

No. 20-1009  
No. 20-1029

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

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AMERICAN SECURITY PROGRAMS, INC.,  
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,  
Respondent/Cross-Petitioner.

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On Petition for Review and Cross-Application for Enforcement  
of an Order of the National Labor Relations Board

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

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## **CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES**

### **(A) Parties and Amici**

The following were parties, intervenors or amici who appeared before the National Labor Relations Board in Case No. 05-CA-211315: American Security Programs, Inc., Region 5 of the National Labor Relations Board, and the Union of Patriots Plaza.

The parties in this Court are: Petitioner/Cross-Respondent American Security Programs, Inc. and Respondent/Cross-Petitioner National Labor Relations Board.

### **(B) Rulings under Review**

The ruling at issue is the Decision and Order issued by the National Labor Relations Board on December 16, 2019 in Case No. 5-CA-211315. The Decision and Order is captioned *American Security Programs, Inc. and Union of Patriots Plaza*, and the Decision and Order are published at 368 NLRB No. 151. A true and correct copy of the Decision and Order was attached to the Petition for Review filed with this Court on January 15, 2020.

### **(C) Related Cases**

There are no related cases.

**(D) Corporate Disclosures**

Pursuant to Local Rule 26.1, Petitioner/Cross-Respondent American Security Programs, Inc. states that American Security Programs, Inc. is a wholly owned subsidiary of SecurAmerica, LLC, which is a privately held company.

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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. STATEMENT OF SUBJECT MATTER AND JURISDICTION

The Court has jurisdiction pursuant to Section 10(f) of the National Labor Relations Act (the “Act”), as amended, 29 U.S.C. § 160(f), which provides in relevant part: “Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia.” (*Id.*)

The National Labor Relations Board (the “Board”) issued a final Decision and Order in this matter on December 16, 2019. The Board’s Decision and Order is reported as *American Security Programs, Inc.*, 368 NLRB No. 151 (2019) (“Decision”). In accordance with Rule 15(a) of the Federal Rules of Appellate Procedure, Petitioner/Cross-Respondent American Security Programs, Inc. (“ASP” or the “Company”) petitioned this Court on January 15, 2020 for review of the Board’s Decision and Order.

## II. STATEMENT OF STATUTORY AUTHORITY

### **National Labor Relations Act, 29 U.S.C. §§ 151-169**

**Sec. 7. [29 U.S.C. § 157]** Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that

such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

**Sec. 8. [29 U.S.C. § 158] (a) [Unfair labor practices by employer]** It shall be an unfair labor practice for an employer – (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]; ... (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

**Sec. 8. [29 U.S.C. § 158] (d) [Obligation to bargain collectively]** For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession....

**Sec. 10 [29 U.S.C § 160] (f) [Review of final order of Board on petition to court]** Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

### **III. STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Whether substantial evidence in the record as a whole supports the Board's factual finding that Petitioner violated Section 8(a)(5) and (1) of the Act by unilaterally implementing changes in wages and benefits prior to reaching a valid impasse in its bargaining efforts with the Union.

2. Whether the Board failed in this case to follow its own precedent decisions permitting parties to declare an impasse in bargaining without first participating in mediation and permitting parties to conduct negotiation sessions through electronic mail exchanges as a supplement to face-to-face negotiation sessions.

3. Whether the National Labor Relations Board has improperly changed an applicable legal standard *sub silentio* and without reasonable notice by requiring Petitioner to negotiate with inexperienced union representatives in a different manner than Petitioner would be permitted to negotiate with experienced union negotiators.

### **IV. STATEMENT OF FACTS**

#### **A. Procedural History**

On May 31, 2018, the Board issued a Complaint asserting, in relevant part, that American Security Programs, Inc. ("ASP") violated Section 8(a)(5) and (1) of the Act by unilaterally implemented the terms of its last contract proposal without first reaching a good-faith impasse during its bargaining sessions with Union of

Patriots Plaza (“Union”). (JA205). ASP filed an Answer denying that it had engaged in any violation of the Act and instead asserting that it had implemented its last contract offer after reaching a valid impasse in negotiations. (JA213).

Administrative Law Judge Michael Rosas (“ALJ”) heard the case and issued a decision on November 14, 2018 finding that ASP violated Section 8(a)(5) and (1) of the Act by unilaterally implementing its final offer in the absence of a valid impasse. (JA7-17). The ALJ further found *sua sponte* that ASP violated Section 8(a)(5) and (1) by failing and refusing to meet and bargain with the Union after it unilaterally implemented its final offer.

The Company filed exceptions to the Board challenging each of the ALJ’s findings and his recommended order. The Board adopted the ALJ’s finding that ASP unilaterally implemented its final offer in the absence of a valid impasse (JA1-6). The Board rejected the ALJ’s *sua sponte* finding that ASP failed and refused to engage in post-implementation bargaining with the Union since that allegation had not been contained in the Complaint and since the ALJ did not address the merits of this additional finding in his Recommended Decision. The Board also modified the ALJ’s recommended order by rejecting the issuance of an affirmative bargaining order and instead substituting a limited bargaining order containing the Board’s standard remedial language.

In accordance with Rule 15(a) of the Federal Rules of Appellate Procedure, ASP filed a timely petition for review of the Board's Decision and Order with the Court. The Board thereafter filed a cross-application for enforcement.

**B. The Framework for Wage and Benefit Payments Under the Service Contract Act**

ASP is a federal contractor providing security services to the federal government at various locations throughout the Washington, D.C. metropolitan area. (JA7). ASP enters into contracts with the Federal Protective Service<sup>1</sup> ("FPS") to provide security officers to protect federal buildings. (*Id.*) ASP wins such federal contracts through an open bidding process against other federal contractors who provide security services. (*Id.*) Contractors like ASP respond to FPS contract solicitations by submitting proposals with details about how the contractor will operate the site, as well as identifying the wages and benefits that it will be paying to its employees at the site. (JA7; JA123-24).

The portion of the contract bid that deals with wages and benefits must comply with the McNamara – O'Hara Service Contract Act, 41 U.S.C. §§ 6701 *et seq.* ("SCA"). The SCA assures that federal contractors provide wages and fringe benefits for contract employees that are at least equal to the level of wages and fringe benefits that the Department of Labor ("DOL") has determined (through

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<sup>1</sup> FPS is an agency within the Department of Homeland Security.

published Wage Determination Orders) to be the prevailing rates in the locality where security services will be performed. (*Id.*)

There is one circumstance in which FPS will approve reimbursement of a contractor for wage and benefit rates that are higher than the applicable Wage Determination. That circumstance is when the employees at the contractor's site are represented by a union and there is a collective bargaining agreement in place that provides higher wage and benefit rates. (*Id.*) These collectively bargained rates become a substitute for the DOL's Wage Determination rates.

FPS is not required to approve the higher collectively bargained rates, and FPS will not tell a contractor in advance whether a particular wage amount will be approved. (*Id.*; JA125, 143, 155-57). So, if a contractor agrees to pay wage and benefits rates that subsequently are not approved by FPS, the contractor will be reimbursed by FPS only at Wage Determination rates, while the contractor remains contractually obligated to compensate its employees at the higher collective bargaining agreement rates. (JA157, 166). If this happens, then the unreimbursed wage and benefit payments correspondingly reduce or eliminate the contractor's profit margin on the federal contract. (*Id.*) Not surprisingly, for at least the ten-year period preceding the dispute in this case, ASP has 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. (JA7).

**C. The Negotiation History at the Patriots Plaza Sites Prior to 2017**

On October 1, 2011, ASP was awarded a standard one-year contract by FPS to provide security services at four federal buildings located at 355 E Street, 375 E Street, 395 E Street and 500 E Street. (*Id.*; JA179-81). The contract included four additional option years that stretched the potential length of the contract to five years. (JA7). FPS and ASP decided each year to exercise the available options; so, the federal contract was in place until it expired on September 30, 2016. (*Id.*) ASP entered into collective bargaining agreements with unions at each of the four building locations. (JA179-81). For this proceeding, the two relevant locations are 375 E Street and 395 E Street in a building complex known as Patriots Plaza. (JA7). ASP's first collective bargaining agreement covering the relevant Patriots Plaza security officers was entered into with the National Association of Special Police and Security Officers ("NASPSO"), and that agreement not coincidentally expired on September 30, 2016 when the federal contract expired. (*Id.*)

The Patriots Plaza security officers, however, became disenchanted and dissatisfied with NASPSO's representation, and they believed that they could represent themselves in any future negotiations. (JA46-47). The officers petitioned the Board to hold a representation election; and, at that election, the officers

formed their own union called the Union of Patriots Plaza (the “Union”). (*Id.*) The employees elected their fellow officers to hold positions as Vice-President, Recording Secretary and Shop Steward even though these leaders had no prior experience as union officers and no prior experience handling collective bargaining negotiations. (*Id.*)

At the Company’s request, FPS extended the expiring federal contract an additional year, setting a new expiration date of September 30, 2017. (*Id.*) Thereafter, FPS asked contractors to bid for a new federal contract for protection of these same buildings, and that contract was scheduled to commence on December 1, 2017. (JA126-27). On August 31, 2017<sup>2</sup>, ASP won the bid for this December 1 new contract. Since there was no collective bargaining agreement yet in place when the Patriots Plaza bidding process took place, wage and benefit reimbursement by FPS would be based on the published Wage Determination prevailing rates starting December 1, unless ASP and the Union were able to agree on a collective bargaining agreement with higher rates prior to December 1. (JA7-8).

In addition to the December 1 start date, there were other important FPS deadlines associated with bargaining in 2017. While the new contract would start December 1, the existing contract was still set to expire September 30. Starting

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<sup>2</sup> All dates hereinafter refer to 2017 unless otherwise indicated.

October 1, there would be no federal contract in place with collectively bargained rates, and FPS would therefore stop reimbursing ASP at any rate higher than the Wage Determination rates. (JA7-8). In order for ASP to be able to pay above the Wage Determination rates starting October 1, ASP and the Union needed to negotiate a collective bargaining agreement into place before September 30, which was the expiration date of the existing federal contract.

Moreover, as the Board found, applicable federal regulations required ASP to submit that collective bargaining agreement to FPS at least 10 days before the expiration of the September 30 contract. (JA10). So, the straight-forward way to ensure that employees received wage and benefit payments above the Wage Determination prevailing rates was to complete negotiations and complete contract execution in time for ASP to submit the agreement to FPS for approval on September 20. Of course, failure to negotiate an agreement by September 20 also would mean that there would be no collectively bargained rates as of December 1, and Wage Determination rates would be paid from December 1 forward as well. (*Id.*)

**D. Negotiations Between ASP and the Union at Patriots Plaza in 2017**

ASP and the Union (“the Parties”) commenced their formal collective bargaining sessions on May 19, 2017. (JA8). Mark Phinney, Vice President of Government Operations, negotiated on behalf of ASP, and employees Rondell

Cropper and David Harris negotiated on behalf of the Union. (JA130). As the Board found, it is undisputed that Phinney told Cropper prior to their first bargaining session that he believed September 19 was a good target date to have an agreement in place since unit employees were facing the risk that wages would revert to the lower “wage determination” rates beginning October 1 after ASP’s federal contract with FPS expired on September 30. (JA8).

ASP had a strong incentive to successfully reach an agreement with the Union because, “when contracts go to wage determination, it makes it very hard for us to staff it. The morale of the officers go down.” (JA143). The record contains no evidence suggesting that ASP did not want to reach an agreement with the Union, and as the Board stated in its Decision, “(t)here is no allegation that the Company’s actions or inaction amounted to bad faith.” (JA15). Instead, the Board simply concluded that ASP implemented its final offer before the Parties had reached an actual impasse in negotiations.

On May 19, 2017, the Parties met in person and exchanged initial proposals. (JA8). The Union “refused to review the Company’s proposed model” of a contract template, so ASP agreed to work from the Union’s proposed template. (*Id.*) The Parties met again on May 26 to discuss language in the CBA and wages, and ASP agreed to drop a proposal it had made regarding temporary employees. (*Id.*) The Parties next met on June 30, 2017 to discuss additional non-economic proposals.

(*Id.*) After the June 30, 2017 meeting, the parties continued to negotiate potential contract language, and ASP e-mailed to the Union messages containing proposed verbiage for various provision. (JA132-33; JA364-67).

The Parties took a break in July but then met for additional in-person meetings on both August 3 and August 18 to negotiate on a wide range of non-economic topics. (JA8). On August 21, Union negotiator Harris e-mailed to Phinney a collective bargaining agreement that a different federal contractor (Paragon Systems, Inc.) had negotiated with NASPSO in 2014 at a nearby FEMA building. (*Id.*) Harris asserted in his e-mail message that his “sources” were telling him that Paragon was willing to pay a \$33.00 an hour base rate as well as \$7.00 per hour health and welfare costs and another \$1.59 per hour in pension payment. (JA368). Harris concluded his e-mail message by arguing that this Paragon contract should be viewed as “the market rate” for security officer services and he asked ASP to incorporate that information into ASP’s next offer. (*Id.*)

On August 31, in preparation for a bargaining session set for the next day, Phinney sent an e-mail to the Union advising it that FPS had communicated with ASP and that, since ASP and the Union had no current collective bargaining agreement in place, FPS’s solicitation for bids in connection with the new December 1 federal contract had identified the 375 E Street and 395 E Street sites as being sites where the DOL’s Wage Determination Order were currently being

used to establish each sites wage and benefit levels. (JA408). He attached the FPS contract solicitation document to confirm this point. Phinney emphasized that ASP believed the Parties needed either two separate collective bargaining agreements for 375 E Street and 395 E Street or a single agreement that contained different wage and benefit scales since the two work sites had significantly different wage scales in place under the NASPSO expired agreement. (*Id.*)

When the Parties met the next day, September 1, they were successfully able to conclude all negotiations regarding the non-economic subjects of the agreement. (JA9). According to Union witness Rondell Cropper, all that remained were the differences in their positions regarding wages, health and welfare benefits and pension. (JA67). Mark Phinney then stated his belief that the Parties could handle the negotiation of the economic items by e-mail rather than requiring the security officers to travel from the District of Columbia to the Company's corporate office in Herndon, Virginia for every negotiation session. (JA7-9). The only evidence in the record regarding this decision to conduct the remaining negotiations by e-mail was as follows from Union President Cropper:

Q. Did the parties continue to bargain after September 1st?

A. Yes, sir.

Q. How did they continue to bargain?

A. We actually continued bargaining by email.

Q. Okay. And how did it come about that the parties switched from bargaining in person to bargaining over email?

A. 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.

(JA67). 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.

On September 8, Phinney commenced the e-mail exchanges on economics by responding to the Union's initial economic demands. (JA413). Phinney first set forth the Union's existing wage demands, which sought the following hourly wage rate increases for the 375 building and the 395 building:

<u>395 Security Officer Wages</u>		<u>375 Security Officer Wages</u>	
Current	\$25.34		\$21.48
10/1/17	\$28.52 (13% increase)		\$25.65 (19% increase)
10/1/18	\$31.69 (11% increase)		\$29.82 (16% increase)
10/1/19	\$34.01 (7% increase)		\$34.01 (14% increase)

This Union proposal sought a 34% wage increase over three years for security officers working in building 395, and a 58% wage increase over three years for security officers working in building 375. The Union also sought increases in hourly health and welfare contributions and pension contributions. Phinney then

set forth ASP's counteroffer, which included increases at both buildings but larger wage increases for workers at the 375 building since the 375 building was at a significantly lower wage rates than the 395 building in 2017:

<u>395 Security Officer Wages</u>		<u>375 Security Officer Wages</u>
Current	\$25.34	\$21.48
10/1/17	\$25.85 (2% increase)	\$22.75 (6% increase)
10/1/18	\$26.40 (2% increase)	\$23.90 (5% increase)
10/1/19	\$26.95 (2% increase)	\$25.10 (5% increase)

ASP's proposal also included proposed corresponding reductions in pension and health and welfare contributions over the three-year period.

On September 11, the Union made its counteroffer by e-mail, but the counteroffer consisted of only a \$0.10 per hour reduction from its first proposal. (JA415). The e-mail included a sentence saying, "if we need to get a mediator involved to resolve these wage issues please let us know asap."

That same day, September 11, Phinney sent the Union a new offer that raised hourly wage rates for the lower paid 375 employees by another \$0.25 per hour in 2017 (7% yearly increase), \$0.50 in 2018 (7% yearly increase) and \$1.25 in 2019 (7% yearly increase) (JA417). Phinney did not respond to the Union's query about whether he thought a mediator was appropriate for bargaining assistance. He

testified that he had never used mediation in any prior union negotiations on behalf of ASP, and he was not familiar with the mediation process. (JA149).

The next day, September 12, the Union sent Mark Phinney a new counteroffer by e-mail, but the new offer was actually higher than the offers that the Union had previously made during earlier negotiations. (JA419). The Union raised its 2017 proposed wage rate for 395 employees from \$28.52 to \$28.89. It raised its 2017 proposed wage rate for 375 employees from \$25.65 to \$25.85. The Union sought to justify its regressive proposal by explaining that it had now done a comparison of ASP's wages at 395 and 375 versus the wages of other federal building locations where FPS had federal contracts with competitors of ASP, and the Union believed that its comparison justified an even higher wage increase. (*Id.*) The Union's e-mail characterized the difference between ASP's wage proposal and the Union's wage proposal as "these minor wage issues", and the Union stated: "The Union of Patriots Plaza isn't obliged to the idea of seeking the help of a federal mediator from The Department of Labor to resolve all wage disagreements." (*Id.*)

Phinney replied to the Union by e-mail later that afternoon with an explanation of what ASP was trying to accomplish, and he included a reference to the Consumer Price Index at that time:

I want to be clear I stated I would compensate you for this year and the CPI was 1.5%. I am looking to compensate you for the years

going forward and trying to bring 375 up as fast as I can, but I am not going to look back at the last four years. We go forward.

I do appreciate all of your information, and I will look at it.

(JA422).

The Union replied to this message on September 13 and asserted that “we have come to a **stalemate** as far as wages are concerned” because “you do not want to meet us halfway.” (JA423 (emphasis added)). The Union asked Phinney, “do you need The Union of Patriots Plaza to contact a federal mediator provided through The Department of Labor to step in and help us resolve this minor issue we are having with you concerning wages?”

Phinney testified that he understood the term “stalemate” to mean that the Union was not going to propose “any other offers or proceed with negotiations as far as wages.” (JA138). By this point, Phinney was of the belief that “we were so far apart, I didn’t think mediation would help at all.” (JA149). Moreover, the Parties were fast approaching the federal contract expiration date of October 1, as well as Phinney’s suggested target date of September 19. The Board’s Decision does not dispute that September 19 was a reasonable target date since ASP would be required to submit any executed collective bargaining agreement to FPS ten days before the expiration of the contract as required by applicable federal regulations. (JA10).

In an attempt to reach an agreement and break the “stalemate”, ASP submitted another wage proposal to the Union on September 14, 2017. (JA139; JA424). ASP proposed that the officers at 395 earn \$25.95 (2.4% increase) beginning October 1, 2017, \$26.60 beginning October 1, 2018 (2.5% increase) and \$27.25 beginning October 1, 2019 (2.4% increase). (JA424). With respect to the officers at 375, ASP proposed that they would earn \$23.20 (8% increase) beginning October 1, 2017, \$25.05 (8% increase) beginning October 1, 2018, and \$27.05 (7.4% increase) beginning October 1, 2019. ASP did not change any other aspects of its past offer. Phinney characterized this as ASP’s “best and final offer”, and asked the Union to let him know if the offer was acceptable. (*Id.*)

The Union did not immediately respond, so Phinney sent the Union a reminder on September 16 about the upcoming September 19 deadline. (JA10; JA426). Then, on September 19, the Union sent Phinney an e-mail asserting that it had “submitted our best offer . . . and you chose to disregard it.” (JA427). The Union complained that ASP was failing to meet the Union “halfway with wages.” (*Id.*) The Union’s message concluded: “So I guess at this moment we are at an **impasse**. Thank you for your time and have a nice day.” (*Id.* (emphasis added)).

Phinney made one final attempt that same afternoon to reach agreement. He sent an e-mail message to the Union offering to increase the wage rates at building 395 by another \$0.15 in 2017 plus an agreement to “renegotiate the Wages, H&W

and Pension” at the end of one year. (JA428). The Union declined to respond (JA10).

**E. Negotiation Efforts After the October 1 Federal Contract Expiration Date**

As ASP became convinced that there would be no timely collective bargaining agreement and that, as a result, the security officers would drop to Wage Determination rates on October 1, with a correspondingly poor drop in morale. (JA143). ASP explored with FPS the possibility of extending the September 30 federal contract expiration date by six month to March 31, 2018. (JA10).

FPS had contacted ASP on September 20 to ask for clarification regarding the wage and benefit status of the four buildings that were covered by the federal contract that was expiring October 1. (*Id.*) In response, ASP explained on September 26 that it had succeeded in executing memorandums of understanding with the unions that represented security officers at 500 E Street and 355 E Street but that ASP had been unable to reach similar agreements with the Union for 375 E Street and 395 E Street. (JA360). In order to bridge the gap between the end of the current contract and the new contract that would take its place and begin December 1, FPS issued a six-month extension of the federal contract (JA345) during which ASP would be permitted to honor the wage and benefit levels set in the 2014-2016 NASPSO contract during the extension period. (JA142-43). Specifically,

FPS issued this modification on September 26 extending the original federal contract to March 1, 2018. (JA11).

While this extension of ASP's federal contract meant that ASP could avoid dropping the Union-represented employees to Wage Determination rates effective October 1, the extension did not change FPS's separate December 1 deadline – the date when the new contract would begin – by which time ASP and the Union needed to have a collective bargaining agreement in place in order to pay above Wage Determination rates during the new contract period of December 1, 2017 to November 30, 2018.

If ASP and the Union wanted the security officers to be paid at collectively bargained rates for that new contract year rather than the lower SCA Wage Determination rates, then ASP needed to send an executed collective bargaining agreement to FPS no later than November 19, 2017. (JA187). While the Union had a legal right to send ASP an information request asking for information about contract expiration dates and extensions, it never did so, and Mark Phinney elected not to volunteer this information. (JA11-12).

Instead, Phinney tried a different tack. The extension agreement allowed ASP to keep existing wage rates in place between October 1 and December 1. Having heard nothing from the Union since the September 19 exchange between the Parties, Phinney sent an e-mail to the Union on October 21 stating his desire to

have a collective bargaining agreement in place by October 31 in order to prevent wages from dropping to Wage Determination rates effective December 1 when the new federal contract began. (JA429). He asked the Union to contact him if their representatives would like to proceed further.

In response, the Union sent an e-mail message to Phinney on October 21 stating that they would “love” to have an agreement in place by October 31. (JA430). However, the Union reiterated their demand that 375 and 395 have the same wage rates, and the Union’s negotiator then stated that the wage rates for both locations should be \$32.00 an hour – again higher than the Union’s earlier wage proposals. (*Id.*)

Meanwhile, on November 1, FPS pressed ASP further as to whether ASP “anticipate[d] any further CBA<sup>3</sup> amendments for the remaining [E Street sites] for this contract.” (JA11). ASP responded by explaining that the Union was still demanding a single agreement covering both locations at a \$32.00 wage rate and an additional \$6.00 an hour health and welfare payment. (JA362, JA11). Since collectively bargained rates had to be sent to FPS at least 10 days before the December 1 contract expiration date, ASP noted that “we have until November 20th technically to submit new CBAs or amendments for incorporation into the contract,” but ASP also noted that it was not expecting that to happen. (*Id.*)

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<sup>3</sup> “CBA” is short for Collective Bargaining Agreement.

Phinney made one more attempt get some collectively bargained document completed and submitted to FPS prior to November 20. On November 15, he wrote to the Union that, since the Parties were “too far apart from an agreement on wages to establish a CBA . . . we would offer that [the Parties] establish a Memorandum of Understanding and send this forward to FPS which will hold the wages where they are at this time as we continue to work on resolving the wage issue. \*\*\* If approved by FPS, the Memorandum of Understanding’s pay rates will go into effect on 12.1.2017, if FPS does not approve the Memorandum of Understanding, we will pay the wage determination pay rates mentioned above.” (JA431). Phinney attached a two-page proposed Memorandum of Understanding, which solely addressed wage and benefit matters and not non-economic matters. (*Id.*) The Union ignored ASP’s proposal and did not respond. (JA11-12).

At that point, Phinney knew the Union was unwilling to execute a limited Memorandum of Understanding regarding wages and benefits. He also knew that the Union was unwilling to make any additional concessions on wages unless ASP agreed to mediation (which ASP did not want to do). At the same time, the Union knew unambiguously from ASP’s many prior statements during bargaining that, absent a new collective bargaining agreement, ASP would be paying the applicable Wage Determination rates for the Patriots Plaza sites commencing December 1.

So, Phinney decided to exercise ASP's legal right to use economic pressure to try and break the impasse that existed regarding wages.

On November 17, Phinney sent the Union a final offer that used the Wage Determination rates as the basis for wages and benefits. (JA434). The term of the proposed agreement was from December 1, 2017 to November 30, 2018, so as to overlap the next contract year during which the Wage Determination rates would be in place. In preparing the document, Phinney overlooked the inclusion of some of the non-economic items that the Parties had agreed to during earlier bargaining, such as the use of temporary employees, gear-up/gear down time, holidays, employee classifications and training/requalification provisions. (JA104-07).

There is no record evidence of the Union bringing this oversight to the attention of Phinney or anyone else at ASP. There is also no record evidence of ASP failing to adhere to the overlooked provisions that should have been part of the final proposal. In fact, when the Union ultimately learned on November 28 that ASP was implementing the terms of this final offer, the Union did not complain about ASP's failure to incorporate the overlooked non-economic provisions into the agreement. Instead, the Union protested only the change in wages. (JA483). Similarly, at the hearing, when the Union's representative testified about the overlooked non-economic provisions, he carefully testified only that ASP's proposed language "does" not match his understanding of what had been

previously agreed to in the first stage of negotiations. (JA104-06), and not that he noticed the absence of those provisions when he reviewed the document in November 2017.

In any event, Phinney emphasized that ASP's final offer needed to be accepted in order to avoid automatic implementation on December 1 of the SCA Wage Determination rates that were \$20.57 for wages and \$4.27 for health and welfare benefits. (JA434). In the absence of this interim agreement, ASP would not be reimbursed by FPS for any wages or benefits exceeding the \$20.57 and \$4.27 figures set forth above. That in turn meant that, given the impasse between the Parties, ASP planned to drop compensation to those rates commencing December 1. Phinney then called Union President Cropper to confirm Cropper's receipt of the proposal, but Cropper rejected the proposal. (JA12).

On November 20, Phinney re-sent the November 17 proposal with the substituted Wage Determination rates and characterized the document as ASP's last, best and final offer, but the Union ignored his message. (JA12). Then, as the required final step, Phinney e-mailed the Union on November 28 to advise the Union that, since the wage and benefit rates that FPS would pay were dropping back down to the Wage Determination rates, ASP was implementing its best last and final offer with the Wage Determination rates in place for wages and benefits. (JA12; JA349).

## V. SUMMARY OF ARGUMENT

ASP did not violate Section 8(a)(5) of the National Labor Relations Act when it implemented changes in wages and benefits on November 28, 2017. At that point in time, the only unresolved topic of bargaining was wage and benefit levels, and the Parties were hopelessly at odds in their respective proposals. The Parties had reached an impasse on that remaining issue, and ASP knew that its federal contract (which started December 1) would reimburse ASP for wages and benefits based on Department of Labor Wage Determination rates rather than collectively bargained rates since the Parties had failed to submit a collective bargaining agreement to FPS prior to the November 20 due date.

While ASP had been able to obtain approval from FPS (through March 2018) to continue paying its Patriots Plaza security officers at the wage and benefit rates contained in the long-expired 2016 collective bargaining agreement, ASP had no obligation to wait until March to declare an impasse and implement changes in wages and benefits if an impasse in negotiations existed. Regardless of whether the November impasse had extended to March 31 or whether ASP's declaration of impasse in November spurred the Union to make some genuine and serious wage proposals prior to March 31, the failure to reach an agreement with the Union by November 20 meant that wages for the new 2018 federal contract would be paid at Wage Determination rates commencing March 31 at the latest. If ASP and the

Union subsequently were able to reach an agreement between December 1, 2017 and March 31, 2018, then that new agreement could be submitted to FPS for approval and inclusion as the rates in the next contract option year (December 1, 2018 to November 30, 2019), but it would not affect the Wage Determination rates that would be reimbursed by FPS in the 2017-2018 contract year. Here, where an impasse in bargaining existed on November 28, ASP was free to declare an impasse and implement Wage Determination rates without waiting until March 31.

Under Board and Court precedent, an impasse exists when there is no realistic possibility that continuation of discussions would be fruitful and the prospects of reaching an agreement have been exhausted. This is particularly true where there is a demonstrable impasse on a critical subject of negotiation and when an employer is facing economic exigencies that compel prompt action – such as the November 20 deadline for submitting an agreement to FPS for approval.

Here, the record evidence indisputably shows that ASP very much wanted to reach a collective bargaining agreement with the Union, and as the Board found, ASP acted in good faith during negotiations in its attempt to reach an agreement. It made a series of wage proposals to increase wages by 2.5% to 8% in the 2017-2018 year. By contrast, the Union made unrealistic wage proposals for 2017-2018 seeking increases ranging from 12% to 19%. Then, instead of seeking to bridge the distance between ASP's proposal and the Union, the Union subsequently raised its

wage demands to increasingly higher levels on both September 12 and October 23. The Union also stated an unwillingness to make any more wage movement unless ASP agreed to bring in an outside mediator to be part of negotiations. ASP had no desire to do this and no legal obligation to do this, and as a result, the Union's insistence on mediation as a prerequisite for more wage movement brought negotiations on wages to a halt.

The Board's Decision sweeps aside this dispositive evidence with virtually no comment, and the Board instead demonizes ASP for engaging in lawful, hard bargaining tactics that the Board deems to be "unfair" in this case's factual context because ASP was an experienced negotiator and the Union had no representative with bargaining experience. For example, the Board faults ASP for not agreeing to mediation, which ASP had no obligation to do. The Board finds that ASP refused to hold face-to-face meetings once the Parties had reduced their negotiation subjects to wages and benefits; but the record evidence shows that the only thing ASP did was to suggest that economic proposals be exchanged electronically so that the Union's representatives would not have to travel to Herndon, Virginia every time a proposal exchange needed to occur. The Union did not object to e-mail exchanges as the means for continued negotiations. It participated willingly in e-mail proposal exchanges and it never asked for face-to-face meetings except in the context of outside mediators being part of meetings.

Particularly troubling is the Board's assertion that ASP declared impasse after only six bargaining sessions. The Board counts only the six face-to-face meetings that the Parties had between May and September 2017, and the Board ignores the 13 proposal exchanges by e-mail that the Parties had between September and November. Those proposal exchanges were indisputably part of the bargaining process, and they are substantial evidence that was ignored by the Board.

The Board's Decision additionally criticizes ASP for failing to voluntarily notify the Union about a contract extension being granted by FPS (where the Union did not exercise its right to make information requests to ASP) and failing to explain to the Union why new deadlines existed for reaching agreements (where the Union never sought information about why there were new deadlines that needed to be met). Essentially, the Decision departs from existing precedent by *sub silentio* establishing a different standard of impasse law for employers who are negotiating with an inexperienced Union representatives instead of experienced professional negotiators.

That previously unannounced change in the applicable legal standard is especially unreasonable in the present case where the affected employees affirmatively voted to oust its experienced union representatives (NASPSO) in favor of proceeding forward representing themselves. Their decision resulted in the

employees' inexperienced bargaining representative making unrealistic wage and benefit proposals that consistently increased in size rather than moving the Parties to some middle ground compromise. The Union's approach created an impasse, which was expressly confirmed twice by the Union when it said at one point that the Parties were at a "stalemate" and said at another point that the Parties were at an "impasse." For all of these reasons, the Board's Decision and Order should not be enforced.

## **VI. STANDING**

The Company has standing to petition this Court for review of the Board's decision based on Section 10(f) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(f), which provides in relevant part: "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia." (*Id.*)

## **VII. ARGUMENT**

### **A. Standard of Review**

The Board's authority to declare the existence of unfair labor practices is constrained by the legal requirement that the Board not act in an arbitrary manner.

*Circus Circus Casinos, Inc., v NLRB*, No. 18-1201, Slip Op. 6-7 (D.C. Cir. June 12, 2020). The U.S. appellate courts have been vested with the statutory “responsibility for assuring that the Board keeps within reasonable grounds.” *Id.* at 7 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951)). Accordingly, the Court does not simply act as a rubber stamp on agency decisions. *Avecor, Inc. v. NLRB*, 931 F.2d 924, 928 (D.C. Cir. 1991).

Findings of fact by the Board are upheld only “if supported by substantial evidence on the record considered as a whole . . . .” 29 U.S.C. § 160(f). It is the Court’s responsibility to examine carefully both the Board’s findings and its reasoning. *Peoples Gas Sys., Inc. v. NLRB*, 629 F.2d 35, 42 (D.C. Cir. 1980). It is appropriate to set aside a Board decision if the Court “cannot conscientiously find that the evidence supporting [the] decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board’s view.” *Cook Paint & Varnish Co. v. NLRB*, 648 F.2d 712, 719 (D.C. Cir. 1981) (citing *Universal Camera Corp.*, 340 U.S. at 488).

**B. The Record Evidence Demonstrates Conclusively That ASP and the Union Had Reached an Impasse On November 20 Regarding Wage and Benefit Levels for a Prospective Collective Bargaining Agreement**

**1. The Applicable Legal Standard for Determining the Existence of an Impasse in Bargaining**

An employer may unilaterally implement collective bargaining proposals once the employer and the union have reached impasse on those proposals. “There is no fixed definition of an impasse or deadlock which can be applied mechanically to all factual situations which arise in the field of industrial bargaining. Nor is there a rigid formula for assessing so subtle an issue as the precise time when an impasse occurs.” *Dallas Gen. Drivers, Warehousemen and Helpers, Local Union No. 745 v. NLRB*, 355 F.2d 842, 845 (D.C. Cir. 1966).

An impasse finding is warranted where there is “no realistic possibility that continuation of discussions . . . would have been fruitful.” *TruServ Corp. v. NLRB*, 254 F.3d 1105, 1114 (D.C. Cir. 2001) (quoting *Television Artists AFTRA v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968) (alteration in *TruServ*), *cert. denied* 534 U.S. 1130 (2002)).

In determining whether negotiations have reached impasse, the Board considers several factors, including the parties’ bargaining history, their good faith, the length of the negotiations, the importance of the issues in dispute, and the parties’ contemporaneous understanding of the state of negotiations. *See Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), review denied sub nom. *American Federation of Television & Radio Artists, AFL- CIO v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

*Phillips 66*, 369 NLRB No. 13, p. 7 (Jan. 31, 2020).

The Board's recent decision in *Phillips 66* (finding a lawful impasse in bargaining) points out that, among these listed factors, a finding that the employer bargained with its union in good faith is "a critical element in determining the existence of impasse." *Id.* at 7-8. *See also, AMF Bowling Co., Inc. v. NLRB*, 63 F.3d 1293, 1299 (4th Cir. 1995) (similarly noting that an employer's good faith during "bear[s] significantly" on impasse analysis and is a "powerful fact" in employer's favor). In the present case, of course, the Board found that ASP bargained at all times in good faith with a genuine desire to reach an agreement rather than a desire to frustrate the bargaining process. (JA13).

There are three exceptions to the rule that there must be an overall impasse before an employer may implement its last, best and final offer: (1) when the union engages in conduct calculated to frustrate agreement and frustrate impasse; (2) when the employer can demonstrate that an impasse on one critical issue precluded agreement; or (3) if economic exigencies compel prompt action. *Serramonte Oldsmobile*, 318 NLRB 80, 113-114 (1995); *Calmat Co.*, 331 NLRB 1084, 1097 (2000); *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995). If these circumstances exist, then the employer may be able to implement its last proposal in spite of not having reached an overall impasse. *CalMat Co.*, 331 NLRB at 1097; *see also Richmond Elec. Servs., Inc.*, 348 NLRB 1001 (2006) (deadlock on wages resulted

in overall impasse.); *Clarke Mfg., Inc.*, 352 NLRB 141, 145 (2008) (Board upholding the administrative law judge's conclusion that an impasse had been reached because the parties "were simply unable to resolve the health care issue and any agreements on other issues would not, in my opinion have resolved the impasse.").

Here, of course, ASP did not implement changes in wages and benefits while the Parties still had other open bargaining topics. ASP and the Union had exhaustively bargained and reached tentative agreement on all non-economic items when they turned their attention to wage and benefits. Nonetheless, it needs to be highlighted that the present case is one where ASP's declaration of impasse occurred in a context where all three of these "partial impasse" exceptions existed. First, the Union was engaging in conduct that was designed to frustrate agreement because the Union was increasing its wage and benefit demands with each new proposal instead of compromising to bridge the gap in the Parties proposals. Second, there was an irreconcilable impasse on the most critical aspect of the Parties' negotiations – namely, wages and benefits. Third, ASP was facing serious economic exigencies to put in place wage and benefit levels by December 1 that would in fact be reimbursed by FPS for the 2017-2018 contract year. The Board's Decision improperly understates the importance of this substantial evidence, which is inconsistent with the Board's obligation to draw all inferences from the record

that are fairly demanded by the record evidence. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 378 (1998); *King Elec., Inc. v. NLRB*, 440 F.3d 471, 475 (D.C. Cir. 2006).

**2. The Board’s Finding That the Parties Were Not at Impasse on November 28 Is Not Supported by Substantial Evidence**

By November 28, ASP and the Union had met in person for negotiations on six different occasions between May and September. As they negotiated between September and November 28, they had an additional 13 exchanges of proposals through e-mail exchanges, including e-mail explanations of the reasons for their respective changes in their proposals. They had reached agreement on all non-economic provisions of a new collective bargaining agreement, but they were far apart on wages and benefits. ASP had made an initial proposal on wages and had then increased its wage offers multiple times between September 1 and November 28 in an effort to reach agreement.

By contrast, the Union during that same time frame twice increased the amount of its initial wage demands rather than showing any willingness to compromise its position. Moreover, it is undisputed that the Union itself twice characterized wage discussions as being at a “stalemate” or at an “impasse.”

The Board’s decision improperly downplays the importance of the Union’s statements about impasse and stalemate. The Board finds the statements insignificant because “an inexperienced unit employee serving as a Union

negotiator” made the statements. (JA15). The Board then cites *Colfor, Inc.*, 282 NLRB 1173, 1180 (1987), *enforced* 838 F. 2d 164 (6th Cir. 1988) for the proposition that an untutored negotiator’s use of a legal term does not “establish” the existence of a legal impasse. This statement by the Board, however, is simply a straw man argument that utterly deflects away from the significance of the Union’s stalemate and impasse claims. The Board knows that ASP is not arguing that the Union’s use of the words “stalemate” and “impasse” prove as a matter of law that an impasse in bargaining existed. ASP’s point is that, when the Board purports to examine the “contemporaneous understandings of the parties” as a factor in evaluating the existence of an impasse. (JA14-15), the use of the words “stalemate” and “impasse” are meaningful and substantial evidence that the Board cannot ignore when drawing inferences about the “understanding of the parties.”

The use of the words “stalemate” and “impasse” are a window into the Union’s understanding of where the Parties stood on wages and benefits. When Union negotiator Harris used these terms, he was plainly stating that ASP should not expect any additional wage offers from the Union. That was the Union’s understanding, and it conveyed that understanding to ASP.

The Board’s failure to acknowledge this point is exacerbated by the Board’s related assertion that any stalemate or impasse that existed as of the dates of the Union’s two statements was thereafter broken “by continuing to bargain after that

time.” (JA15). This is extraordinarily misleading. The actual chain of events concerning “stalemate” and “impasse” is as follows

- September 12 – The Union responds to ASP’s second wage offer by making a counteroffer on wages which exceeds the Union’s prior offer and which is based on seeking recompense for wages that the Union feels should have been sought by NASPSO during the prior four years of the expired collective bargaining agreement. (JA419).
- September 12 – ASP responds that afternoon and explains why it is disinclined to try to make up in 2017 for wages that employees agreed to accept in 2012-2016 as part of the prior agreement. (JA422).
- September 13 – The Union responds that ASP does not seem to “understand where The Union of Patriots Plaza is coming from pertaining to fair wages” and that “we have come to a stalemate as far as wages are concerned.” (JA423).
- September 14 – ASP increases its offer on wages. (JA424).
- September 19 – The Union responds that it has already sent ASP its “best offer” and that “I guess at this moment that we are at an impasse.” (JA427).
- October 23 – In response to offers made by ASP to break the impasse in negotiations, the Union proposes a third 2017 wage offer that exceeds the wage levels of its two prior proposals, thereby demonstrating no willingness to compromise and break the impasse. (JA430).

Thus, at no point can it be said that the Union took steps that would signal a willingness to make a wage offer that would break the stalemate/impasse that the Union understood to exist between the Parties. Indeed, for the Board to characterize this record evidence as a demonstration by the Union of “continued flexibility on economic issues” is absurd. The only circumstances that the Union

indicated would prompt new offers on the Union's part would be if ASP agreed to bring in outside mediators, which as discussed below, was not something that ASP had a legal obligation to do or a desire to do.

**3. The Board's Remaining Justifications for Finding No Impasse in Bargaining Are Not Supported by Substantial Evidence**

**a. ASP Acted Lawfully By Declining to Bring In an Outside Mediator, and ASP's Decision Not to Participate in Mediation Is Not Substantial Evidence Supporting the Board's Finding That No Impasse Had Been Reached In Negotiations**

The Board based its finding of no impasse in significant part on the fact that “the Company repeatedly ignored the Union's requests that the parties submit to mediation or arbitration on the economic issues” (JA13) and that the Union's insistence on mediation as a prerequisite for the Union making additional offers on wages and benefits somehow demonstrated “the Union's continued flexibility on economic issues.” (JA15).

The Board's Complaint, however, did not allege that ASP committed an unfair labor practice by ignoring the Union's demands for mediation, nor did the Board's Decision find that ASP engaged in bad faith by declining mediation. The Board could not make such allegations or findings because the Board's own precedent decisions (ignored and uncited by the Board in its Decision) have uniformly held that a party's request for mediation is a “permissive” subject of

bargaining and not a “mandatory” subject of bargaining, and a party like ASP does nothing wrong when it exercises its legal right to ignore or otherwise decline demands by the other party for outside mediation of disputes. *Riverside Cement Co.*, 305 NLRB 815, 818-19 (1991) (a party could not insist on mediator participation as a condition for continuing negotiations), *aff’d mem.*, 976 F.2d 731 (5th Cir. 1992); *Success Village Apartments, Inc.*, 347 NLRB 1065, 1068 (2006) (“Although parties may voluntarily agree to engage in mediation as a means of collective bargaining, the use of mediation as a bargaining process is a permissive subject of bargaining, and a party may not insist on mediation, much less on a particular mediation format, to the point of impasse”).

Indeed, under these same Board’s precedent decisions, the Union’s refusal to make bargaining proposals on economic items absent ASP’s waiver of its right not to agree to mediation was in itself an unfair labor practice by the Union. *Id.* As such, it was conduct that was calculated to frustrate agreement and frustrate impasse, which is a lawful and legitimate basis for ASP to declare a bargaining impasse under *Serramonte Oldsmobile, supra*, 318 NLRB at 113 (employer can lawfully declare impasse “when, in response to an employer’s ‘diligent and earnest efforts’ to engage in bargaining, a union insists on continually avoiding or delaying bargaining”) and *RBE Electronics of S.D., supra*, 320 NLRB at 81 (recognizing an

employer's right to declare an impasse "when a union engages in tactics designed to delay bargaining . . .").

As the Board said in *Riverside Cement Co.*, Section 8(d) of the Act defines the obligation to bargain collectively to include "the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." 305 NLRB at 818-819. Matters encompassed by the 8(d) phrase "wages, hours, and other terms and conditions of employment" are generally called mandatory subjects of bargaining. Other lawful subjects of bargaining not encompassed within that 8(d) phrase are traditionally called permissive subjects of bargaining.

As to mandatory subjects, the Supreme Court held long ago that a party may lawfully persist to the point of deadlock in negotiations; however, a party may not legally insist to impasse on a permissive subject of bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Under *Borg-Warner Corp.*, when a party raises a permissive subject like mediation, the other party "is free to bargain or not to bargain and to agree or not to agree." *Id.*

ASP was legally permitted to respond to the Union's request for mediation or ignore the Union's request for mediation, as it saw fit, and it was simply wrong for the Board to use ASP's exercise of this legal right as evidence that there was no impasse in negotiations. A valid impasse occurred in this case because the Union

improper insisted on mediation as a prerequisite for additional bargaining, and the Board flatly ignored this substantial evidence undermining its finding of no valid impasse in negotiations.

**b. The Parties' E-Mail Exchanges of Contract Proposals Are Not Substantial Evidence of the Parties Failing to Be at Impasse on November 28**

The Board also justified its “no impasse” finding on the ground that the Parties’ negotiation of wages and benefits took place by e-mail rather than through face-to-face negotiations. The Board concluded at JA13 that, while ASP negotiated in good faith, it “decelerated negotiations after [September 1], deciding to forego in person meetings and, instead, bargain with the inexperienced Union representatives by e-mail.” This is factually and legally incorrect.

It is factually incorrect because there is no record evidence supporting the idea that ASP forced the Union to bargain by e-mail. First, ASP and the Union had been exchanging proposals on non-economic subjects prior to the September 1 meeting where Mark Phinney suggested using e-mail to exchange economic proposals. (*See* ASP e-mails (JA364-67) and the Union’s e-mail on August 21 (JA368).

Second, the only record evidence on how e-mail exchanges came to be used by both Parties after September 1 is a Union witness’s testimony that Phinney stated: “Okay, well this is the economic part. You guys don’t have to come back

down here now. We can just communicate by e-mail.” On its face, this is an effort to accommodate the Union negotiators who had been traveling to each session from the District of Columbia to ASP’s corporate headquarters in Herndon, Virginia. Moreover, his statement is a suggestion/proposal for how the Parties should negotiate moving forward. He did not refuse to negotiate further in person, and the Union did not oppose the idea of exchanging economic proposals by e-mail. Instead, the Union embraced the approach of exchanging proposals by e-mail and it did not claim at the underlying hearing that it had any problem with the use of e-mail moving forward.

As the Board noted in *Appel Corporation d/b/a Somerville Mills*, 308 NLRB 425 (1992), Section 8(d) of the Act only requires the parties “to meet at reasonable times and to confer in good faith.” *Id.* at 426. “[T]he Board has stated that it does not take a per se approach to deciding where bargaining should take place and instead considers all the relevant circumstances bearing on the issue. Those circumstances include failure to justify the reason for a proposed location, the intransigence of a party’s insistence on a location, and whether a party is acting in bad faith by making proposals for the purpose of delaying or avoiding negotiations. \*\*\*\* In sum, the determining factors in cases of this kind are whether the proposed bargaining location is unreasonable, burdensome, or designed to frustrate bargaining, and whether the proponent has been intransigent and [acted] in bad

faith.” *See also Stone Container Corp.*, 313 NLRB 336, 342 (1993) (rejecting bad faith bargaining allegation where the union did not object to the employer’s proposed meeting schedule).

Here, the Parties jointly agreed to face-to-face negotiation sessions followed by e-mail negotiation sessions. There is no record evidence of the Union opposing this negotiation approach or favoring a different approach. Under such circumstances, the use of that negotiation approach adds no weight to the question of whether the Parties were at an impasse on November 28.

**c. The Number of In-Person Negotiation Sessions and E-Mail Negotiation Sessions Is Not Substantial Evidence of No Impasse in Bargaining**

It was similarly wrong for the Board to ignore these e-mail proposal exchanges when it evaluated the frequency with which ASP and the Union met to exchange bargaining proposals. As the Board noted in its Decision, one of the factors that is used in evaluation the existence of an impasse is the frequency and length of negotiations between the parties. (JA13). The Board characterized ASP and the Union as holding only six bargaining sessions because the Parties only met face-to-face on six occasions from May to September 1. (*Id.*). The Board went on to cite a series of past Board decisions where six sessions were “insufficient to support an impasse” in the factual contexts of those particular cases. (*Id.*) However, none of those cases suggest that there is some magic number of times

that the Parties need to meet in order to be at a valid impasse in negotiations. In *Richmond Electrical Services, Inc.*, for example, the Board upheld a declaration of impasse after a mere five bargaining sessions over a four-month period.

The history of negotiations between ASP and the Union include 13 e-mail exchanges that are intrinsically part of the negotiation process in this case. Coupled with the six face-to-face bargaining sessions, this makes 19 negotiation-related interactions between the Parties. This was an extensive bargaining effort that successfully reached agreement on all non-economic subjects and included serious efforts (at least on ASP's part) to resolve difficult differences in the Parties' respective economic proposals. There is no substantial evidence that e-mail communications – or the number of bargaining sessions and e-mail exchanges – prevented the Parties from reaching a genuine impasse in their bargaining on wages and benefits, and the Board's findings on those points should be disregarded.

**d. ASP's Inadvertent Failure to Incorporate a Few of the Parties' Non-Economic Tentative Agreement's Into the November 28 Implemented Offer Is Not Sufficiently Substantial Evidence That the Parties Were Not at Impasse on November 28**

The Board's decision correctly notes that, when ASP sent the Union a revised final offer containing the SCA Wage Determination rates, ASP failed to incorporate into that final offer several of the non-economic provisions that the

Parties had tentatively agreed to during the first stage of their negotiations. (JA12). While the oversight was careless, it did not have any bearing on whether an impasse existed between the Parties as of November 28. The non-economic provisions were not a source of contention or impasse. The Union did not complain to ASP about the error in the proposal or otherwise bring the oversight to ASP's attention. There is also no record evidence of ASP failing to adhere to the overlooked provisions after implementation of ASP's final offer. The Union contemporaneously protested only the change in wages. (JA483), and the oversight regarding incorporation of the non-economic proposals appears to be something that was not uncovered until the Board investigated the underling unfair labor practice charge.

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. As such, ASP's failure to accurately incorporate all non-economic provisions into its final offer is not substantial evidence bearing on the critical issue of whether an impasse in bargaining occurred in this case.

**e. There Is No Substantial Evidence Supporting the Board's Finding That ASP Improperly Set Shifting and Artificial Deadlines for Reaching an Agreement on Wages and Benefits**

At different points during 2017, the Parties were facing various deadlines that they needed to meet if they wanted FPS to approve paying hourly wage and benefit amounts that exceeded the applicable Department of Labor Wage Determination. The Board's Decision characterizes these deadlines as being "artificial" (JA15) and unfairly "shifting." (JA1). Neither of these characterizations is supported by the record evidence.

There was nothing artificial about the deadlines that ASP brought to the attention of the Union. The first deadline that was discussed by the Parties was September 19. It was a real deadline because ASP's federal contract expired September 30, and ASP was required to submit any applicable collective bargaining agreements to FPS for review and approval (or rejection) at least 10 days before the September 30 deadline. ASP accurately communicated that information to the Union, but the Union treated the deadline as unimportant.

When FPS expressed concern on September 20 about the lack of any timely submission of a replacement collective bargaining agreement, ASP sought and received a six-month extension of the federal contract during which would permit ASP to honor the wage and benefit levels set in the 2014-2016 NASPSO contract for as long as March 31, 2018 if ASP found it necessary to do so.

The Board faulted ASP for failing to voluntarily tell the Union about this October 2017 to March 2018 extension. The Board is unable, however, to point to any legal precedent that would require ASP to proactively provide extension information to the Union. In the collective bargaining context, the Union has the legal right to make information requests to ASP on any matters connected with ASP's bargaining proposals. However, it is well established 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. *NLRB v Boston Herald Traveler Corp.*, 210 F. 2d 134 (1st Cir. 1954); *Westinghouse Elec. Supply Co. v NLRB*, 196 F. 2d 1012 (3d Cir. 1952).

Here, the Union did not ask for any information about the ASP's dealings with FPS or about the status of the federal contract that was set to expire September 30. When Phinney contacted the Union on October 21 in an effort to kick-start additional negotiations, he simply informed the Union – accurately – that ASP's December 1, 2017 to November 30, 2018 federal contract would be subject to SCA Wage Determination rates if ASP and the Union did not reach an agreement and submit that agreement to FPS in advance of the start of the federal contract, and he stated his belief that the Parties needed to have their agreement in place by October 31 in order to have sufficient time to accomplish this task. (JA429).

If the Union did not understand why the September 30 deadline had passed without the Parties losing their chance to collectively bargain for wage and benefit levels that exceeded SCA Wage Determination rates, then the Union had the right and the opportunity to try to better understand what was happening. Instead, it expressed no curiosity about this point in any of its follow-up communications with ASP, and it sought no information. Perhaps, as the Board speculates, a more experienced negotiator (like the NASPSO Union that the employees ousted) would not have accepted Phinney's explanation at face value and would have sought an explanation for why additional negotiation time was now available, but that is not a material concern at this stage of proceedings.

The material point is that September 19 was not an artificial deadline. Similarly, Phinney's desire to get a negotiated agreement in place by October 31 was not an artificial deadline since it is what he believed needed to be accomplished in order to draft, finalize and submit a collective bargaining agreement to FPS before the definite November 20 deadline (10 days prior to the December 1 contract starting date). October 31 also was not an improperly shifting deadline since the change from September 19 did not occur until FPS approved a contract extension subsequent to September 19.

When the Parties were unable to agree upon a three-year agreement by October 31, Phinney tried instead to convince the Union to execute a simple one-

year Memorandum of Understanding to keep the wages and benefits from the expired collective bargaining agreement in place so as to avoid dropping wages and benefits to the lower Wage Determination rates. He advised the Union that the date for executing the Memorandum would be November 20, and that was not an artificial date since that was the date by which a collective bargaining agreement needed to be submitted to FPS for approval in order for the collectively bargained rates to act as a substitute for SCA Wage Determination rates. November 20 cannot fairly be characterized as an improperly shifting date since November 20 was the actual deadline for getting the Memorandum to FPS. Also, since the Memorandum was a simple two-page document and not a complex three-year collective bargaining agreement with multiple provisions, the Memorandum could be completed and submitted to FPS as late as November 20 rather than building in time for review and execution, which is what necessitated the earlier October 31 deadline proposed by Phinney for a full collective bargaining agreement.

The Board's Decision also misfocuses its attention on the separate arrangement that ASP was able to reach with FPS in September 2017 to obtain FPS's approval to continue paying security officers at Patriots Plaza at the expired agreement's wage and benefit rates through March 31, 2018. The Board concluded that "(w)ages and benefits remained the same during this period" under the

extension arrangement, but that is not an accurate characterization of the extension arrangement.

Once ASP and the Union missed the November 20 deadline for submitting collectively bargained rates to FPS, the SCA's Wage Determination rates applied between December 1, 2017 and November 30, 2018. Because of the extension implemented by FPS on or about September 26, ASP could continue to pay the expired collective bargaining agreement's wages through March 31, 2018 on the original contract, but ASP was not required to pay those higher rates throughout the October 1 to March 31 time frame.

If ASP had not declared an impasse on November 28 and implemented its final offer, and if after December 1 ASP hypothetically (and contrary to all existing record evidence) had been able to negotiate a new collective bargaining agreement with the Union subsequent to December 1, then it is important to recognize that any such new agreement would not raise wages for the contract year covering December 1, 2017 to November 30, 2018. The Parties' failure to submit collectively bargained rates for FPS approval by November 20 had foreclosed that opportunity. However, assuming subsequent FPS approval of any newly negotiated agreement, the new agreement could be used as the basis for raising rates in the next option year running from December 31, 2018 to November 30, 2019.

ASP continued bargaining from October 1 to November 20 in an effort to submit a timely agreement to FPS for approval by November 20, but once November 20 passed and it was obvious that further bargaining on wages was futile, ASP was justified in declaring an impasse on November 28. ASP was entitled at that point to use its economic leverage to try and break that impasse by implementing its final offer and dropping wages and benefits to the SCA Wage Determination rates that were set to be in place for the December 1, 2017 through November 30, 2018 contract year.

Contrary to the Board's conclusions, ASP's actions in this regard did not mislead the Union in any way since the Union was never aware of ASP's opportunity to continue paying the expired agreement's wage rates beyond November 30. The Union never sought such information, so the Union never relied on such information when preparing its bargaining proposals or when refusing to make additional wage proposals after its final offer on October 23.

By November 28, the Union's bargaining conduct had demonstrated conclusively that it was futile for the Parties to continue bargaining on wages and benefits and that the Parties had reached an impasse. In this regard, ASP's situation is not significantly different from the Board's recent decision in *Phillips 66, supra*, in which the Board concluded both that the employer did not bargain in bad faith and that the parties' course of negotiations showed that they were indeed at an

impasse in their negotiation efforts. In that case, the key negotiating issue concerned an HHS specialist position, and the Board found that “the clear pattern and direction of the parties’ dealings shows no realistic possibility that further negotiations regarding the Respondent’s proposed changes to the HSS specialist position would have been fruitful.” *Id.* at 7. Moreover, unlike the present case, the *Phillips 66* decision included record evidence that the Union at least purported to have the flexibility to make more movement in its proposals, though the Board found that claims of flexibility were not sufficient without an actual “significant change in bargaining position.” *Id.* “Rather, there must be substantial evidence in the record that establishes *changed circumstances* sufficient to suggest that future bargaining would be fruitful.” *Id.* at 8 (quoting *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 233 (D.C. Cir. 1996) (emphasis in original)).

In the present case, the Board failed to apply this same, correct legal standard regarding impasse. Instead, the Board improperly changed the traditional legal standard regarding impasse *sub silentio* and without reasonable notice by requiring Petitioner to negotiate with inexperienced union representatives in a different manner than Petitioner would be permitted to negotiate with experienced union negotiators. This was improper under *Circus Circus, supra* at 8. The Board then ignored substantial evidence that undermined the Board’s preferred result, while exaggerating various insubstantial record evidence to support that same

result. This is why the Board's decision keeps returning over and over to the notion that ASP "leverage(d) its economic position" and took advantage of "inexperienced union negotiators." (JA15). Leveraging ones economic position is just another way of saying that that ASP engaged in lawful hard bargaining. *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.").

## VIII. 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 30, 2020

Respectfully submitted,

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I hereby certify that on November 30, 2020 a copy of the foregoing Appellant's Opening Brief was served upon all counsel of record via the Court's CM/ECF Filing system:

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