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

NOAH'S ARK PROCESSORS, LLC
D/B/A WR RESERVE

Cases 14-CA-255658

and

UNITED FOOD AND COMMERCIAL WORKERS
UNION LOCAL NO. 293

COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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Counsel for the Acting General Counsel (GC) respectfully files this brief with the Honorable Robert A. Ringler, Administrative Law Judge (ALJ). This case is before the ALJ based upon a Complaint and Notice of Hearing alleging that Noah's Ark Processors, LLC d/b/a WR Reserve (Respondent) violated Sections 8(a)(1) and (5)of the National Labor Relations Act (Act). The issues in this matter were heard by the ALJ over the Zoom for Government platform on December 15, 2020 and January 12, 2021, and are addressed below.

I. Facts

On January 1, 2015, Respondent acquired the Hastings facility when it purchased the business of Nebraska Prime Group (NPG). JT 7, p. 4. Since then, Respondent has continued to operate NPG's business in basically unchanged form, employed as a majority of its employees individuals who were previously employees of NPG, and adopted the collective-bargaining agreement between NPG and United Food and Commercial Workers Union and its Local 293 (Union), dated January 28, 2013 to January 28, 2018. JT 2; JT 7, p. 4; JT 33, p. 1.[1]

Following the expiration of the contract, Respondent and the Union met 20 times to bargain for a successor agreement between March 22, 2018 and January 25, 2019. JT 33, p. 1. At the initial session on March 22, 2018, the Union offered its first collective-bargaining proposal. T. 49; GC 3. Respondent offered its first proposal on May 15, 2018. JT 3; JT 33, p. 1. On January 2, 2019, Respondent offered its second proposal and stated it would be Respondent's last, best, and final offer. JT 4; JT 5; JT 33, p. 1. On January 30, 2019, Respondent implemented its January 2, 2019 last, best, and final offer. JT 5; JT 33, p. 1. Between March 28, 2018 and February 22, 2019, the Union filed five ULP charges against Respondent alleging, in relevant part, that Respondent had engaged in bad faith bargaining,

[1] References will be denoted using the following abbreviations followed by the page number: Trial Transcript (T.), General Counsel's Exhibits (GC), and Joint Exhibits (JT).

unlawfully declared impasse, and failed to provide presumptively relevant information requested by the Union. Region 14 ordered the cases consolidated and issued a Second Consolidated Complaint and Notice of Hearing in Cases 14-CA-217400 et al. JT 7, p. 2-3. From March 18 to March 22, 2019, ALJ Andrew S. Gollin presided over an ULP hearing involving Respondent and the Union in Cases 14-CA-217400 et al. JT 33, p. 1; JT 7.

Prior to the ULP Hearing, on February 25, 2019, Region 14 Regional Director Leonard J. Perez, on behalf of the National Labor Relations Board, filed a Petition for Injunction Under Section 10(j) of the National Labor Relations Act, as Amended, with the United States District Court for the District of Nebraska. JT 33, p. 1.

On May 10, 2019, Chief United States District Judge John M. Gerrard granted the Petition and issued an Injunctive Order requiring Respondent to, in relevant part, (1) bargain in good faith with the Union at its request on a schedule providing for good-faith bargaining for not less than 24 hours per month and not less than 6 hours per session, or on another schedule to which Noah's Ark and the Union have mutually agreed, (2) appoint a representative to this bargaining with the authority to bargain until the parties reach a complete CBA or a good faith impasse in negotiations, and (3) on or before May 17, 2019, furnish the Union with the information it had requested on November, 6, 2017. JT 8, p. 29; JT 33, p. 1-2.

The Union promptly requested bargaining on May 13, 2019. JT 11, 11A. All further communications between the parties for the purpose of scheduling additional bargaining sessions occurred between Respondent's attorney Jerry Pigsley (Pigsley) and the Union's attorney Eric Zarate (Zarate) via email and are identified in Joint Exhibits 11 - 13. JT 33, p. 2; JT 11, 11A, 12, 13. In addition to seeking dates for bargaining, Zarate requested that Respondent provide the requested information in advance of the court-ordered bargaining

sessions. JT 13, p. 8-9, 11-12.

More than two months after the Injunctive Order issued, the parties finally met for court-ordered bargaining sessions on July 23, July 30, and August 6, 2019. At the July 23 session, Business Agents Brian Schwisow (Schwisow) and Terry Mostek and Union secretary Carmen Perez participated for the Union. JT 33, p. 2. Schwisow served as the Union's chief negotiator. T. 46. CEO Fischel Ziegelheim (Ziegelheim) and Mary Junker (Junker) were present for Respondent. T. 47; JT 33, p. 2.

Despite the Court's order to bargain in good faith, no bargaining occurred on July 23, 2019. Although the Union's attorney Zarate sent numerous emails to Respondent's attorney seeking to resolve the issue with the information request prior to bargaining, as of the parties' scheduled July 23, 2019 bargaining session, Respondent had not provided the Union with information it had been requesting since November 6, 2017, related to terms and conditions of employment for bargaining unit employees and necessary for the Union's bargaining. JT 13; JT 20A, p. 2-3. Thus, at the start of the July 23, 2019 session, Schwisow asked Respondent if the company had information for the Union. T. 52. Even after being copied on emails in which the Union stated it did not have the requested information, Ziegelheim took the position that the Union already had the information in question as Respondent claimed it had given the information to the Union's attorney during the NLRB hearing that took place in March 2019. *Id.* The parties continued to disagree and caucused to call their respective counsel. T. 53. When they reconvened, Respondent advised that its attorney had given the information to the NLRB attorney at the hearing and the Union could request a copy from the NLRB. *Id.* The Union rejected Respondent's directive and made it known that Respondent had an obligation to provide the information to the Union. *Id.* Respondent responded that it would take several days

to make copies of the documents in question. *Id.* Schwisow agreed to caucus so that the company could go to the facility and make copies and meet back at the end of the day. T. 53-54. Ziegelheim and Junker departed the Union hall. T. 54; JT 33, p. 2. When Ziegelheim returned around 3:55 p.m. that afternoon, he stayed long enough to hand the Union manilla envelopes containing information for approximately 50 employees in a unit consisting of approximately 400. T. 54.

The parties next met on July 30, 2019 with the same participants from July 23. JT 33, p. 2. At the start of the session, Respondent gave the Union information for another 50 employees. T. 56. Junker then handed the Union Respondent's latest bargaining proposal, which consisted of a copy of the expired collective-bargaining agreement where Respondent had proposed removing a large number of articles either partially or in their entirety. T. 56-58; JT. 14. After a caucus where the Union reviewed Respondent's proposed changes, Schwisow told Respondent that the proposal looked "a lot worse than the one from January of '19." T. 60. Not only did Respondent not provide an explanation, it did not even respond to the Union's concern. *Id.* Respondent sought to delete all of the parties' grievance procedure in Article 4 except for the first step. T. 60, JT 14, p. 4-5. Respondent did not explain why it sought to reduce the grievance process to one step. T. 64. Schwisow informed Respondent that it was very important that the Union have arbitration in the grievance procedure. T. 64. Schwisow asked Respondent about the proposed modification to Article 7 – Safety. T. 60. Ziegelheim informed the Union that the company was doing fine with safety and they did not need the Union involved in that. T. 60-61. The parties also discussed Article 8 – Vacation Provisions and Respondent's proposal to eliminate established vacation days for employees with more than four years of seniority. T. 61; JT 14, p. 6. Ziegelheim explained that employees received

enough time off when considering the two weeks of Jewish holidays they receive and they did not need any additional vacation time. T. 61. The next article discussed was Article 9 – Holidays. T. 62; JT 14, p. 7. Respondent sought to eliminate all benefits established under this article beyond the six designated holidays identified in the expired contract. *Id.* Benefits eliminated included additional holiday pay employees would receive if a designated holiday fell within an employee's vacation period; if a holiday falls on Sunday, it would be observed the following Monday; eligibility for holiday pay excluding absences for funeral leave, jury duty, vacation, and hospitalization; and premium pay (double time and a half) for employees required to work on a holiday or employees receive another day with pay at Respondent's discretion. JT 14, p. 7. Respondent's reasons mirrored those for reducing vacation days. T. 62. Respondent also sought to eliminate the Union's ability to visit the facility as set forth in Article 21 – Plant Visitation. T. 62-63; JT 14, p. 11. At the time, Respondent did not provide the Union an explanation for its proposal to eliminate Plant Visitation. T. 63. The Union did not agree to any of Respondent's proposals and countered with modifications to two of its own proposals. Schwisow proposed (1) reducing the frequency Respondent would be required to provide specific identifying information for all unit employees from a weekly to a monthly basis and (2) rescinding the Union's proposal that employees with 30 years' seniority receive six weeks' vacation. T. 63, 70-71; JT 3, p. 3-4. Respondent did not provide an answer to the Union's proposals and bargaining for that day ended. T. 64.

The parties met again on August 6, 2019, with the same participants except that Carmen Perez was absent. T. 65; JT 33, p. 2. At the start of the meeting, Respondent provided the Union with documents Respondent claimed constituted the remainder of the documents responsive to the Union's November 6, 2017 request for information. T. 65. Schwisow then

asked for Respondent's response to the modifications he had proposed during the July 30 session. T. 66. Ziegelheim answered that the Union was in possession of Respondent's LBFO and that it was not going to negotiate any further. *Id.* Looking through his notes, Schwisow recalled that Respondent owed him an answer to a question he had regarding holiday pay. T. 66. The parties caucused briefly so that Ziegelheim could make a phone call but when he returned he did not provide an answer to Schwisow's question. *Id.* Schwisow reiterated his understanding that Respondent declared its July 30 proposal to be its LBFO and that Respondent was refusing to negotiate any further. T. 66-67. Ziegelheim confirmed Schwisow was correct. T. 67. Schwisow then advised Ziegelheim if Respondent was not willing to negotiate any further, he was not going to negotiate with himself and bargaining concluded at that point in time. T. 67-69; GC 4.[2]

On September 16, 2019, Region 14 Acting Regional Director Paula S. Sawyer, on behalf of the Board, filed a Motion for Adjudication in Civil Contempt and for Other Civil Relief, and for Expedited Consideration with the United States District Court for the District of Nebraska, arguing, in relevant part, that Respondent continued to bargain in bad faith with the Union following Judge Gerrard's Injunctive Order.[3] JT 33, p. 2.

On October 11, 2019, Judge Andrew S. Gollin issued his decision in Cases 14-CA-217400 et al. JT 7; JT 33, p. 3. On January 27, 2021, the Board affirmed Judge Gollin's decision in substantial part, including but not limited to his finding that Respondent had failed to provide the information requested by the Union on November 6, 2017, engaged in bad faith bargaining for a successor agreement, and made changes to mandatory subjects of bargaining

[2] Brian Schwisow identified GC 4 as the bargaining notes he took at the table on August 6, 2019. T. 68-70.
[3] While the underlying 10(j) proceedings were pending, Region 14 Regional Director Leonard J. Perez retired. At the time of the Board's motion, Paula S. Sawyer served as Acting Regional Director for Region 14.

without bargaining to good faith impasse when Respondent implemented its last, best and final offer dated January 2, 2019. *Noah's Ark Processors, LLC d/b/a WR Reserve*, 370 NLRB No. 74 (Jan. 27, 2021). In the time between when Judge Gollin issued his decision and the Board's order affirming the decision, Judge Gerrard issued a Memorandum and Contempt Order granting the Board's Motion for Adjudication in Civil Contempt and a Sanctions and Purgation Order. JT 9; JT 10; JT 33, p. 3

Following Judge Gerrard's Sanctions and Purgation Order, the parties met for additional court-ordered bargaining sessions on the following dates: November 11, November 18, November 26, December 9, December 10, December 17, 2019, and January 13, 2020. JT 33, p. 3-4. For this third round of bargaining, the parties had new representatives at the table. The Union's chief negotiator was newly elected President Eric Reeder, and Respondent's chief negotiator was its attorney Jerry Pigsley. T. 80; JT 33, p. 3-4

During the parties' November 11, 2019 bargaining session, the parties exchanged their latest proposals. JT 26, p. 6-7; JT 26, p. 18. As will be addressed in more detail below, Respondent renewed all of its regressive proposals offered to the Union on July 30, 2019 while proposing to remove additional employee benefits and Union rights for the first time. The parties continued to meet with limited tentative agreements being reached until January 13, 2020. JT 30, p. 19-30. On January 13, 2020, Pigsley arrived at the session with a proposal and before the parties departed that day, declared it to be Respondent's last, best, and final offer. T. 183-184, JT 32, Exhibit E; JC 33, p. 4. Business Agent Rodney Brejcha (Brejcha) served as the Union's sole representative at negotiations that day. T. 179, 188; JT 33, p. 4. When Pigsley declared that Respondent's proposal was its last, best, and final, Brejcha told Pigsley he would have to get with Reeder and Zarate before going any further. T. 184. The parties had

previously agreed to meet for another bargaining session on January 14, 2020. T. 184. Brejcha asked if the parties were still meeting the following day to which Pigsley responded there was no use because the company was not willing to talk anymore. GC 5.

Between January 14 and January 16, 2020, Zarate emailed Pigsley that the Union remained ready and available to engage in additional bargaining, including the bargaining session that was scheduled for January 14, 2020 and the bargaining session that had been scheduled to take place on January 23, 2020 in the presence of FMCS mediator Ron Morrison. JT 24. Pigsley confirmed that the Union had Respondent's LBFO and that he had informed Commissioner Morrison that if the Union did not accept Respondent's final offer then the company would consider the parties to be at impasse. *Id.*

When the Union refused to accept Respondent's LBFO, on January 24, 2020, Pigsley emailed Zarate a letter advising that Respondent was declaring impasse. JT 25; JT 33, p. 4. Despite the Union's requests to do so, Respondent has failed to return to the bargaining table since January 13, 2020.

II. Legal Argument

A. Respondent bargained in bad faith for a successor agreement

Section 8(d) of the Act requires "the employer and the representative of its employees to bargain with each other in good faith with respect to wages, hours, and other terms and conditions of employment. . . ." *Fiberboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 209-210 (1964), citing *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). This duty requires that parties "enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement. . . ." *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960), *rehearing denied* 277 F.2d 793 (1960); *accord NLRB v. Wonder State Mfg. Co.*,

344 F.2d 210, 215 (8th Cir. 1965). On the other hand, bad-faith bargaining will be found from conduct "clearly showing an intent [by a party] not to enter into a contract of any nature." *Horsehead Resource Development Co. v. NLRB*, 154 F.3d 328, 339 (6th Cir. 1998); *accord NLRB v. Big Three Industries, Inc.*, 497 F.2d 43, 47 (5th Cir. 1974) (bad-faith bargaining will be found if a party demonstrates a "belligerent, intransigent attitude completely at war with any genuine desire to reach ultimate agreement . . . ."), citing *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 485 (1960). Although the Board will not determine whether a proposal is acceptable or unacceptable to a party, it will "consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract." *Reinchold Chemicals*, 288 NLRB 69 (1988), aff'd. in relevant part 906 F.2d 719 (D.C. Cir. 1990). In the instant case, Respondent's bad faith has been demonstrated by its bargaining tactics, regressive bargaining proposals, and its insistence on proposals that were clearly intended to prevent the parties from reaching a successor agreement. The few meager tentative agreements reached by the parties do not warrant excusing Respondent's flagrant bad faith bargaining that has continued since the expiration of the collective-bargaining agreement, including during the relevant 10(b) period.

1. Respondent engaged in regressive bargaining and bad faith tactics

Documentary and testimonial evidence established that Respondent employed tactics intended to prevent agreement and engaged in unlawful regressive bargaining during two separate phases of negotiations within the 10(b) period. In addition to delaying the parties' return to the table, Respondent continued to delay providing presumptively relevant information that the Union had been requesting for nearly two years. Once at the table, Respondent compounded its bad faith behavior by making regressive proposals. The first instance of

regressive bargaining occurred during the limited bargaining that took place between July 23 and August 6, 2019,[4] when Respondent was ordered by Judge Gerrard to return to the table pursuant to his Injunctive Order. The second instance occurred when Respondent was forced back to the table again after being held in contempt by Judge Gerrard.

Following the issuance of the Court's Injunctive Order, the parties met again for bargaining for the first time on July 23, 2019. JT 33, p. 2. As detailed above, the Union had been waiting on presumptively relevant information concerning bargaining unit employees since at least November 6, 2017. Respondent provided no defense at the March 2019 ULP hearing for its failure to provide that information.[5] JT 7, p. 5-7. As a part of the Injunctive Order, Judge Gerrard ordered Respondent to provide the information in question by May 17, 2019. JT. 8, p. 29. Yet, Respondent failed to provide the requested information necessary for the Union to put together its bargaining proposals in advance of the parties' negotiations on July 23, 2019. Respondent also appeared at that session empty handed, taking the position that the information in question had been given to the Board attorney during the March 2019 ULP hearing, and instructing the Union to obtain the information from the Board's attorney. Respondent astoundingly took this position even though it had known for months that the Union did not have the requested information. Between May 31 and July 23, 2019, Eric Zarate exchanged numerous emails with Jerry Pigsley wherein Zarate was very clear that Respondent still owed the Union the documents initially requested on November 6, 2017. JT 13, p. 8-9, 11-

[4] The General Counsel's Complaint and Notice of Hearing alleges Respondent engaged in bad faith bargaining during the 10(b) period in this matter, dating back to August 4, 2019. GC 1-E, p. 3. Respondent's declaration of an LBFO and refusal to engage in additional bargaining on August 6, 2019 clearly falls within the relevant time period identified by the Complaint.

[5] The Board affirmed Judge Gollin's finding that Respondent had violated Section 8(a)(1) and (5) of the Act by failing to provide the Union with the information it had requested. *Noah's Ark Processors, LLC d/b/a WR Reserve,* 370 NLRB No. 74, at slip op. 1 (Jan. 27, 2021).

12. Ziegelheim was fully aware of this fact as he was copied on those emails. *Id.* When the Union rightfully enforced its right under the Act to obtain the information from Respondent, it resulted in an entire day being wasted when it should have been reserved for bargaining. When bargaining did take place on July 30, 2019, Respondent gave the Union a new proposal that was highly regressive in comparison to the LBFO it implemented on January 30, 2019. JT 4; JT 14.

Despite a federal court injunction ordering Respondent to bargain in good faith and facing a pending decision from a Board ALJ, Respondent made the bold move of offering a new comprehensive proposal that stripped a large number of existing benefits and rights from the parties' expired collective bargaining agreement. This decision to do so came after the parties had met 20 times between March 2018 and January 2019. The July 30, 2019 proposal was a stark change from Respondent's January 2, 2019 LBFO that Respondent unlawfully implemented on January 30, 2019. In its January 2, 2019 LBFO, Respondent proposed "No change" for 16 of the existing 24 articles. JT 4. Yet, in its July 30, 2019 proposal, Respondent wrote "REMOVE" over a significant number of articles. JT 14. So many in fact, that the result was the proposed elimination or reduction of benefits in 11 of the 24 articles, including the elimination of 80% of the grievance procedure (Article 4); the elimination of the Union's involvement in any safety procedures and joint safety councils (Articles 6 and 7); drastic reduction of employee vacation days (Article 8); the reduction of employee holiday benefits (Article 9); the elimination of work equalization, premium pay, call-in pay, and transfer pay (Article 10); discontinuance of company obligations related to the Union when Respondent is interested in subcontracting work (Article 13); discontinuance of equal extra work opportunities and rotation of Sunday and holiday work (Article 14); the complete elimination of the use of seniority (Article 17); and the complete prohibition of Union plant visitation rights (Article 21).

JT 14. On August 6, 2019, the very next bargaining session, with very little discussion of the new proposals, minimal explanation for the proposed reductions and/or removal of benefits and rights, and without the Union having the time to review the information it had been requesting since November 6, 2017, Respondent declared that it was unwilling to bargain any further over its proposal. After just one day of bargaining, Respondent declared its July 30, 2019 proposal to be its last, best, and final offer. Due to Respondent's blatant failure to bargain in good faith, the Board filed a motion with the District of Nebraska requesting the Court find Respondent in contempt of Judge Gerrard's injunctive order. JT 33, p. 2. Part of the Board's argument at that time was that Respondent engaged in bad faith bargaining tactics by offering a highly regressive proposal seeking to eliminate basic aspects of the parties' expired contract. On October 17, 2019, Judge Gerrard agreed with the Board:

> And of course, on the substance of negotiation between Noah's Ark and the Union, Noah's Ark has failed to counter any of the Board's evidence that the "bargaining" was a sham – and the Court concludes, for substantially the same reasons as it did before, that Noah's Ark is engaged in a course of "surface bargaining" that the NLRA doesn't permit.

JT 9, p. 10.

Yet, even in the face of a contempt order and the threat of monetary fines for continued non-compliance, Respondent maintained its same course. When the parties met for their first post-contempt order bargaining session on November 11, 2019, Respondent chose not to heed the Court's warnings concerning its conduct. Instead, it took its same proposals from July 30, 2019, and it went a step further. Respondent's November 11, 2019 contract proposal sought to strip the same benefits and rights as its regressive July 30, 2019 proposal, but it also sought the following: removal of a classification of employees from the recognized bargaining unit (Article 1); unlimited authorization for Respondent to increase pay without the Union's agreement (Article 12); unlimited authorization for Respondent to subcontract any existing

operations including bargaining unit work (Article 13); unlimited authorization for Respondent to assign extra work at Respondent's discretion (Article 14); removal of Union leave benefits from the contract (Article 20); and the elimination of employees' rights to decline work in excess of 12 hours (Article 23). JT 26, p. 6-7. Respondent further proposed a new article titled "Waiver, Entire Agreement, and Severability" wherein Respondent sought to require the Union to agree to a broad waiver that would result in the Union waiving its rights to bargain over *any* mandatory subjects of bargaining covered by the Act during the term of the contract. JT 28, p. 9-10. When the Union proposed agreeing to the new article under the condition that it would not waive any rights to bargain over mandatory subjects, Respondent rejected the Union's counter because it would make Respondent's proposed waiver language "null and void." T. 120-122; JT 28, p. 13.

Under the Act, "an employer is under a duty to enter into sincere, good faith negotiations with the constituted representative of the employees, with an intent to settle the differences and arrive at an agreement." *NLRB v. Wonder State Mfg*. Co., 344 F.2d 210, 215 (8th Cir. 1965). An employer's regressive proposals violate the Act when they are made in bad faith or are intended to frustrate agreement. See *Quality House of Graphics*, 336 NLRB 497, 515 (2001). To determine whether regressive proposals are unlawful, the Board considers the totality of an employer's conduct and the circumstances, including factors such as the substance and timing of bargaining proposals, the parties' bargaining history, whether and how the employer explains its proposals, and other evidence of its intent. *Id.* (citing pretextual explanation or regressive proposals made months after negotiations ended in unlawful impasse); *Mid-Continent Concrete*, 336 NLRB 258, 260-261 (2001) (citing pretextual explanations for repeated regressive proposals, "staged" negotiations, and concurrent

violations), enfd. 308 F.3d 859 (8th Cir. 2002). The fact that proposals are regressive or unacceptable to the union, or that the union finds the employer's explanations for them unpersuasive, does not suffice to make the proposals unlawful if they are not "so harsh, vindictive, or otherwise unreasonable as to warrant a conclusion they were proffered in bad faith." *Genstar Stone Products Co.*, 317 NLRB 1293, 1293 (1995). However, the Board and the courts hold that the introduction of regressive proposals, particularly those made without reasoned justification, is a strong indication of surface bargaining. *NLRB v. Hardesty Co., Inc.*, 308 F.3d 859, 866 (8th Cir. 2002) (respondent made regressive proposals on a number of bargaining subjects including wages, vacation, insurance premiums, and 401(k) and failed to provide legitimate explanations to justify significant differences between proposals made during negotiations and the status quo prior to negotiations). Where the proponent of a regressive proposal fails to provide an explanation for it, or the reasons appears dubious, the Board may weigh that factor in determining whether there has been bad-faith bargaining." *Mid-Continent Concrete*, supra, at 260. As the Board stated in *John Ascuaga's Nuggett*, 298 NLRB 524, 527 (1990), enfd. in pertinent part sub nora. *Sparks Nugget v. NLRB*, 968 F.2d 991 (9th Cir. 1992), "refusal[s] to budge from an initial bargaining position, [refusals] to offer explanations for one's bargaining proposals (beyond conclusional statements that that is what a party wants), and [refusals] to make any efforts at compromise in order to reach [a] common ground" can constitute evidence of bad-faith bargaining." *Mid-Continent Concrete*, supra, at 260.

The factors all weigh against Respondent in this case. It is unquestionable that a large number of Respondent's proposals on significant bargaining issues, including wages, seniority, vacation, holidays, grievance processing, safety, and employees' hours of work were more regressive once Respondent was ordered to and the parties recommenced bargaining on July 30,

2019,[6] and again on November 11, 2019, when compared to its illegally implemented proposal offered on January 2, 2019. After 20 sham bargaining sessions over the course of 2018 and early 2019, Respondent went through the motions of bargaining in July 2019 and again in November 2019 with a transparent goal of not reaching a successor agreement with the Union. Respondent's explanations to the Union at the table were absent, without substance, or for the sole purpose of obtaining full authority over a mandatory subject of bargaining.

During bargaining in July 2019, proposal after proposal was made by Respondent often with no reason provided or the position that Respondent simply wanted certain language or rights removed from the contract. On July 30, 2019, when pressed about the drastic change to the parties' grievance procedure, including the elimination of arbitration, Respondent did not provide an explanation. T. 64. Ziegelheim proposed eliminating the entirety of Article 7 (Safety) with the only explanation provided being Respondent's stance that it did not want the Union involved with safety. T. 60-61. As for its drastic proposed changes reducing employees' vacation and holiday benefits, Respondent simply argued that employees already received enough vacation due to Respondent recognizing Jewish holidays. T. 61. As of July 30, 2019, Respondent provided the Union with no explanation as to why it sought to strip all Union access to its facility pursuant to then-Article 21. T. 62-63.

Respondent followed the same methodology in its approach to explaining its proposed elimination of benefits/rights when the parties renewed negotiations on November 11, 2019. For example, Articles 6 and 7 (Injury on the Job and Safety) address the issue of employees' safety at Respondent's facility. Article 6 required that a designated Union Committee member be notified promptly of any illness or accident resulting in serious injury or death and that

[6] Though the parties met on July 23, 2019, no bargaining took place due to Respondent taking the day to obtain information sought by the Union in its November 6, 2017 information request.

individual, along with Respondent's Safety Director, shall review the circumstances. JT 2, p. 3. Article 7 was a multi-paragraph provision that, in relevant part, established a Safety Council consisting of management officials, one Union official, and bargaining unit employees. JT 2, p. 3-4. The Safety Council had the right to make recommendations on the use of safety devices and the elimination of health and safety hazards. Both parties had an obligation to see that the recommendations of the council were enforced. JT 2, p. 4. Additionally, a Safety Inspection Committee consisting of the Union's Business Agent and one bargaining unit employee selected by the Union had the right to visually inspect the facility for safety on a monthly basis. *Id.* While seeking to make no changes to Article 6 and proposing the elimination of the Safety Inspection Committee in Article 7 leading up to the implementation of its first LBFO in January 2019, Respondent started negotiations in July 2019, and again in November 2019, by eliminating both articles in their entirety. Respondent's sole explanation to the Union was that Respondent wanted "sole responsibility." T. 105. Union President and lead negotiator Eric Reeder provided detailed testimony concerning the Union's efforts to maintain some type of Union involvement in assuring the safety of its bargaining unit employees. T. 104-112. Respondent's only counter was a proposal of a new Safety Committee that would consist of only employees and members of management. T. 106-107; JT 27, p. 5. Again, there would be no Union involvement. T. 107. The Union proposed reducing the number of Safety Inspection Committee inspections from a monthly to a quarterly basis and giving Respondent more flexibility as to the employee to serve on the committee along with the Union Business Agent. JT 27, p. 6. Respondent rejected it based solely on a dispute Respondent had with a former Union business agent and because Respondent wanted sole responsibility as it concerned safety. T. 110. The Union continued to try and find a middle ground, acknowledging that it may have

to concede to Respondent's insistence that the Union not play a role in safety. T. 110. With that in mind, the Union proposed additional language to supplement Respondent's new safety committee language that would require Respondent to follow OSHA and NIOSH guidelines as it concerned safety adherence. T. 110; JT 27, p. 7. Even though the Union was willing to concede involvement in safety, Respondent still rejected its proposal because it would not agree to following NIOSH guidelines. T. 111. No reason was given for this position. T. 111. As of January 13, 2020, when Respondent eliminated the entire safety article, Respondent had provided no reason for seeking to delete or significantly trim the contract's articles related to employee safety other than its intent to remove the Union from the entire process.

During the entirety of negotiations up through January 2, 2019, Respondent did not propose any changes to Article 8 (Vacation Provisions). JT 3; JT 4.[7] Effective with its July 30, 2019 and January 13, 2020 proposals, Respondent now seeks to eliminate additional vacation days for employees with more than three years of seniority. The Union argued to Respondent that the company's proposal would impact retaining employees. JT 38, p. 2. Respondent's response was simply that it was not willing to change its position on reducing employees' vacation days. *Id.*

In its LBFO from January 2, 2019, Respondent only sought to modify Article 9 (Holidays) in one way: If a holiday fell on a Saturday or Sunday, the prior Friday or following Monday shall not be observed as the holiday (as permitted under the expired contract). JT 2, p. 8; JT 4. In its LBFO's on July 30, 2019 and January 13, 2020, Respondent proposed eliminating all article benefits following the identification of six holidays set forth in the expired contract. JT 4; JT 26, p. 6; JT 32, p. 12. Respondent's implemented changes resulted in the

[7] The parties stipulated that the only bargaining proposals submitted by Respondent to the Union between March 1, 2018 and January 31, 2019 are set forth as Joint Exhibits 3 and 4. GC 2.

elimination of (1) holiday pay while employees are on vacation, (2) the observation of a weekend holiday on the following Monday, (3) temporary transfer upgrade pay, and (4) overtime pay for working a holiday. Respondent provided limited explanation for this proposed reduction in benefits other than admittedly telling the Union it was only willing to offer the "six holidays on the dates observed." JT 28, p. 2.

On the question of subcontracting, Article 13 of the expired CBA required Respondent to notify the Union if it desired to subcontract bargaining unit work and, if requested by the Union, the parties would meet to discuss the effects on employees' job security. JT 2, p. 7. Respondent was also required to delay layoffs caused by subcontracting by at least one week to allow ample time for the parties to discuss methods of avoiding layoffs or minimizing their adverse effects. *Id.* During the 20 bargaining sessions that took place between March 2018 and January 2019, Respondent did not propose any changes to this article. JT 3; JT 4. Per its July 30, 2019 proposal, Respondent sought to delete the entire article and add language requiring the Union to recognize management's right to subcontract any existing operations. JT 26, p. 7. In its January 13, 2020 LBFO, Respondent deleted the entire language and substituted the limitations set forth in the expired contract with its proposed language requiring the Union to authorize Respondent to use subcontractors with unlimited discretion. JT, 32, p. 13. Respondent's bargaining summaries do not provide any explanation for Respondent's insistence to subcontract bargaining unit work at any time it so chooses. At no point during the hearing or through the voluminous exhibits did Respondent provide an explanation for its proposal.

Article 17 (Seniority) defined plant seniority and set forth the process of using seniority to fill job vacancies. JT 2, p. 8. Respondent did not seek any changes to this article in its January 2, 2019 LBFO. JT 4. On July 30, 2019, and again on November 11, 2019, Respondent

proposed deleting the entire article. JT 14; JT 26, p. 6. Eric Reeder testified to the discussions the parties had at the table during the sessions he attended beginning on November 11, 2019. T. 112-117. Reeder explained to Respondent that seniority was a primary concern for the Union as it concerns addressing subjects such as vacation and job bidding by longevity. T. 112-113. As it concerned job bids, Respondent took the position that it wanted sole control/discretion on who to select for vacancies. T. 113. For vacations, requests would be approved on a first come, first served basis. T. 113-114. The Union stressed the importance of seniority and addressed the possibility of assisting with a job bid board where vacancies would be posted on a board with Respondent selecting the most senior qualified applicant. T. 114. Respondent admittedly had previously agreed to such a system with the Union but it never came to fruition. T. 114-115. Even though Respondent had previously agreed to use a job bid board, when the Union made the same proposal, Respondent offered no reason as to why it would not do so now. T. 115-116. Because of Respondent's unwillingness to modify its stance on eliminating seniority, Respondent's January 13, 2020 LBFO only maintained the definition of seniority while deleting the use of it for any purpose. JT 32, p. 15. As a result, seniority is defined without any use of the word in any capacity as Respondent has taken the position that it should possess exclusive decision-making ability in all aspects of employees' terms and conditions of employment. Respondent's only explanation during the course of negotiations was its desire to control that decision.

Respondent did not propose any changes to Article 20 (Leave of Absence) in its January 2, 2019 or July 30, 2019 proposals. JT 4; JT 14. However, on November 11, 2019, Respondent proposed deleting Section 6 – Union Leave. JT 26, p. 7. Under the expired CBA, Union leave was permitted for no more than three employees selected by the Union to attend Union

conventions and that such leave would be granted no more than twice in a 12-month period. JT 2, p. 10. Although the Union was able to acquire some concessions from Respondent with respect to this article, agreeable terms could not be reached and Respondent implemented language reducing the number of employees eligible to attend Union conventions to one and the number of days they could be absent to two. JT 32, p. 17. Again, the parties expended important bargaining time on a regressive proposal that Respondent generated upon the parties' return to the table in November 2019. Respondent did not put on any evidence at the hearing to establish the necessity of such a proposal or even an explanation for its position. Instead, the record reveals another proposal made by Respondent in an effort to frustrate negotiations, causing the Union to dig itself out from a hole in order to climb back to the status quo.

Article 23 (Miscellaneous) of the expired CBA allowed employees to decline work in excess of 12 hours in a single day with the exception of emergency maintenance situations. JT 2, p. 11. In its January and July 2019 proposals, Respondent did not seek any changes to this provision. Yet again, on November 11, 2019, Respondent added the article to its list of deletions along with a proposal that the Union "recognizes management's right to assign work in excess of 12 hours a day." JT 26, p. 7. Again, the record is void of evidence of explanations for such a proposal.

A common theme throughout the Union's bargaining sessions with Respondent is Respondent's blanket denials of proposals and conclusional statements regarding its positions. See *John Ascuaga's Nuggett*, 298 NLRB 524, 527 (1990) ("[A] refusal to offer explanations for one's bargaining proposals (beyond conclusional statements that this is what the party wants)…is indicative of bad faith because it is not the conduct of a party seeking sincerely to reach agreement."). However, as it concerned its proposal to drastically modify the parties'

grievance procedure, Respondent did provide the Union an explanation. When that was resolved by the Union, Respondent created another reason. And then another. And then another. As noted above, on July 30, 2019, Respondent initially did not provide the Union with an explanation for its proposal to delete 80% of the grievance procedure, whittling the process down to one step where management would have the final say over the grievance. Respondent maintained the same position when the parties reconvened on November 11, 2019. JT 26, p. 6. Eric Reeder testified in detail to the parties' discussion of the proposal and Respondent's frequent moving of the goalpost. When pressed by the Union, Respondent first explained that it thought the grievance process was too long. T. 92. The Union listened to Respondent's concern and acted accordingly by proposing a streamlined grievance procedure that involved two steps and arbitration. T. 93-94; JT 26, p. 19-20. Respondent rejected the counter proposal without a reason other than it was not interested. T. 94. As bargaining progressed, Respondent then offered a different reason for its desire to change the grievance procedure – wanting a local person to resolve the issue. T. 94-95. Respondent did not want someone from outside the area. T. 95. This new reason bled into a discussion about cost associated with using an arbitrator from outside of the region. T. 95. With the new explanation, the Union pivoted and proposed selecting regional arbitrators, which is an option for the parties when they select arbitrators. T. 95-96. Again, Respondent rejected the proposal without explaining how it did not address their concerns. T. 96. With cost becoming the next excuse, the Union then proposed a "winner take all" system where the loser of the arbitration would pay the full cost. T. 96. Again, Respondent rejected the Union's counter proposal without providing an explanation as to why. T. 96. As the parties continued to discuss the subject, Respondent landed on its last reason that it did not want arbitration included in the grievance process in any capacity. T. 96-97. Respondent was

willing to add back the second step of the grievance process in the expired CBA, but it was not willing to do more than that. T. 97. Respondent only offered the alternative of the parties seeking redress through the courts or the Board. T. 97. Respondent never provided an explanation concerning why it objected to a third party arbitrator deciding a grievance but not a third party such as a judge or federal agency. T. 97-98. Respondent also reneged on its promise to provide the Union with a counter proposal to binding arbitration. On November 20, 2019, Respondent requested to postpone the following day's bargaining session in order to give it time to formulate a new proposal for handling grievances. T. 122-128. The Union agreed to communicate to its attorney that it had no objection to rescheduling the meeting the following day. *Id.* Yet, at no point did Respondent follow through and provide any kind of counter proposal concerning the grievance procedure. T.138. Respondent's shifting positions as it concerned the parties' grievance procedure and binding arbitration is just another example of Respondent having no intention of reaching an agreement with the Union.

The evidence of Respondent's regressive bargaining is clear through the progression of its proposals. During the 20 times the parties met for bargaining over the course of 2018 and early 2019, Respondent only offered two bargaining proposals. One was made on May 15, 2018, and the other on January 2, 2019. After the Court issued its in injunction on May 10, 2019, the parties returned to the table only because the Court ordered Respondent to do so. Respondent showed up for these negotiations with a contract proposal that drastically stripped rights and benefits it had not sought to previously remove from the contract. In finding Respondent to be in contempt of its injunctive order, the Court agreed that Respondent continued to bargain in bad faith. Again, Respondent was ordered back to the bargaining table with the Union. Again, Respondent offered the same regressive proposals as it had on July 30,

2019, but it doubled down by insisting on the removal of additional rights and benefits. Respondent's explanations were either not provided or very limited in detail. Respondent's actions were clearly designed to prevent the parties from ever reaching a good-faith successor agreement by requiring the Union to dig out from a bargaining hole that deepened with each proposal.

2. Bad faith bargaining indicated by Respondent's proposals

Not only did Respondent engage the Union in an unlawful manner with respect to the regressive nature of its proposals, but the substance of Respondent's proposals were evidence of bad faith bargaining because they were made to stifle the bargaining process and/or frustrate the Union's ability to represent bargaining unit employees. The Board looks to whether proposals, taken as a whole in the context in which they are made, demonstrate a mindset open to agreement or opposed to a true give-and-take. *Hydrotherm, Inc*., 302 NLRB 990, 993 (1991); *Public Service Co. of Oklahoma*, 334 NLRB 487, 487 (2001). Respondent has insisted on proposals that would give it unilateral control over numerous and important mandatory subjects of bargaining, including but not limited to wages, job assignments, safety concerns, and dispute resolution. Both *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992), enfd. 987 F.2d 1376 (8th Cir. 1993), and *McClatchy Newspapers*, 321 NLRB 1386, 1388 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998), hold that an employer cannot legally insist on retaining unilateral control over such a broad range of mandatory subjects of bargaining. Therefore, Respondent's insistence on unilateral control is itself further evidence of its overall bad-faith (or surface) bargaining. *Radisson Plaza*, 307 NLRB at 95-96. In *Regency Service Carts*, 345 NLRB 671, 675 (2005), the Board explained why employer insistence on unilateral control constitutes bad-faith bargaining:

> An inference of bad-faith bargaining is appropriate when the employer's proposals, taken as a whole, would leave the union and employees with less protection than provided by law without a contract. *Id.* at 488 (citing, inter alia, *A-1 King Size Sandwiches, Inc.*, 265 NLRB 850, 859-861 (1982), enfd. 732 F.2d 872,977 (11th Cir. 1984), cert. denied 469 U.S. 1035 (1984). — In such circumstances, the union is excluded from the participation in the collective-bargaining process to which it is statutorily entitled, effectively stripping it of any meaningful method of representing its members in decisions affecting important conditions of employment and exposing the employer's bad faith.

Respondent's insistence that it be able to increase employees' wages without input from or bargaining with the Union is a prime example. JT 26, p. 7; JT 32, p. 8, p. 13. In *McClatchy Newspapers*, supra, the employer insisted to impasse on and implemented a proposal reserving the sole discretion on merit wage increases. The Board found that because the employer's proposal gave it the ongoing ability to determine wage increases and excluded the union from negotiating them, this structure would directly impact a key term and condition of employment and would simultaneously disparage the union by showing, despite its resistance, its inability to act as the employees' representative in setting terms and conditions of employment. *McClatchy Newspapers*, 321 NLRB at 1391. The Board concluded that this type of proposal was inherently destructive of the principles of collective bargaining, and held that the employer violated the Act by unilaterally changing wages of bargaining unit employees after having bargained to impasse on its proposal to implement a company controlled merit pay plan. See also *KSM Industries, Inc.*, 336 NLRB 133 (2001) (Board affirmed the ALJ's decision extending *McClatchy Newspapers* rationale to health insurance); *Golden Eagle Spotting Co.*, Inc., 319 NLRB 64, 82 (1995), enfd. 93 F.3d 468 (8th Cir. 1996) (employer engaged in surface bargaining by making proposals granting the employer the exclusive authority to determine wages and the outcome of grievances).

In *A-1 King Size Sandwiches*, supra, the employer insisted on unilateral control over

merit increases, manning of jobs, scheduling, hours, layoff, recall, the granting of leave, promotion, demotion, discipline, the assignment of work outside of the unit, and changes to past practice. In finding the employer to have engaged in bad faith bargaining, the Board stated the employer's proposals "would strip the union of any effective method of representing its members…further excluding it from any participation in decisions affecting important conditions of employment. *A-1 King Size Sandwiches*, 265 NLRB at 859, quoting *San Isabel Electric Services*, 225 NLRB 1073, 1080 (1976). The Board further noted that, if accepted, the proposed contract terms would have left the union with fewer rights than if it relied solely on its certification, which would require the employer to bargain each time it wanted to change an existing term and condition of employment. *Id.* at 860.

Similarly, in *Mar-Len Cabinets*, 243 NLRB 523 (1979), the Board found the employer bargained in bad faith where it sought the deletion or substantial modification of existing contractual provisions covering union security, arbitration, union access, stewards' rights, and seniority. The Board found that the employer's proposals "would have the clear net effect…of substantially weakening the bargaining power of the unit employees as a material expansion of the prerogatives of management to control virtually all elements of the work and employment relationships, essentially untrammeled by effective interposition of a bargaining representative." *Id.* at 536.

In the instant matter, Respondent seeks the same type of unilateral control deemed unlawful by the Board in cases such as *A-1 King Size Sandwiches* and *Mar-Len Cabinets*. Respondent seeks the deletion or substantial modification of existing contractual provisions covering, but not limited to arbitration, union access, granting of leave, seniority, safety, and subcontracting of bargaining unit work. Respondent then takes that similar attempt of obtaining

unilateral control and steps on the gas by proposing, and then implementing, a new article including a waiver that would prevent the Union from negotiating over any "subject matters referred to or covered in the agreement or with respect to any subject matter not referred to or covered in the Agreement even though such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement." JT 28, p. 9; JT 32, p. 18. Not only does Respondent seek to obtain wholesale control over a significant number of contractual provisions, but it also insists the Union waive its right to bargain over mandatory subjects of bargaining within, and beyond, the CBA. When the Union sought to clarify that it did not waive its right to bargain over mandatory subjects, Respondent rejected the carve out because it would make its general waiver language "null and void" or as Respondent's bargaining summary reads, "non-effective." T. 120-122; JT 28, p. 3. Respondent's insistence on and implementation of the waiver language has left the Union and employees with fewer rights and less protection under the contract than they would have under the Act. To ensure that the law applies to be everybody and cannot be set aside, these circumstances demand that an inference of bad faith be drawn. To find otherwise would allow employers to bargain away the very protections that the Act guarantees.

3. Tentative agreements are not evidence of good faith bargaining

Respondent presumably will point to the tentative agreements reached by the parties as evidence of good faith bargaining. The tentative agreements (TA's) reached are simply more evidence of the negative effect Respondent's regressive bargaining had on negotiations. The TA's reached are de minimis in comparison to the vast number of important issues that remained on the table when Respondent declared impasse. Seven TA's are attached to Respondent's bargaining summary from the December 10, 2019 session. JT 30, p. 19-30. The

first TA simply acknowledges the change in Respondent's legal name. JT 30, p. 19. The second TA concerns the parties' agreement to exclude shag drivers from the bargaining unit. JT 30, p. 20-21. The third TA was not a new tentative agreement. It simply reiterates a TA concerning new non-discrimination language that was reached by the parties during the negotiation session that took place on August 17, 2018. JT 7, p. 35; JT 30, p. 22-23. The fourth TA concerns Respondent's withdrawal of Company Proposal 4 wherein Respondent had sought to delete the words "glassed-in" from the existing bulletin board language found in Article 5 of the parties' expired contract. T. 175; JT 2, p. 3; JT 30, p. 24. Respondent agreed to withdraw its proposal when it learned that the bulletin board is, in fact, already glassed in. T. 175. The fifth TA simply confirmed that neither party proposed any changes to Article 11 – Military Services. JT 30, p. 25. The sixth TA included an agreement that additional non-discrimination language would be added to the previously TA'd non-discrimination language from August 17, 2018. T. 176-177; JT 30, p. 26-28. Lastly, the seventh TA concerned the Union withdrawing its proposal seeking to provide employees with additional break benefits in exchange for Respondent agreeing to add the word "paid" to Article 18 – Rest Periods as it concerned employees' pre-existing 15-minute breaks. T. 177-178; JT 26, p. 14; JT 30, p. 29-30. Respondent confirmed during negotiations that employees already received paid 15-minute breaks. T. 178. As a result, the inclusion of the word "paid" did not present any new benefit to the employees. T. 178. It simply confirmed a benefit already conferred. As can be seen through the substance of the TA's in question, most, if not all do not present new or additional benefits to employees. The TA's either identify minor changes or confirm the status quo. The minimal TA's reached after seven additional bargaining sessions are more evidence of the massive hole dug by Respondent due to its regressive proposals and proposals seeking to strip

Union representational rights and benefits of employees that have existed for years.

4. Respondent's actions are not isolated

As detailed above, the Board looks at the totality of an employer's conduct and the circumstances to determine if a party has engaged in bad faith bargaining. Factors analyzed include the substance and timing of bargaining proposals, the parties' bargaining history, whether and how the employer explains its proposals, and other evidence of its intent. *Quality House of Graphics,* 336 NLRB 497, 515 (2001). Respondent's conduct was not done in a vacuum. It was not isolated to a limited period of time wherein Respondent should receive the benefit of the doubt. It began with 20 sessions worth of bad faith bargaining between March 22, 2018 and January 2, 2019. The Board agreed with Judge Gollin that "Respondent deliberately acted throughout bargaining to prevent any meaningful progress toward a contract." *Noah's Ark Processors, LLC d/b/a WR Reserve*, 370 NLRB No. 74, slip op. at 5 (Jan. 27, 2021). The Board described Respondent's bargaining as a "charade" and concluded that "[a]s a result of the Respondent's bad-faith bargaining, the Union fruitlessly expended time and financial resources arranging dates for bargaining, developing proposals in the vacuum created by the Respondent's silence, and attending bargaining sessions where no bargaining took place." *Id.*[8] When Respondent was ordered back to the bargaining table again by Judge Gerrard pursuant to his injunctive order, Respondent kept playing games. Judge Gerrard ordered Respondent to turn over the documents requested by the Union on November 6, 2017 within one week of the injunctive order. JT 8, p. 29. However, as of the parties' next bargaining session on July 23, 2019, Respondent had yet to do so. Then, on the first day of actual bargaining on July 30, 2019, Respondent offered a new wholesale CBA proposal wherein it sought to significantly strip

[8] Due to Respondent's flagrant bad faith bargaining, the Board ordered Respondent to reimburse the Union for bargaining expenses incurred between March 22, 2018 and January 25, 2019. *Id.*

rights and benefits that it had not sought in the 20 sessions between March 22, 2018 and January 2, 2019. When the Union did not accept Respondent's new proposal on the spot, on August 6, 2019, Respondent declared its proposal to be its last, best, and final. But for Judge Gerrard finding Respondent's atrocious conduct to be in violation of his injunctive order, Respondent would not have returned to the table. It was only after Respondent was found in contempt and was under the threat of additional compensatory damages that it returned to the table on November 11, 2019. When it did, the only change made was sending its legal counsel as its lead negotiator and the generation of bargaining summaries as required by Judge Gerrard. Despite Judge Gerrard's contempt order and bad faith bargaining finding, Respondent subsequently used its same regressive bargaining proposals as July 30, 2019, except that it added a few more to the pile. Respondent does not get the benefit of the doubt in any capacity as its conduct at the table is concerned. All of the factors that the Board looks at to determine if a party has bargained in bad faith weigh against Respondent. Every day that Respondent is allowed to continue its conduct is a detriment to the rights of Respondent's bargaining unit employees and the Union as the collective-bargaining representative of those employees.

B. Respondent prematurely declared impasse

In determining whether impasse has been reached, the Board considers "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Stein Indus., Inc*., 365 NLRB No. 31 slip op. at 3 (Feb. 10, 2017), citing *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), review denied sub nom. *Television Artists AFTRA v. NLRB,* 395 F.2d 622 (D.C. Cir. 1968). "'[I]mpasse is ... that point at which the parties have exhausted the prospects of

concluding an agreement and further discussions would be fruitless."' *Laborers Health & Welfare Trust Fund v. Advance Lightweight Concrete Co.,* 484 U.S. 539, 543 fn. 5 (1988); see also *Sacramento Union*, 291 NLRB 552, 554 (1988) ("The Board has long held that an impasse occurs 'after good faith negotiations have exhausted the prospects of concluding an agreement."') (quoting *Taft Broadcasting Co.*, above), enfd. mem. sub nom. *Sierra Publishing Co. v. NLRB,* 888 F.2d 1394 (9th Cir. 1989); *Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60, 65 (2d Cir. 1979) (negotiations must be sufficiently exhaustive to find that impasse had been reached). "Both parties must believe they are at the end of their rope." *Nexeo Solutions, LLC,* 364 NLRB No. 44, slip op. at 12 (2016), (quoting *Larsdale*, *Inc.,* 310 NLRB 1317, 1318 (1993)). Respondent relied upon its unlawful bad faith bargaining to prematurely declare impasse and subsequently unilaterally change employees' terms and conditions of employment. The Board has held that "a finding of impasse presupposes that the parties prior to the impasse have acted in good faith." *Circuit Wise, Inc*., 309 NLRB 905, 918 (1992). "Generally, a lawful impasse cannot be reached in the presence of unremedied unfair labor practices." *Id.* An impasse is unlawful if it is partially based on the employer's unremedied unfair labor practices. *Laborer's Fund Adm. Office of Northern California, Inc*., 302 NLRB 1031, 1033 (1991); *Wayne's Dairy*, 223 NLRB 260 (1976)("A party cannot parlay an impasse resulting from its own misconduct into a license to make unilateral changes."). As detailed at length above, Respondent engaged in bad faith bargaining both outside and inside of the 10(b) period and Board law does not allow Respondent to benefit from its unlawful conduct. Not only does Respondent's bad faith bargaining remained unremedied, but so do the numerous unfair labor practices found by the Board in *Noah's Ark Processors, LLC d/b/a WR Reserve*, 370 NLRB No. 74 (Jan. 27, 2021).

Bad faith bargaining aside, the record additionally established that Respondent prematurely declared impasse. First, the parties had yet to address all economic subjects. Respondent is presumed to argue that it did not agree to defer negotiations on certain mandatory subjects of bargaining, including wages. However, the record does not support Respondent's anticipated argument. Eric Reeder provided detailed testimony concerning the parties' approach to addressing economics, in particular wages, and Respondent did not provide contrary testimony at the hearing. The Union's written proposal dated November 11, 2019 is clear on its face that rates of pay proposals will be "addressed later." JT 26, p. 12, p. 17. Reeder testified that the Union frequently communicated its position to Respondent at the table that it would address economics, specifically wages, after the parties had completed negotiations on non-economic subjects. T. 131. Beyond the Union's initial November 11, 2019 proposal, when the parties would go over each proposal line by line, when the parties reached rates of pay, it was clearly defined that it would be discussed later. T. 131. It was first verbally communicated during the parties' November 11, 2019 session. T. 132-133. Every time the parties repeated this task, the Union's intent was made known. T. 131. This was done in most sessions Eric Reeder attended. T. 133. At no point during negotiations did any company representative object. T. 133. Respondent never took the position that both economics and non-economics need to be addressed or bargained simultaneously. T. 133. At a certain point during negotiations, it became clear that Respondent had previously provided documents detailing wage information for bargaining unit employees. T. 134. Lead negotiator Eric Reeder was not aware of this at the time, but subsequently confirmed it. T. 134. What he found was a flash drive containing voluminous documents such as financial papers, rates of pay, job classifications, etc. T. 134. When he started looking closely at what had been provided, he

realized it was an overwhelming amount of material with some files consisting of 900 pages. T. 135. Because it would have taken a substantial amount of time to review, Reeder requested a more concise document that would allow the Union to prepare its wage proposal. T. 135. During the parties' December 10, 2019 session, Respondent provided the Union a wage summary sheet that it asserted had previously been provided to the Union in earlier sessions. T. 135; JT 30, p. 6.[9] While Reeder admitted that the wage summary was a document the Union could utilize to formulate its wage proposals, he had not yet finished doing so when Respondent declared its offer to be its LBFO on January 13, 2020. Reeder explained that the Union did not believe the parties were done bargaining because they had not yet finished discussing non-economics. For example, the parties had yet to even discuss the length of the contract, which was crucial in determining proposed raises per year. T. 136. Reeder also believed there was room to negotiate non-economics including but not limited to seniority, safety issues, vacation, and funeral leave. T. 137.

During the parties' January 13, 2020 session, Respondent gave the Union what it deemed to be its last, best, and final offer. Eleven days later, Respondent declared impasse and implemented the terms of that offer. At no point prior to January 13, 2020 had the parties bargained over employees' wages. T. 136. Instead, prior to the parties ever engaging in an actual substantive discussion about employees' wages, Respondent announced its LBFO and declared impasse. "Negotiating the details on such important subjects as wages is at the heart of collective bargaining." *Royal Motor Sales*, 329 NLRB 760, 763 (1999), enfd. 2 Fed. Appx. 1 (D.C. Cir. 2001). The Board expects parties to engage in longer and more demanding

[9] Reeder testified that he had not previously seen the summary sheet in question. However, the Union had recently transitioned into new leadership with Reeder taking office as Local President on October 22, 2019. T. 80. Because it took place before he took office, Reeder was not involved in the parties' bargaining sessions on July 23, July 30, and August 6, 2019.

bargaining over such important issues as wages and benefits. *Grinnell Fire Systems, Inc.*, 328 NLRB 585, 597 (1999) (for bargaining over wages and benefits with radical departures from existing contract proposed, "it was to be expected that, in order to be fruitful, the negotiations would be long and arduous."). In *Old Man's Home of Philadelphia*, the Board-affirmed ALJ found that even though "the negotiations were long, including 17 sessions over 6 months," discussions were limited during negotiations on the impasse-causing issue of wages, and "[t]hus, the length of negotiations does not support a finding of impasse." 265 NLRB 1632, 1634 (1982). In *Atlas Refinery, Inc.*, the ALJ concluded that the parties did not reach impasse based in part on "the scant number of bargaining sessions on the economic issues" because even though the employer declared impasse after 9 bargaining sessions over the course of 3 months, the parties discussed the economic issues only at the last three sessions. 354 NLRB 1056, 1071 (2010)(the ALJ's decision was adopted by the Board in 357 NLRB 1798 (2011); see also *Beverly Farm Foundation, Inc.*, 323 NLRB 787, 793 (1997) (finding impasse declared on economic issues invalid even after 19 bargaining sessions and a year of bargaining because "it is important to bear in mind that 16 of the parties' 19 bargaining sessions were devoted to noneconomic issues."). Here, session after session, the intent was clear to the parties that economics would be addressed following non-economic terms. Respondent never objected. Respondent did not make one opposing comment in response to this approach.

The party asserting impasse has the burden of proof on the issue. *Dish Network Corp.,* 366 NLRB No. 119, slip op. at 2 (2018); *Grosvenor Orlando Associates, Ltd*., 336 NLRB 613, 616 (2001). Whether parties have reached impasse is a matter of judgment, and the Board has outlined several factors to be considered in making that judgment: the bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the

issue or issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967). The record does not support Respondent's impasse stance as the *Taft* factors weigh heavily against Respondent. It is not enough for Respondent to assert it reached an endpoint in bargaining, "both parties must believe that they are at the end of their rope." *Larsdale, Inc*., 310 NLRB 1317, 1318-19 (1993) (internal quotes omitted). The Board will not find impasse if the employer does not prove that the union is unwilling to continue bargaining. *Grinnell Fire Systems, Inc.*, 328 NLRB at 598 (finding no impasse even where the parties "were still far apart on wages and benefits" because the union was willing to bargain). The evidence set forth in the record does not show that the Union was at the end of its rope when Respondent declared impasse and implemented its LBFO. Instead, the record shows that the parties agreed to additional bargaining dates, including mediation, during the months of January, February, and March 2020, and the Union made it adamantly clear to Respondent that it was willing to continue bargaining. JT 24. Respondent was plainly aware of this as shown by its January 10, 2020 letter to the Board's attorneys and Eric Zarate wherein Respondent offered its availability for additional bargaining sessions throughout the months of February, March, and April 2020. JT 23; JT 23A. Yet, three days later, Respondent's lead negotiator Jerry Pigsley arrived to the parties' January 13, 2020 bargaining session with a LBFO in his possession. The fact that Pigsley arrived at negotiations that day with the intent of distributing Respondent's LBFO is supported by the evidence. First, Pigsley gave the Union's lead negotiator that day, Business Agent Rodney Schwisow, three updated proposals within the first five minutes of negotiations. T. 196; GC 5; JT 32, p. 7-9. Those proposals contained updated article numbers that

corresponded to Respondent's LBFO that Pigsley gave to Schwisow later that session. They do not correspond to the article numbers set forth in the parties' expired CBA. JT 2, p. 5, 6, 9; JT 32, p. 7-9, 12, 13, 16. The evidence revealed at hearing established that Respondent arrived to negotiations on January 13, 2020, without any intent of further bargaining as its plan was to announce its LBFO and declare impasse absent the Union's refusal to accept it as is. Despite the Union subsequently making it adamantly clear that the Union sought continued bargaining, Respondent ignored those assertions and declared impasse and implemented its LBFO on January 24, 2020. As a result, its refusal to engage in further bargaining with the Union and its implementation of its LBFO on January 24, 2020, culminating in unilateral changes to mandatory subjects of bargaining, Respondent violated Sections 8(a)(1) and (5) of the Act.[10]

III. Conclusion

The Acting General Counsel respectfully submits that for all of the reasons set forth above, Respondent violated Sections 8(a)(1) and (5) of the Act as detailed in the Acting General Counsel's Complaint and Notice of Hearing.[11]

Dated: February 12, 2021

Respectfully Submitted,

/s/ William F. LeMaster

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William F. LeMaster and Julie Covel
Counsel for the Acting General Counsel

[10] In addition to the changes in mandatory subjects of bargaining identified throughout Respondent's LBFO implemented on January 24, 2020, Respondent also stipulated that on May 25, 2020, it unilaterally paid employees holiday pay for hours worked on the Memorial Day holiday that was contrary to the parties' expired CBA and Respondent's past practice without notice to or bargaining with the Union. GC 2.

[11] The Board ordered special remedies, including a notice reading in English and Spanish, because Respondent's violations were "widespread, ongoing, and strike at the heart of the employees' Section 7 rights." *Noah's Ark Processors, LLC d/b/a WR Reserve*, 370 NLRB No. 74, slip op. at 38. Respondent has continued its unlawful conduct. Therefore, the Acting General Counsel requests a notice reading that mirrors the Board's order.