary warnings after a certain period. The Union also indicated that it would not agree to the Company's wage-increase proposal as long as it was based on percentages rather than cents per hour.

The Company made clear that its proposals regarding the defined contribution and 401(k) plans were not going away. However, it agreed to modify its wage increase proposal so that it was based on cents per hour. It likewise agreed to adopt the Union's position on the health insurance increase structure. In addition, it modified its sole remaining noneconomic proposal to match the Union's last counterproposal. After further discussion with the Union, it also agreed to settle the third grievance. Given these changes, the Union advised the Company that it would submit the LBFO to a ratification vote, but without recommending acceptance. (Tr. 237-241, 387-390.)

Shortly after the meeting, the Union distributed another "bargaining update" to the membership. The update notified the employees that the Company had made a LBFO, and that the Union would be conducting a contract vote on April 9. However, it emphasized that the Company had "not moved" on

replacing the defined benefit pension plan with a defined contribution plan for younger workers and suspending 401(k) matching contributions. Accordingly, it stated that “your Local Union Committee and your International Union unanimously recommends a NO vote!” (R. Exh. 98.)

A few days later, on March 30, the Company distributed a “negotiation update” of its own to employees. The update responded to the Union’s March 28 update, explaining how the economic downturn had adversely affected the Company’s business, why the Company was proposing the pension and 401(k) changes, and what the changes would mean for employees. It also noted that both proposals had been negotiated into nine other union contracts, including four Steelworkers contracts, since May 2009. (R. Exh. 81.)<sup>24</sup>

The ratification vote was subsequently held on April 9 as planned. Consistent with the Union’s recommendation, the vote was 65–3 against the LBFO. (Tr. 132, 243, 295–296.)

The Company did not declare an impasse or unilaterally implement the LBFO following the unfavorable vote (Tr. 243, 393). Nor did either side initiate economic action, i.e., a strike or a lockout, against the other. However, there is no evidence of any significant contract-related communications or additional information requests by or between the parties following the vote. And the parties did not meet again until approximately a month later, on May 10.

#### May 10 Meeting

The May 10 meeting was scheduled with the assistance of a Federal mediator, who also attended the session (and all subsequent sessions). (Tr. 132–133.) The parties essentially just reviewed the open issues at the meeting; no written contract proposals or counterproposals were exchanged and no TAs were reached on any item. Nor was there otherwise any real progress. Although the Union floated a few ideas during the session, directly and/or through the mediator, they were quickly rejected as either unrealistic or unacceptable. For example, the Union indicated that it would consider a defined contribution plan if there was a guaranteed 5-percent return. However, the Union did not identify any such plan (Bolte admitted at the hearing that he could not find *any* investment option with a guaranteed 5-percent return, Tr. 245). And the Company assured the Union that no such plan existed. The Union also indicated that it would consider the Company’s proposed 401(k)-suspension language if it would “sunset” when the contract expired. However, the Company rejected this idea as well. Finally, although the Union brought six additional grievances to the table, no resolution was reached on them either.

Following the meeting, on May 13, the Company mailed another “negotiation update” to the employees. The update summarized the history of the negotiations, including the recent May 10 meeting with the mediator. It expressed the Company’s understanding that the “two big issues” for the Union were the Company’s proposed defined contribution pension plan and

401(k)-suspension language. It stated that these were likewise “important issues” to the Company and again explained why. Finally, it advised the employees that the LBFO “is as it states: it is the last, the best, and the final offer the Company has.” It asked the employees to

[P]lease take the time to look at the offer again, discuss it with your family, and make the best decision for you. At this point some decisions have to be made. Ask the Union leadership for another opportunity to vote on the contract.

(R. Exh. 83.)

No second vote was held at that time, however. Further, as after the first vote, there were no significant contract-related communications or additional meetings between the parties for an extended period following the May 10 meeting. Indeed, the parties did not meet again until 2-1/2 months later, on July 28.<sup>25</sup>

#### July 28 Meeting

The July 28 meeting lasted essentially the entire day (8–4:30) and was relatively productive. The Union withdrew four of its economic proposals relating to holidays, vacations, layoff seniority rights, and the defined benefit pension plan (all of which the Union had previously offered to withdraw on March 28 only if the Company withdrew its defined contribution, 401(k), and other economic proposals). In addition, two of the noneconomic proposals that the Union had previously listed as “sticking points” were resolved; the parties reached agreement on the Union’s proposal regarding posting schedules, and the Union withdrew its proposal relating to dues deductions. The parties also reached a TA on another of the Union’s miscellaneous economic proposals, and agreed to settle seven grievances the Union had brought to the table. Finally, the Union offered counters on wages and the defined benefit pension multiplier, and also modified its previous proposal regarding retroactivity (substituting a \$250 bonus “upon ratification” for retroactive wages).

However, the Union continued to “reject” the Company’s proposals regarding the defined contribution pension plan and the 401(k) plan, stating that it was “not going to buy a pig in a poke.” With respect to the former, the Union repeated that it wanted a guaranteed 5 percent return.<sup>26</sup> It also suggested that

<sup>25</sup> The only contract-related communications in the record following the May 10 meeting were in late June and early July about scheduling future meeting dates and bringing grievances to the bargaining table. See R. Exhs. 35–38. As previously discussed, there were also communications between the parties from March through June regarding the Company’s unilateral changes in health insurance premiums and safety procedures. The Union filed the unfair labor practice charges and amended charges over the changes on April 14, June 30, and July 7. The Union also referenced the unilateral changes (and other actions it believed evidenced bad faith) at least once during the bargaining sessions. However, as noted above, the General Counsel does not contend that the unilateral changes prevented an impasse on September 2.

<sup>26</sup> Bolte testified that he told the Company at some point that the Union would accept a 4-percent guaranteed return. However, he was unsure whether he did so at the July 28 meeting or later (Tr. 145, 246). Further, it is clear from the contemporaneous bargaining notes that the Union was still seeking a 5-percent guaranteed return on July 28, and

<sup>24</sup> The Union subsequently distributed a letter to its members on April 4 again urging a “NO” vote (R. Exh. 99). The Company also thereafter distributed another update on April 6 responding to questions it had received about various provisions in the LBFO (R. Exh. 82).

the Company withdraw the proposal and repropose the plan in the next contract, after there had been sufficient time to evaluate its performance at other facilities.

In response, the Company again assured the Union (as it had on March 28) that its defined contribution and 401(k) proposals were “not going away.” And while it countered the Union’s modified proposal on retroactivity, it likewise refused to move from its previous positions on wages, the defined benefit multiplier, or any of the other economic and noneconomic items that had not been resolved or withdrawn. Thus, notwithstanding substantial progress, the July 28 meeting ended with the parties still far from agreement.

Following the meeting, the Company again distributed a series of “negotiation updates” to the employees. The first, on August 4, summarized the July 28 meeting and warned that the Company had become “frustrated with the delay” in achieving a new contract and would “not continue to operate without a contract indefinitely.” (R. Exh. 84.) As previously discussed, the second, on August 9, responded to the Union’s unfair labor practice charge and related NLRB complaint regarding the Company’s initial refusal to pay the postcontract health insurance premium increase. It explained the Company’s legal position on the matter, but assured employees that all premiums had been paid in full since July 1. (R. Exh. 85.) The third, on August 15, notified the employees that the Company had recently filed an unfair labor practice charge against the Union. The charge, which was attached, alleged that the Union had engaged in a number of “dilatatory tactics” during the contract negotiations, including, among other things, “refusing to hold a ratification vote.” (R. Exh. 86.)<sup>27</sup>

In the meantime, on August 11, the Company temporarily laid off the unit employees (Tr. 486–487), apparently due to lack of work. (The Company asserts that this was the reason and the General Counsel acknowledges that there is no allegation that the layoff was unlawful.)

Again, however, no second ratification vote was held during this time. Nor, other than email exchanges about future meeting dates (R. Exhs. 40–43), were there any significant contract-related communications directly between the parties following the July 28 meeting. And the parties would not actually meet again until over a month later, on September 2.

#### September 2 Meeting

The Union began the September 2 meeting by introducing a Steelworkers International Union Representative Robinson, who served as director of the Illinois/Indiana district and had not attended any of the previous bargaining sessions. Robinson then gave a brief speech, focusing on the Company’s retirement proposals. Robinson said he was there “to say what may not have been said in the past”: that such proposals were an attempt to “destroy retirement benefits”; were “an attack on the middle class”; and were “wrong,” “shortsighted,” and “self-

destructive.”

May, the Company’s chief negotiator, strongly disagreed with Robinson’s statements, noting that defined contribution plans are nothing new. He also pointed out that the exact same proposals had been accepted at four other facilities represented by the Steelworkers. Robinson, however, stated that the proposals should not have been accepted at those facilities, and that the Steelworkers Union was going to do everything it could to “reverse the trend” toward such plans.

Robinson then asked about a recent newspaper article, which reported that the Company would not bring the employees back from layoff until a new contract was reached (R. Exh. 140). After reviewing the article and caucusing, May responded that the Company was neither the cited nor the actual source of the article; that the article was not true; and that the employees were scheduled to return September 6.

At that point, Bolte handed out another union counterproposal. It modified the Union’s previous counter regarding wages, thereby matching the amounts set forth in the Company’s previous LBFO for all 3 years of the contract (i.e., effective “upon ratification”; February 1, 2012; and February 1, 2013). It also modified the Union’s previous counter on the defined benefit plan multiplier, moving closer to the Company’s LBFO on that economic item. Finally, it also modified somewhat the Union’s noneconomic proposal on clearing employee personnel files (which was one of the Union’s previously identified “sticking points”).

However, the Union continued to “hold” on various other items. Consistent with Robinson’s comments, it also continued to flatly “reject” the Employer’s defined contribution and 401(k) proposals. Bolte advised the Company that Robinson had spoken on the Union’s behalf with respect to those proposals.

May responded that the Company would review the counterproposal, but the Company had already made a LBFO that included the defined contribution and 401(k) proposals. He also stated that, given Robinson’s opening speech, there might not be much left to talk about.

The parties then separated to caucus. When they returned (without Robinson, who had left), May advised the Union that the Company’s position would not change; that the Company had a LBFO “out there” and the Union should let the employees “revote on it.” “Short of that,” May advised, given the Union’s stated position that morning regarding the defined contribution and 401(k) proposals, the Company believed the parties were at impasse.

Bolte asked for clarification whether the Company was claiming impasse at that time. May replied that it was, “short of” a new vote. Bolte asked if this meant the Company was not claiming impasse if the Union took the LBFO to a vote, and was claiming impasse if the Union did not take it to a vote. May answered “yes” or “correct” to both.

The parties at that point took another caucus. When they returned, May gave the Union a copy of the Company’s LBFO, which was identical to the previous LBFO the employees voted on in early April, except that it attached the additional TAs since that time (including a TA the parties executed that day with respect to items the parties had previously agreed to on

did not move off this position until 3 months later, at a postlockout meeting on October 24.

<sup>27</sup> The record does not reveal the subsequent history of the Company’s August 12 charge. However, it is a reasonable assumption that the General Counsel did not issue a complaint against the Union given the allegations of the instant complaint against the Company.

July 28). He said this was what the Union should take back for a vote.

Bolte then gave the Company the Union's position. He stated that the Union did not believe the parties were at impasse and stood ready to continue bargaining. He also advised that conditioning impasse on a vote might be found illegal. The Company, however, did not respond, and the meeting ended.

Thereafter, by email to May dated September 4, Bolte again stated "for the record" that the Union did not believe the parties were at impasse and that it was willing to continue bargaining. In reply, by email dated September 6, May reiterated that the Company did "not intend to modify" its defined-contribution and 401(k) proposals. May stated that it also appeared clear the Union had no intention of modifying its position on those issues, and that the issues were "critical to the reaching of an agreement." May requested Bolte to promptly let him know if he had misstated the Union's position on those issues. Finally, May noted that the Union had added a new proposal on September 2 regarding health insurance; specifically, that "there would be no balance billing to employees for the [previously unpaid health insurance premium increase] back to April 1." May stated that, "[a]lthough we are prepared to discuss that proposal, . . . the Company has not agreed that there will be no balance billing to any employee."

Bolte responded by another email the following day. He did not dispute May's description of the Union's position on the defined contribution and 401(k) proposals. Rather, he focused on May's statement that the Company was willing to discuss the Union's proposal regarding retroactive apportionment of the premium increase. Bolte asked if this meant the Company had changed its position from the September 2 meeting that there was nothing more to discuss. May replied by email the same day. He denied that there was any inconsistency between what he said at the meeting and in his email, stating, "[t]hey both convey that unless there is a change in the union's position on [the defined contribution and 401(k) plans], continuing to meet seems highly unlikely to produce an agreement." (R. Exh. 44.)

Notwithstanding its declaration of impasse, the Company did not unilaterally implement its LBFO (Tr. 243, 393). However, within a few days after the September 2 meeting, the Company decided not to recall the laid off employees on September 6 as planned. Rather, after evaluating what had occurred at the meeting, the Company decided to lock them out instead. (Tr. 69, 72–73, 409–410, 460.) According to May, who participated in a subsequent conference call with the management team regarding the lockout:

Basically, the decision was made to try to get the employees to the point of voting for the contract. . . . To put pressure on them to communicate to their union committee that they wanted to vote the last, best and final again. We had been hearing feedback that employees were frustrated, wanted to vote again, and we did it to help put pressure on that to get it to a vote again. . . . Our hope and expectation at that time was that the outcome was going to be ratification. [Tr. 462, 470.]

Accordingly, on September 6, the Company distributed a notice to all unit employees, either by mail or when they arrived at the gate, advising that they were being locked out. The notice

stated that the Company believed the lockout was "necessary to bring our negotiations to a conclusion with a new agreement," and would "continue until a new collective bargaining agreement is ratified." (R. Exh. 87; Tr. 302, 485–486, 500–501.)

At the request of the mediator, the parties met again about 7 weeks later, on October 24. The Union at that time offered another written counterproposal, which modified the Union's previous positions regarding both the defined contribution plan and the 401(k) plan (and also lowered the previously requested ratification bonus from \$250 to \$225). However, the Company rejected the counterproposal, as the modifications were either clearly unsatisfactory (the Union's counter to the defined contribution pension plan was to substitute a Steelworkers-sponsored PACE 401(k) plan) or insignificant (the Union's counter on the existing 401(k) plan continued to require both good faith bargaining and mutual agreement before matching contributions could be suspended).<sup>28</sup>

The following month, on November 22, the Union held another vote on the Company's LBFO. However, the LBFO was again voted down, 53–19. (Tr. 70, 159, 413, 164.)

The Company eventually ended the lockout in March 2012, approximately 6 months after it began. (Tr. 302.) However, the record indicates that the parties had still not reached an agreement at that time (or as of the May 2012 hearing).

#### A. Alleged Premature Declaration of Impasse

As indicated above, the General Counsel first alleges that the Company's refusal to continue bargaining on September 2 was unlawful because the Company's impasse declaration was premature. The General Counsel argues that the parties clearly had not reached impasse at that time, given the significant movement that occurred throughout the negotiations, including at the final bargaining sessions, and Bolte's repeated statements that the Union was prepared to continue bargaining. The General Counsel argues that, in fact, May's own statements linking the declared impasse to another ratification vote shows that the

<sup>28</sup> The posthearing briefs filed by the General Counsel and the Union contain a number of materially incorrect or imprecise statements regarding the October 24 meeting. For example, the General Counsel's posthearing brief (p. 14) states that the Union's counterproposal "essentially agreed to Respondent's 401(k) suspension proposal, with the addition of one line that the parties would negotiate in good faith over such a suspension." The Union's brief (p. 23, 29), likewise indicates that the October 24 counter to the Company's 401(k) proposal represented "progress" because it only required "bargaining in good faith" over suspending matching contributions. However, as indicated above, the counter actually continued to require that the parties "will negotiate in good faith and must reach mutual agreement regarding the proposed suspension of the Company 401(k) matching contributions" (emphasis added). Thus, like the Union's previous counter on March 10, it was still essentially the opposite of the unilateral authority the Company was proposing. It also continued to "reject" the Company's proposal to make matching contributions only once a year. GC Exh. 5, p. 103. Both briefs also repeatedly suggest that there was significant progress at the October 24 meeting because the parties reached a TA with respect to one of the Company's noneconomic proposals (GC Br. 21; U Br. 23, 29). However, as indicated by both the Company's LBFO and the bargaining notes, the parties had previously reached agreement on that proposal on March 28.

Company had not truly reached the “end of its rope.”

The Company, on the other hand, contends that the parties clearly had reached impasse on September 2 under the relevant legal standards. With respect to May’s statements linking the impasse to another vote, the Company argues that, in context, those statements simply reflected the deadlocked state of the negotiations at that point, and May’s belief that only a revote in favor of the Company’s last, best, final offer would resolve the deadlock and result in a final agreement.

I find that the Company has the better argument. In evaluating the existence of an impasse, the Board considers a number of factors, including the bargaining history, whether the parties have negotiated in good faith, the length of the negotiations, the importance of the issue(s) over which there is disagreement, and the contemporaneous understanding of the parties regarding the status of the negotiations. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

Here, as indicated above, the parties have a substantial history of successfully and expeditiously negotiating successive agreements, apparently without the necessity of economic warfare. Unfortunately, this history did not repeat when the most recent contract expired. However, both parties showed considerable perseverance in attempting to once again reach a new agreement. The parties met on 12 separate occasions over a relatively lengthy 9-month period. Although some of the meetings were quite short, half lasted all or most of the day.<sup>29</sup> Further, both parties offered numerous proposals and counterproposals at the meetings, and there is no allegation that any of the Company’s were unlawful or that the Company otherwise bargained in bad faith.<sup>30</sup>

Moreover, it is clear, based on the parties’ statements and bargaining updates, that resolution of the two issues on which the parties were consistently furthest and most fundamentally apart—the Company’s proposals to substitute a defined contribution pension plan for younger workers and to permit suspending 401(k) matching contributions—were of vital importance and critical to reaching agreement.<sup>31</sup> And there is no evidence that the Union had anything more to offer on September 2 that would have altered the Company’s steadfast position on those issues. Indeed, the substantial progress cited by the General Counsel during the final bargaining sessions on July 28

<sup>29</sup> Seven of the meetings, including three of the full-day meetings, occurred after February 9, when the Company initially responded to the Union’s economic proposals and formally offered the economic proposals it had provided to the Union prior to the January 25 meeting.

<sup>30</sup> The Company argues, consistent with its previous unfair labor practice charge, that the Union bargained in bad faith by engaging in “unjustified delay and dilatory tactics throughout negotiations” (Br. 86). However, it is unnecessary to address this issue given my conclusion that an impasse existed even assuming the Union bargained in good faith. As previously noted, it is also unnecessary to address whether the Company’s prior unilateral changes in health insurance premiums and safety procedures prevented a bona fide impasse, as there is no contention that they did so.

<sup>31</sup> To the extent Bolte testified otherwise at the hearing, I discredited his testimony as contrary to the overwhelming weight of the record evidence.

and September 2—which, with the exception of various grievance settlements, primarily consisted of the Union withdrawing proposals or agreeing or moving closer to the Company’s other proposals—simply highlights both how ineffectual such moves were in resolving the two critical issues, and how little there was left for the Union to move on.

In these circumstances, there was no reasonable basis for the Union to believe that continued bargaining on September 2 would have been fruitful. Nor do I believe the Union really believed this, notwithstanding Bolte’s statements on the record that it was prepared to continue bargaining. And there was every reason for the Company to believe, as May testified, that Bolte’s statements were an “empty offer” (Tr. 409, 443). Cf. *Taft Broadcasting*, above; and *CalMat Co.*, 331 NLRB 1098 (2000) (citing similar circumstances in finding impasse). See also *California Pacific Medical Center*, 356 NLRB 1283 (2011); *Richmond Electrical Services*, 348 NLRB 1001 (2006); *ACF Industries, LLC*, 347 NLRB 1040 (2006); and *H&H Pretzel Co.*, 277 NLRB 1327 (1985), enfd. 831 F.2d 650 (6th Cir. 1987).<sup>32</sup>

In arguing to the contrary, the General Counsel makes much of the Union’s subsequent counterproposal on October 24. However, this later counterproposal is irrelevant to whether the Company’s actions on September 2 and 6 were unlawful. See generally *Francis J. Fisher*, 289 NLRB 815 fn. 1 (1988); and *Dependable Maintenance Co.*, 274 NLRB 216 (1985). See also *Teamsters Local 639 v. NLRB*, 924 F.2d 1078, 1084 fn. 6 (D.C. Cir. 1991).<sup>33</sup> In any event, even assuming arguingo that the October 24 counterproposal may properly be considered, it supports the Company’s, rather than the General Counsel’s, position. (See fn. 28, above.)

As for May’s statements at the September 2 meeting linking the impasse to a revote, as indicated by the Company, those statements also support rather than undermine a finding of im-

<sup>32</sup> Other Board decisions such as *Harbor Freight Lines*, 358 NLRB No. 41 (2012); *Laurel Bay Health & Rehabilitation Center*, 353 NLRB 232 (2008), reaffid. 356 NLRB 3 (2010), enf. denied in relevant part 666 F.3d 1365 (D.C. Cir. 2012); *EAD Motors*, 346 NLRB 1060 (2006); *Newcor, Inc.*, 345 NLRB 1229 (2005), enfd. 219 Fed. Appx. 390 (6th Cir. 2007); and *Cotter & Co.*, 331 NLRB 787 (2000), revd. in relevant part sub nom. *Truserv Corp v. NLRB*, 254 F.3d 1105 (D.C. Cir. 2001), cert. denied 122 S.Ct. 1070 (2002), which rely on recent progress and/or similar union statements in reaching a contrary conclusion, are factually distinguishable for the reasons discussed above.

<sup>33</sup> *Martin Marietta Energy Systems*, 316 NLRB 868, 873 (1995), cited by the Union, is clearly distinguishable. In that case, not only did the employer fail to claim impasse at the time it unilaterally implemented its last offer, it stated that it would resume negotiations with the union on request. Thus, the subsequent bargaining sessions cited by the judge merely confirmed what the employer had previously stated at the time of the alleged unlawful conduct. (It is also noteworthy that the Board specifically disavowed the judge’s “unqualified statement that an employer may not propose continued negotiations and at the same time declare an impasse.” 316 NLRB at 868 fn. 4.) A second case cited by the Union, *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982), enfd. in relevant part 254 NLRB 739 (1981), is distinguishable for similar reasons. The employer there had likewise never indicated to the union, before taking unilateral action, that further negotiations would be fruitless, and it met with the union the very next day.

passee. Nothing is clearer from the record than that no contract could or would be reached with the Union without a favorable ratification vote, and that the Company was well aware of this. May testified that, to his knowledge, no Steelworkers local at any Company facility had ever accepted a LBFO without a ratification vote (Tr. 411–412). Gammon, the current Shoals plant manager and former HR manager from 1999–2006, likewise testified, without contradiction, that Shoals contracts were always the result of a ratification vote; that the Union had never executed a contract without such a vote (Tr. 507). Further, the parties' proposals for the new Shoals contract expressly contemplated a ratification vote. Indeed, as indicated above, at the second meeting on January 24, the parties specifically agreed that the exact dates of the new contract would be determined "pending date of ratification." The parties' proposals on wages (which eventually matched), the defined benefit multiplier, and retroactivity also expressly stated that they would be effective "upon ratification."<sup>34</sup> Even the Steelworkers Health and Welfare Fund assumed that there would be a ratification vote before any new contract took effect. See the Fund's previously described, January 31, 2011 email to the Company regarding the premium increase (R. Exh. 118).

Moreover, as May testified in explaining why he had previously believed negotiations could be wrapped up with just one more day of bargaining on March 28, there was a history of employees voting to accept the Company's LBFO despite the union's refusal to agree to it at the table. Indeed, this had occurred at another facility (Pryor, Oklahoma) in December 2010, shortly before the Shoals negotiations began, where May had likewise been the Company's lead negotiator and the LBFO included the same defined contribution and 401(k) provisions (Tr. 350, 463–464, 471). Bolte admitted at the hearing that the same thing could have happened at Shoals, i.e., if the membership had rejected the Union's recommendation and voted for the LBFO, there would have been a contract (Tr. 267). This explains why the Company continued to push for a second ratification vote after the unfavorable vote on April 9, even to the point of filing an unfair labor practice charge over the matter. It likewise explains why the Company would believe, as May credibly testified regarding his September 2 statements (Tr. 67, 77), that a revote at that time would break the deadlock and result in a contract.

Finally, there is no substantial basis in the record to conclude that anything but a favorable second ratification vote would have broken the deadlock. The Company did not in any way modify its defined contribution and 401(k) proposals (or the other primary provisions of its LBFO) following the first unfavorable ratification vote in April. Nor is there any reason to think the Company would have done so if the LBFO was voted down again in September. The Company was obviously not concerned about the potential economic effects of a strike at

that point; the employees had already been laid off for 3 weeks and the Company subsequently locked them out for another 6 months.

Thus, May's statements cannot reasonably be construed as suggesting that the Company would agree to modify or withdraw its defined contribution and 401(k) proposals if employees again voted the LBFO down. Rather, as indicated by the Company, considered in context, the statements were obviously intended to describe, in a simple if not perfect manner, what had become the reality at that point: the only apparent way to reach a new agreement, and thereby end the impasse, would be for employees to revote in favor of the LBFO.

Accordingly, for all the foregoing reasons, I find that a preponderance of the record evidence establishes that the parties did, in fact, reach a genuine impasse at the September 2 session.<sup>35</sup>

#### *B. Alleged Improper Insistence on Another Ratification Vote*

As previously mentioned, the General Counsel also alleges that the Company's refusal to continue bargaining on September 2 was unlawful because ratification votes are an internal union matter and nonmandatory subject of bargaining, and thus May could not properly insist, as a condition of reaching any agreement and ending the declared impasse, that the Union permit another such vote.

For essentially the same reasons, I find that this allegation fails as well. As discussed above, the parties had already reached a bona fide impasse at the time May made his statements linking the impasse to another ratification vote. Further, May's statements simply reflected what was patently true at that point: the only apparent way to reach a new collective-bargaining agreement—consistent with both the parties' practice and their proposals and express understanding regarding the necessity of a ratification vote—was for the employees to revote in favor of the Company's LBFO.

In short, May did not insist to impasse on a ratification vote; an impasse already existed.<sup>36</sup> Nor did May insist on a vote as a

<sup>35</sup> As noted by both the General Counsel and the Union, it is well established that the party asserting a valid impasse as a defense has the burden of proving it. Thus, as the Company asserts that there was a valid impasse in defense to the allegation that it unlawfully ceased bargaining on September 2, it properly bears the burden of proving that defense. See, e.g., *Erie Brush*, 357 NLRB 363 (2011). Here, however, the complaint also contains a separate allegation, which specifically and affirmatively alleges that the Company's declaration of impasse on September 2 was premature and independently violated Sec. 8(a)(5) of the Act (see GC Exh. 1(p), pars. 7(g), 9). Nevertheless, the Company does not contend that this additional allegation shifts the burden of proof to the General Counsel. And I would reach the same conclusions, and dismiss both allegations, regardless of whether the Company or the General Counsel has the burden.

<sup>36</sup> This distinguishes the two cases cited by the General Counsel in support of the allegation: *Jano Graphics, Inc.*, 339 NLRB 251 (2003), and *Movers & Warehousemen's Assn.*, 224 NLRB 356, 357 (1976), enf. 550 F.2d 962 (4th Cir.), cert. denied 98 S.Ct. 75 (1977). In neither case did the Board find that the parties had reached a bona fide impasse at the time the employer insisted on a ratification vote; in *Jano*, the Board found that the parties were not at impasse, and in *Movers*, the employer

<sup>34</sup> Arguably, by virtue of their agreement on the contract-term and wage provisions, the parties effectively reached a tentative agreement that ratification was a condition precedent to a contract. See generally *Personal Optics*, 342 NLRB 958, 961–962 (2004), enf. mem. 165 Fed. Appx. 1 (D.C. Cir. 2005), and cases cited there. However, I need not address this issue as I would reach the same conclusions regardless.

condition to ending the impasse and reaching an agreement; a vote was simply the only apparent way to reach a new contract at that time. Accordingly, this allegation is likewise dismissed. Cf. *ACF Industries*, 347 NLRB at 1042 (impasse was not invalidated by the employer's insistence on a nonmandatory subject of bargaining, as it did not contribute to the impasse).<sup>37</sup>

### III. ALLEGED UNLAWFUL LOCKOUT

As indicated above, the General Counsel's final allegation is that the September 6 lockout violated Section 8(a)(5) and (3) of the Act because it was in furtherance of the Company's unlawful bargaining positions regarding impasse and ratification. As found above, however, the Company's positions regarding impasse and ratification were not unlawful. Accordingly, this allegation is dismissed as well. See generally *Boehringer Ingelheim Vetmedica, Inc.*, 350 NLRB 678, 679 (2007) (employer lockouts in support of legitimate bargaining demands are lawful).<sup>38</sup>

### CONCLUSIONS OF LAW

1. By unilaterally refusing, from April 1 through June 30, 2011, to pay any portion of the increase in health insurance premiums announced and implemented by the Steelworker Health and Welfare Fund, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. By unilaterally changing its "lockout/tagout" safety procedures in June 2011 to require covered unit employees to carry at least two locks on their person at all times, the Company likewise engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

3. The Company did not otherwise violate Section 8(a)(5), (3), and (1) of the Act as alleged in the consolidated complaint.

### REMEDY

The appropriate remedy under the Act for the violations found is an order requiring the Company to cease and desist and to take certain affirmative action. Specifically, to the extent it may not have already done so, the Company will be required, on the Union's request, to rescind its unlawful unilateral changes and restore and maintain the status quo ante until such time as the Company has complied with its collective-bargaining obligations under the Act. The Company shall also be required, to the extent it may not have already done so, to

apparently never even contended that an impasse existed (and the Board did not decide the issue). An additional case cited by the Union, *Houchens Market*, 155 NLRB 729 (1965), enfd. 375 F.2d 208 (6th Cir. 1967), is similarly distinguishable. There, the employer insisted on a ratification vote after the parties had reached full agreement on the terms of the contract.

<sup>37</sup> As with the allegation that the Company prematurely declared impasse, the complaint also alleges that the Company's insistence on a revote as a condition of reaching an agreement and ending the impasse separately and independently violated Sec. 8(a)(5). This allegation is dismissed for the same reasons.

<sup>38</sup> In light of this conclusion, it is unnecessary to address the Company's arguments that the lockout was lawful regardless of whether Company's positions regarding impasse and ratification were lawful.

make all required payments to the health and welfare fund, including any additional amounts due the fund in accordance with *Merryweather Optical*, 240 NLRB 1213, 1216 fn. 7 (1979), and to make whole the unit employees for any loss of wages, benefits, or expenses resulting from the unlawful unilateral changes, in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), and *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest compounded daily as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010).<sup>39</sup> Finally, the Company will be required to post a notice to employees in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010).

Accordingly, on the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>40</sup>

### ORDER

The Respondent, New NGC, Inc. d/b/a National Gypsum Company, Shoals, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Making changes in the unit employees' terms and conditions of employment without first bargaining in good faith with the United Steelworkers International Union and its Local 7-0354 to an impasse or agreement.

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

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

(a) To the extent it may not have already done so, on the Union's request, rescind its unlawful unilateral changes regarding health insurance premiums and "lockout/tagout" safety procedures and restore and maintain the status quo ante until such time as it has complied with its collective-bargaining obligations under the Act.

(b) To the extent it may not have already done so, make all required payments to the union health and welfare fund that it failed to make from April 1 through June 30, 2011, including any additional amounts due the fund, and make whole the unit employees for any loss of wages, benefits, or expenses resulting from the unlawful unilateral changes, in the manner set forth in the remedy section of this decision.

(c) 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

<sup>39</sup> To the extent that an employee has made personal contributions to the fund that have been accepted by the fund in lieu of the Respondent's failure to make contributions, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to any amount that the Respondent otherwise owes the fund.

<sup>40</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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.

(d) Within 14 days after service by the Region, post at its facility in Shoals, Indiana, copies of the attached notice marked "Appendix."<sup>41</sup> Copies of the notice, on forms provided by the Regional Director for Region 25, 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

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<sup>41</sup> 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."

are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 2011.

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