

Nos.14-1021 & 14-1031

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MIKE-SELL'S POTATO CHIP COMPANY

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board (“the Board”) certify the following:

A. Parties, Intervenors, and Amici: Mike-sell’s Potato Chip Company (“the Company”) was the respondent before the Board and is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court. General Truck Drivers, Warehousemen, Helpers, Sales and Service, and Casino Employees, Teamsters Local Union No. 957 (“the Union”), was the charging party before the Board. The Board’s General Counsel was also a party before the Board.

B. Ruling Under Review: This case is before the Court on the Company’s petition for review and the Board’s cross-application for enforcement of a Decision and Order issued by the Board on January 15, 2014, and reported at 360 NLRB No. 28.

C. Related Cases: This case has not previously been before this or any other court. Board Counsel are unaware of any related cases either pending or about to be presented before this or any other court.

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**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court on the petition of Mike-sell's Potato Chip Company ("the Company") to review, and on the cross-application of the National Labor Relations Board to enforce, a Board order issued against the Company finding that, during negotiations for new collective-bargaining agreements, it unlawfully implemented its offers without first bargaining to a good-faith impasse

with General Truck Drivers, Warehousemen, Helpers, Sales and Service, and Casino Employees, Teamsters Local Union No. 957 (“the Union”). The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act (29 U.S.C. § 160(a)) (“the Act”). The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), which provides that petitions for review of Board orders may be filed in this Court.

The Board’s Decision and Order issued on January 15, 2014, and is reported at 360 NLRB No. 28. (JA 741-53.)¹ The Board’s Order is final with respect to all parties. The Company filed its petition for review on February 10, 2014. The Board filed its cross-application for enforcement on March 7. The petition and cross-application are timely because the Act imposes no time limit on such filings.

STATEMENT OF THE ISSUE

It is undisputed that after the parties had engaged actively in negotiations for new collective-bargaining agreements, the Company implemented changes to the employees’ terms and conditions of employment on November 19, 2012, that were consistent with its most recent set of contract proposals. That unilateral implementation is a violation of the Company’s duty to bargain under the Act, unless the Company can prove, as an affirmative defense, that it bargained with the

¹ “JA” references are to the joint appendix. “Br.” references are to the Company’s brief. Where applicable, references preceding a semicolon are to the Board’s decision; those following are to the supporting evidence.

Union to a good-faith impasse. Accordingly, the issue before the Court is whether substantial evidence supports the Board's finding that the Company failed to meet its burden of proving the existence of a good-faith impasse.

RELEVANT STATUTORY PROVISIONS

All relevant statutory provisions are included in the addendum to the Company's brief.

STATEMENT OF THE CASE

In September 2012, the parties began bargaining for new collective-bargaining agreements that would cover three groups of employees and reached numerous tentative agreements over the course of a series of negotiating sessions. In a session on November 14, they made significant progress on the remaining key issues and discussed possible dates for the next meeting. On November 16, however, the Company announced that its most recent sets of contract proposals were its final offers. It implemented them three days later, on November 19. Acting on charges filed by the Union, the Board's General Counsel issued a complaint alleging that the Company violated Sections 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by implementing its offers without first bargaining with the Union to a good-faith impasse. (JA 741; 7-11.) Following a hearing, an administrative law judge found merit to the allegation and issued a decision and recommended order. (JA 741-53.) On review, the Board agreed with the judge

that the Company had failed to bargain with the Union to a good-faith impasse prior to its unilateral implementation, and adopted the judge's recommended order. (JA 741-53.)

I. THE BOARD'S FINDINGS OF FACT

A. Background: The Company's Business and Its Collective-Bargaining Agreements with the Union

The Company is a regional snack-food manufacturer and distributor. (JA 742; 555.) The Union has long represented the Company's drivers and warehouse employees under two separate collective-bargaining agreements. (JA 742; 20-59, 60-76, 354.) Two distinct groups comprise the drivers' unit. Over-the-road truck drivers deliver the Company's products to warehouses or distribution centers. (JA 742; 347-48, 676.) Route sales drivers deliver those products to retailers, stock their shelves, and seek to increase their purchases of Company products. (JA 742; 347.) The Company's warehouse employees prepare and load products for shipment. (JA 742; 346, 676.)

The most recent agreement for the warehouse employees was in effect from October 26, 2008, to October 26, 2012. (JA 742; 60.) For the over-the-road and route sales drivers, the most recent agreement was effective from November 17, 2008, to November 17, 2012. (JA 742; 20.) Both agreements set forth rates for employee compensation. (JA 742-43; 25-29, 63-65.) Under the warehouse agreement, employees received an hourly wage. (JA 743; 63.) Over-the-road

drivers were paid \$.57 per mile plus \$20 for each stop where they loaded or unloaded freight. (JA 744; 27.) Compensation for route sales drivers was primarily commission based. (JA 742-43; 25.) The agreement established commissions on gross sales of the Company's products at the following rates:

Mike-sell's manufactured products:	13 percent
Non-manufactured products:	9 percent
Private-label products:	7 percent
Mike-sell's chocolate covered potato chips:	3 percent

(JA 743; 25.)

The agreements for drivers and warehouse employees shared important provisions governing pensions and healthcare. (JA 742; 51-57, 71-74.) Under both agreements, full-time employees and certain retirees were eligible to participate in the Company's self-administered health savings account. (JA 742; 52, 71.) Both agreements also required the Company to make contributions each week to the Central States Southeast and Southwest Areas Pension Plan for each employee who worked one or more days that week. (JA 742; 54-57, 72-74.) The agreements required employee contributions of \$10 for individuals and \$20 for families, but employees made no contributions to the pension plan. (JA 742; 52, 57, 71, 73-74, 353-54.)

B. The Union Contacts the Company To Begin Negotiations for a Successor Agreement and the Parties Enter Negotiations with Opposing Goals

On July 2, 2012, Michael Maddy, the Union’s business agent, notified the Company that the Union intended to negotiate new agreements for both units before they expired. (JA 743; 80, 82.) Maddy proposed that the parties meet for negotiations “in the near future.” (JA 743; 80, 82.) Nearly six weeks later, on August 13, director of human resources Sharon Wille responded that the Company also wanted to negotiate new agreements. (JA 743; 81, 83.)

C. Overview of Negotiations

In new agreements, the Company hoped to reduce its costs and increase its flexibility. (JA 743; 552, 570.) The Union, by contrast, wanted to restore wages and benefits it had given up in recent contracts to make the Company more competitive. (JA 743; 258-60.) Consequently, in negotiations for all three groups, the most difficult issues were economic ones—wages, healthcare, and pensions. (JA 742.) As described below, negotiations proceeded separately for warehouse employees, over-the-road drivers, and route sales drivers. With regard to healthcare and pensions, however, the parties opened with essentially the same proposals in all three groups. (JA 743-47; 88, 91-92, 97-98, 100, 124, 127.) Once tentative agreements on wages and other issues had been reached for warehouse employees and over-the-road drivers, the parties tabled negotiations in those

groups to finish negotiating healthcare and pensions in the route sales driver negotiations. (JA 743-44; 412, 437, 462-64, 523, 566-67, 715-16, 788.) The following chart shows the dates on which the parties met:

<u>Warehouse</u>	<u>Route Sales</u>	<u>Over-the-Road</u>
<ul style="list-style-type: none"> • Sept. 12 • Oct. 3 • Oct. 25 • Oct. 26 • Nov. 13 • Nov. 15 Tentative agreements on everything but pensions and healthcare; parties table negotiations to resolve those issues in route sales bargaining. (JA 743-44; 437, 464, 523, 566, 716, 788.) 	<ul style="list-style-type: none"> • Oct. 10 • Oct. 24 • Nov. 14 Union moves to net commissions and offers increased employee contribution to healthcare; Company improves its offers for net commission rates and pension contributions; parties reach other tentative agreements. (JA 746-47 & n.20; 426, 433, 519, 533, 535-36, 775-79.) 	<ul style="list-style-type: none"> • Oct. 12 • Oct. 29 • Nov. 5 Tentative agreements on everything but pensions and healthcare; parties table negotiations to resolve those issues in route sales bargaining. (JA 744; 410-11, 462-63, 523, 566-67, 715.)
<ul style="list-style-type: none"> • Nov. 16-19 The Company converts its latest proposals for all three groups into its “full and final offers,” declares impasse, and unilaterally implements its offers. (JA 747-48; 145-46, 508.) 		

D. Warehouse Negotiations: The Parties Exchange Healthcare and Pension Proposals and Information Applicable to All Three Groups of Employees, and Reach Tentative Agreements for the Warehouse Unit on Everything Else

Negotiators for the Company and the Union began discussing the warehouse agreement first. (JA 743; 349, 351.) At initial meetings on September 12 and October 3, the Company's negotiators described in detail the Company's financial difficulties. (JA 743; 352, 358.) The Company, they said, was facing projected increases in the cost of potatoes, cooking oil, and other commodities. (JA 743; 354, 358.) At the same time, it was paying above-average wages and pension contributions for the warehouse unit. (JA 743; 352-53.)

Following the Company's presentation, the parties exchanged contract proposals addressing wages, healthcare, and pensions, among other things. (JA 743; 85-88, 352, 356.) As to wages, the Union sought increased hourly compensation and higher shift premiums, while the Company proposed freezing wages and reducing shift premiums. (JA 85-86, 91.) Nonetheless, over the course of six meetings in September, October, and November, the parties reached tentative agreements on everything but healthcare and pensions. (JA 743; 464, 523, 566.)

1. The parties' progress on healthcare in warehouse negotiations

On healthcare, the Union's initial contract proposal provided for moving employees from the Company's health savings account to the Central States

Southeast and Southwest Areas Health and Welfare Fund. (JA 743; 88, 362.) The Company, by contrast, proposed eliminating all retiree health benefits and giving the Company full discretion to decide what, if any, health plans to offer for current employees. (JA 743; 91-92.) The Company explained that it wanted discretion to change employees' health benefits because it was unsure about the possible impact of the Affordable Care Act. (JA 743; 368.) In addition, the Company wanted to discontinue retiree health coverage as a cost-cutting measure. (JA 743-44; 367.) The Company stated, however, that it was willing to consider any healthcare option that would save it money. (JA 744 n.10; 364, 368.) The Union requested information regarding its healthcare costs, which the Company provided. (JA 363, 786.)

2. The parties' progress on pensions in warehouse negotiations

With regard to pensions, the Union initially proposed that the Company continue to pay all pension contributions, including annual increases. (JA 743; 88, 365.) The Company proposed requiring employees to pay 50 percent of pension contributions, and increasing the time employees would have to work to be eligible for pension contributions from 30 to 60 days. (JA 743; 92.)

In October and November, the parties explored a range of possible arrangements for pension contributions. (JA 743.) At their October 3 meeting, the Union explained that Central States would not permit employees to contribute to

their pensions directly, as the Company proposed. (JA 743 n.9; 366.) The Union subsequently suggested that the Company negotiate itself out of Central States' pension fund, but the Company explained that it could not afford to do so. (JA 421.) On October 26, the Company proposed a move from weekly to hourly pension contributions. (JA 121, 763.) The Union, however, learned from Central States that this arrangement was unavailable, and the Company subsequently withdrew the proposal. (JA 121, 763, 767.) On October 26, the parties also discussed other models for weekly pension contributions, but learned from Central States that those arrangements would not be possible either. (JA 764.)

On October 25 and November 15, the Company proposed a one-year contract under which wages would be frozen, employees would only pay the increases in required pension contributions, and current employees would remain in the Company's healthcare plan but the Company would cease providing retiree health benefits. (JA 743; 191, 421-22.) The Union declined that offer. (JA 743; 422.)

3. On November 15, the parties defer pension and healthcare issues after reaching tentative agreements on everything else

The parties continued negotiating after the warehouse agreement expired on October 26. (JA 743; 60.) By November 15 they had reached tentative agreements on everything but pension and healthcare. (JA 743; 464, 523, 566, 716, 788.) As described below (p. 13), when the parties reached that point in

negotiations for over-the-road drivers on November 5, they put those negotiations on hold to finish bargaining healthcare and pensions for the route sales group. The Union proposed on November 15 that the parties do the same for the warehouse unit. (JA 744; 437.) The Company agreed to that approach, but it noted that the route sales drivers' contract was expiring in a few days. (JA 744; 788.) The Union responded that the warehouse contract had already expired and that the Union was continuing to bargain. (JA 744; 437, 788.)

E. Over-the-Road Driver Negotiations

Negotiations for the over-the-road drivers began on October 12. (JA 744; 350.) As in the warehouse negotiations, the Company began with a presentation on its poor financial condition. (JA 744; 391.) It also asserted that the wages and pension costs for its over-the-road drivers were above average. (JA 744; 393.) The Company proposed reducing wages per mile from \$.57 to \$.45, along with reductions in compensation for loading and unloading freight, or "stop pay." (JA 744; 396-97.) At the opening meeting, the Union proposed increased wages. (JA 744; 400.) With regard to healthcare and pensions, the Union proposed the same framework for over-the-road drivers as for warehouse employees and route sales drivers—that the Company move to Central States for healthcare and continue paying pension contributions in full. (JA 744; 124, 398, 400-01.)

1. The parties exchange proposals and information regarding pensions, healthcare, and wages

At negotiating sessions on October 29 and November 5, the parties exchanged information and discussed a range of proposals on wages, healthcare, and pensions. (JA 744; 130-35, 402, 405-06.) The Union obtained quotes for health insurance from Central States, which the Company asserted were higher than what it was then paying. (JA 744; 130-35, 405-06.) The Company also requested information on compensation earned by drivers the Union represented at other companies, which the Union provided. (JA 407.)

2. On November 5, the parties defer pension and healthcare issues after reaching tentative agreements to the Company's satisfaction on everything else

By the end of the November 5 meeting, the parties had reached tentative agreements on everything but healthcare and pensions. (JA 744; 462-63, 523, 566-67, 715.) They decided to put those matters on hold to allow the parties to meet with representatives from Central States, and then to finish negotiating healthcare and pension for the route sales drivers and discuss applying the same terms for the over-the-road group. (JA 744; 410-11, 462-63.)

The Company was very pleased with the cost savings it achieved in the tentative agreements with the over-the-road drivers. (JA 744; 716.) In a November 6 email to the Company's CEO, the Company's vice president of operations lauded the achievements of the Company's negotiating team,

emphasizing the wage cuts the Union had accepted and anticipating that an agreement on pensions and healthcare would soon follow.²

F. Route Sales Driver Negotiations

1. October 10: the parties exchange proposals; the Company announces plans to close routes and lay off half of the route sales drivers

The parties began negotiations for route sales drivers October 10.³ (JA 745; 757.) At the initial meeting, the Company described its finances and asked the

² The email announced:

Language and Wage Related issues excluding Pension and Health Care were resolved in yesterday's 3rd Bargaining Session with the Over-The-Road Drivers. There is no wage increase or benefit increases in the Agreed to Contract Language. Conversely, the [over-the-road] Drivers have agreed to reductions in stop pay that will reduce Mikesell's costs (wages paid) by 6.4 [percent] annually or about \$11,000 each 52 week period of the new [bargaining agreement]. The annual [total for over-the-road] Driver Pay is about \$172,000. The savings will be greater as wage related taxes, holiday pay, and vacation pay will be based on smaller wages going forward with the lower stop pay.

The [over-the-road] Drivers remain in the same Agreement with the Route Sales Drivers and will have to vote on the same Pension and Health language/costs negotiated with Route Sales next week. Health Care costs with the [over-the-road drivers] are minimal as 2 of the 3 drivers are opt-outs.

I can't say enough about the TEAM approach in reaching the first phase of the Agreement with Pension and Health Care to follow; Sharon and Steve were excellent.

(JA 744-45; 211, 716-17.)

Union for proposals that would help it return to profitability. (JA 745; 369-70.)

The Union responded that it had made concessions every year, and its proposals were aimed at getting the bargaining unit back to where it used to be. (JA 745; 258-60.)

With regard to wages, the Union proposed increasing commissions across the board to 15 percent of gross prices, along with other increases in compensation. (JA 745; 373.) The Company proposed a switch to calculating commissions based on net rather than gross prices, without raising the commission rates. (JA 745; 99, 102-03.) That framework would produce lower earnings for drivers for each bag of product sold. (JA 745 n.13; 416.)⁴

On healthcare and pensions, the parties began with essentially the same proposals they had opened with in warehouse and over-the-road negotiations. (JA

³ At the Company's request, route sales sessions were scheduled for Wednesdays, which were days off for the unit members who were participating in negotiations. (JA 215, 489-90.)

⁴ At the hearing, Wille explained drivers' compensation using the hypothetical example of a bag of potato chips with a "bag price" of \$5 stamped on it by the Company. (JA 742-43 n.6, 745 n.13; 574-82.) A retailer would pay the Company a "net price" of \$3 for the bag. (JA 742-43 n.6, 745 n.13; 574-76.) The retailer, in turn, could sell that bag to a consumer for a "shelf price" of \$4. (JA 742-43 n.6, 745 n.13; 574-76.) According to Wille, a driver earning gross-price commissions would be paid a percentage of the "bag price"—13 percent of \$5 under the 2008-2012 contract. (JA 742-43 n.6, 745 n.13; 574-76.) Under the Company's proposal, that driver would be paid 13 percent of \$3, the net price. (JA 742-43 n.6, 745 n.13; 574-76.)

745; 100, 400-01, 759.)⁵ The Union proposed a change to Central States for healthcare and continuation of full employer responsibility for pension contributions. (JA 745; 97-98.) The Company sought discretion as to healthcare for current employees and elimination of retiree healthcare benefits. (JA 745; 100.) The Company also proposed that employees pay half the current cost of pension contributions plus all future increases. (JA 745; 100.)

During the first route sales session, the Company also announced that it planned to sell its routes in three areas, Columbus, Sabina, and Cincinnati, effective November 12. (JA 745 & n.14; 385-86, 475.) That plan was to reduce the number of route sales drivers by about half, from approximately 60 to 30. (JA 347, 475.) The Company offered to bargain severance agreements for the laid-off drivers. (JA 585.)

2. October 24: the parties negotiate laid-off drivers' severance and reach other tentative agreements, but remain "worlds apart" on commissions, healthcare, and pensions

On October 24, at the beginning of their next route sales meeting, the parties successfully negotiated severance packages for the laid-off drivers. (JA 745; 413-14, 484, 592.) These negotiations took a good part of the day. (JA 745; 414, 484.)

⁵ The Union's proposals for pension contributions from the Company reflected different projected increases from Central States for the warehouse employees and drivers. (JA 400-01.) The Company's proposals were that warehouse employees pay 50 percent of pension contributions and that drivers, whose pension costs were higher, pay 50 percent in the first year plus the full cost of any increases thereafter. (JA 743, 745; 92, 100, 127.)

They also reached several tentative agreements, adding language regarding work performed on holidays, extending the time for employees to provide a doctor's note for sick days, and expanding funeral leave to include deaths of brothers- and sisters-in-law. (JA 745-46 n. 15; 93-98, 375-84, 595, 759.) Nonetheless, the Union believed the parties were "still worlds apart." (JA 746; 417.) The Union explained that it would be difficult for employees to accept the reduction in pay that would come with a move to net commissions and a new obligation to pay 50 percent and more of pension costs. (JA 746; 99, 415.)

Before discussing healthcare further, the Union wanted to bring a Central States representative to talk about possible health and welfare plans. (JA 746; 758.) The Union also said it would obtain information from Central States' pension plan on whether the Company could pay contributions after 60 rather than 30 days, and whether it could move new employees into a 401(k) program. (JA 760.) Finally, the Union said it would bring its attorney, John Doll, to the next bargaining session. (JA 746; 417.)

3. November 14: the parties reach various tentative agreements; the Union makes a significant move to net commissions and offers higher healthcare contributions; the Company significantly drops its requested pension contributions

On November 13, the Union brought in a representative from Central States to present to the Company on its healthcare offerings. (JA 601.) The next day, on November 14, the parties met for route sales bargaining. (JA 746; 182.) At that

meeting, the Union proposed a one-year extension of the 2008-2012 agreement. (JA 746; 424, 597-98, 770.) The Union hoped that this would allow time to see if the Company's elimination of its Sabina, Columbus, and Cincinnati routes would help its bottom line. (JA 746; 424, 597-98.) The Union also hoped that a short-term agreement would allay the Company's concerns about uncertainties relating to healthcare reform. (JA 528.)

In response, the Company provided its own offer for a one-year contract. (JA 746; 424, 529-30, 598, 771.) For that year, the Company proposed that employees pay only the annual increase in pension costs—\$13.50 per week—rather than the \$91.10 per week it had previously sought. (JA 746; 598.) The Company maintained its proposal for net commissions, but raised the rate it was willing to pay on manufactured products from 13 percent to 14.5 percent. (JA 746; 424, 598, 771.)

Neither party was willing to accept the other's proposal for a one-year agreement, and the parties moved on to a lengthy discussion about commissions. (JA 746; 425, 531.) The Company emphasized the importance of moving to a net commissions system. (JA 746; 425, 531, 598.) The Company's vice president of sales, Phil Kazer, insisted that "net sales [was] [the Company's] only way to take a price increase in the market." (JA 598.) Discontinuing gross commissions would free the Company to raise its bag prices without paying drivers more per bag sold.

(JA 578.) In that way, the Company would inflate the discounts consumers perceived in stores when they compared bag prices and shelf prices, stimulating sales and allowing drivers to earn comparable income under the new model. (JA 746 & n.17; 579.)

After a caucus, the Union agreed for the first time to move from gross to net commissions—a “big step” for the Union’s members. (JA 746; 533, 775.) The Union proposed the following rates:

Mike-sell’s manufactured products:	15 percent
Non-manufactured products:	10 percent
Private-label products:	7 percent
Mike-sell’s chocolate covered potato chips:	3 percent

(JA 746; 533.) In response, the Company made a new offer to pay 14.5 percent on Mike-sell’s manufactured products in the first year, but then increase that rate to 15 percent if drivers increased sales by 3 percent. (JA 746-47; 535, 776.)

The November 14 session also produced new proposals on healthcare and pensions. The Union presented a new Central States healthcare option with a weekly rate of \$272.80, of which employees would pay \$30. (JA 747; 426, 519.) The Company dropped its proposal for employees to pay half of pension costs plus increases, offering to continue paying its current contributions if employees would pay only the annual increases. (JA 747; 433, 604.) Neither offer was accepted. (JA 747; 434, 538.) The parties did, however, reach tentative agreements on

numerous other issues. (JA 747 n.20.)⁶ The Company did not refer to any of its proposals as final. (JA 436, 541, 714-15.)

The November 14 session ended around 8 p.m. because employees on the Union's negotiating team had to be at work as early as 4 a.m. the next morning. (JA 747; 434, 539.) At the end of the day, the Union's attorney expressed frustration that the parties had not accomplished more, remarking that the parties had not moved the ball very far. (JA 747; 434, 538.) Kazer replied, "we made good movement today." (JA 747 & n.21; 187, 434, 538, 606.) The Company proposed meeting again on November 16, but the Union's negotiators were unsure of their availability that day—Doll did not have his calendar with him. (JA 747; 434-35, 540-41.) The Union promised to get back to the Company with future dates. (JA 747; 434-35, 540-41.) In the next few days, the Union proposed meeting on November 27. (JA 747; 435, 504.)

⁶ The parties settled on minimum weekly pay of \$450, which the Company had sought to eliminate; the Union had initially proposed an increase to \$650. (JA 747 & n.20; 184, 188, 374, 775.) Among other things, they also agreed on new language for holiday scheduling, the number of days for laid-off employees to respond to a recall, language for the route bidding process, providing 1/5 of one week's pay for each day missed for funeral leave, changes in wording regarding commission payments, deleting language allowing warehouse employees to fill in for drivers, adding the Company's proposed language on progressive discipline, and incorporating the Company's proposed union recognition terms, with additional language from the Union. (JA 747 & n.20; 110, 184-85, 187, 426, 774, 779, 781-84.)

As discussed above, the parties met for warehouse negotiations on November 15. (JA 744; 436, 785.) By that point, healthcare and pension contributions were the only open issues. (JA 743; 464, 523, 566, 716.) The Company gave the Union information regarding its healthcare costs and provided proposals for healthcare and pensions for warehouse employees. (JA 191, 437, 787.) The parties ultimately agreed to place warehouse negotiations on hold until they had finished working out pensions and healthcare for the route sales group. (JA 744; 523, 788.) At that point, they would “try to bring it back and try to mirror that” for the warehouse and over-the-road groups. (JA 744; 523.)

G. The Company Declares Impasse and Unilaterally Implements Its “Full and Final Offers”

The next day, on November 16, Wille hand-delivered a letter to Maddy at the Union’s office. (JA 747; 146, 438-39.) The letter noted that the “Labor Agreement for the Sales/Over-the-Road group” was to expire on November 17 and stated that because the Union was not “available to meet either today or tomorrow,” the Company’s November 14 proposal was “the Company’s full and final offer.” (JA 747; 146.) The letter attached proposed contracts for the drivers unit as well as for the warehouse unit, and requested that they be brought “to a vote of the Union membership before the Labor Agreement expires.” (JA 747; 146-79.) In closing, the letter stated that the Company “remain[ed] available to meet anytime before the current Labor Agreement expires.” (JA 747; 146.)

Maddy and Wille spoke briefly. (JA 747; 440-41.) Wille summarized the letter's contents and stated that the parties were at impasse. (JA 747; 440-41.) Maddy disagreed. (JA 747; 441.) He explained that the Union was still willing to meet even though it could not meet on the dates the Company proposed. (JA 747; 441.) He insisted that the parties were not at impasse, that they were still negotiating, and that they "[woul]d get an agreement." (JA 747; 441, 506, 614.)

Two days later, on Sunday, November 18, the Company sent the Union another letter. (JA 747; 145, 443.) The letter noted that the Union had not accepted the offers for the driver and warehouse units that the Company had provided on November 16. (JA 747; 145.) It declared that the parties were at impasse "in each of these negotiations" and that the Company intended to implement its "full and final offers for both units" on November 19. (JA 747-48; 145.)

The Company implemented the terms of its offers on November 19. (JA 748; 508.) With regard to healthcare, the newly implemented terms provided that the Company would continue its current health savings account plan for 2013, but that it would have full discretion as to what plan, if any, to offer thereafter. (JA 748; 160-61, 176, 670.) Effective immediately, the Company discontinued retiree health benefits. (JA 677.)

The Company implemented its November 14 proposal that employees pay future increases in required pension contributions. (JA 748; 671-74.) As for wages, the Company incorporated its last offer for route sales drivers, with 14.5 percent net commissions on manufactured products in the first year, going up to 15 percent in the next two years if sales increased by at least 3 percent. (JA 748; 149, 703.)

H. The Parties Continue Bargaining After Implementation

The parties continued to bargain after the Company's unilateral implementation, meeting for seven negotiating sessions prior to the hearing in this case, on December 5 and 7, 2012, January 3 and 22, February 13 and 27, and March 20, 2013. (JA 748 & n.22; 509, 514.) Over the course of these meetings, both parties continued to move on route sales driver commissions. (JA 748.) The Union lowered its proposed rate for non-manufactured products from 10 percent to 9.5 percent on December 5, and on February 13, the Company agreed to that rate, coming up from its prior offer of 9 percent (JA 748; 194, 447, 624.) Both parties also made new offers for manufactured product commissions: on January 22, the Union proposed a rate of 14.5 percent in the first year, going up automatically to 15 percent thereafter. (JA 748 & n.24; 314.) On February 13, the Company offered to increase the rate to 15 percent if drivers achieved a 3 percent increase in units sold in the first year, as opposed to the 3 percent increase in total dollar sales

it had sought earlier. (JA 748 & n.24; 325.) On February 27, the Union proposed triggering the 15 percent rate in the second and third years based on a 1 percent increase in unit sales. (JA 748 & n.24; 328.) It raised that proposed increase to 1.75 percent on March 20. (JA 748 & n.24; 333.)

Regarding healthcare, on December 7, 2013, the Union raised its proposed employee contribution toward a Central States plan from its November 14 offer of \$30 per week to \$40 in the first year, \$44 in the second, and \$48 in the third. (JA 748; 448.) The Union also proposed the following healthcare arrangements on December 7, January 22, 2013, and February 27: moving to Central States for one year with a subsequent reopener, keeping the Company's health savings account with modifications, or keeping the health savings account with payments for employees and retirees who chose to opt out. (JA 748 n.24; 310, 314, 328, 639, 712). A federal mediator joined the parties for the March 20 meeting, although no agreement was reached. (JA 751 n.26; 509).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Members Miscimarra, Hirozawa, and Schiffer) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its offers without first bargaining with the Union to a good-faith of impasse. (JA 741.) The Board's Order requires the Company to cease and desist from engaging in the

unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under the Act. (JA 751-52.) Affirmatively, the Order requires the Company, on the Union's request, to restore, honor, and continue the terms of the expired collective-bargaining agreements with the warehouse and driver units and bargain with the Union until the parties agree to a new contract or reach a good-faith impasse. The Order also requires the Company to make its drivers and warehouse employees whole for any losses they incurred as a result of its unilateral implementation on November 19, 2012, and to post a remedial notice. (JA 752.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its contract offers without first bargaining with the Union to a good-faith impasse. In finding that negotiations were not deadlocked, the Board reasonably focused on factors such as the parties' overall progress over a short period of time, the flexibility they demonstrated at their last pre-implementation route sales meeting, and their shared willingness to continue working toward an agreement.

The overall progress the parties achieved in a relatively brief timeframe supports the Board's finding of no impasse. Although the parties began negotiations with starkly different goals, their good-faith bargaining produced numerous tentative agreements and allowed them to explore a variety of possible pension and healthcare arrangements. Over just two months, the parties steadily narrowed the gap between their positions, making their most significant movement on pensions, healthcare, and route sales driver commissions during a long day of bargaining on November 14.

During that session, both parties demonstrated flexibility by making significant concessions. In particular, the Union changed its basic approach to route sales compensation, accepting the net commission model on which the Company had insisted. The Union also presented a new healthcare offer with

higher employee contributions. The Company, for its part, acknowledges that it made “significant revisions to its commissions and pension proposals.” (Br. 15.) The Court’s precedent amply supports the Board’s finding that the parties’ movement on these key items showed their willingness to compromise and opened the door to more fruitful bargaining.

When the November 14 session ended, both parties were willing to schedule more meetings and keep working toward an agreement. Indeed, neither party called its offers that day “final” or otherwise suggested that impasse might be near. And the very next day, the parties demonstrated their anticipation of further bargaining—and thus the absence of impasse—by agreeing to work out terms for warehouse employees’ pensions and healthcare in route sales negotiations. Yet just one day later, on November 16, the Company announced that its latest offers were final, and it implemented them on November 19. The Company—which had the burden of proving its claim of impasse—failed to establish that the parties had exhausted the prospects of concluding an agreement at that time.

The Company’s arguments to the contrary are without merit. The record does not support the Company’s exaggerated claims of dilatory tactics on the Union’s part. The Board recognizes a narrow exception to the bargain-to-impasse rule, permitting unilateral implantation if a union insists on continually avoiding or delaying bargaining. But the Union—which initiated negotiations and met with

the Company 12 times in 2 months—did no such thing. Nor does the credited evidence regarding post-implementation bargaining reveal any sort of bad faith on the Union’s part. Rather, that evidence amply supports the Board’s finding that the parties did not reach the end of their negotiating ropes in the months that followed the Company’s unlawful implementation. During that time, the parties enlisted the aid of a federal mediator, the Union made numerous conciliatory offers, and the Company never announced impasse or reimplementation. There is, accordingly, no basis for tolling the Company’s liability for its unfair labor practices, and the Board’s Order should be enforced in full.

STANDARD OF REVIEW

Because “the existence of impasse is a question of fact,” the Court’s review of the Board’s decision in this case is “limited.” *Monmouth Care Ctr. v. NLRB*, 672 F.3d 1085, 1089 (D.C. Cir. 2012). The Court “ordinarily defers to the Board’s fact-finding as to the existence of a bargaining impasse unless the finding is irrational or unsupported by substantial evidence.” *Id.* (quotations omitted). Indeed, “because of the subjectivity involved in deciding when an impasse has occurred, its existence is an inquiry particularly amenable to the experience of the Board as a fact-finder.” *Lapham-Hickey Steel Corp. v. NLRB*, 904 F.2d 1180, 1185 (7th Cir. 1990) (quotation and brackets omitted). As the Supreme Court has observed, “Congress made a conscious decision” to delegate to the Board “the

primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain.” *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979). As a result, this Court has recognized, “in the whole complex of industrial relations, few issues are less suited to appellate judicial appraisal than evaluation of bargaining processes or better suited to the expert experience of [the Board,] which deals constantly with such problems.” *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011) (quotation and brackets omitted).

The credibility determinations of an administrative law judge, when adopted by the Board, “may not be overturned by the reviewing court absent the most extraordinary circumstances such as utter disregard for sworn testimony or the acceptance of testimony which is on its face incredible.” *U-Haul Co. of Nevada, Inc. v. NLRB*, 490 F.3d 957, 962 (D.C. Cir. 2007) (quotation and brackets omitted)). The Court will not reverse Board findings based on credibility determinations unless “those determinations are hopelessly incredible, self-contradictory, or patently unsupportable.” *Monmouth*, 672 F.3d at 1092 (quotation omitted).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY IMPLEMENTING ITS BARGAINING PROPOSALS IN THE ABSENCE OF A GOOD-FAITH IMPASSE

It is undisputed that the Company unilaterally implemented the terms of its most recent set of contract proposals on November 19, 2012. It could not lawfully take such action unless it proves that it bargained with the Union to a good-faith impasse in negotiations. *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1084 (D.C. Cir. 1991). Ample evidence supports the Board's finding that the Company failed to meet that burden and that its unilateral implementation was therefore unlawful.

A. Applicable Principles

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer to “refuse to bargain collectively with the representatives of [its] employees.” Section 8(d) of the Act (29 U.S.C. § 158(d)) requires employers to bargain before changing “wages, hours, and other terms and conditions of employment.” An employer violates Section 8(a)(5) and (1) by making changes to mandatory bargaining subjects covered by Section 8(d) without

first bargaining to impasse or agreement.⁷ *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

Because impasse is an affirmative defense, the burden of proof rests with the party asserting it. *Wayneview*, 664 F.3d at 347. That burden is not met by evidence of “frustration, discouragement, or apparent gamesmanship.” *Daycon Prods. Co.*, 357 NLRB No. 92, 2011 WL 4403044, at *19 (Sept. 21, 2011) (quoting *Powell Elec. Mfg. Co.*, 287 NLRB 969, 973 (1987), *enforced as modified*, 906 F.2d 1007 (5th Cir. 1990)), *enforced*, 494 F. App’x 97 (D.C. Cir. 2012). *Accord Grinnell Fire Prot. Sys. Co. v. NLRB*, 236 F.3d 187, 199 (4th Cir. 2000) (“*Grinnell*”). Rather, impasse exists only when “good-faith negotiations have exhausted the prospects of concluding an agreement and there is no realistic possibility that continuation of discussion would be fruitful.” *Monmouth*, 672 F.3d at 1088 (citations, brackets, and ellipses omitted). There can be no impasse unless “[b]oth parties in good faith believe that they are at the end of their rope.” *PRC Recording Co.*, 280 NLRB 615, 635 (1986), *enforced*, 836 F.2d 289 (7th Cir. 1987). Further, impasse must be reached not as to one or more discrete contractual items, but on the agreement as a whole. *Wayneview*, 664 F.3d at 349-50.

⁷ A violation of Section 8(a)(5) of the Act produces a “derivative” violation of Section 8(a)(1). *See, e.g., Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1163-64 (D.C. Cir. 2004).

The Board considers a number of factors to determine whether impasse exists, including the “bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations.” *Teamsters Local Union No. 639*, 924 F.2d at 1083 (quoting *Taft Broad. Co.*, 163 NLRB 475, 478 (1967), *petition for review denied sub nom. Am. Fed. of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968) (brackets omitted)). One or two factors alone, however, may be sufficient to demonstrate the absence of impasse. *See id.* at 1084 (“The evidence regarding the length of the wage negotiations and the [u]nion’s view of the state of the negotiations [wa]s, on its own, sufficient to justify the Board’s finding of no impasse.”); *Carey Salt Co. v. NLRB*, 736 F.3d 405, 423 (5th Cir. 2013) (bad faith alone was sufficient to support finding of no impasse); *Colfor Inc. v. NLRB*, 838 F.2d 164, 167 (6th Cir. 1988) (lack of contemporaneous understanding of impasse was sufficient, regardless of other factors).

B. The Company Failed To Establish that the Parties Reached Impasse Before November 19

Applying these established legal principles, the Board found (JA 750) that the parties were not at impasse when the Company unilaterally implemented its contract offers for all three groups of employees on November 19. Considering the relevant bargaining history, the Board recognized (JA 743, 749) that the parties

entered negotiations with opposing goals on three important, complex issues: healthcare, pensions, and wages. Nonetheless, the Board found (JA 749-50) that good-faith negotiations produced significant progress in a relatively short timeframe. Moreover, on November 14, both sides demonstrated flexibility by making major concessions, and both parties were prepared to keep bargaining. (JA 750.) Accordingly, there was no contemporaneous understanding that negotiations were deadlocked when the Company abruptly declared impasse two days later and unilaterally implemented its proposals on November 19. (JA 747-48, 750.) As set forth below, substantial evidence supports the Board's findings.

1. Length of negotiations and bargaining history: the parties entered negotiations with opposing goals, but steadily narrowed the distance between their proposals and reached numerous tentative agreements during a short timeframe

The parties' overall progress in a short span of time supports the Board's finding (JA 741 n. 1, 750) that negotiations were not deadlocked by November 19. *See Monmouth*, 672 F.3d at 1091 (union's "demonstrated flexibility, coupled with the relatively short bargaining timeline, provides substantial evidence" that there was no impasse). As the Board found (JA 743, 750), the Company and the Union entered negotiations in the fall of 2012 with dramatically different objectives. The Union viewed negotiations for a successor collective-bargaining agreement as an opportunity to restore the wages and benefits it had previously surrendered. (JA 743, 750; p. 6.) The Company, by contrast, believed it could not be competitive

with larger companies unless it obtained new concessions from employees on wages, healthcare costs, and pension contributions. (JA 743, 750; p. 6.) Thus, the parties' initial proposals for all three groups of employees were far apart. (JA 743-45; pp. 9, 12, 14-15.)

As the Board found (JA 750), however, the parties negotiated in good faith to progressively narrow the distance between their proposals over a "relatively brief" period. The parties met for only about two months before the Company declared impasse. During that time, they met on 12 different dates, but devoted just 3 sessions over about a month to route sales negotiations. (*See* p. 8.) *Compare Grinnell*, 236 F.3d at 197 (no impasse where parties only had four bargaining sessions during relevant period) *and Beverly Farm Found., Inc. v. NLRB*, 144 F.3d 1048, 1052 (7th Cir. 1998) (no impasse where parties met for 19 sessions, but devoted only 3 sessions to economic issues over about two months, and union remained flexible) *with Laurel Bay Health & Rehab. Ctr. v. NLRB*, 666 F.3d 1365, 1375 (D.C. Cir. 2012) (impasse reached only after "6 months' fruitless bargaining").

Yet, as the Board found, in that "short timeframe," the parties "hammered out" tentative agreements on wages and all other issues but pensions and healthcare for warehouse employees and over-the-road drivers. (JA 743-45, 750; pp. 11-12, 13.) The Company, in fact, was "particularly pleased" with the cost-

saving measures the Union agreed to for the over-the-road group—measures that resulted in an \$11,000 savings to the Company. (JA 744-45, 749; pp. 13-14 & n.2.) In addition, the parties tentatively settled many issues for route sales drivers, including minimum weekly pay, holiday pay, and funeral leave. (JA 745-47 & nn. 15, 20; pp. 16-20 & n.6.) And they succeeded in bargaining severance agreements for approximately half of the route sales drivers. (JA 745; pp. 16-17.)

The parties also made progress in areas where they did not reach tentative agreements. As described at greater length below (p. 50), they spent time “going back and forth” on healthcare, pensions, and route sales driver commissions—understandably, “given the economic importance and complexity of those issues.” (JA 750.) These developments clearly show that “negotiations were not static” when the Company declared impasse. *See NLRB v. WPIX, Inc.*, 906 F.2d 898, 901 (2d Cir. 1990) (no impasse after 12 meetings over 9 months, where “changes were being made, revisions were being offered” and “progress was discernable”).

2. Demonstrated flexibility: on November 14, the parties made significant progress and the Union demonstrated its willingness to compromise further

The parties made their greatest strides during a long bargaining session on November 14. Ample evidence supports the Board’s finding that, “while the parties did not reach a final agreement” that day, “they made significant progress that included concessions from both sides.” (JA 750.) At the close of the prior

route sales meeting on October 24, the parties were “still worlds apart” on commissions, healthcare, and pensions. (JA 746; 417.) The Union wanted to retain gross commissions with higher rates, while the Company wanted a move to net commissions with no rate increase. (JA 746; p. 17.) Whereas the Union wanted guaranteed healthcare coverage through Central States, the Company wanted the right to eliminate any coverage. (JA 746; pp. 15-16.) Finally, the Union wanted the Company to continue paying pension contributions in full, and the Company wanted employees to shoulder at least half the burden. (JA 746; p. 17.) This bargaining landscape changed, however, by the end of the November 14 bargaining session.

a. Progress at the November 14 meeting included reaching tentative agreements, considering contract extensions, and making significant concessions in commissions, healthcare, and pensions

The parties reached a number of tentative agreements on November 14. (JA 747 & n.20; pp. 19-20.) As set forth above (p. 20 n.6), those agreements included compromises on minimum weekly pay for route sales drivers as well as language regarding holiday scheduling, recall procedures, route bidding, funeral leave, progressive discipline, and union recognition. *See WPIX*, 906 F.2d at 901 (“A fundamental tenet of the Act is that even parties who seem to be in implacable conflict may, by meeting and discussion, forge first small links and then strong

bonds of agreement.” (quoting *Am. Fed. of Television & Radio Artists*, 395 F.2d at 628 (internal quotation marks and brackets omitted)).

The parties also explored potential short-term agreements. (JA 746; pp. 17-18.) Mindful of the Company’s concern with healthcare-related uncertainty in the near future and the cost-saving measures the Company had already taken by eliminating routes, the Union proposed a contract extension to let the parties see where things stood in a year. (JA 746; pp. 17-18.) The Company countered with a proposal for a one-year agreement, during which it would freeze its pension contribution and employees would cover increases. (JA 746; p. 18.) The Company still sought a switch to net commissions, but it offered to increase rates from 13 percent to 14.5 percent for Mike-sell’s manufactured products. (JA 746; p. 18.)

After neither party’s one-year proposal was accepted, the Company made a presentation on its need to move to net commissions, which it described as “the only real way [it] could get more profitability.” (JA 492.) The presentation inspired a “major move” on the Union’s part. (JA 533.) Since the Company’s one-year contract offer had shown that it was open to raising its rates under a net commission model, the Union’s negotiators caucused for “a long discussion about what it would take” to “get the number high enough” for the Union’s members to accept. (JA 533; *see also* JA 425.)

On their return, the Union took a “big step” and agreed to net commissions. (JA 533; *see also* JA 425.) For manufactured products, the Union sought a rate of 15 percent—just half a point above what the Company had offered. (JA 746; p. 19.) For non-manufactured products, the Union proposed a 10 percent rate, up just one point from the Company’s one-year proposal. (JA 746; p. 19.) In response, the Company improved its offer, proposing 14.5 percent for manufactured products in the first year, with an increase to 15 percent if the route sales drivers increased sales by at least 3 percent. (JA 746; p. 19.)

Further concessions on healthcare and pensions followed that same day. (JA 746-47.) The Company moved significantly from its initial pension proposal, asking for employees to cover only the increases in pension contributions each year. (JA 745, 747; p. 19.) Route sales drivers would pay only \$13.50 per week in the first year, rather than the \$91.10 as the Company initially proposed. (JA 747; p. 19.) The Union made a new offer on healthcare, increasing employee contributions to \$30 per week, up from \$10 for single employees and \$20 for families under the expiring contract. (JA 747; p. 19.) Thus, the parties made significant movement on the important economic issues of commissions, healthcare, and pension contributions. The next morning’s work schedule—and not a desire to cease bargaining—required the parties to end negotiations that day. (JA 747; p. 20.)

b. Precedent supports the Board’s finding that the parties’ mutual movement on key issues demonstrated a lack of impasse

Established law supports the Board’s finding that the parties’ movement on November 14 “indicat[ed] a willingness to compromise further.” (JA 750.) *See Saunders House v. NLRB*, 719 F.2d 683, 687 (3d Cir. 1983) (noting that “movement on one important issue may support a finding that an impasse did not exist even though other key issues remain unresolved” because “a willingness to move toward an agreement on an important issue in dispute might trigger other concessions on related questions”). Even if the parties were not yet in the same place on the rates that would be associated with the net commission structure, the Union’s agreement to use that model was “significant progress towards the goal desired by the [Company],” and “demonstrated [its] continuing willingness to compromise.” *Grinnell*, 236 F.3d at 198, 200. The Company, for its part, admits (Br. 15) that it too made “significant revisions to its commissions and pension proposals.” (JA 746-47.) *See Local 13, Detroit Newspaper Printing & Graphic Commc’ns Union v. NLRB*, 598 F.2d 267, 273 (D.C. Cir. 1979) (noting that “[p]arties commonly change their position during the course of bargaining notwithstanding the adamance with which they refuse to accede at the outset,” but “compromises are usually made cautiously and late in the process”). Both parties’ movement on important issues at their last pre-implementation route sales

bargaining session strongly supports the Board’s finding (JA 749-50) that there was no impasse several days later. *See Colfor*, 838 F.2d at 167 (“[G]reat progress made at the final bargaining session . . . strongly supports the conclusion that further negotiations would not have been futile.”); *WPIX*, 906 F.2d at 901 (no impasse after employer made “substantial modifications” by dropping and modifying numerous demands).

The Court has recognized that precisely this sort of mutual movement on key disputed issues weighs heavily against the existence of impasse. In *Wayneview*, the parties negotiated for approximately seven months and reached some tentative agreements. 664 F.3d at 344-45. The employer ultimately identified two issues as “principal stumbling blocks” in the way of agreement. *Id.* at 345. In response, at a final “marathon” bargaining session, the union “softened its position on th[ose] specific items,” and the employer made “significant concessions” as well. *Id.* Although the union anticipated that negotiations would continue, three days later the employer submitted a “last best offer,” which it implemented after several weeks. *Id.* The Court upheld the Board’s finding that there was no impasse, observing that both parties made “new and important changes to their basic approach to the bargaining” during their last bargaining session. *Id.* at 348. As a result, “the parties were coming closer together on the major items about which they had disagreed in the past.” *Id.* (quotation omitted).

Just so, in this case the parties were in the process of coming together after the Union changed its “basic approach” to commissions in response to the Company’s plea that it could not be competitive without such a restructuring. As in *Wayneview*, the record here demonstrates that “there was no deadlock” notwithstanding the differences that remained between the parties. 664 F.3d at 350. *See also Monmouth*, 672 F.3d at 1089 (no impasse where union’s proposal at parties’ penultimate bargaining session “demonstrated a clear willingness to compromise by showing movement” on key issues).

The Court’s decision in *Laurel Bay*, upon which the Company relies (Br. 31-32), is not to the contrary. As the Court has recognized, that decision turned on the union’s rigid adherence to proposals which tracked the terms of a pattern agreement, because of which “‘the parties remained steadfastly fixed in their respective positions,’ with ‘neither party having budged’ on the critical terms of its proposals.” *Monmouth*, 672 F.3d at 1092 (quoting *Laurel Bay*, 666 F.3d at 1374 (brackets omitted)). Here, by contrast, the Union’s movement on November 14 demonstrated that it had no such commitment to any predetermined stance and was instead ready and willing to compromise.

Moreover, the Court in *Laurel Bay*, in reversing the Board’s finding of no impasse, found that the union belatedly claimed it had “wiggle room” and wanted to make a counterproposal only “after impasse had already been reached.” 666

F.3d at 1375. At that juncture, the Court held, “the burden lay on the [u]nion to show ‘changed circumstances,’” which it failed to do. *Id.* at 1376. *See also TruServ Corp. v. NLRB*, 254 F.3d 1105, 1117 (D.C. Cir. 2001) (noting that “in the pre-impasse context the [u]nion does not have to offer ‘a substantial change’ in its position” to stave off impasse). Here, as the Board found (JA 741 n.1), the parties never reached impasse, and the Union therefore had no heightened burden of showing “a substantial change.” *Laurel Bay*, 666 F.3d at 1375 (quotation omitted).

c. The Company’s attempt to minimize the importance of the parties’ November 14 meeting fails

The Company’s attempt (Br. 41) to downplay the significance of the parties’ movement on November 14 is unavailing. The Company said that it needed net commissions to be profitable, and the Union moved accordingly. The Company never said its profitability depended on a specific net commission rate. It is therefore immaterial that the Union’s opening offer included slightly higher rates than the Company wanted to pay. *See WPIX*, 906 F.2d at 902 (“An opening negotiating position often bears little resemblance to the conditions ultimately accepted after rounds of serious bargaining”); *Newcor Bay City*, 345 NLRB 1229, 1238 (2005) (no impasse despite “wide gap” between parties, where there is possibility of further movement (quotation omitted)), *enforced*, 219 F. App’x 390 (6th Cir. 2007). Indeed, the gap narrowed with the Company’s counterproposal on the same afternoon. (JA 746-47; p. 19.) An impasse did not arise simply because

the Union was “unwilling to capitulate immediately and settle” on the rates the Company desired. *Grinnell*, 236 F.3d at 199 (quotation omitted). *See Daycon Prods. Co.*, 2011 WL 4403044, at *19 (union’s offer “represented some movement and flexibility” even though employer “still considered it too expensive”).

Nor does the Company undermine the Board’s finding that each party made significant concessions by noting (Br. 38, 41) the parties’ posturing at the end of the November 14 session. *See WPIX*, 906 F.2d at 902 (union’s dismissal of proposals as “ridiculous” or a “slap in the face” did not evince impasse, as “some exaggeration” and “posturing” can “be expected in labor negotiations”); *Monmouth Care Ctr.*, 354 NLRB 11, 61 (2009) (“[T]he Board is careful not to throw back in a party’s face remarks made in the give-and-take atmosphere of collective bargaining, because to do so would frustrate the Act’s policy of encouraging free and open communications between parties.” (quotation omitted)), *incorporated by reference*, 356 NLRB No. 29 (Nov. 17, 2010), *enforced*, 672 F.3d 1085 (D.C. Cir. 2012). *Cf. Colfor*, 838 F.2d at 168 (“[A]n employer may not seize upon the inartful use of the word ‘impasse’ by the union’s negotiator in order to break off negotiations when an agreement is imminent.”). As the Board found (JA 747; p. 20), attorney Doll expressed frustration that the parties had not “moved the ball very far” at the first negotiating session he attended, and the Company’s representative replied, “we made good movement today.” Regardless of whether

the Company was referring to its own or to both parties' offers, the exchange confirms that there was movement. (JA 747 & n.21.) Thus, it only reinforces the Board's finding that neither party believed an impasse existed.⁸

Further, contrary to the Company's arguments (Br. 41-42), the parties were not at impasse after November 14 merely because the Union did not expressly state that it was "flexible" or set a date for the parties' next negotiating session on the spot. As the Court has recognized, conduct speaks louder than words in the collective-bargaining context: empty assertions of flexibility may, for example, "offer about as much as a handful of air." *Laurel Bay*, 666 F.3d at 1375 (quotation omitted). *See TruServ*, 254 F.3d at 1117 ("Absent conduct demonstrating a willingness to compromise further, a bald statement . . . is insufficient to defeat an impasse."). What the Board found in this case (JA 750) was precisely what the Court looked for and did not find in *Laurel Bay* and *TruServ*: the Union "demonstrated a clear willingness to compromise by showing movement" on a matter the Company deemed important. *Monmouth*, 672 F.3d at 1089.

⁸ The Company erroneously insists that Wille asked the Union to vote on the Company's proposals on November 14 (Br. 17, 24, 43), but Maddy said there was "no point" in voting on the Company's proposals and the parties were "spinning their wheels" (Br. 16, 41). Maddy and Doll denied that these statements were made, and the judge did not find that they were made. (JA 502, 505, 554, 789.) *See The Modern Honolulu*, 361 NLRB No. 24, 2014 WL 4076358, at *2 n.7 (Aug. 18, 2014) ("It is well established that explicit credibility resolutions are unnecessary where a judge has implicitly resolved conflicts in the testimony." (quotation omitted)).

3. The parties' contemporaneous understanding: the Union and the Company both anticipated further negotiations after November 14

As the Board found (JA 750), when the Union agreed to calculate route sales driver commissions based on net sales, it “opened the door to possible compromises on other issues” and created “the opportunity for further negotiation towards a potential agreement.” Substantial evidence supports the Board’s finding (JA 750) that following that compromise “both parties were willing to schedule additional meetings to continue working towards an agreement,” further demonstrating that they were not at impasse. As the Board found (JA 747; p. 20), the Company attempted to schedule further negotiations, and the Union promised to get in touch with dates shortly. *See Monmouth*, 672 F.3d at 1090 (no contemporaneous understanding of impasse where employer’s negotiator “did not object to or dispute the need for more meetings, but merely stated that he did not have his calendar with him” (quotation omitted)). The parties’ mutual anticipation of further bargaining clearly “evidences a lack of any contemporaneous understanding by the parties that further negotiation would be futile.” *Shangri-La Health Care Ctr.*, 288 NLRB 334, 334 (1988). *See WPIX*, 906 F.2d at 900 (no impasse where employer “appeared ready to meet the next day” and union “expressed . . . desire to continue the negotiations” although it was not available until a later date); *Northampton Nursing Home*, 317 NLRB 600, 603 (1995)

(parties' plan to continue meeting weighed against impasse); *O'Reilly Enters.*, 314 NLRB 378, 380 (1994) (employer's statement that it was willing to meet again showed parties were not at impasse); *Colfor, Inc.*, 282 NLRB 1173, 1174 (1987) (no impasse where parties "were willing to meet again for the purpose of further negotiations"), *enforced*, 838 F.2d 164 (6th Cir. 1988).

Moreover, both parties' contemporaneous conduct confirms their mutual belief that more negotiations could be productive. On November 5, the parties had agreed to put over-the-road driver negotiations on hold with the expectation that, in the Company's words, "Pension and Health language/costs [would be] negotiated with Route Sales next week." (JA 744-45; 211.) Then, on November 14, in declining one of the Union's proposals, the Company referenced future negotiations when it said it would "revisit the issue and possibly open up more of the summer months." (JA 186, 781.) At that time, the Company admitted, it was still "hoping" the parties could reach an agreement. (JA 705.) Indeed, the next day the parties agreed to put warehouse negotiations on hold while they resolved pension and healthcare issues in route sales negotiations. (JA 747.) That arrangement would have made no sense if either of the parties believed they had already "exhausted the prospects of concluding an agreement." *Monmouth*, 672 F.3d at 1088 (quoting *Taft Broad. Co.*, 163 NLRB at 478).

Furthermore, at no time on November 14 did the Company tell the Union that it had made a “last, best, and final offer.” (See p. 20.) Rather, the Company only converted its November 14 positions into “full and final offers” after the fact when it became frustrated with the Union’s unavailability on the dates it desired. See *Bolton-Emerson, Inc. v. NLRB*, 899 F.2d 104, 108 (1st Cir. 1990) (upholding Board’s finding that “parties had not yet reached an impasse because, among other factors, the parties were making progress in the negotiations, had scheduled an additional negotiating session and neither had yet made a ‘final’ offer”).

These circumstances distinguish this case from *TruServ*, 254 F.3d at 1115-16, which the Company cites (Br. 28-32). In that case, the Court recognized that although “merely labeling an offer as ‘final’ is not dispositive,” the employer had stressed ahead of time that it would only designate an offer as “final” when it had truly reached the end of its rope. *Id.* Here, the Company took no such steps, and indeed sought to continue meeting with the Union for further bargaining between November 16, when it delivered its offers, and November 19, when it implemented them. (JA 747; 146.)

The Company erroneously suggests (Br. 39) that the parties’ expectation of further meetings was irrelevant because the Company had a “legal obligation to continue negotiations” but no “reason to be optimistic about breaking the deadlock.” On the contrary, there was no deadlock to break, given that the parties

had just “made significant progress that included concessions from both sides.” (JA 750.) The Union’s acceptance of net commissions had opened up new avenues for bargaining which the parties “had an inadequate opportunity to fully explore,” *Teamsters Local Union No. 639*, 924 F.2d at 1083 (quotation omitted), before the Company “brought the process to a halt.” (JA 750.) *See id.* (no impasse where parties met for 12 sessions, but only spent the final session on wages); *Royal Motor Sales*, 329 NLRB 760, 762, 772 (1999) (unions’ acceptance of flat-rate compensation model, which they had fervently opposed, “demonstrated flexibility and significant movement, provided a basis for further progress, and strongly indicated that the parties were not yet completely deadlocked,” even though parties disagreed on details of implementing it), *enforced on alternate grounds sub nom. Anderson Enters. v. NLRB*, 2 F. App’x 2 (D.C. Cir. 2001). Thus, as the evidence discussed above shows, the Board properly found (JA 750) that “neither party was at the end of its negotiating rope when [the Company] declared impasse.”

C. The Company’s Remaining Arguments Are Meritless

1. The Union did not engage in dilatory tactics that would justify the Company’s unilateral implementation of its proposals

There is no merit to the Company’s claim (Br. 32-35) that its premature implementation was excused because the bargaining process was moving too slowly. It is settled that “impasse is not demonstrated simply when one party’s concessions are not thought to be adequate or when frustration in the movement

has reached a subjectively intolerable level.” *AMF Bowling Co. v. NLRB*, 63 F.3d 1293, 1301 (4th Cir. 1995). “[F]utility, rather than mere frustration, discouragement, or apparent gamesmanship, is necessary to establish impasse.” *Grinnell*, 236 F.3d at 199. *Accord Daycon Prods. Co.*, 2011 WL 4403044, at *19. Board law does recognize a “limited” exception to the rule against unilateral implementation where, “in response to an employer’s diligent and earnest efforts to engage in bargaining, a union insists on continually avoiding or delaying bargaining.” *Serramonte Oldsmobile*, 318 NLRB 80, 100 (1995) (quotations omitted), *enforced in relevant part*, 86 F.3d 227 (D.C. Cir. 1996). *See NLRB v. Auto Fast Freight, Inc.*, 793 F.2d 1126, 1129 (9th Cir. 1986) (noting “narrow exception” to the bargain-to-impasse rule where “union has avoided or delayed bargaining”). But the Company’s delay arguments rest on a faulty premise and lack record support, and therefore fall far short of meeting that standard. (JA 750.)

a. The Board properly considered bargaining progress in all three groups

The Company’s arguments are grounded in the assertion (Br. 32-33) that only route sales negotiations should be considered to determine whether impasse was reached for all three groups. That proposition is entirely divorced from the facts. The Company presented “full and final offers” for all three employee groups—warehouse employees, over-the-road drivers, and route sales drivers—on November 16. (JA 747; 146.) It declared impasse with regard to all three groups.

(JA 747-48; p. 21.) And it implemented its offers for all three groups on November 19. (JA 748; 508.)

Moreover, the parties only agreed to have “route sales drivers control the ultimate outcome” (Br. 33) in November. (JA 744; pp. 11-12, 13, 21.) By that time, bargaining across all three groups had allowed the parties to narrow the range of possible pension and healthcare options. In warehouse negotiations, for example, the parties learned from Central States that several pension arrangements could not be used for any of the groups of employees. (JA 743 n.9; pp. 10-11.) The Union also obtained information from the Company about its healthcare costs in warehouse bargaining. (JA 363.) And after the Company indicated at a warehouse session that it would consider any proposal that would save it money (JA 743-44; p. 10), the Union arranged a meeting with a Central States representative on November 13 to explore whether the Union’s proposals could accomplish that goal (JA 593, 601, 766). Similarly, in over-the-road bargaining, the Union obtained quotes for healthcare coverage from Central States (JA 744; p. 13) and, at the Company’s request, provided numbers on “wages, insurance, [and] pension levels” at another unionized company (JA 407). The exploration that took place in each of the three groups’ sessions did not occur in a vacuum; it moved the overall process forward. Accordingly, the Board properly considered all three groups together. (JA 750.)

b. There is no evidence that the Union engaged in dilatory tactics

The Company, erroneously viewing the parties' route sales bargaining in isolation, assembles a laundry list (Br. 34-35) of baseless allegations of delay on the Union's part. The Board properly found (JA 750) those claims "not supported by the evidentiary record."

Initially, the Company fails to acknowledge that, as the Board found (JA 750; p. 6), both parties were responsible for the slow start to negotiations after the Company took nearly six weeks to respond to the Union's invitation to bargain. *See Day Auto. Group*, 348 NLRB 1257, 1261 (2006) (no undue delay on union's part where both parties were "somewhat lackadaisical in their approach to setting up their first meeting"). The Company fails to show that the Union engaged in any improper bargaining behavior thereafter.

The Company asserts (Br. 34 (citing JA 662-63)) that the Union arrived late for bargaining, but the testimony it cites pertains to a bargaining session on February 27—long after the November 19 implementation. Wille's vague, offhand claim that this "happened all the time" does not establish that the Union was dragging its feet in pre-implementation negotiations. (JA 662-63.) The same is true for the Union's cancellation of two October bargaining sessions. Contrary to the Company's statement (Br. 34) that the Union "refused to meet" after the October 31 session was cancelled, the parties met five times between the October

24 route sales meeting where the cancellation was announced and their next route sales meeting on November 14. As explained above (p. 50), during the intervening sessions, the parties discussed a variety of pension and healthcare issues pertaining to all three groups. Moreover, while the circumstances of the first cancellation are unclear, the Union adequately explained its reason for cancelling the October 31 meeting—to make arrangements to bring its attorney to the next session.⁹ (JA 461, 681-82.) *Bottom Line Enters.*, 302 NLRB 373, 374 & n.7 (1991) (union’s cancellation of a bargaining session for legitimate business reasons did not evidence bad faith), *enforced sub nom. Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994) (unpublished table decision).

The Company’s remaining examples are just as overblown. The single break the Company cites (Br. 34 (citing JA 255, 295, 599)) was entirely justified: on November 14, the parties broke for lunch and a caucus, during which the Union’s negotiators hammered out comprehensive proposals including the “major move” to net commissions. (JA 298-301, 533, 599, 773.) The Company’s after-the-fact objection to that three-hour break is especially absurd given that the Company took over two hours for its own caucus before presenting a counterproposal. (JA 534.) The Company’s claim (Br. 34 (citing JA 592)) that the Union “wasted” time on “unrelated issues” is equally preposterous. On October

⁹ Wille testified that in both instances the parties “had to reschedule because the Union had some issues and they had to . . . cancel.” (JA 587.)

24, the Union accepted the Company's invitation to negotiate a severance agreement for nearly half the route sales drivers, who were to be laid off on November 12 as a result of a decision the Company had announced in the preceding bargaining session. (JA 745; p. 16.) There was nothing improper about the Union's desire to address such a substantial and immediate issue.

Nor was there anything inappropriate about the Union's desire to schedule a meeting with a Central States representative for a presentation on the Union's proposal before engaging in more extensive discussions of healthcare options. (Br. 34.) In any event, contrary to the Company's claim (Br. 34), the parties did discuss healthcare before November 13. (*See* p. 50.) And there is no basis for the Company's suggestion (Br. 34) that the Union delayed in responding to the Company's October 10 proposals. The Union responded at the very next route sales meeting by offering counterproposals on several points, explaining concerns regarding the details of the Company's pension proposal, requesting to put off healthcare discussions until it could provide a Central States presentation on the Union's proposal, and otherwise explaining that the Company's opening demands would be hard for the Union's members to accept. (JA 746; 99-100, 484-86, 593-94.) The Company (Br. 34-35) also provides no reason to fault the Union for preparing a new proposal with composite numbers from Central States, which it

presented on November 14 as part of a new offer in which it also increased proposed employee healthcare contributions. (JA 747; 426.)

As for the Company's October 24 suggestion to bring in a federal mediator (Br. 35), the Union explained that it saw no need to do so "early in negotiations" (JA 491), when "we had plenty of movement, and we were still moving on things" and the parties were "still worlds apart" on so many issues (JA 417).¹⁰ And contrary to the Company's claim that the Union failed to respond to its November 16 and 18 correspondence, Maddy immediately informed the Company verbally on November 16 that the Union was willing to meet, but "had conflicting dates and w[as not] able to meet" on the dates the Company requested. (JA 747; 441, 613.) Maddy also informed the Company that the parties were not at impasse—"that we were still negotiating and we'd get an agreement." (JA 747; p. 22.) As for the November 18 correspondence, the Company tried to reach Maddy on a Sunday, and the Union responded the very next day, on Monday, November 19. (JA 615-17.)

Finally, the Company faults the Union (Br. 35) for failing to make itself available soon enough after implementation. That argument is at odds with the Company's own insistence (Br. 43) that post-implementation conduct is irrelevant

¹⁰ Contrary to the Company's repeated assertion (Br. 35, 38), the record reveals only one pre-implementation suggestion to involve a mediator. The Company's November 2 letter (Br. 35 (citing JA 144, 219)) referenced that prior discussion (Br. 35 (citing JA 417, 488, 490-91)).

for purposes of determining whether the parties were at impasse on November 19. But in any event, the Union more than adequately explained that while it could not commit to resuming negotiations on November 16, it would get back to the Company once it knew its negotiators' availability. (JA 747; p. 20.) Shortly thereafter, as the Board found (JA 747; p. 20), the Union proposed meeting on November 27, less than two weeks after their last meeting. *See FKW, Inc.*, 321 NLRB 93, 94 (1996) (union did not unduly delay bargaining where it was unwilling to meet between December 20 and January 6, despite employer's desire to reach an agreement by January 1).

In short, the Company fails to point to anything in the parties' bargaining history that even approaches the sort of bad-faith delay tactics that could justify unilateral implementation. *Cf. Serramonte Oldsmobile*, 318 NLRB 80, 100-01 (1995) (unilateral implementation lawful where union delayed start of bargaining for three-and-a-half months with spurious objections, then feigned ignorance of employer's proposals and refused to formulate counterproposals throughout negotiations). The cases the Company cites do not show otherwise, as both are readily distinguishable. In *M&M Contractors*, 262 NLRB 1472, 1472 (1982), the union refused to provide a date for an initial bargaining session for seven months. Here, by contrast, it was the Union which first sought to initiate bargaining, and the parties met 12 times over a 2-month period.

In the Company's other case, *NLRB v. H&H Pretzel Co.*, 831 F.2d 650 (6th Cir. 1987), the issue before the court was not whether the union had "continually avoid[ed] or delay[ed] bargaining." *Serramonte Oldsmobile*, 318 NLRB at 100. Rather, it was whether substantial evidence supported the Board's finding that the parties were at impasse after the union's members twice voted to reject the employer's proposals and "the absence of serious bargaining in the weeks preceding contract expiration suggest[ed] a principled commitment on either side to positions that were plainly irreconcilable." *H&H Pretzel*, 831 F.2d at 657. As set forth above (pp. 35-38), the Union's demonstrations of flexibility and the significant bargaining that occurred just before the Company declared impasse makes the instant case incomparable to the circumstances in *H&H Pretzel*.

2. The Company's arguments regarding post-implementation negotiations are faulty

The Company raises several unsound arguments relating to the parties' post-implementation conduct. It claims (Br. 44-45) that the judge erred in admitting that evidence, and in any event, that the evidence highlights the Union's bad behavior. The Company further claims that the evidence supports a finding that the parties bargained to a subsequent impasse, cutting off any bargaining liability. As we show below, these arguments lack merit.

At the outset, the Company overlooks the Board's statement that its finding of no impasse on November 19 did not depend on "any consideration of

subsequent offers of bargaining concessions by the Union.” (JA 741 n.1.)

Because the Board found it unnecessary to rely on the judge’s reasoning in this regard, the Company raises a non-issue when it argues (Br. 43-45) that the judge erred in admitting evidence of post-implementation bargaining.¹¹

After arguing that post-implementation negotiation sessions are irrelevant, the Company nonetheless claims (Br. 45) that those meetings reveal “bad behavior” on the Union’s part. Again, the Board’s finding of no impasse does not rest on any post-implementation conduct; therefore, any alleged Union misconduct during that time is irrelevant. But in any event, the Board’s factual findings and credibility determinations foreclose the Company’s argument that the Union acted in bad faith following implementation. In particular, the judge discredited (JA 748 n.23) Wille’s claim that the Union reinstated all of its October 10 proposals on December 7. That determination, which the Board adopted (JA 741), was plainly reasonable. Wille’s notes referenced a nonexistent bargaining date (JA 309), and they did not reflect any objection to what the Company now characterizes as a drastic move that caused “any progress that had been made on these proposals [to be] lost.” (Br. 21.) The Company has not even attempted to meet its difficult

¹¹ Similarly, the Company’s discussion of *Newcor Bay City Division*, 345 NLRB 1229, 1240 (2005), and *CBC Industries*, 311 NLRB 123, 127 (1993), has no bearing on any issue before the Court. (Br. 36-39.) The Board would have found no impasse before November 19 regardless of the judge’s view that the Company set November 17 as an “arbitrary deadline for reaching a new agreement.” (JA 741 n.1.)

burden of showing that the Board's credibility determination was "patently unsupportable." *Wayneview*, 664 F.3d at 349.

Finally, the Company falls short in its attempt (Br. 46-47) to use the parties' post-implementation negotiations to cut off liability for its unfair labor practice. The Board properly rejected the Company's contention that the parties reached impasse on February 13, 2013. (JA 741, 751 n.26.) It was the Company's burden to establish that the parties were at the end of their ropes on that date and that no realistic chance remained for reaching an agreement. *N. Star Steel Co.*, 305 NLRB 45, 45-46 (1991), *enforced*, 974 F.2d 68 (8th Cir. 1992). As the Board found (JA 751 n.26), however, the Company never displayed a contemporaneous understanding to that effect by notifying the Union that it was declaring impasse or reimplementing the terms of its last offers. *Compare Dependable Maint. Co.*, 276 NLRB 27, 29-30 (1985) (terminating employer's liability for unlawful implementation after it subsequently notified union of impasse and that it was reimplementing its final offer) *with Triple A Fire Protection*, 315 NLRB 409, 409 n.4 (1994) (refusing to toll employer's liability where, after initial unlawful implementation, employer never declared impasse or announced reimplementing), *enforced*, 136 F.3d 727 (11th Cir. 1998), *cert. denied*, 525 U.S. 1067 (1999).

Moreover, as the Board found (JA 751 n.26), the parties made continual—if gradual—progress in their negotiations after the unlawful implementation. The Union made “multiple conciliatory offers” on wages and healthcare. (JA 751 n.26.) Indeed, by March 20, 2013, the parties had reached accord on commission rates for route sales drivers, narrowing their disagreement to whether higher rates in the second and third years would be triggered by an increase of 1.75 percent or 3 percent in unit sales. (JA 748 n.24; 333.) And on that day, for the first time, the parties engaged a federal mediator to assist them, further demonstrating that they believed further progress was possible. (JA 751 n.26.) *See Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982) (involvement of a federal mediator in bargaining efforts “reinforces the inference that the negotiations were continuing at that time”); *Powell Elec. Mfg. Co.*, 287 NLRB at 969 (solicitation of mediator’s assistance in arranging further negotiations indicates parties had not yet exhausted bargaining over core economic issues). Thus, the Board reasonably found that the Company failed to show that the parties reached a good-faith impasse on February 13, and the Board’s remedy must be upheld.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Company's petition for review and enforce the Board's Order in full.

Respectfully submitted,

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JANUARY 2015

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MIKE-SELL'S POTATO CHIP COMPANY)	
)	
Petitioner/Cross-Respondent)	Nos. 14-1021
)	14-1031
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	9-CA-94143
)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), Board counsel certifies that the Board's brief contains 13,573 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2007.

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Dated at Washington, D.C.
this 30th day of January, 2015

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

MIKE-SELL'S POTATO CHIP COMPANY)	
)	
Petitioner/Cross-Respondent)	Nos. 14-1021
)	14-1031
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case No.
Respondent/Cross-Petitioner)	9-CA-94143
)	

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that all counsel of record, listed below, are registered CM/ECF users and were served through the CM/ECF system, as well as by First-Class Mail:

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Dated at Washington, D.C.
this 30th day of January, 2015