JD–84–17
Dayton, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MIKE-SELL'S POTATO CHIP CO.,

and **Case 09–CA–094143**

GENERAL TRUCK DRIVERS, WAREHOUSEMEN, HELPERS, SALES AND SERVICE, AND CASINO EMPLOYEES, TEAMSTERS LOCAL UNION NO. 957.

SUPPLEMENTAL DECISION and ORDER

DAVID I. GOLDMAN
Administrative Law Judge

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Table of Contents

Page

Supplemental Decision 1

A. ..... The Board's Order 1

B. ..... Court Enforcement of the Board's Order 2

C. ..... Com pliance Proceedings 2

1. ..... The rulings at the hearing 3

a. ..... The Union's effort to introduce evidence in support of a theory of backpay liability in conflict with the General Counsel's amended compliance specification 3

b. ..... The Respondent's effort to offset vacation and holiday benefits from sick benefits, and to offset sick, holiday, and vacation benefits from wages owed under the compliance specification 4

c. ..... The Respondent's June 2013 impasse defense 5

2. ..... Back pay owed 11

Supplemental Order 12

SUPPLEMENTAL DECISION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. This compliance case arises out of a labor dispute that began in 2012, during negotiations for new labor agreements covering a bargaining unit of warehouse employees and a unit of (route-sales and over-the-road) drivers employed by Mike Sell's Potato Chips Co. (Mike-Sell's or Employer). The union representing the two bargaining units is the Teamsters Local No. 957 (Teamsters or Union).[1]

The collective-bargaining agreement covering the warehouse employees expired October 26, 2012. The collective-bargaining agreement covering the drivers expired November 17, 2012. On November 18, 2012, Mike-Sell's announced that the parties were at a bargaining impasse over both units and that effective November 19, 2012, it would unilaterally implement its bargaining proposals.

A. The Board's Order

The Union disputed there was a bargaining impasse and filed an unfair labor practice charge with the National Labor Relations Board (Board) over this unilateral implementation. On January 15, 2014, the Board issued a decision and order, reported at 360 NLRB 131 (2014), finding, inter alia, that Mike Sell's unilateral implementation of its bargaining offers in the absence of impasse violated Section 8(a)(5) and (1) of the National Labor Relations Act (Act). The Board ordered its traditional remedies which included ordering Mike Sell's to:

> "Cease and desist from . . . . Failing to comply with the terms and conditions of employment that are set forth in the warehouse unit collective-bargaining agreement that expired on October 26, 2012, and failing to comply with the terms and conditions of employment that are set forth in the drivers unit collective-bargaining agreement that expired on November 17, 2012, until the parties agree to a new contract or bargaining leads to a good-faith impasse.

Affirmatively, the Board ordered, among other remedies, that Mike Sell's:

> (a) On request of the Union, restore, honor and continue the terms of the collective-bargaining agreements with the warehouse and drivers units that expired on October 26 and November 17, 2012, respectively, until the parties agree to a new contract or bargaining leads to a good-faith impasse.
>
> (b) Make employees in the warehouse and drivers bargaining units whole for any and all loss of wages and other benefits incurred as a result of Respondent's unlawful unilateral implementation of its full and final offers on November 19, 2012, with interest, as provided for in the remedy section of this decision.
>
> (c) Make contributions, including any amounts due, to any funds identified in the warehouse and drivers unit collective-bargaining agreements that expired on October 26 and November 17, 2012, and which Respondent would have paid but for the unlawful unilateral changes, as provided for in the remedy section of this decision.

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[1]The full name of the Union is the General Truck Drivers, Warehousemen, Helpers, Sales and Service, and Casino Employees, Teamsters Local Union No. 957.

The remedy section of the Board's decision, which is referenced by the Order states, in part, that:

> Respondent shall immediately put into effect all terms and conditions of employment [of the expired contracts] and shall maintain those terms in effect until the parties have bargained to agreement or a valid impasse, or the Union has agreed to those changes. In addition, the Respondent must make its employees whole for any loss of earnings and other benefits that resulted from its unilateral and unlawful decision to, on or about November 19, implement its full and final offers.

B. Court enforcement of the Board's Order

On January 30, 2014, the Union requested, in writing, that Respondent restore, honor and continue the terms of the expired collective-bargaining agreements. Mike-Sell's declined to do so. Instead, on February 10, 2014, Mike Sell's petitioned for review of the Board's order by the United States Court of Appeals for the District of Columbia. The Board cross-applied for enforcement of its order on March 7, 2014. On December 11, 2015, after briefing and oral argument, the Court, in accordance with an opinion filed by Judge Silberman (with Judges Millett and Williams joining), reported at 807 F.3d 318 (2015), denied Mike-Sell's petition for review and granted the Board's cross-application for enforcement of its order.

C. Compliance Proceedings

On September 30, 2016, the Regional Director of Board Region 9 issued a compliance specification alleging the backpay amounts owed to employees under the Board's Order, through June 25, 2016. The total amount of backpay alleged through June 25, 2016, amounted to $327,554, excluding interest. Mike-Sell's filed an answer to the compliance specification on November 3, 2016.

On December 12, 2016, the Regional Director provided union counsel with a compliance determination in which he explained to the Union that he had concluded that the backpay previously alleged had been overstated. The letter stated:

> On September 30, 2016, the Region issued a Compliance Specification alleging a total amount of backpay of $327,554. This amount was based, in part, on projected sales figures. After careful consideration of additional records of actual sales obtained subsequent to the issuance of the compliance specification, the Region has now determined that backpay for the employees in this matter is $209,609. . . . The Region intends to issue an amended compliance specification following the disposition of any compliance appeal filed in this matter.

The compliance determination letter then detailed the basis and methodology for the new backpay calculations. The compliance determination acknowledged but rejected an alternate backpay calculation advanced by the Union.

At the conclusion of the letter, the Regional Director explained the Union's right to appeal his decision to the General Counsel of the Board and the method and due date for doing so.

The Union filed an appeal of the Regional Director's compliance determination. The appeal was denied by the General Counsel by letter dated April 7, 2016, which explained the basis for denial and the General Counsel's conclusion that the Region's calculation of backpay

was not unreasonable. This letter closed by explaining the Union's right to file a request of this decision directly with the Board:

> You may file a request for review of our decision with the National Labor Relations Board. You may file your request electronically, by mail, or by delivery service. Filing a request for review electronically is preferred but not required. Your request for review should clearly identify the facts and reasons that form the basis of your objection. You must file your request for review no later than **April 21, 2017** and it must be served on the General Counsel and on the Regional Director. [Emphasis in original.]

The Union did not file a request for review with the Board.

On July 10, 2017, the Regional Director for Region 9 issued an amended compliance specification alleging the backpay amounts owed to employees under the Board's Order, through March 31, 2017, "based on the methodology approved by the General Counsel in his letter dated April 7, 2017, denying the Union's compliance appeal." The total backpay alleged to be owed through March 31, 2017, amounted to $242,944, excluding interest. Mike-Sell's filed an answer to the compliance specification on July 31, 2017, and an amended answer August 2, 2017.

A hearing on the compliance specification was conducted August 7–8, 2017, in Cincinnati, Ohio. At the hearing, counsel for the General Counsel moved to amend the compliance specification and submitted new appendices (GC Exh. 2) setting forth the amounts allegedly owed through March 31, 2017, and moved to amend paragraph 11 (total backpay and excess tax due employees through March 31, 2017) to conform to the calculations in the amended appendices. This exhibit was received and the motion granted.

Counsel for the General Counsel, the Charging Party Union, and the Respondent Employer, filed posttrial briefs in support of their positions by September 12, 2017.[2] On the entire record, I make the following findings, conclusions of law, and recommendations.

1. The rulings at the hearing

At the compliance hearing in this matter, before receipt of evidence, and after argument of the parties, I issued three rulings—one adverse to the Union, two adverse to the Respondent—essentially precluding, as a matter of law and procedure, the introduction of evidence on two of the Respondent's defenses, and separately, precluding a theory advanced by the Union seeking enhancement of backpay liability beyond that alleged in the amended compliance specification.

I invited the parties to brief these rulings posthearing, and they have done so. I have considered their briefs on the subjects, as well as all previous submissions and the record as a whole. As discussed below, I reaffirm my rulings at trial, as supplemented herein.

a. The Union's effort to introduce evidence in support of a theory of backpay liability in conflict with the General Counsel's amended specification

In a pretrial conference call, the Union indicated that it intended to introduce evidence at the hearing in support of its theory—rejected by the Regional Director in his December 12, 2016 compliance determination and by the General Counsel in his April 7, 2017 ruling on the Union's

[2]Respondent's motion to correct the transcript has been addressed in a separate order.

appeal of the compliance determination—that Respondent's backpay obligations relating to commission-based pay should account for drivers working additional hours as a result of the unlawful unilateral change. On August 4, 2017, Respondent filed a motion in limine (GC Exh. 1(bb)) contending that the Charging Party should be precluded from introducing such evidence at the hearing. On August 7, 2017, the Charging Party filed a response in opposition to the motion in limine (GC Exh. 1(cc).)

After taking the parties positions at the hearing (Tr. 18-25), I ruled on the record, granting the motion in limine. I have considered the parties' posthearing briefs on this issue. I now reaffirm that ruling for the same reasons stated at the hearing. See, Tr. at pages 25–33.

b. The Respondent's effort to offset vacation and holiday benefits from sick benefits, and each of these benefits from wages owed under the compliance specification

On August 2, 2017, counsel for the General Counsel filed a motion in limine (GC Exh. 1(z)) seeking to preclude the Respondent from adducing evidence in support of defenses asserted in its answer contending that alleged overpayments to employees of vacation and holiday pay should be offset from sick pay, and/or that sick-pay, holiday, and vacation pay should be offset from wages owed to employees under the compliance specification. The Respondent filed a response August 4, 2017. (GC Exh. 1(aa).) The parties argued the motion at the hearing. (Tr. at 35–45.) I ruled on the record, granting the motion in limine. I now reaffirm that ruling for the same reasons stated at the hearing. See, Tr. at pages 45–49.

In response to the Respondent's argument, as renewed in its posttrial brief, I note that neither the General Counsel's motion nor my ruling precluded the Respondent from introducing evidence of overpaid commission-based wages to offset commission-based wages. Rather, the ruling precluded overpayment of one element of backpay (e.g., sick pay, vacation pay, or holiday pay) from being offset from another element of backpay owed. *Mining Specialists*, 330 NLRB 99 (1999) (setoff allowed only if additional compensation paid the employee is equivalent to the element of backpay claimed in the specification).

The Respondent asserts that its use of commissions (i.e., a percentage of sales) as a basis for calculating the value of wages and benefits (sick, holiday, vacation) suggests that these disparate elements of backpay are uniquely linked so as to make them the equivalent of one another. The Respondent reasons that commissions incentivize higher sales, both in terms of wages and benefits. However, I find that the use of commissions to calculate the value of benefits is irrelevant to understanding the nature and purpose of these various benefits and/or wages. Sales incentives aside, the wages, sick leave, holidays, and vacations benefits, as their name suggests, continue to represent different forms of backpay, different in nature and purpose.

Notably, the more typical use of hourly wage rates or salaries to calculate the value of benefits also links the value of wages to the value of benefits—in just as sure a way as does the use of commissions. In an hourly-wage-rate-based system, an employee with a higher hourly-wage rate receives a sick, vacation, and holiday benefit at a higher rate than an employee who earns a lower hourly wage rate. The higher the wage rate, the higher the benefit value. The same is true for salary systems. Thus, in an hourly-wage rate or salary system, the value of sick, vacation, and holiday benefits is linked to the wage structure just as it is with commission-based wage and benefits calculations. When benefits are calculated based on an employee's hourly rate or salary, it creates its own type of incentive to increase hourly or salary pay. Yet, no one—not even the Respondent—contends that this renders the benefits "equivalent" and allows one to

be offset against the other for purposes of backpay specifications. Commission-calculated benefits are no different in this regard. An employer's use of commission-based remuneration does not render equivalent any and all benefits calculated with reference to commission. Wages, sick pay, vacation pay, and holiday pay are not equivalent benefits, regardless of the base-rate method used to calculate the value to employees of each benefit (e.g., hourly, salary, or commission).

In regard to the nature and purpose of the Respondent's benefits, I note the Respondent's contention, made at the hearing and in its posttrial brief (R. Br. at 20–21), that "drivers have routinely used their sick and vacation days interchangeably for whatever they please." In other words, "if someone is sick, they may take a vacation day," and "vice versa." However this claim, which describes a not-unusual application of sick and vacation pay benefits, does not change the fact that these benefits are separately set out in the labor agreements, separately maintained, calculated, and paid. The Respondent makes no claim that the benefits have been merged so that they are one indivisible benefit. At most, employees wanting a day off can "take" the day from their sick leave benefits or their vacation leave benefits, without employer inquiry into their medical status. This does not render the benefits equivalent for purposes of backpay offsets.

c. The Respondent's June 2013 impasse defense

The Board issued its order in this case on January 15, 2014.[3] The D.C. Circuit Court of Appeals enforced the Board's order in full on December 11, 2015.[4]

In front of the Board and the Court of Appeals, Respondent argued that the parties had reached a bargaining impasse in November 2012, justifying implementation of its final offer. In addition, the Respondent argued to the Board and to the Court that the parties had reached a subsequent impasse in February 2013, and that this second alleged impasse justified implementation, tolling any backpay obligation and nullifying the need for an order restoring the November 2012 terms and conditions of employment. These arguments were put to and rejected by the Board, and then put to and rejected by the Court of Appeals.

Now, three and half years later, in a compliance hearing to determine how—not if—the Respondent is to comply with the Board's court-enforced order, the Respondent contends that it had reached a third bargaining impasse with the Union in negotiations, one not previously mentioned to the Board or to the Court of Appeals, although it allegedly occurred June 13, 2013, seven months before the Board issued its order in this case and some 30 months before the Court of Appeals enforced that order.

In the compliance hearing, the Respondent sought to put on evidence of the 2013 bargaining, contending in compliance that the June 2013 alleged impasse terminated its duty to restore the old terms and conditions and tolled the back pay period as of June 2013. Thus, the Respondent came to the compliance hearing contending for the first time that the Board's order was "dead on arrival" when it issued in January of 2014—that the Board's order was null and void from its inception—based on events occurring seven months before issuance of the Board's order.

[3]360 NLRB 131 (2014).

[4]807 F.3d 318 (D. C. Cir.).

At the hearing I ruled (Tr. 76–83) that the Respondent's argument amounted to an effort to modify the Board's order—not an argument for compliance with it—and that it could not mount this argument in compliance. The Respondent has renewed its argument in its posthearing brief. However, I adhere to my ruling, as supplemented herein.

Essentially, the Respondent's position is that because the June 2013 alleged impasse occurred (two months) after the administrative law judge closed the unfair labor practice hearing, the Respondent is free to raise this third alleged impasse as an objection to the Board's 2014 order, which was enforced in 2015.

The Respondent is in error. The Respondent is transparently seeking to modify the Board's order to eliminate the order's requirement that it restore the old terms and conditions and maintain them until it reaches agreement or impasse with the Union. The Respondent is seeking to modify the Board's order based on arguments that could have been made to the Board even before the issuance of the Board's order in this case.

It is too late under the Board's rules.[5] Indeed, once the Board's order was enforced by the Court of Appeals—nearly three years ago and a full 30 months after the alleged June 2013 impasse—it became too late as a matter of jurisdiction under Section 10(e) of the Act. The Board has no jurisdiction to modify a court-enforced order.[6]

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[5]*Cogburn Healthcare Center*, 342 NLRB 98, 99 (2004) (evidence of changed circumstances warranting change in Board bargaining order rejected as untimely: "The Respondent has failed to show that some or all of this evidence it now relies on was not available during the period that the case was pending before the Board on exceptions"); *Electro-Voice, Inc.*, 321 NLRB 444 (1996) (motion to reopen record 10 months after judge's decision issued untimely: "Clearly, the Respondent was in possession of this evidence at least during the period when the case was pending before the Board on exceptions").

[6]*Willis Roof Consulting, Inc.*, 355 NLRB 280, 280 fn. 1 (2010) ("a finding in the present [compliance] case that there was no collective-bargaining agreement would modify the court's order to comply with that agreement. The Board has no jurisdiction to modify a court-enforced order"); *D.L. Baker, Inc.*, 351 NLRB 515, 525 fn. 31 (2007) (Board order providing for backpay only back to beginning of 10(b) period could not be expanded in compliance specification, even though Board case law supported such expansion, because court's enforcement of order deprived Board of "liberty to modify an order that has been enforced by a court of appeals"); *Scepter Ingot Castings, Inc.*, 341 NLRB 997, 997 (2004), enfd. 448 F.3d 388, 390–391 (D.C. Cir. 2006) (holding that "Because [employer] did not in its petition for review of the [Board's] Order challenge the remedy clearly imposed in that order, it could not do so at the compliance stage of the proceeding. The Board therefore correctly held in the [compliance] Order that it lacked jurisdiction to grant [the employer's] post-enforcement request for relief from the [Board's] Order. Indeed, § 10 of the NLRA requires a party to timely file exception to an order of the Board precisely in order to insure against repetitive appeals to the courts, such as this one") (internal quotation omitted); *Convergence Communications Inc.*, 342 NLRB 918, 919 (2004) ("even assuming no relitigation bar, we are powerless in any event to revisit the merits and alter our Order accordingly. That Order has been enforced by the court of appeals. Under Section 10(e) of the Act, we are without jurisdiction to modify a court-enforced Board Order"); *In re Grinnell Fire Protection Systems Co.*, 337 NLRB 141, 142 (2001) ("The Charging Parties' motion, though styled as one for clarification, may more accurately be described as one seeking additional substantive relief. Thus, the Charging Parties are essentially asking the Board to change the Order that has already been enforced by the Fourth Circuit. The Board, however, is without

Had the Respondent wanted to challenge the propriety of the Board's January 2014 order based on events occurring in June 2013, its path was clear under the Board's rules, and under the terms of the Act itself. Thus, Sec. 102(48(c) of the Board Rules and Regulations provides for a motion for reopening to have the Board consider newly available evidence. But such a motion "must be filed promptly on the discovery of the evidence to be adduced."[7] In addition, Section 10(e) of the Act specifically prescribes the method for raising new matters directly to the Court of Appeals and seek an order from the court requiring the Board to consider the matter.[8]

However, the Respondent chose not to pursue the matter with the Board or the Court. At this point, the door has shut:

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authority to change such an order, as Section 10(e) of the Act"); *Regional Import & Export Trucking*, 323 NLRB 1206, 1207 (1997) ("Because the Respondent Union's offset methods [in compliance hearing] . . . would effectively require a modification of the Board's 1988 Order, we do not have jurisdiction to adopt them"); *Royal Typewriter Co.*, 239 NLRB 1, 2 (1978) ("With respect to the 'clarifications' the Union seeks in our Order . . . we perceive the extensive relief sought as, in actuality a request to modify our Order. . . . Since, as noted above, the Board's order has already been enforced and is now the subject of contempt . . .); *Dupuy v. NLRB*, 806 F.3d 556 (D.C. Cir. 2015); *NLRB v. Mastro Plastics Corp.*, 261 F.2d 147, 148 (2d Cir.1958) ("If respondents believed that they had sufficient grounds to justify [deviating from a court-enforced order], their only proper recourse was in timely fashion to petition this court for modification of its clear mandate.") (emphasis added).

[7]Sec. 102.48(c) of the Board Rules and Regulations states:

> *Motions for reconsideration, rehearing, or reopening the record.* A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. (1) . . . A motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes may have been taken at the hearing will be taken at any further hearing. (2) . . . . [A] motion to reopen the record must be filed promptly on discovery of the evidence to be adduced.

[8]Section 10(e) of the Act states, in relevant part:

> If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order.

> Because [the employer] did not in its petition for review of the [Board's] Order challenge the remedy clearly imposed in that order, it could not do so at the compliance stage of the proceeding. The Board therefore correctly held in the [compliance] Order that it lacked jurisdiction to grant [the employer's] post-enforcement request for relief from the [Board's] Order. Indeed, § 10 of the NLRA requires a party to timely file exception to an order of the Board precisely in order to insure against repetitive appeals to the courts, such as this one."

Scepter, Inc. v. NLRB, *448* F.3d 388, 390–391 (D.C. Cir. 2006) (internal quotation omitted).[9]

The Respondent contends that it is "implicit" in the Board's Order that it can argue in compliance for ignoring the order's direction to restore and maintain the status quo ante. To the contrary, the Board order must be understood as it plainly reads—i.e., that restoration is effectively a condition precedent to reaching an impasse that can toll liability. Indeed, this reading is mandated by Board precedent, enforced by the D.C. Circuit, holding that an order to restore terms and conditions of employment requires actual restoration before claims related to subsequent bargaining can toll the backpay. *Mimbres Memorial Hospital*, 356 NLRB 744 (2011), enfd. sub nom. *Deming Hospital Corp. v. NLRB*, 665 F.3d 196 (2011). *Mimbres* is dispositive of the issue. Contrary to the suggestion of the Respondent, the Board's holding in *Mimbres Memorial Hospital* is firmly rooted in the rejection of the same species of argument advanced by the Respondent here.

Mimbres Memorial Hospital involved an underlying order identical in all material respects to the order in this case. See, 342 NLRB 398, 404 (2004), enfd. 483 F.3d 683 (10th Cir. 2007).

In *Mimbres* the employer arrived at the compliance hearing some ten years after its unlawful reduction in hours, contending as an affirmative defense that backpay tolled on its unlawful reduction of hours because the union failed to engage in post-violation bargaining that would have enabled the employer to reach impasse and re-implement the prior unlawful changes.

In reasoning adopted by the Board, the administrative law judge located the Respondent's argument in the more general "implementation-upon-impasse doctrine" and squarely rejected its applicability where, as here, the Respondent simply flouted the Board's order to restore old terms and conditions:

> "At the core of Respondent's Affirmative Defense 37 are Board cases that hold in one way or another that an employer may "(re)implement the prior unlawful changes" with the union's agreement or by bargaining to impasse over that subject at issue. *Five Star Mfg. Inc.*, 348 NLRB 1301, 1339 (2006); *Mammoth Coal Co.,* 354 NLRB No. 83, slip op. at 45 (2009), citing *U.S. Marine Corp. v NLRB*, 944 F.2d 1305, 1322-1323 (7th Cir. 1991); *New Concept Solutions LLC*, 349 NLRB 1136, 1161 (2007); *Waterbury Hotel Management LLC*, 333 NLRB 482, 555 (2001); and *Eldorado Inc.*, 335 NLRB 952, 959 (2001). By failing to respond to the various requests made by Respondent in 2007 for bargaining following the court's enforcement of the Board's order, the Union, according to Respondent, effectively

[9]Although I do not assume that the Respondent engaged in a calculated withholding of its third impasse argument to the Board or the D.C. Circuit—to be utilized later if it's first two impasse arguments did not stick—it seems to me that the Respondent's argument, if accepted, would condone exactly that in future cases.

> deprived it of the opportunity to negotiate about the change made in 2001 that the Board and the court found unlawful. However, I concluded that principle from the *Five Star Mfg.* case and the other similar cases cited had no application here in the absence of a showing, or an offer to show, that Respondent had restored the status quo ante by rescinding the original unlawful reduction in hours as ordered by the Board. *Five Star Mfg.,* 348 NLRB 1339 ("If Respondent wants to change this situation, it can—after returning to the status quo ante, give the Union notice of a proposed change and bargain with the Union.") Because Respondent failed to take such action in advance of the 2007 bargaining requests, the Union had no duty to bargain under those circumstances.

356 NLRB at 746.

Thus the Board's answer to the unfair labor practice violator who claims its subsequent bargaining released it from the Board's order *is that under the terms of the order before bargaining tolls its obligations it must have restored the old terms and conditions*.

In enforcing the Board's decision, the D.C. Circuit, *Deming Hospital Corp. v. NLRB*, 665 F.3d 196 (2011), made the point just as forcefully:

> Employers must rescind their unlawful actions before attempting bargaining so they cannot "tak[e] advantage of [their] wrongdoing to the detriment of the employees." *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1322 (7th Cir.1991). Employers cannot force unions to come to the bargaining table in a position of weakness. That is why, "in cases involving unlawful unilateral changes, the Board's normal remedy is to order restoration of the status quo ante as a means to ensure meaningful bargaining," a policy that "has been approved by the Supreme Court." *Porta–King Bldg. Sys.*, 310 N.L.R.B. 539, 539 (1993) (citing *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964)), enforced, 14 F.3d 1258 (8th Cir.1994). Accordingly, an employer's attempt to negotiate without first rescinding the unlawful action "does not toll ... backpay liability." *Porta–King Bldg. Sys.*, 310 N.L.R.B. at 540.
>
> The Hospital asserts its situation is different because the Union "has decided to eschew the entire collective-bargaining process," and "backpay [should] not continue to run into eternity." Hospital's Reply Br. 9–10. The Hospital has not provided any evidence the Union has abandoned collective bargaining. And even if the Union has done so, the Hospital can simply rescind the hours reduction, and when its subsequent attempts to negotiate with the Union fail, it can toll its backpay obligation by showing the bargaining process has reached a "lawful impasse." *NLRB v. Cauthorne*, 691 F.2d 1023, 1026 (D.C.Cir.1982).

665 F.3d at 203; see also, *Adams and Associates, Inc. v. NLRB*, __ F.3d ___, 2017 WL 4079063 (5th Cir. September 15, 2017) ("subsequent participation in the bargaining process does not dissipate [the employer's] initial violation of unilaterally imposing its own terms and conditions of employment. Nor does it make bargaining unit employees whole but for Adams's unfair labor practice. Accordingly, we hold that restoring the status quo ante is an appropriate remedy for [the employer's] unlawful conduct").

Notably, there is nothing onerous about the approach of the Board and court in *Mimbres Memorial Hospital*, supra. To the contrary, where an employer has made unlawful unilateral changes, compliance with a restoration remedy is the standard prerequisite to termination of the

remedial obligations. As the Board explained *Pressroom Cleaners*, 361 NLRB No. 57, slip op. at 3 (2014), overruling *Planned Building Services*, 347 NLRB 670 (2006), and returning to the standard rule that places restoration as a prerequisite to mitigation in a unilateral change case:

> This approach is consistent with the Board's standard remedial scheme in 8(a)(5) unilateral change cases: rescission of the change, restoration of the status quo terms and conditions, and bargaining to agreement or impasse. *See, e.g.*, *Mi Pueblo Foods*, 360 NLRB No. 116, slip op. at 4 (2014). In such cases, the employer must maintain the status quo until it reaches agreement or a good-faith impasse in bargaining; the employer is not permitted to show in compliance that it would have agreed to different terms, or reached impasse earlier, if it had bargained lawfully in the first place."

The Respondent, citing (R. Br. at 13–16) *NLRB v. Cauthorne Trucking,* 691 F.2d 1023 (D. C. Cir. 1982), *Dependable Maintenance Co.*, 276 NLRB 27 (1985), and *Storer Communications*, 297 NLRB 296 (1989), contends that the Board and courts can and should limit orders in unilateral changes cases to continue only to such time when the parties reach a subsequent lawful impasse, even if the old terms and conditions have not been restored. However, in each of these cases, the employer timely argued the point as a basis on which the Board should forego an order requiring restoration of the status quo ante and make-whole relief. In each case the Board, or in the case of *Cauthorne*, the Court, addressed the argument and modified the order as appropriate. Here, by contrast, neither the Board nor the Court took that step and the Respondent never asked them to. At this point, the Board's order has been enforced, as is.

In the instant case, timely seeking to have the Board or court consider the alleged June 2013 impasse—just as it asked the Board and Court to consider the alleged February 2013 impasse—is the critical step that the Respondent skipped, and it makes all the difference in the world, especially when we are left with an enforced Board order on all fours with *Mimbres Memorial Hospital*, and not one word from the Board or the Court suggesting that the issue of the June 13 impasse may be interposed to dissolve the Board's order in a compliance hearing. *Rochester Gas & Electric Corp.*, 364 NLRB No. 6 (2016) (distinguishing case where court modified Board order from case where court enforced Board order—in the latter instance "[u]nder Section 10(e) of the Act, the Board has no jurisdiction to modify an Order that has been enforced by a court of appeals").

The same point can be made as to each of the cases Respondent cites (R. Br. at 16 fn. 10) where the Board, either in a specific case, or as precedent for a recurring type of case, has held in the unfair labor practice decision that it will be appropriate in compliance for the Board to consider anew a specific defense to the scope of the remedy ordered.[10] These examples avoid the Section 10(e) problem posed here because the matter was raised to the Board and addressed by the Board. Here, the matter was not raised to the Board, not addressed by the Board, and not raised to or addressed by the court enforcing the Board's order. It is done. See, *Alden Leeds, Inc.*, 357 NLRB 84, 84 fn. 3 (2011) (distinguishing *Greensburg CocaCola Bottling*

[10]Thus, in *Coronet Foods, Inc.*, 305 NLRB 79, 79 fn. 6 (1991), the Board, relying on *Lear Siegler*, 295 NLRB 857, 862 (1991), expressly stated that with regard to the order to restore an unlawfully disbanded or transferred department of the employer, "evidence concerning the appropriateness of the remedy could also be submitted at the compliance stage." Similarly, with regard to the remedy for illegally withheld requested information, the Board has "set out a clear procedural framework" that expressly authorizes the circumstances in which the respondent may raise in compliance a defense to providing the information. *The Boeing Co.*, 364 NLRB No. 24, slip op. at 5 (2016).

Co., 311 NLRB 1022, 1029 (1993), enf. denied on other grounds 40 F.3d 669 (3d Cir. 1994)—where issue of curing of illegal lockout was deferred to compliance—from *Alden Leeds* where there was no deferral of the issue). In agreement with the Board, the D.C. Circuit enforced the Board's decision in *Alden Leeds*, expressly rejecting the employer's argument that

> the scope of the Company's backpay liability should be reserved for the compliance stage of the Board's proceedings," because . . . [unlike [i]n *Greensburg Coca–Cola*, the ALJ explicitly deferred the backpay issue of whether the lockout was cured or retained its initial taint of illegality to a future compliance proceeding, 311 NLRB at 1028–29, and neither party filed an exception to that portion of the ALJ's decision. Thus, the jurisdictional bar of Section 10(e) was not at issue.

812 F.3d 159, 167 (2016).

I note that other arguments advanced in the Respondent's posthearing brief are not compelling. Thus, the Respondent goes to great lengths in its posthearing brief (R. Br. at 10–12) to argue that it was the Union's responsibility to file a charge or otherwise legally challenge the June 13, 2013 implementation, and failing to do so has "waived" its right to restoration of the November 2012 terms and conditions under the order. This is a red herring. There is no allegation much less a finding that the Respondent violated the Act when it implemented new terms and conditions on June 13, 2013. The only issue is the Respondent's claim that this implementation extinguished the force of the Board's January 2014 order directing it to restore the November 2012 terms and conditions.

Finally, the Respondent contends (R. Br. at 19) that through my ruling barring evidence of the June 2013 alleged impasse, I "took on the role of a litigant and improperly injected an entirely new dispute into the compliance proceeding." I do not agree.

The Respondent pleaded its impasse argument as an affirmative defense. I have both the duty and power to "regulate the course of the hearing" and "to request the parties at any time during the hearing to state their respective positions concerning any issue in the case or theory in support thereof." Sec. 102.35(6), (12) of the Board Rules and Regulations. I did just that. I am not required to hear evidence on a pleaded affirmative defense that my questioning of counsel and research of the issues lead me to conclude is invalid. In any event, when queried, union counsel endorsed the theory that the impasse defense was inappropriate in the absence of compliance with the Board's restoration order (Tr. at 63–64) and in his posttrial brief counsel for the General Counsel also advances the argument.

2. Backpay owed

At the hearing, and in light of the rulings discussed above, and subject to a stipulation agreed to by all parties (Jt. Exh. 1), the Respondent (Tr. 128) admitted the allegations of the amended compliance specification (as amended at the hearing, see GC Exh. 2).

Thus, I will issue a supplemental order, below, requiring the Respondent to satisfy its obligation to make employees whole, in accordance with the extant amended compliance specification and appendices (GC Exh. 2).

However, the supplemental order covers only the amounts owing through March 31, 2017. In accordance with the amended compliance specification (paragraph 2), the backpay period will

continue until the Respondent restores and honors the terms of the labor agreements that expired on October 26 and November 17, 2012, respectively, or until an employee's last day of employment, whichever comes first."

5 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

SUPPLEMENTAL ORDER

10

IT IS HEREBY ORDERED that the Respondent Mike-Sell's Potato Chip Co, Dayton, Ohio, its officers agents, successors, and assigns, shall:

Satisfy the obligation to make whole the following employees and former employees by paying
15 them the following amounts (which totals $ **$239,888.61**), plus interest accrued to the date of payment as prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB 6 (2010), minus tax and withholdings required by Federal and State laws, plus such additional backpay and interest as has accrued until such time as the Respondent restores, honors and continues the terms of the collective-bargaining agreements with the warehouse and
20 drivers units that expired on October 26 and November 17, 2012, and maintains such terms until the parties agree to a new contract or bargaining leads to a good-faith impasse:[12]

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[11]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.

[12]Three important additional points:

1. As referenced, this backpay order only sets forth figures for backpay accruing through March 31, 2017. The backpay continues to accrue.

2. By agreement of the parties in the stipulation (Joint Exhibit 1 at ¶3), in the event all appeals to my evidentiary rulings are unsuccessful, the "Commission" payments alleged in General Counsel Exh. 2 (Amended Appendix 1) will be paid at 50 percent; all other forms of pay (pension, stop-pay, and excess tax payments) will be paid as alleged in GC Exh. 2. In that case, the order should provide for 50 percent of the payments listed under "Commission." For affected employees this will affect the calculation of "Total Backpay" and "Total."

3. The stipulation provided for specified payment of a portion of the alleged pension-based backpay to employees by August 31, 2017, owed for the period 11/17/2012 through 6/15/2013, including specified interest through August 31, 2017, and an amount specified for excess taxes through August 31, 2017. See, Jt. Exh. 1 at ¶1. This amount to be paid on or before August 31, 2017, totaled $18,993.70, with amounts specified by employee. To the extent these payments were made to specified employees, they are, of course, to be deducted from the comparable payments owed to the same employees under this order.

Route Sales Drivers 11/17/2012 through 03/31/2017

Last Name	First Name	Commission	Pension	Sick Days	Total Back Pay	Excess Taxes	Total
Anderson	Stephen	$641.00	$1,266.40	$271.56	$2,178.96	$32.00	$2,210.96
Bartels	Michael	$0.00	$7,166.30	1,152.95	$8,319.25	$76.00	$8,395.25
Binder	Eric	$0.00	$7678.80	$377.37	$8,056.17	$72.00	$8,128.17
Brown	Brian	$150.00	$4,561.60	$1,121.37	$5,832.97	$71.00	$5,903.97
Bryant	William	$0.00	$4,182.70	$539.32	$4,722.02	$51.00	$4,773.02
Coleman	David	$574.00	$1,024.90	$452.03	$2,050.93	$37.00	$2,087.93
Debevec	Frank	$0.00	$7,670.60	$1,228.32	$8,898.92	$77.00	$8,975.92
Deeter	Dean	$0.00	$7,706.60	$1,385.87	$9,092.47	$79.00	$9,171.47
Evans	Tom	$0.00	$8,130.70	$1,223.26	$9,353.96	$84.00	$9,437.96
Faulstich	Bryan	$69.00	$7,328.60	$707.28	$8,104.88	$71.00	$8,175.88
Fortener	Ronald	$181.00	$553.50	$198.01	$932.51	$19.00	$951.51
Glaser	Gary	$838.00	$3,057.90	$676.90	$4,572.80	$67.00	$4,639.80
Haeufle	Robert	$0.00	$7,532.20	$1,218.69	$8,750.89	$79.00	$8,829.89
Kazda	Richard	$0.00	$6,045.40	$1,347.13	$7,392.53	$77.00	$7,469.53
Koogler	Thomas	$232.00	$658.90	$104.02	$994.92	$20.00	$1,014.92
Krupp	Lisa	$0.00	$4,782.30	$0.00	$4,782.30	$46.00	$4,828.30
Lacy	Paul	$0.00	$7,670.60	$1,233.63	$8,904.23	$77.00	$8,981.23
Lake	Jerry	$0.00	$7,082.50	$1,061.13	$8,143.63	$70.00	$8,213.63
Mattern	James	$0.00	$8,036.50	$1,448.52	$9,485.02	$125.00	$9,610.02
Middleton	David	$0.00	$4,749.90	$225.10	$4,975.00	$25.00	$5,000.00
Miller	Kris	$987.00	$1,963.70	$291.47	$3,242.17	$54.00	$3,296.17
Montgomery	James	$124.00	$526.50	$134.21	$784.71	$16.00	$800.71
Nelson	Gregory	$0.00	$7,754.90	$1185.67	$8,940.57	$78.00	$9,018.57
Osborne	James	$0.00	$6,129.70	$993.75	$7,123.45	$74.00	$7,197.45
Pollard	James	$0.00	$7,613.60	$1,007.70	$8,621.30	$77.00	$8,698.30
Schimer	Gerald	$0.00	$7,874.90	$1,371.55	$9,246.45	$81.00	$9,327.45
Shockley	Gregory	$3.00	$0.00	$0.00	$3.00	$0.00	$3.00
Snook	Randy	$0.00	$7,430.20	$920.73	$8,350.93	$73.00	$8,423.93
Vance	Richard	$0.00	$7,646.70	$1,136.53	$8,783.23	$101.00	$8,884.23
Woyat	Albert	$267.00	$707.70	$81.49	$1,056.19	$21.00	$1,077.19
Gardner	Richard	$0.00	$229.50	$0.00	$229.50	$5.00	$234.50
Garvin	Keith	$37.00	$256.50	$107.27	$400.77	$9.00	$409.77
Hines	Michael	$4.00	$378.00	$136.80	$518.80	$11.00	$529.80
Jollay	Steven	$2.00	$391.50	$83.88	$477.38	$10.00	$487.38
Mason	Larry	$45.00	$81.00	$165.98	$291.98	$6.00	$297.98
Miller	Jerry	$5.00	$378.00	$161.23	$544.23	$11.00	$555.23
Ohler	Gary	$5.00	$391.50	$143.29	$539.79	$11.00	$550.79
Reigelsperger	Todd	$5.00	$378.00	$128.36	$511.36	$11.00	$522.36
	Totals	**$4,169.00**	**$157,018.80**	**$24,022.37**	**$185,210.17**	**$1,904.00**	**$187,114.17**

Over the Road Drivers: 11/17/2012 to 03/31/2017

Last Name	First Name	Pension	Stop Pay	Total Back Pay	Excess Taxes	Total Owed
Boyer	John	$7,640.30	$3,600.00	$11,240.30	$114.00	$11,354.30
Graeter	Robert	$7,573.00	$5,120.00	$12,693.00	$344.00	$13,037.00
Marcum	Charles	$0.00	$140.00	$140.00	0.00	$140.00
Titus	Steve	$270.00	$260.00	$53.00	11.00	$541.00
	Totals	**$15,483.30**	**$9,120.00**	**$24,603.30**		**$25,072.30**

Warehouse Employees: 11/17/2012 to 03/31/2017

Last Name	First Name	Pension	Excess Tax	Total
Adam	Richard	$1,389.74	$4.00	$1,393.74
Bledsoe	Ronald	$904.10	$16.00	$920.10
Cropper	Rick	$2,073.90	$31.00	$2,104.90
Dressel	Edward	$2,500.00	$35.00	$2,535.00
Gates	Gary	$3,646.00	$42.00	$3,688.00
Henry	Ronald	$4,837.00	$40.00	$4,877.00
Jackson	Jelani	$4,298.60	$29.00	$4,327.60
Myers	Kody	$2,181.70	$8.00	$2,189.70
Wolfe	Gregory	$751.40	$14.00	$765.40
Womack	Terry	$110.40	$2.00	$112.40
Zaborowski	Alan	$4,742.30	$46.00	$4,788.30
			Totals	**$27,702.14**

Dated, Washington, D.C. October 6, 2017

David I. Goldman
U.S. Administrative Law Judge