

No. 20-1009
No. 20-1029

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

AMERICAN SECURITY PROGRAMS, INC.,
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

**REPLY BRIEF OF PETITIONER/CROSS-RESPONDENT
AMERICAN SECURITY PROGRAMS, INC.**

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GLOSSARY

“**Act**” refers to the National Labor Relations Act.

“**ALJ**” refers to Administrative Law Judge Michael A. Rosas.

“**Board**” or “**NLRB**” refers to the National Labor Relations Board.

“**Company**” or “**ASP**” refers to Petitioner/Cross Respondent American Security Programs, Inc.

“**Decision**” refers to the order of the National Labor Relations Board issued on December 16, 2019 in Case No. 5-CA-211315, officially reported at 368 NLRB No. 151 (2019), captioned *American Security Programs, Inc. and Union of Patriots Plaza*.

“**DOL**” refers to the U.S. Department of Labor.

“**FPS**” refers to the Federal Protective Service, which is an agency within the U.S. Department of Homeland Security.

“**Region 5**” refers to Region 5 of the National Labor Relations Board.

“**SCA**” refers to the McNamara – O’Hara Service Contract Act, 41 U.S.C. §§ 6701 *et seq.*

“**Union**” refers to Union of Patriots Plaza.

I. SUMMARY OF REPLY ARGUMENTS

The Board's Decision acknowledged that the present case does not include any "allegation that the Company's actions or inaction amounted to bad faith." (D. 15). The Board's Brief nonetheless largely accuses American Security Programs ("ASP") of engaging in actions or inactions that – while lawful – are characterized in the Board's Brief as being indications of bad faith.

The Board's Brief faults ASP for ignoring the Union's overtures to bring in a federal mediator, but the Board's Brief does not rebut the legal authorities cited by ASP holding that mediation is a permissive subject of bargaining that could be rejected or ignored as ASP saw fit. The Board's Brief faults ASP for suggesting to the Union that negotiations concerning wages could be handled through an e-mail exchange of bargaining proposals rather than face-to-face meetings, but the Board's Brief does not rebut the fact that the Union agreed to this e-mail approach and never opposed it. The Board's Brief characterizes e-mail exchanges as being a deceleration of the bargaining process, but there is no record evidence supporting that assertion.

It is important to remember that it is undisputed that ASP genuinely wanted to reach an agreement with the Union, and all of the steps that ASP took were designed to move the Parties towards an agreement within the confines of the very real federal contract deadlines set by the Federal Protective Service ("FPS"). The

Board's Decision faults ASP for not volunteering information to the Union about how those deadlines were set and how those deadlines were extended, but the Board's Brief does not rebut ASP's argument that ASP had no legal obligation to volunteer such information unless and until the Union exercised its bargaining right to request such information – which the Union never did.

Like the Board's Decision, the Board's Brief essentially is contending that ASP's use of lawful hard bargaining tactics to drive the Parties to an agreement was wrong in this instance because the Union was inexperienced at the bargaining process. However, existing law does not set up different standards for dealing with experienced and inexperienced negotiators. The bargaining unit employees chose to oust their prior, experienced union representative and instead bargain for themselves, and this unfortunately resulted in unrealistic wage demands ranging from 12% to 19% that ASP knew would not be accepted and reimbursed by FPS.

The bottom line here is that, at the time that ASP implemented its final offer on November 28, 2017¹, the Union had made it clear that it would not reduce its extreme wage demands unless ASP agreed to bring in a federal mediator to participate in negotiations. This created a legal impasse in the bargaining process, and ASP was permitted to try and break that impasse by implementing an offer that was consistent with what ASP had been repeatedly telling the Union during

¹ Hereafter, all dates are 2017 unless designated otherwise.

negotiations – namely, that the Parties failure to agree upon a collective bargaining agreement prior to December 1 meant that FPS would only reimburse ASP for wages at the Department of Labor’s applicable wage determination rates. In turn, ASP would only pay employees at those wage determination rates since ASP could not obtain higher reimbursement rates through a timely-executed collective bargaining agreement.

It is certainly true that, because of the six-month extension modification that ASP obtained from FPS on September 26, ASP could have chosen to temporarily keep paying wages at the higher rates of the otherwise expired union contract between December 2017 and March 2018. However, it is equally true that FPS’s modification did not place any contractual or legal obligation on ASP to pay the higher rates after December 1; and it is also true that, regardless of whether ASP and the Union reached a collective bargaining agreement between the dates of December 1 and March 2018, FPS would not reimburse ASP for the higher wage rates until the beginning of the next federal contract option year (December 1, 2018 to November 30, 2019).

ASP was not required contractually or legally to keep wage rates at the prior contract’s rates and then wait until March to see if the Union might change its insistence on federal mediation as a pre-condition for additional movement on wages. ASP also was not obligated to volunteer to the Union that ASP had

obtained the contractual option to continue higher wage payments. The Parties were at an impasse when ASP implemented its final offer on November 28, and ASP acted lawfully when it took steps to break that impasse. If the Union had responded to the change in status (i.e., the implementation of the final offer) by offering to reduce its wage demands, then the Parties could have re-opened discussions, which is one of the lawful mechanisms that the law recognizes for breaking bargaining impasses. However, the Union did not do so.

The Board's Brief does not identify substantial evidence supporting the Board's contention that ASP and the Union were not at an impasse in bargaining as of November 28. The record evidence is crystal clear that the Union would make no additional movement on wages unless ASP agreed to federal mediation, and ASP had no legal obligation to agree to mediation. In such circumstances, ASP acted lawfully by implementing its final offer, and the Court should decline to enforce the Board's Order.

II. REPLY ARGUMENTS

A. ASP Did Not Force the Union to Forego In-Person Bargaining, Nor Did the Exchange of Wage Proposals By E-Mail Decelerate Bargaining on Economic Issues

ASP believes that the Statement of Facts contained in ASP's Brief more accurately reflects the record evidence, so it will largely use this Reply Brief to address arguments from the Board's Brief rather than factual assertions. The only

exception to this approach is that ASP is compelled to point out an important mischaracterization of the evidence at page 7 of the Statement of Facts in the Board's Brief. The Board's Brief asserts that, after the conclusion of the Parties discussion of non-economic issues on September 1, "Phinney stated that the parties no longer needed to meet and could instead communicate by e-mail." This characterization is consistent with the Board's assertion that Phinney forced the Union's inexperienced negotiators to forego further face-to-face negotiation sessions. The record evidence, however, does not support this characterization of what happened. The Union's witness is the one who testified that:

Once we finished the noneconomics of the Union's model CBA, Mr. Phinney said, okay, well, this is the economic part. You guys don't have to come back down here now. We can just communicate by email.

(Tr. 44). Telling someone that the Parties "can" communicate by e-mail and that they "don't have to" travel to ASP's headquarters for the exchange of economic proposals is not the equivalent of a unilateral decision by Phinney that bargaining would no longer take place in person. The Parties had already voluntarily exchanged some non-economic proposals by e-mail rather than in person. (See ASP e-mails (JX 2-4) and the Union's e-mail on August 21 (JX-5). Phinney was making a suggestion as to how to proceed with proposal exchanges. Exchanging proposals by e-mail would be a faster and easier approach to making progress and is not – the Board's Brief (p. 17, 26-27) argues – a step that would "decelerate"

negotiations. There is no record evidence of the Union opposing Phinney's suggested approach at the September 1 session, nor did the Union assert that exchanging proposals by e-mail was not an acceptable method of continuing negotiations.

B. The Parties' Impasse On Wage Rates Was Sufficient to Create a Legal Impasse In Bargaining

When summarizing the law regarding the existence of an impasse in bargaining, the Board's Brief states that "impasse must be reached not as to one or more discrete contractual items, but on the agreement as a whole." (Bd.'s Br. 21). This is not an accurate statement of the law. The Board has consistently held that an impasse on one critical issue like wages can create a legal impasse in bargaining. *Serramonte Oldsmobile*, 318 NLRB 80, 96-97 (1995); *Calmat Co.*, 331 NLRB 1084, 1097 (2000); *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995); *Richmond Elec. Servs., Inc.*, 348 NLRB 1001 (2006) (deadlock on wages resulted in overall impasse.); *Clarke Mfg., Inc.*, 352 NLRB 141, 145 (2008).

C. ASP's Opening Brief Addresses and Analyzes the Taft Broadcasting Factors For Determining the Existence of a Genuine Impasse In Bargaining

In ASP's Opening Brief (p. 31-32), ASP cited several decisions by this Court regarding the framework for analyzing whether there has been an impasse in bargaining, and ASP noted that the framework stemmed from the Board's decision in *Taft Broadcasting Co.*, 163 NLRB 475 (1967), *affirmed sub nom. AFTRA v.*

NLRB, 395 F.2d 622 (D.C. Cir. 1968). The Board chose in its underlying Decision (D. 12-15) to structure its findings and arguments in a manner that expressly listed those *Taft* factors by name in its topic headings, and ASP's Opening Brief addresses the Board's findings and arguments regarding each listed impasse factor.

Nonetheless, because ASP did not structure its written argument to break down the factors in the same manner as the Board's Decision, the Board's Brief (p. 24) accuses ASP of failing to apply those factors and failing to analyze whether the Board properly applied the factors in its Decision. That is both unfair and untrue. ASP's Opening Brief addresses all relevant *Taft* factors and explains why the Board reached the wrong conclusion regarding the existence of an impasse in negotiations. ASP did not fail to cite this relevant precedent, nor did ASP fail to apply this relevant precedent.

D. The Bargaining History Between the Parties Does Not Provide Any Weight to the Issue of Whether the Parties Were At an Impasse In Their Negotiations as of November 28

As ASP pointed out in its Opening Brief, the bargaining unit employees at Patriots Plaza ousted their experienced union representative in favor of representing themselves. There was an expired collective bargaining agreement in place between ASP and those same bargaining unit employees, so the Parties were not starting their discussions from scratch. The fact that they resolved all non-economic issues in their first six bargaining sessions undercuts the Board's Brief's

argument (p. 24) that the Parties' lack of past direct negotiations somehow meant that the 2017 negotiations would be time-consuming. Indeed, the 19 combined bargaining meetings and e-mail exchanges between the Parties makes any speculation about protracted negotiations unsupported.

Bargaining history is more commonly considered a relevant impasse factor where there is a lengthy bargaining history that can be analyzed to determine how the parties had resolved past impasses in bargaining or otherwise bridged the gaps in their respective position. *E.g., CalMat Co.*, 331 NLRB 1084, 1099 (2000) (40 year bargaining history). Here, however, bargaining history adds no real value to the Board's impasse analysis.

E. ASP Did Not Decelerate Negotiations When the Parties Commenced Discussions About Economic Issues

The Board's Brief (p. 30-31) states that ASP "does not dispute" the Board's finding that e-mail exchanges of proposals "decelerated" the negotiations. At pages 40-42 of ASP's Opening Brief, ASP specifically challenged this finding as being both "factually and legally incorrect," and ASP identified facts and legal authorities supporting its challenge to the idea that its actions decelerated negotiations.

While the Board's Brief asserts that ASP decelerated negotiations after reaching agreement on non-economic items on September 1, the record evidence does not support that assertion. The Board found that the Parties held in-person

negotiation sessions regarding non-economic issues May 19, May 26, June 30, August 3, August 18 and September 1, as well as related e-mail exchanges (during that same time frame) about proposals on August 21 and August 31 (D. 8). There are gaps of multiple weeks and the entire month of July that were part of this pattern of bargaining dates on non-economic issues. The fact that it took a single week between September 1 and September 8 to prepare and send ASP's counteroffer to the Union on wages is hardly surprising in this context of past bargaining activity, and it is certainly not a deceleration of interest in trying to reach an agreement.

When the Union responded to ASP's counteroffer on September 11, ASP "responded the same day" with an increased offer (D. 9). When the Union replied the next day (September 12) with an offer that actually increased its wage demand (JX-10), ASP answered that same day with a more detailed explanation of its wage offer approach (*id.*). Even when the Union claimed the following day (September 13) that the Parties were at a "stalemate", ASP made another counteroffer on September 14 with increased wage rates in an effort to reach an agreement. It was the Union that then delayed until September 19 to reject the offer and declare an "impasse" for a second time, and it was ASP that made one final offer of increased wage rates in an effort to break that preliminary impasse (JX-16), which was

ignored by the Union (D.10). These facts do not support an assertion that ASP decelerated bargaining commencing September 1.

In apparent recognition of this lack of supporting record evidence, the Board's Brief (pp. 27-28) claims that the "deceleration" consisted of: (1) ignoring the Union's request for mediator participation in negotiations (ASP was legally permitted to do this); (2) exchanging proposals by e-mail with the Union (the record shows that e-mail actually sped along proposal exchanges in September); and (3) informing the Union about genuine existing deadlines that changed as events developed (in the absence of the Union exercising its bargaining right to ask for information about why the deadlines had changed, ASP had no duty to volunteer this information). ASP's lawful steps in this regard did not delay negotiations and cannot be described as a deceleration in bargaining.

F. ASP Did Not Make Any False Statements Regarding Federal Contract Deadlines, and ASP Had No Obligation to Inform the Union That ASP Had Been Able to Obtain the Option to Continue Paying Employees at the Prior Contract's Wage Rates Between December 1, 2017 and March 2018 Absent a Union Request For Such Information

As discussed more fully in ASP's Opening Brief (p. 45-50), there were two federal contract deadlines that were important to the Parties' negotiations, and ASP informed the Union about both deadlines during bargaining. The first deadline was September 30 when the then-existing federal contract was set to expire. The second deadline was December 1 when the new federal contract was set to begin.

ASP also accurately informed the Union that, since federal regulations required ASP to submit any collective bargaining agreement to FPS at least ten days before those September 30 and December 1 deadlines, the actual deadlines for submitting new collective bargaining agreements for approval were September 20 and November 20. Since it would take some time to get any agreement drafted and ratified in advance of these September 20 and November 20 deadlines, ASP informed the Union that ASP believed the Parties needed to set target dates of September 19 (for the September 30 deadline) and October 31 (for the November 20 deadline) in order to be certain that any new agreement could be timely drafted, reviewed, ratified and ultimately submitted to FPS in a timely fashion.

When the Parties were unable to agree upon a full three-year agreement by October 31, ASP proposed that the parties execute a simple one-year Memorandum of Understanding to keep the wages and benefits from the expired collective bargaining agreement in place for the first year of the December 1 new contract. ASP again informed the Union of the need to execute the Memorandum in time to submit it by November 20. These were all real deadlines that cannot fairly be characterized as “shifting” deadlines, and ASP’s efforts to reach an agreement by these respective dates is certainly not an effort to decelerate negotiations.

The only deadline-related information that ASP did not voluntarily provide to the Union was the fact that ASP was able on September 26 to obtain a six-month extension of the contract that was set to expire on September 30. The extension would allow ASP, if it wished, to pay wages from December 1 through March 2018 at the expired contract's higher rates rather than the lower wage determination rates that would otherwise go into place from December 1, 2017 to November 30, 2018 because the Parties did not reach a collective bargaining agreement in advance of December 1, 2017. ASP had no legal obligation to volunteer extension information to the Union absent a Union inquiry about the status of the expiring federal contract.

The authorities cited in the Board's Brief do not support the Board's effort to impose on ASP an obligation to volunteer such information. ASP's Opening Brief (p. 46) cited authorities establishing that an employer's duty to supply the bargaining representative with information does not arise until the union makes a request or a demand that the information be furnished. The Board's Brief does not address those authorities but instead deflects by citing cases for the general proposition that parties must be willing to "justify positions taken by reasoned discussion." *Blue Jeans Corp.*, 177 NLRB 198, 206 (1969), *enforced sub nom. Amalgamated Clothing Workers of Am. v. NLRB*, 432 F.2d 1341, 1343 (D.C. Cir. 1970).

The *Blue Jeans* case, however, did not hold that a party had an obligation to voluntarily disclose information about its bargaining positions absent a union request for information. In *Blue Jeans*, the employer's failure to "justify positions taken by reasoned discussions" consisted of failures by the employer to draft counterproposals and refusals by the employer to explain bargaining proposals when the Union questioned the basis for the proposal. The Board did not place an affirmative obligation on an employer to proactively anticipate union questions and volunteer information to the Union.

The same is true for the two other cases cited in the Board's Brief (p. 28). In *NLRB v. Hardesty Co.*, 308 F.3d 859, 866 (8th Cir. 2002), *enforcing Mid-Continent Concrete*, 336 NLRB 258, 260 (2001), the Board did not face a situation where an employer declined to voluntarily provide information to the Union. Indeed, the Board found that the employer engaged in an unfair labor practice by failing to respond to union information requests. In *Ingredion, Inc.*, 366 NLRB No. 74 (May 1, 2018), *enforced*, 930 F.3d 509 (D.C. Cir. 2019), the issues relied upon in the Board's Brief were whether an employer representative threatened to take away health and pension benefits through a perfunctory wave of his hand and whether the same employer representative threatened employees through statements he made about the employer's right to replace striking employees. The Board did not establish an affirmative obligation to volunteer information to the

union in the context of bargaining, and the Board in fact found that the employer could “address the subject of striker replacement without fully detailing the protections set forth” under existing Board law. *Id.* at *25-26.

The Board’s Brief (p. 29) similarly errs when it cites *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-153 (1956) for the general proposition that bargainers need to make “honest claims” during bargaining. *Truitt* is the landmark Supreme Court decision holding that, if an employer claims at the bargaining table that it cannot afford a wage increase, then the employer must comply with union information requests for financial information that will prove the accuracy of this claim. *Id.* at 153. ASP, of course, did not make any representations during bargaining about whether an extension had or had not been sought or granted, and the Union never sought any information on this topic even though the Union was aware that there was a gap in time between the date that the existing federal contract expired on September 30 and the date that the new federal contract commenced on December 1.²

² The Board’s Brief’s citation of *United Steelworkers of Am. v. NLRB*, 390 F. 2d 846, 850-852 (D.C. Cir. 1967) similarly misses the mark. The Court faulted the employer for rejecting a Union proposal for a dues check-off provision in the contract “as a matter of principle” and without a willingness to explain why the proposal was being rejected. The Court also faulted the employer for failing to provide certain information requested by the Union regarding employer bargaining positions. *United Steelworkers* did not involve a situation like ASP’s situation, where an employer is aware of information that has not been requested by a Union and the employer declines to volunteer the existence of such information.

The Board's Brief (p. 28-29) contends that ASP's communications to the Union on October 21, November 15 and November 17 were "patently false" because they contained statements saying that "the FPS would reduce reimbursement rates to the wage-determination minimums on December 1, 2017." This is a mischaracterization of the record evidence. The new contract that commenced December 1 did in fact set wage rates at wage determination rates for the period covering December 1, 2017 through November 30, 2018 because the Parties did not submit a collective bargaining agreement to FPS for approval by November 20, 2017. Each of the three communications cited by the Board's Brief was factually correct about the consequences of not executing a Memorandum of Understanding by November 20, and ASP had a legal right to point out this fact without simultaneously volunteering that ASP could, if it wanted to do so, provide wages at the rates of the preceding, expired federal contract for the first four months of the December 1 contract.

It is important to keep in mind that, at this point in time in October and November, ASP was trying everything that it was lawfully permitted to do to convince the Union to break the bargaining impasse that the Union had created when it declined to make additional wage offers absent ASP agreeing to third party mediation. Volunteering to the Union that the status quo of the existing impasse could potentially remain in place from December 1 to March 2018 was not

something that was going to help the Parties break their existing impasse. When ASP asked FPS for the six-month extension of the expiring contract, ASP's intent at that time was to "honor the economic terms [of the expiring contract] for the entire duration of the referenced option period", and ASP said precisely that to FPS (RX-6). However, this is not the same as saying that FPS's granting of the extension was conditioned on ASP keeping those expiring rates in place for the full period of the extension. The extension gave ASP leverage to continue negotiating with the Union while keeping the expiring rates in place, but the extension (RX-3) does not contain any provision mandating that ASP maintain the expiring rates during the December 1 to March 2018 time frame.

ASP's only legal obligation during the December 1 to March 2018 time frame was to pay the wage determination rates set forth in the December 1 contract. Given the impasse on wages that existed in late November, ASP was within its rights to try and break that impasse by implementing its last offer and foregoing the continued payment of the expiring federal contract's wage rates. Informing the Union about the extension was not legally required, and in these particular circumstances, volunteering information about the extension would in fact have decreased the chances of breaking the impasse in negotiations.

ASP's decision to not volunteer information about the six-month extension and ASP's decision to try to break the genuine impasse in bargaining by

implementing its last proposal both can fairly be described as “hard bargaining” because ASP’s actions include the full use of ASP’s negotiating power and informational knowledge to try and drive the Parties to reach an agreement, but hard bargaining is not only lawful; it is also sometimes necessary in order to reach an agreement. *See H. K. Porter Co. v. NLRB*, 397 U.S. 99, 107-08 (1970) (“It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties.”). *See also TruServ Corp. v. NLRB*, 254 F. 3d 1105, 1116 (D.C. Circ. 2001) (“The record evidence thus demonstrates that in the face of eight days of what were uniformly perceived as difficult negotiations, the Company engaged in the kind of good-faith, hard bargaining that characterizes impasse.”).

G. ASP Acted Lawfully When It Ignored the Union’s Demand For Mediation

The Board’s Brief (p. 31) concedes that a party’s request for the participation of a mediator is a permissive subject of bargaining that can be rejected by the other party. The Board’s Brief nonetheless argues that refusing the request by ignoring the request demonstrates a lack of the “sincerity and cooperation” that good faith bargaining demands. The cases cited by the Board’s Brief do not involve requests for mediation or any conduct similar to ASP’s situation.

In *NLRB v. W. Coast Casket Co.*, 469 F.2d 871, 875 (9th Cir. 1972), the court faulted the employer for cancelling scheduled bargaining sessions, refusing to return phone calls and delaying the submission of counterproposals for four months. In *NLRB v. Am. Nat. Ins. Co.*, 343 U.S. 395, 410 (1952), the Supreme Court found that it was not *per se* unlawful for an employer to bargain for a management rights clause in a contract, and the Court simply held that the facts of each case must be examined on their own merits. Neither case suggests that ignoring a request for bargaining on a particular permissive subject is an improper way to reject the request for bargaining on that permissive subject.

The Board's Brief (p. 32) also is wrong when it attempts to deflect the force of ASP's argument by claiming that ASP did not argue in the underlying Board proceedings that the Union conditioned further bargaining on mediation after the Union made its last wage proposal in September. ASP's Brief in Support of Exceptions (p. 24) expressly argued that "there was no willingness on the Union's part to continue negotiations on November 28, 2017 unless it was on their terms, and unless ASP agreed to their demands". ASP reiterated this point in its Reply Brief in Support of Exceptions: "There is no bargaining requirement that the parties submit to mediation." (p. 8).

H. The E-Mail Exchanges Between the Parties About Wages Are Part of the Bargaining Process For Purposes of Assessing the Length of Negotiations Between the Parties

One of the *Taft Broadcasting* factors that the Board uses for determining the existence of an impasse in bargaining is to assess “the length of the negotiations.” 163 NLRB at 478. Like the Board’s Decision, the Board’s Brief seeks to minimize the exchange of proposals between ASP and the Union by only counting the six in-person sessions between the Parties and not the additional 13 bargaining proposal communications during which proposals were exchanged. As already pointed out, this is an improper truncation of the record evidence since the Union agreed to use e-mails as the basis for proposal exchanges both before and after the negotiations shifted to a discussion of economics. The Board has never held that e-mail communications are to be ignored when assessing the “length of the negotiations,” and the Board is not likely to adopt such a view moving forward given the current restrictions on in-person negotiations imposed by the ongoing COVID-19 pandemic. Where, as here, the Parties have agreed to use e-mail as a method of

bargaining, e-mail exchanges need to be included in the “length of negotiations” assessment.³

I. ASP Has Never Contended That the Service Contract Act Prevented ASP From Voluntarily Paying Wage Rates Higher Than Wage Determination Rates, But ASP Is Contending That It Was Lawful For ASP to Decline to Agree to Wage Rates That Were Higher Than What FPS Would Reimburse to ASP

The Board’s Brief (p. 39) cites *Mgmt. Training Corp.*, 317 NLRB 1355 (1995), *Williams Servs., Inc.*, 302 NLRB 492, 502-03 (1991) and *Dynaelectron Corp.*, 286 NLRB 302, 302-05 (1987) for the proposition that ASP could have chosen to pay wage rates higher than what FPS would reimburse and that the Service Contract Act, 41 U.S.C. §§ 6701 *et seq.*, does not diminish an employer’s bargaining obligations under the National Labor Relations Act. This is a straw-man argument, however, since ASP’s Opening Brief did not contest either of these established principles.

Instead, ASP’s point was that, once the Union and ASP missed the November 20 deadline for seeking FPS approval of a collective bargaining

³ The Board’s Brief cites *Hendrickson Trucking Co.*, 365 NLRB No. 139, slip op. at 7, n.4 (Oct. 11, 2017), *enforced*, 770 F. App’x 1 (D.C. Cir. 2019) as support for the proposition that exchanges of proposals outside the confines of an in-person do not constitute bargaining sessions, but this is a strained and misleading application of the Board’s actual decision in *Hendrickson*. While footnote 4 of that decision chooses, for terminology purposes, to distinguish between in-person meetings and other proposal exchanges, the decision itself includes all communications – both at and away from the bargaining table – as being a relevant part of the assessment of

agreement, ASP had a legitimate business reason for implementing a final offer that was based on the wage determination rates that FPS would use for capping wage payment reimbursement under the new federal contract. As the Board found, ASP had negotiated multiple agreements under the Service Contract Act over the prior 10 years, and ASP never agreed to pay its employees at a higher wage and benefit rate than what FPS has agreed to as permissible reimbursement under the applicable Wage Determination or collectively bargained rates. (D. 7).

Once the November 30 deadline passed, any collective bargaining agreement that was subsequently negotiated would only apply to the next option year of the federal contract – i.e., December 1, 2018 to November 30, 2019. ASP had made this point repeatedly to the Union during the bargaining process. The offer that ASP implemented reflected this reality, and it was consistent with ASP's stated bargaining position.

Even if ASP had not implemented its final offer on November 28 in an effort to break the existing impasse on wage rates, and even if ASP had elected to continue wages at the prior federal contract's wage rates from December 1 to March 2018 despite the ongoing impasse on wages, a subsequently negotiated contract could not be submitted to FPS seeking reimbursement above wage determination rates for the December 1, 2017 to November 30, 2018 contract year.

whether a lawful impasses in negotiations existed, including telefaxed contract

Given the Union's unlawful insistence on mediation as a prerequisite for further negotiations on economics, ASP's best prospect for obtaining a collective bargaining agreement with the Union was for ASP to implement its final proposal with the wage determination rates (which is what ASP had told the Union would happen in the absence of reaching a collective bargaining agreement that FPS could approve for higher wage rates) rather than keeping the predecessor contract's higher wage rates in place during the ongoing impasse that would have stretched from December 1 to March 2018.

ASP does not dispute that this was an example of using economic muscle to move the Parties towards an agreement, but it was a lawful exercise of economic muscle because there was a genuine impasse on the topic of wages and no prospect at that time for additional concessions on wages from the Union. Indeed, the Board's Decision – aside from saying that the Union's unlawful insistence on mediation showed a potential willingness for movement on the topic of wages – does not and cannot point to any record evidence that the Union (absent mediation) intended to make any additional wage concessions. The Union's mindset is conclusively proven by its characterization of the wage issue as being at a “stalemate” and at “impasse”.

proposals.

J. ASP Did Not Stipulate That It Implemented all of the Terms of Its Final Offer

ASP's Opening Brief (p. 43-44) pointed out that the issue in this case is whether the extremely differing positions of the Parties on wages, coupled with the Union's unwillingness to make additional wage proposals in the absence of ASP agreeing to mediation, created an impasse that would allow ASP to implement its final proposal. The issue is not the mechanics of how ASP prepared its final proposal or how accurately that proposal captured the tentative agreements of the Parties on issues that were not the basis for the impasse in bargaining. While ASP's final proposal did not reflect the non-economic changes that the Parties had agreed upon in earlier negotiations, the Union never contended that the non-economic proposals were not implemented, and there is no evidence that the Union ever even noticed the oversight in contract language.

The Board's Brief (p. 51) seeks to fill that void by the use of semantics to support a claim that ASP stipulated that "*all*" (emphasis in original) of the terms set forth in the final offer were in fact implemented. The actual language in the Stipulation is:

On November 28, 2017, American Security Programs, Inc. implemented its last, best and final offer unilaterally. The terms of the last, best and final offer are contained in Joint Exhibit 21 (b), and went into effect on December 1, 2017.

(JX-23, p. 2). Stating that the terms are contained in the final offer document and that the final offer went into effect on December 1 is not the same as an affirmative stipulation that ASP did not implement the non-economic terms that the Parties agreed upon in earlier negotiations. The impasse between the Parties was over economics rather than non-economics, and the lawfulness of ASP's conduct turns in this case on the existence of an impasse on wages rather than the thoroughness of how the final proposal was drafted.

K. ASP Argued to the Board In the Underlying Proceeding That the Union's Mediation Demands Frustrated Agreement and That Economic Exigencies Compelled Prompt Action By ASP, and Those Arguments Are Not Jurisdictionally Barred on Appeal

Before the Board, ASP filed a Brief in Support of Exceptions that cited (p. 13-14) three Board precedent decisions in support of the proposition that there are three exceptions to the rule that there must be an overall impasse before an employer may implement its final offer. ASP listed those exceptions as “when the union engages in conduct calculated to frustrate agreement and frustrate impasse, when the employee can demonstrate that impasse on one critical issue precluded agreement, or if economic exigencies compel prompt action.” (*Id.*).

The Board's Brief (p. 54-55) therefore is wrong when it asserts that ASP did not raise this argument in the Board-level proceeding. The Board's Brief (p. 55) is also wrong when it asserts that ASP's briefing of the issue to the Board was “cursory or undeveloped”. In ASP's Brief in Support of Exceptions, ASP

contended that “ASP was not required to concede to the Union’s request to engage a mediator” (p. 18). ASP reiterated this point on page 24 of the Brief in Support of exceptions, emphasizing the Union’s insistence that bargaining take place on the Union terms/demands, as well as in ASP’s Reply Brief in Support of Exceptions (p. 8) emphasizing that there is no bargaining requirement to submit to mediation.

The Board’s Brief (p. 55) is forced to concede that ASP adequately briefed the issue of whether one critical issue (wages) precluded agreement, and that this argument is not jurisdictionally barred. However, the Board’s Brief asserts that ASP did not argue to the Board that economic exigencies compelled prompt action. In actuality, ASP argued to the Board in ASP’s Brief in Support of Exceptions (p. 25) that the failure by the Parties to reach a collective bargaining agreement by November 20 meant that the wage determination rates would be in place for the new federal contract and that the administrative law judge should have considered ASP’s risk of losing money (through lack of FPS reimbursement) if ASP implemented a final offer that exceeded the applicable wage determination rates. ASP reinforced this point in its Reply Brief in Support of Exceptions (p. 10), arguing that the Union’s continued demands for 12% to 20% wage increases that would not be reimbursed would make the federal contract “unprofitable and cause the business to decline.” Thus, there is no merit to the Board’s claim that such arguments are jurisdictionally barred.

III. CONCLUSION

For the foregoing reasons, the Court should grant the Company's petition for review and deny enforcement of the Board's Order.

Dated: November 9, 2020

Respectfully submitted,

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I hereby certify that on November 9, 2020 a copy of the foregoing Appellant's Reply Brief was served upon all counsel of record via the Court's CM/ECF Filing system:

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