

Nos. 10-1406 & 10-1409

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

COMAU, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMAU, INC.)
)
Petitioner/Cross-Respondent) Nos. 10-1406
) 10-1409
)
v.) Board Case No.
) 7-CA-52106
NATIONAL LABOR RELATIONS BOARD)
)
Respondent/Cross-Petitioner)
)

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

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

A. *Parties and Amici:* Comau, Inc. was the respondent before the National Labor Relations Board and is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court. Automated Systems Workers Local 1123, A Division of Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America was the charging party before the Board. The Board's General Counsel was a party before the Board.

B. *Rulings Under Review:* The case under review is a decision and order of the Board issued on November 5, 2010, and reported at 356 NLRB No. 21.

C. *Related Cases:* This case has not previously been before this Court. The Board is not aware of any related cases pending or about to be presented to this Court or any other court.

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Dated at Washington, DC
this 27th day of July 2011

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GLOSSARY

Act	The National Labor Relations Act
Board	The National Labor Relations Board
Br.	The Opening Brief of Comau, Inc.
Company	Comau, Inc.
D&O	Decision and Order
Union	Automated Systems Workers Local 1123, A Division of Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America

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**BRIEF FOR
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STATEMENT OF JURISDICTION

This case is before the Court on the petition of Comau, Inc. (“the Company”) to review and set aside, and on the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Board order issued against the Company. The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the National Labor Relations Act, as amended

(29 U.S.C. §§ 151, 160(a)) (“the Act”), which authorizes the Board to prevent unfair labor practices affecting commerce. The Board’s Decision and Order issued on November 5, 2010, and is reported at 356 NLRB No. 21.¹

The Court has jurisdiction over this case under Section 10(e) and (f) of the Act. The Board’s Order is final with respect to all parties. The Company filed its petition for review on December 3, 2010, and the Board filed its cross-application for enforcement on December 9, 2010. Those filings were timely because the Act imposes no time limits on proceedings for the review or enforcement of Board orders.

STATEMENT OF THE ISSUE

Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(5) and (1) of the Act by implementing its healthcare insurance plan on March 1, 2009, in the absence of an agreement or a bona fide impasse.

¹ “D&O” refers to the Board’s Decision and Order. “Tr.” refers to the transcript of the hearing before the administrative law judge. “GCX” and “RX” refer, respectively, to General Counsel and Respondent exhibits introduced at the hearing. “Br.” references are to the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are contained in an addendum to this brief.

STATEMENT OF THE CASE

During negotiations between the Company and the Automated Systems Workers Local 1123, A Division of Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (“the Union”) for a new collective-bargaining agreement, the Company declared impasse in early December 2008. It announced that it would impose the terms of its last best offer later that month and that its new healthcare insurance plan, which decreased benefits and required all employees to pay a premium, would become effective on March 1, 2009. Within days of declaring impasse, however, the Company resumed negotiations on the specific issue of healthcare insurance with the Union. Between December 2008 and March 2009, the parties engaged in extensive bargaining and came within striking distance of an agreement that would have substituted the Union’s own plan for the previously announced plan. On March 1, however, the Company implemented the plan contained in its last best offer.

Based on those facts, and an amended charge filed by the Union, the Board’s General Counsel issued a consolidated complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by putting into effect its healthcare plan when the parties were still actively bargaining

and had not reached impasse. *See* 29 U.S.C. § 158(a)(5) and (1). (D&O 2; GCX 1(g).) After a hearing, an administrative law judge found that the Company had committed the alleged unfair labor practice. On review, the Board affirmed the judge's rulings, findings, and conclusions, as modified. (D&O 1-2.) The facts supporting the Board's Order are summarized directly below, followed by a description of the Board's Conclusions and Order.

I. THE BOARD'S FINDINGS OF FACT

A. Background; in January 2008, the Company and the Union Begin Negotiations for a New Contract

The Company, a division of the Fiat automotive company, builds assembly lines and specialty tools for the automobile industry at various plants in the metropolitan Detroit area. (D&O 1; Tr. 43, 299-301, GCX 1(g) par. 2, 1(j) p. 1.) Since 2001, the Union has represented a bargaining unit of the Company's production and maintenance employees which, by 2009, consisted of over 200 employees. (D&O 2 and n.1, 2; Tr. 42, 300, GCX 1(g) par. 5, 7, 9, 1(j) pp. 1-2.)

The most recent collective-bargaining agreement between the Union and the Company ran from March 7, 2005, to March 2, 2008, and contained a two-tier system for payment of healthcare premiums. Employees hired prior to the ratification of the agreement—a group that included almost all of the current unit employees as of 2008—did not pay any premiums for healthcare coverage which

the Company provided through Blue Cross/Blue Shield (“Blue Cross”). (D&O 3; Tr. 44, 52, 82-83, GCX 2 pp. 21-24.) During negotiations for that contract, the Union had chosen to forgo pay increases and bonuses in exchange for retaining the no-premium healthcare coverage for those employees. Around the same time, another bargaining unit of the Company’s employees who were represented by a different union agreed to pay a portion of healthcare premiums in exchange for pay increases and bonuses. (D&O 3 n.8; Tr. 91, 94, 383-84.)

In January 2008, the parties began negotiations for a successor contract. (D&O 3; Tr. 44.) Prior to the March 2 expiration date, the parties entered into an agreement that extended the contract terms indefinitely, but gave either party the right to cancel the extension with timely notice. (D&O 2-3; GCX 1(g) par. 8, 1(j) p. 2, RX 2.) Edward Plawecki, the Company’s vice president and general counsel, and Peter Reuter, a union employee, led the respective bargaining committees. Fred Begle, the Company’s director of labor relations was also a primary spokesperson at the negotiating sessions, and led the Company’s bargaining committee when Plawecki was not present. (D&O 3 and n.4; Tr. 42, 44-46, 116-17, 216-17, 237, 302-03, 491-92.)

B. Throughout 2008, the Parties Negotiate For a New Contract; in August, the Company Expresses a Willingness To Use a Union-Sponsored Healthcare Insurance Plan

Early in the 2008 negotiations, the Company informed the Union that it wanted a “concessionary” contract, which meant that it would not provide the employees with anything that increased its costs unless the employees provided savings in return. (D&O 3; Tr. 97-98, 309.) The Company also stated that it wanted to reduce healthcare benefits and to require all employees to pay a portion of their healthcare insurance premiums. (D&O 3; Tr. 317-19.) The Union expressed a willingness to accept a reduction in healthcare benefits, but wanted the same raises and bonuses that employees represented by the other union had previously received from the Company for agreeing to similar changes. (D&O 3 and n.8; Tr. 91, 94, 252-53, 337, 383-85.)

In August, the Union suggested that it could offer healthcare insurance to employees through the Union’s plan. The Union explained that because its plan covers a large number of people, the Company’s use of the plan would allow it to realize savings without requiring the employees to pay premiums. Under the Union’s proposal, the Company would not have to finance its own self-insured plan, but would contribute to the Union’s plan on a per-employee basis. Like the

Company's self-insured plan, the Union's plan was provided through Blue Cross. (D&O 3-4; Tr. 53-54, 98-99.)

The Company expressed interest in the Union's plan, but explained that the switch had to adequately reduce the Company's existing health insurance costs. The Company also explained that even if the employees were moved to the Union's plan, it would, for a period of about 3 to 6 months, have "trailing costs," to pay—that is, bills it would receive for healthcare services that employees had used while they were covered by the Company's plan. (D&O 4 and n.9; Tr. 133, 324-25, 357.)

At no time in 2008 did the Company obtain an estimate from Blue Cross of the amount of potential "trailing costs." During negotiations, the Company guessed that such costs might total \$1 million or more. The Union, however, discussed the Company's liability for trailing costs with Blue Cross, and concluded that they would be substantially less—about \$500,000. In response, Plawecki told the Union that it was "very feasible" that the parties could agree to move to the Union's plan if the trailing costs were, in fact, less than \$500,000. (D&O 4; Tr. 79, 100-01, 109-11, 133-35, 324-25, 357, 491.)

C. In December 2008, the Company Declares Impasse and Announces that on March 1, 2009, It Will Put into Effect Its New Health Insurance Plan, but States a Desire to Continue Bargaining Over Health Insurance

On December 3, the Company declared impasse. The Union, however, denied that impasse had been reached. (D&O 4; Tr. 50, 254.) The Company then provided 14-days notice that it was canceling the contract extension, and stated that it would impose its “last best offer effective” December 22 when the bargaining agreement would cease to apply. The Company also stated that, despite its declaration of impasse, it was “prepared to continue negotiations in order to agree upon and reach a successor” agreement. (D&O 4; RX 5, 7.)

The Company’s “last best offer,” which it gave to the Union on December 3, contained a notation that the new health insurance plan would be “[e]ffective March 1, 2009.” (D&O 4; GCX 4 p. 23.) That plan would require all employees to pay healthcare premiums in an amount dependent on the type of coverage they chose and the extent of cost increases during the term of the contract. (D&O 3; Tr. 50-52, GCX 4 pp. 1, 23-24.) In a December 8 letter, the Company notified employees of certain changes “being implemented effective December 22,” such as changes to shop rules and seniority. The letter also noted that the Company was offering healthcare coverage requiring premiums “effective” March 1, 2009. (RX

4 p.19.)² The letter also explained that the Company would “continue to bargain with the [Union] in an attempt to come to a formal agreement.” (D&O; RX 4 p.20.)

D. Between December 8, 2008, and February 20, 2009, the Parties Continue To Bargain Over Healthcare Insurance and Make Substantial Progress on an Agreement To Use the Union’s Healthcare Plan

Beginning on December 8, 2008, and continuing through March 20, 2009, the parties met on about 10 occasions to negotiate over healthcare insurance. Generally, the parties met as subcommittees comprised of persons who were knowledgeable about insurance and had the authority to enter into tentative agreements. Company Director of Labor Relations Begle and union employee Reuter led the respective subcommittees. (D&O 5; Tr. 55-56, 65-66, 81, 145-46, 176-77, 219-20, 238, 248, 269.) During the meetings, the parties discussed savings the Company might realize by using the Union’s plan, and discussed trailing costs as a cost to the Company that would have to be outweighed by savings the Company would realize by switching from the old plan to the Union’s plan. (D&O 6, 7; Tr. 194-96, 241-42, 249-50.)

² Specifically, the “key” changes set forth in the letter included new rules regarding: seniority; tardiness; possession of various prohibited items; employee use of a co-worker’s “scan card”; notice required from night shift employees in advance of absences; mileage reimbursement rate; and standards for obtaining “double time” and “overtime” pay. (D&O 4; RX 4 pp. 19-20.)

On December 8, the Union proposed that the Company pay \$1000 per-month/per-employee to the Union healthcare plan for each employee enrolled. The \$1000 figure was \$214 less than the Company's per-month/per-employee cost for the more generous healthcare benefits that it was continuing to provide the employees under the terms of the expired bargaining agreement. (D&O 5; 56, 240-41, GCX 7 pp. 1-3.) That day, the Company counterproposed that it would pay a contribution to the Union's plan with a "weighted average" of \$766 per employee/per month, approximately the amount it would pay under the plan contained in its last best offer. (D&O 5; Tr. 54, 57, 123-24, 239-40, 247, GCX 6.) The Company also gave the Union a list of questions regarding the logistics of moving from the Company's plan to the Union's plan. (GCX 8.)

The Company increased its offer on December 15 and again on December 18. On January 7, 2009, the Company increased the amount it was offering to pay under the Union's plan to a weighted average of at least \$820 per-month/per-employee. (D&O 5 and n.12, 13; Tr. 58, 249-52, GCX 11, 15-18.) On January 15, the Union reduced the amount it was seeking from the Company to \$880 monthly for each employee. (D&O 5; Tr. 63-64, 257-59, GCX 20.) On February 5, the Company counteroffered with a weighted average of \$835 per month for each covered employee. (D&O 5; Tr. 65-67, 123-24, 259-60, GCX 23.) On February 20, the Union presented a healthcare insurance proposal that met the Company's

\$835 contribution figure. The proposal had no expiration. (D&O 5; Tr. 67-71, 105-09, 127-29, 177-79, 221-23, GCX 26, 29 pp. 26-28.) At the end of the February 20 meeting, the Company's negotiators said that they would review the Union's proposal and "get back to" the Union. (D&O 5; Tr. 73.) In the meantime, the Company received several estimates from Blue Cross regarding trailing costs. An initial estimate of \$183,000 was later revised to \$240,000, and then \$440,000. (D&O 4; Tr. 440-41.) In a February 23 e-mail, the Company asked the Union to clarify several points in its proposal, and the Union responded that day. (Tr. 265-66, GCX 30-31.)

E. On March 1, 2009, Despite the Parties' Substantial Progress on the Issue of Healthcare Insurance, the Company Puts into Effect Its New Healthcare Plan; on March 20 the Company Introduces a New Condition Necessary To Reaching an Agreement on Healthcare Insurance

On March 1, the Company discontinued its existing healthcare plan under which the employees were still receiving benefits consistent with the terms of the expired bargaining agreement, and switched the employees to the plan that had been outlined in its December 2008 "last best offer." That plan decreased benefits and required all employees to pay significant premiums. (D&O 5; Tr. 194.)

On March 20, at the Union's request, the parties met with their full bargaining committees. The Union had wanted to meet earlier, but the Company had been unavailable. At the meeting, the Company announced for the first time

that any agreement on healthcare insurance would need to be contingent on the Union paying the Company's trailing costs due under the old plan. The Union replied that it did not understand why it would be responsible for such costs. The meeting ended without the Company raising any other issues it had with the Union's proposal. (D&O 5, 6; Tr. 78-79, 81, 137-38, 141-42, 207, 223, 231-32, 241-42, 249-50, 266-70, 292-93, GCX 33-35.) After the March 20 meeting, the Union requested that bargaining continue, but the parties held no further negotiations. (D&O 8; GCX 39.)

On March 5, 2009, the Union filed a charge alleging that the Company had implemented a variety of changes in December 2008, including health benefits, without bargaining to impasse. (GCX 1(j) ex.A.) The Board's General Counsel declined to file a complaint on that charge. In the meantime, on May 19, 2009, while the earlier charge was still pending, the Union filed the charge that underlies this case. In the May 19 charge, the Union alleged that since approximately February 20, the Company had failed to bargain in good faith and that since May 14, the Company had refused to bargain. (D&O 2; GCX 1(c).) On July 28, the Union amended the May 19 charge to assert that the Company had unlawfully and unilaterally implemented its healthcare insurance plan on March 1, 2009, in the absence of a bona fide impasse. (D&O 2; GCX 1(e).)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Members Becker, Pearce, and Hayes) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally implementing a new healthcare insurance plan on March 1, 2009, in the absence of an agreement or a bona fide impasse. (D&O 1 and n.5.) The Board's Order requires the Company to cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). (D&O 12.) Affirmatively, the Order directs the Company to, upon request by the Union, retroactively rescind any and/or all healthcare benefits that the Company unilaterally implemented on March 1, 2009, and to restore the healthcare benefits set forth in the collective-bargaining agreement that went into effect on March 7, 2005, until the parties complete a new agreement, reach a bona fide impasse, or the Union agrees to the changes. (D&O 12-13.) The Board's Order further requires the Company to bargain with the Union and to sign an agreement if reached. (D&O 13.) The Board's Order also requires the Company to post and electrically distribute to employees a remedial notice. (D&O 1, 13.)

SUMMARY OF ARGUMENT

In December 2008, the Company declared impasse and announced, effective March 1, 2009, that it would implement a new healthcare insurance plan that decreased benefits and required all employees to pay significant premiums. After the Company declared impasse, however, it immediately returned to the bargaining table and, over a period of three months, engaged in productive negotiations with the Union on the issue of healthcare. It is undisputed that, as of March 1, the parties were well on their way toward reaching an agreement to substitute the healthcare insurance plan administered by the Union for the plan contained in the expired bargaining agreement. Based on that undisputed fact, the Board applied settled principles to find that the parties were not at impasse on March 1, and that therefore the Company's implementation of its new healthcare plan on March 1 was unlawful. The Board also reasonably applied settled principles to find that it did not need to determine whether impasse was reached in December 2008, because the ongoing productive negotiations broke any impasse that might have previously existed.

Although, importantly, the Company does not dispute the Board's key finding that no impasse existed on March 1, it nevertheless asserts that the Board's reliance on the March 1 date was misplaced, claiming that the new healthcare plan was "implemented" in December 2008, when the prospective change was

announced, and not March 2009, when the change took effect. The Board reasonably rejected that contention. It was hardly unreasonable for the Board to decline to view the plan as “implemented” when no unit employee was yet covered by the new plan. Indeed, the Company had not yet even asked any employee to seek enrollment.

Finally, based on settled principles and the facts of this case, the Board reasonably found that its unfair labor practice finding was not precluded by the General Counsel’s prior dismissal of an earlier charge that had expressed the view that the parties were not at impasse in December 2008, a matter unnecessary to the Board’s finding here. Similarly, based on its regular well-established procedures, the Board reasonably rejected the Company’s claim the Board agent who investigated the charge in this case acted inappropriately by suggesting to the Union that the charge might be amended.

STANDARD OF REVIEW

The Board’s findings of fact are conclusive if supported by substantial evidence in the record considered as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). *Accord Scepter, Inc. v. NLRB*, 280 F.3d 1053, 1055 (D.C. Cir. 2002). Evidence is substantial when “a reasonable mind might accept [it] as adequate to support a conclusion.” *Universal Camera*, 340 U.S. at 477. Thus, the Board’s reasonable

inferences drawn from the facts may not be displaced on review even though the Court might justifiably have reached a different conclusion considering the matter de novo. *Id.* at 488. *Accord United States Testing Co., Inc. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998). Because the Court's standard of review is whether the Board's position is supported by substantial evidence, the Company's argument (Br. 38) that its position is also supported by substantial evidence is irrelevant. Further, the Court will not reverse the Board's adoption of an administrative law judge's credibility determinations unless they are "hopelessly incredible," "self contradictory," or "patently unsupportable." *UFCW Local 204 v. NLRB*, 447 F.3d 821, 824 (D.C. Cir. 2006) (citation omitted).

The Board's legal determinations under the Act are entitled to deference, and this Court will uphold them "so long as they are neither arbitrary nor inconsistent with established law." *Tualatin Elec., Inc. v. NLRB*, 253 F.3d 714, 717 (D.C. Cir. 2001). *See also Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 42 (1987) ("If the Board adopts a rule that is rational and consistent with the Act, . . . then the rule is entitled to deference from the courts.") (citation omitted). More specifically, the Board's finding regarding whether the parties were at impasse may not be disturbed unless it "is irrational or unsupported by substantial evidence." *Teamsters Local Union No. 175 v. NLRB*, 788 F.2d 27, 30 (D.C. Cir. 1986). Indeed, "in the whole complex of industrial relations few issues are less suited to

appellate judicial appraisal than evaluation of bargaining processes or better suited to the expert experience of [the Board,] which deals constantly with such problems.’” *Teamsters Local Union No. 639 v. NLRB*, 924 F.2d 1078, 1083 (D.C. Cir. 1991) (quoting *Dallas Gen. Drivers Local 745 v. NLRB*, 355 F.2d 842, 844-845 (D.C. Cir. 1966)).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY IMPLEMENTING ITS NEW HEALTHCARE INSURANCE PLAN ON MARCH 1, 2009, IN THE ABSENCE OF AN AGREEMENT OR A BONA FIDE IMPASSE

A. Applicable Principles

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees. Section 8(d) of the Act (29 U.S.C. § 158(d)) defines collective bargaining in relevant part as “the mutual obligation of the employer and the representative of the employees to meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” An employer fails to meet its statutory obligation to bargain in good faith and violates Section 8(a)(5) of the Act when, without having negotiated to impasse, it makes a unilateral change in a mandatory subject of collective bargaining. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991); *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

Accord Teamsters Local No. 639 v. NLRB, 924 F.2d 1078, 1084 (D.C. Cir. 1991).³

The Supreme Court has observed that a stalemate in negotiations is deemed a good-faith impasse only when ““the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless.”” *Laborers Health & Welfare Trust Fund v. Advanced Light Weight Concrete Co.*, 484 U.S. 539, 543 n.5 (1988) (citation omitted). *Accord Am. Fed’n of Television & Radio Artists, Kansas City Local v. NLRB*, 395 F.2d 622, 628 (D.C. Cir. 1968) (genuine impasse in negotiations exists when “there [is] no realistic possibility that continuation of discussion at that time would have been fruitful”), *affirming Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967).

In determining whether the parties are at impasse, the Board considers several factors, including ““the bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations.”” *TruServ Corp. v. NLRB*, 254 F.3d 1105, 1114 (D.C. Cir. 2001) (quoting *Taft Broadcasting Co.*, 163 NLRB at 478). The

³ Section 8(a)(1) of the Act (29 U.S.C. §158(a)(1)) makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise” of their statutory rights. A violation of Section 8(a)(5) of the Act (29 U.S.C. §158(a)(5)), therefore, results in a “derivative” violation of Section 8(a)(1). *See Regal Cinemas, Inc. v. NLRB*, 317 F.3d 300, 309 n.5 (D.C. Cir. 2003).

parties' demonstrated flexibility and willingness to compromise is an additional consideration relevant to the existence of impasse. *Wycoff Steel*, 303 NLRB 517, 523 (1991). Of central importance, however, is "the parties' perception regarding the progress of the negotiations." *Teamsters Local No. 639*, 924 F.2d at 1084.

Thus, there can be no impasse unless *both* parties believe that they are "at the end of their [bargaining] rope"—in other words, where negotiations show there is "no realistic possibility that continuation of discussions . . . would [be] fruitful."

TruServ Corp., 254 F.3d at 1114 (citations and internal quotations omitted).

Indeed, often "[a]fter final offers come more offers." *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1508 (7th Cir. 1991).

Even if the parties reach impasse, it is merely "a recurring feature in the bargaining process, . . . a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken through either a change in mind or the application of economic force.'" *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1165 (D.C. Cir. 1992) (remanded on other grounds) (quoting *Charles D. Bonnanno Linen Serv., Inc.*, 243 NLRB 1093, 1093-94 (1979). *Accord Richmond Elec. Servs.*, 348 NLB 1001, 1003-04 (2006) ("A bargaining impasse merely suspends, rather than obviates the duty to bargain . . ."). Accordingly, parties can reach impasse, but then resume bargaining. In that situation, the resumption of negotiations breaks the impasse and revives the duty to bargain. *See Jano*

Graphics, Inc., 339 NLRB 251, 251 (2003); *Richmond Elec.*, 348 NLRB at 1003-04. “Anything that creates a new possibility of fruitful discussion (even if it does not create the likelihood of agreement),” such as “bargaining concessions, implied or implicit,” breaks the impasse. *Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390, 1399 (5th Cir. 1983). *Accord PRC Recording Co.*, 280 NLRB 615, 636, 640 (1986), *enforced*, 836 F.2d 289 (7th Cir. 1987). “Because impasse is only a temporary deadlock or hiatus, and any change in circumstances that creates a new possibility of fruitful discussion breaks an impasse, the analysis necessarily focuses on the status of negotiations at the time the unilateral change was made.” *Northwest Graphics, Inc.*, 343 NLRB 84, 91 (2004), *enforced mem.*, 156 F. App’x 331 (D.C. Cir. 2005).

If impasse exists, an employer may unilaterally implement terms and conditions of employment that were reasonably comprehended by its pre-impasse proposals. *Am. Fed’n of Television & Radio Artists*, 395 F.2d at 624. In that situation, the unilateral implementation of the final offer “breaks the impasse and therefore encourages future collective bargaining.” *McClatchy Newspapers, Inc. v. NLRB*, 131 F.2d 1026, 1032 (D.C. Cir. 1997). If impasse did not exist at the time of implementation, a unilateral change violates Section 8(a)(5) and (1) of the Act, even if impasse had once existed. *See Raven Serv. Corp. v. NLRB*, 315 F.3d 499, 506 (5th Cir. 2002); *Jano Graphics*, 339 NLRB at 251; *Richmond Elec.*, 348

NLRB at 1004; *PRC Recording*, 280 NLRB at 640. The burden of showing that an impasse existed at that moment of the unilateral change rests with the party asserting the defense. *Serramonte Oldsmobile*, 318 NLRB 80, 97 (1995), *enforced in relevant part*, 86 F.3d 227 (D.C. Cir. 1996).

B. Substantial Evidence Supports the Board's Finding that the Company Failed to Carry Its Burden of Establishing that Impasse Existed on March 1, 2009, When It Implemented Its New Healthcare Insurance Plan

It is undisputed that the Company declared impasse on December 3, 2008, and that it later put into effect its new healthcare insurance plan on March 1, 2009. Accordingly, if substantial evidence supports the Board's finding (D&O 1, 8-9) that the Company did not establish that impasse existed on March 1, then that unilateral change was unlawful. Here, the record evidence amply supports the Board's finding that the Company failed to show that impasse existed on March 1. As set forth below, the bargaining that occurred after the Company declared impasse in December demonstrates that the parties were not at the end of their rope when the Company put the new healthcare insurance plan into effect. Moreover, as further set forth below, the Board reasonably found (D&O 1, 9 and n.19), that notwithstanding whether impasse had existed when the Company declared impasse, the subsequent unilateral change was still unlawful because the continued bargaining had ended any impasse that may have previously existed.

As an initial matter, although the Company declared impasse on December 3, 2008, and announced that the new healthcare insurance plan would go into effect on March 1, 2009, the undisputed fact that the parties continued their negotiations to reach a new collective-bargaining agreement amply demonstrates that they had not exhausted the possibility of reaching an agreement. Thus, the Company itself expressed a belief that further bargaining after December 3, 2008, was not futile by inviting the Union to continue negotiations over a successor agreement.

Thereafter, it is undisputed, as the Board found (D&O 5), that the parties engaged in ongoing negotiations to reach an agreement on healthcare insurance. Those negotiations started on December 8, just days after the Company had declared impasse, and consisted of approximately 10 meetings that the Company repeatedly identified as “negotiations” and “healthcare negotiation session[s]” in its contemporaneous communications with the Union. (D&O 5; Tr. 313, 479, GCX 9, 19, 22, 25, 27.) The fact that the parties continued negotiations after the Company declared impasse shows that neither party believed that further bargaining would be futile. *See Colfor, Inc.*, 282 NLRB 1173, 1174 (1987) (no impasse where the parties agreed to meet for further negotiations), *enforced*, 838 F.2d 164 (6th Cir. 1988).

Significantly, the evidence establishes that movement toward an agreement on healthcare insurance was not exhausted during those subsequent negotiations.

To the contrary, the parties moved progressively closer toward an agreement under which the Company would substitute the Union's healthcare insurance plan for the healthcare insurance plan contained in the prior bargaining agreement. Thus, it is undisputed, as the Board found (D&O 5, 7), that the Company was willing to switch to the Union's plan if it saved money when compared to its cost under the plan in the prior bargaining agreement, and that it was not seeking savings beyond those contained in the last best offer.

It is also undisputed, as the Board found (D&O 5), that the parties exchanged proposals that steadily moved them toward a compromise. Under the compromise, the Company's cost for healthcare insurance per-month/per-employee would be between the \$1200 cost incurred under the plan contained in the prior bargaining agreement, and the \$766 cost it would incur under the less generous plan contained in its last best offer. Indeed, the Union's initial offer on December 8, to have the Company pay \$1000 per-employee/per-month provided immediate savings to the Company over the plan in the prior bargaining agreement. Though the Company countered that day with an offer of \$766 per-month/per-employee, it steadily increased its offer, a fact fully consistent with the parties' understanding that they were seeking a compromise between the cost to the Company of the plan in the prior bargaining agreement, and the cost to the Company of the plan

proposed in its last best offer. Those offers are also evidence of productive bargaining, not impasse.

Indeed, the Company's three offers made between December 8, 2008, and January 7, 2009, which increased the contribution it was willing to pay to use the Union's healthcare insurance plan amply demonstrated that the Company was not at the end of its rope. By January 7, the Company had offered to pay at least \$820 per-month/per-employee to use the Union's plan—an amount appropriately described (D&O 5) as a “significant increase[]” from its first proposal.

Accordingly, the Board reasonably found (D&O 9), that “[a]ny prior impasse regarding healthcare ceased to exist as of January 7, 2009,” due to the Company's concession to pay a larger portion of the cost of the Union's plan. Indeed, the parties' proposals and the Company's continued concessions over the amount it would pay to use the Union's plan provides highly persuasive evidence that the parties were no longer at impasse. *See Huck Mfg. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982) (“[F]or a deadlock to occur, *neither* party must be willing to compromise.”) (emphasis in the original).

Importantly, the parties' willingness to compromise extended well after January 7. Indeed, as the Board found (D&O 9), the evidence regarding the bargaining sessions of January 15, February 20, and February 25, established that the “positions of the parties continued to converge after [January 7],” and amply

established the absence of either futility or deadlock. Thus, on January 15, the Union substantially reduced the amount it sought from the Company from \$1000 to \$880 per-month/per-employee, which left the parties' proposals only \$60 per-month/per-employee apart. Thereafter, on February 5, the Company made a counteroffer of \$835 per-employee/per-month that moved the parties within striking distance of agreement. Subsequently, on February 20, the Union agreed to the Company's \$835 per-month/per-employee figure, and the Company promised to review the proposal and to "get back to" the Union. In those circumstances, the Union, as the Board found (D&O 8), had reason to believe that it was near a tentative agreement that it could take to its membership for a ratification vote. At minimum "neither party, and certainly not the Union, was shown to be at the end of its rope." (D&O 9.)

Yet, the Company did not get back to the Union as promised. Instead, on March 1, 2009, despite the absence of a deadlock, or any indication that further bargaining was futile, or, as the Board undisputedly found (D&O 5 n.14), the fact that the Union's offer had not expired, the Company simply put into effect its last best offer on healthcare insurance that it had announced in December 2008.

Because the Company implemented the healthcare insurance plan at a time when the parties were in the "midst of productive discussions" "that [had] moved them progressively closer to an agreement on the subject of healthcare" (D&O 9), the

Board was fully warranted in finding (D&O 1 n.5, 9 and n.19, 12) that the Company had acted unlawfully because “there was no legally cognizable impasse on March 1, 2009.”

Moreover, as the Board explained (D&O 3 n.6, 9 and n.19), because of the parties’ extensive negotiations after the Company declared impasse in December 2008, there was no need to determine whether impasse had existed then. Rather, the subsequent negotiations demonstrated that even if impasse had previously existed, no impasse existed on March 1, 2009, when the Company put into effect its healthcare insurance plan. *See, e.g., Jano Graphics*, 339 NLRB at 251 (employer unlawfully implemented final offer because any impasse that may have existed was broken prior to the employer’s unilateral implementation); *PRC Recording*, 280 NLRB at 636, 640 (unilateral change unlawful because even if impasse had existed at the time the employer initiated the change, the resumption of bargaining had broken any such impasse prior to the implementation of the unilateral change). *See also Richmond Elec. Servs.*, 348 NLRB at 1003-04 (stating that, if impasse were broken after the employer declared impasse and announced implementation, but before actual implementation, then the employer’s subsequent unilateral implementation would be unlawful).

C. The Company's Contentions that the Healthcare Insurance Plan Was Implemented in December 2008 Rather Than on March 1, 2009, and Its Alternative Argument that the Board Erred By Failing To Decide Whether the Parties Had Later Reached Impasse on March 20, 2009, Are Both Without Merit

Importantly, the Company does not dispute (Br. 21) the Board's key factual finding that the parties' extensive negotiations between December 3, 2008, and March 1, 2009, broke any bargaining impasse that might have existed in December 2008. Instead, the Company offers two meritless arguments to challenge the Board's reliance on the status of negotiations on March 1 when the Company put its new healthcare insurance plan into effect. First, the Company argues (Br. 12, 29-30, 38-50) that the parties had reached impasse in December 2008, and that because its new healthcare insurance plan was "implemented" in December 2008, it does not matter that the parties were not at impasse on March 1, 2009, when the plan was put into effect. Second, the Company argues in the alternative (Br. 56-61) that, even if its conduct on March 1 were unlawful, it claims the Board erred by failing to address its argument that the Company met its burden of establishing that the parties had reached impasse over healthcare insurance on March 20, and that the Board should therefore have limited its remedy to the period from March 1 to March 20. Neither of these claims has merit.

1. The Board reasonably rejected the Company's argument that the plan was implemented in December 2008

The Board reasonably found (D&O 10-11), contrary to the Company's contention (Br. 12, 29-30, 38-50), that the healthcare plan was implemented on March 1, 2009, the date it was effective, and not December 22, 2008, the date it was announced. As the Board explained (D&O 10), the Company's argument "fails not only as a matter of semantics, but also under the facts of this case and the applicable law."

First, as the Board found (D&O 10), under the facts of this case, "[e]ven assuming that the definition of 'implement' is broad enough to encompass a final action that has not yet been given effect, the evidence in this case shows that the [Company] did not take any final action on December 22, 2008, regarding the announced change in healthcare benefits." To the contrary, it is undisputed that prior to March 1, not a single employee was covered by the Company's new healthcare plan. Thus, as the Board explained (D&O 4, 10), although the Company (D&O 4) took some steps toward putting the plan into effect, it did not even mail enrollment forms to employees until mid-January 2009. By that date, the Company had made its January 7, 2009 proposal that brought the parties closer to a compromise on healthcare insurance which, as shown above at p. 24, had ended any impasse that might have existed on December 22.

Moreover, whatever steps the Company may have taken toward putting its new plan into effect, the Company conceded at the hearing (D&O 10) that prior to the March 1 effective date, the Company had not taken any action that would have precluded it from “abandoning its plan to make the change.”⁴ In these circumstances, the Board reasonably found (D&O 10) that “[a] change in terms of employment cannot reasonably be viewed as ‘implemented’ for unit employees at a time when that change is not being applied to a single one of those employees and the employer has not passed a ‘point of no return’ committing it to make the change at all.” Rather, as the Board reasonably concluded (D&O 10), “what the [Company] did in December 2008 regarding healthcare amounted to an announcement of intent to implement the new plan on March 1—not the implementation of such a plan.”

Second, as the Board noted (D&O 10), the Company “has not cited any legal authority showing that the rule permitting an employer to unilaterally implement changes at impasse, also permits an employer to proceed with a change that its officials announced at impasse, but had not yet implemented when impasse was broken.” To the contrary, as shown above at p. 26, the Board has recognized that

⁴ Union officials helped the Company sign up employees for the Company’s new plan, but, as the Board found, “only because of concerns that there could otherwise be a gap during which employees would be left without any healthcare insurance.” (D&O 4; Tr. 62-63, 122, 154-55, 255-56.)

in such a situation an employer cannot implement a unilateral change. The fact that the Company may not have committed any other unfair labor practices (Br. 42-43) has no bearing on the underlying principle that the voluntary ending of the impasse precluded a subsequent unilateral change.

Nor does *ABC Automotive Products Corp.*, 307 NLRB 248 (1992), or *Century Wine & Spirits*, 304 NLRB 338 (1991), cited by the Company (Br. 12, 41), undermine the Board's conclusion that implementation did not occur when the healthcare insurance plan was announced. To the contrary, neither of those cases involved impasse, and both were decided on facts particular to those cases. Indeed, a cursory examination of those cases beyond the brief parenthetical and partial quotation cited by the Company establishes no conflict among Board cases over the term implementation.

Thus, in *ABC Automotive*, the employer unlawfully discharged striking employees and unilaterally implemented health care benefits. 307 NLRB at 250. The employer effectively offered the striking employees the ability to return to work without permanent replacement, but only under the unlawfully unilaterally changed terms. *Id.* Although the employer had not yet actually implemented the unilateral change, the context of the offer left the striking employees with no choice but to return to work under the unilateral change. *Id.* In that specific fact situation, the unilateral change was effective when offered to the striking

employees. *Id.* Here, in contrast, the new healthcare plan did not become effective on December 22, as no employee was under that plan on that date, or even faced the possibility of being under that plan on that date.

In *Century Wine & Spirits*, the Board also addressed a very different issue than present here, assessing whether a union had waived its right to bargain over a unilateral change. 304 NLRB at 347. The Board found that the union did not waive its right to bargain because, once the employer began notifying employees of the change and collecting money from them with no notice to the union, the change was effectively implemented and the union was presented with a fait accompli. *Id.* Here, as shown, impasse had already broken before the Company took any steps to enroll employees in the new healthcare plan.

This Court's decision in *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153 (D.C. Cir. 1992) (per curiam) is not, as the Company claims (Br. 13, 39-40), a contrary citation regarding the meaning of implementation. Twice in Judge Edward's opinion he used the term "enact" regarding an employer's rights once impasse was reached. *Id.* at 1157, 1166. There was no indication, however, as the Company suggests, that the Court was drawing a distinction between enacting, implementing, and putting into effect a unilateral change. To the contrary, Judge Edward's opinion, as well as Judge Silberman's concurring opinion, and Judge Henderson's dissenting opinion, repeatedly used the term "implement" when

referring to an employer's rights after impasse was reached. *Id.* at 1154-55, 1158-59, 1162-67, 1169-78. Even so, in an observation particularly apt here, Judge Edwards cautioned against careless application of the implementation-upon-impasse rule, noting that if an employer can "indefinitely" act unilaterally "pursuant to [a unilaterally] implemented proposal, impasse will not be the 'temporary' phenomenon described in *Bonanno*." *Id.* at 1173.

Moreover, the issue in *McClatchy Newspapers* has no specific bearing on the issue here of whether a unilateral change was implemented when announced prospectively, or when actually put into effect. Rather, the Court considered the issue of whether an employer, after reaching impasse, could unilaterally implement merit pay increases without further bargaining with the union over the exact timing and amounts to individual employees. Here, the Board, consistent with the principle this Court recognized in *McClatchy Newspapers* that a "temporary deadlock" can be "broken[] through a . . . change in mind" (964 F.2d at 1165 (quoting *Charles D. Bonnanno Linen Serv., Inc.*, 243 NLRB 1093, 1093-94 (1979))), found that any impasse ended when the parties immediately resumed negotiations over healthcare insurance, and therefore found that the end of the impasse

precluded the Company from thereafter putting into effect the previously announced prospective change.⁵

Third, the Company does not dispute (Br. 12-13, 39) that, as a matter of semantics, Webster's Dictionary defines "implement" as "1. To put into effect" Webster's II, New Riverside University Dictionary (1984). The Board reasonably concluded (D&O 10) that the dictionary definition was consistent with the Board's finding that in negotiations "a change is generally not implemented until it has been put into effect." And, as the Board noted (D&O 10), the Company "provides no contrary citation indicating that a change can be implemented without being put into effect."

Finally, contrary to the Company's contention (Br. 13-14, 30, 40-41, 44-46) the Board reasonably found (D&O 10) that the circumstances here are distinguishable from where an employer places a new wage plan into effect, under which some of the raises scheduled under that wage plan are not triggered until later dates. In that situation, the Board was not, as the Company argues (Br. 13-14), suggesting a different result simply because wages as opposed to healthcare

⁵ In *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1154 (D.C. Cir. 1992) the Court remanded the case to the Board. Subsequently, the Court enforced, in relevant part, the Board's decision after remand regarding the employer's inability to implement a discretionary pay proposal. See *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026, 1030-37 (D.C. Cir. 1997), *enforcing in relevant part McClatchy Newspapers, Inc.*, 321 NLRB 1386 (1996).

insurance were involved. Rather, in a situation where the employer has already given employees some raises, the Board explained (D&O 10) that “if the employer has implemented the new wage plan it has passed the point of no return and cannot simply choose to ignore its obligation to provide the raises when the triggering dates arrive. *See, e.g., Daily News of Los Angeles*, 315 NLRB 1236, 1238 (1994), *enforced*, 73 F.3d 406 (D.C. Cir. 1996) (employer could not unilaterally end an established condition of employment, which was a merit wage review, during negotiations for a new contract). That principle does not apply here where no change had yet occurred.

In sum, the Board reasonably found that the Company’s healthcare plan was implemented when it was put into effect on March 1, 2009, and not on December 3, 2008, when it was announced. As the Board explained (D&O 10), “[w]hen the [Company] finally implemented the new healthcare plan on March 1, there was no impasse that needed to be broken.” To the contrary, “negotiations were ongoing and making progress towards a compromise.” Under these circumstances, there was no basis for the Company to lawfully put the plan into effect. Rather, as the Board explained (D&O 10), “[i]f anything, the [Company’s] action had the opposite effect by interrupting progress towards a compromise.”

2. The Company's alternative claim that the parties reached impasse on March 20 is based solely on discredited testimony

In support of its meritless alternative contention (Br. 56-61) that the parties had reached impasse on March 20, three weeks after the Company put into effect its new healthcare plan, the Company relies on the principle that in certain cases an employer that implements a unilateral change can thereafter bargain in good faith and reach impasse with a union. In such a situation, the subsequent impasse would cut off liability for the earlier unilateral change. *See NLRB v. Cauthorne*, 691 F.2d 1023, 1023-26 (D.C. Cir. 1982); *La Porte Transit Co., v. NLRB*, 888 F.2d 1182, 1184-87 (7th Cir. 1989). The Company's attempt to apply that principle here, however, is fundamentally flawed because its argument depends solely on discredited evidence and completely ignores the credited testimony and documentary evidence. Incredibly, the Company makes this claim despite also representing to the Court that its argument does not "turn on credibility determinations by the [judge] or on challenges to findings of fact." (Br. 38.)

Thus, the Company argues (Br. 31-32, 47, 59) that the parties had reached impasse on March 20 over its longstanding requirement that the Union pay the trailing costs the Company would incur by switching to the Union's healthcare insurance plan, and that on March 20 the Union categorically refused to pay the

trailing costs and ended negotiations.⁶ That argument simply ignores the administrative law judge's (D&O 6) credibility determinations, adopted by the Board (D&O 1 n.4), that credited the testimony of the Union's witnesses on the parties' negotiations of trailing costs, and ignores, what the Company concedes (Br. 38), are "uncontroverted facts" drawn from the credited testimony. Thus, the credited testimony established that prior to March 20, trailing costs were "treated by both parties as an expense to the [Company] that would have to be outweighed by the savings from switching from the old healthcare plan to the [Union] plan." (D&O 6.) The credited testimony also established that the Company indicated for the first time on March 20 "that it expected the Union to pay the Company's trailing costs" and "that such a concession by the [Union] was a condition of reaching agreement." (D&O 6.)⁷

⁶ The Board recognized (D&O 1, 6, 9) that on March 1 the parties had some additional issues regarding the use of the Union's plan, but found those differences insufficient to establish that impasse had existed on March 1. Before this Court, the Company does not dispute that finding or claim that those differences support its claim of impasse on March 20. Instead, the Company relies solely on the status of trailing costs in arguing that the parties had reached impasse on March 20.

⁷ Having conceded that the Board's credibility findings and findings of fact are "uncontroverted" (Br. 38), the Company has offered no argument to this Court that the Board's adoption of the administrative law judge's credibility determinations were "hopelessly incredible," "self contradictory," or "patently unsupportable." *UFCW Local 204 v. NLRB*, 447 F.3d 821, 824 (D.C. Cir. 2006). Indeed, the credibility determinations are fully supported by the judge's opportunity to observe the witnesses' testimony first hand, and he based his factual findings (D&O 6) on

The Company (Br. 38) also completely ignores the Board's finding (D&O 6-7) that the "documentary evidence supports the testimony of union negotiators that, before March 20, the [Company] had never demanded that the Union agree to pay the Company's leftover bills from the old healthcare plan." As the Board found (D&O 7), neither the Company's multiple written contract offers, nor the spread sheets used by the parties prior to March 20 to calculate the Company's savings under the Union's plan, included trailing costs as a cost to the Union.

Finally, the Company's claim that the Union ended negotiations on March 20, simply ignores the Board's finding (D&O 8) that the Union sought further negotiations after March 20. The Company has offered no basis to disturb that finding. In these circumstances, the fact that the Union may have reacted negatively to the Company's position expressed for the first time on March 20 that the Union was responsible for the Company's trailing costs proves little. Collective bargaining often involves zealous, passionate advocacy, including vociferous protests as to the unacceptability of proposals; impasse is not proved by such words alone. *NLRB v. Beverly Enters.-Mass.*, 174 F.3d 13, 27 (1st Cir.

his considerations of both the "demeanor" and "testimony" of the witnesses, and the "the record as a whole." Moreover, after the Board "carefully examined the record," it (D&O 1 n.4) found no basis to reverse the judge's credibility determinations.

1999); *NLRB v. WPIX, Inc.*, 906 F.2d 898, 902 (2d Cir. 1990) (no impasse despite union dismissal of employer proposals as “ridiculous” and a “slap in the face”). That is particularly true here, where a negative reaction was understandable given that the Union was, as the Company conceded (D&O 8; Tr. 452), “shock[ed]” by the Company’s sudden demand that the Union pay trailing costs.

In sum, absent the Company’s reliance on discredited evidence, it has offered no argument as to how the parties had reached impasse on March 20. In these circumstances, the Board, having upheld the judge’s credibility and factual findings, had no need to specifically address the Company’s argument that impasse was reached on March 20. That the Board (D&O 1) “considered the [judge’s] decision and the record in light of the exceptions and briefs,” is, as this Court has recognized, “sufficient under the circumstances here, to satisfy any applicable requirement of specific format for the Board’s opinions.” *Human Dev. Assn. v. NLRB*, 937 F.2d 657, 668-69 (D.C. Cir. 1991) (citation and quotation omitted).

D. The Company’s Claims that the Board’s Decision Was Precluded by the General Counsel’s Dismissal of a Prior Charge, and that the General Counsel Acted Inappropriately in the Amending of the Charge in this Case Are Without Merit

The Company argues (Br. 27-28, 30-32, 35, 50-53) that the General Counsel’s dismissal of a prior charge that stated his view that the parties were at impasse in December 2008, precluded the Board from finding in this case that the

Company had acted unlawfully when it put its new healthcare plan into effect on March 1, 2009. The Company also asserts (Br. 27) that the General Counsel, after investigating the charge in this case, acted inappropriately by suggesting it could be amended to allege that the Company unlawfully put into effect the healthcare insurance plan on March 1, 2009, in the absence of a bona fide impasse. Neither of these claims has merit.

1. The Board reasonably found that its decision was not precluded by the General Counsel's dismissal of a prior charge

The Company argues (Br. 27-28, 30-32, 35, 50-53) that the dismissal of a prior charge filed by the Union precluded the Board from finding in this case that the Company had acted unlawfully when it put its healthcare insurance plan into effect on March 1, 2009, in the absence of impasse. The Board reasonably found (D&O 10-11) that the dismissal of the charge filed by the Union on March 5, 2009, that alleged the Company had unlawfully implemented unilateral changes in December 2008 without bargaining to impasse, did not preclude the Board from finding in this case that the Company had acted unlawfully three months later when it put its healthcare insurance plan into effect in the absence of impasse. Simply put, as this Court has recognized, “[p]rosecutorial decisions by the Region and General Counsel are not adjudications and have no preclusive effect on future actions of the Board.” *O’Dovero v. NLRB*, 193 F.2d 532, 536 (D.C. Cir. 1999)

(General Counsel's dismissal of charge alleging that employer constituted a single employer did not provide affirmative defense to employer in defending another charge accusing the employer of being a single employer). *Accord NLRB v. UFCW Local 23*, 484 U.S. 112, 118-19 (1987), *Bryant & Stratton Bus. Inst., Inc. v. NLRB*, 140 F.3d 169, 185 (2d Cir. 1998); *B.A.F. Inc.*, 302 NLRB 188, 193 (1991), *enforced*, 953 F.2d 1384 (6th Cir. 1982).

The Company's attempt (Br. 54) to distinguish *O'Dovero* fails. Although the Court in *O'Dovero* noted, as the Company states (Br. 54), that the General Counsel did not conduct an investigation in that case (193 F.3d at 536), the Court's decision does not state that the General Counsel's conducting an investigation would have changed the result. To the contrary, "[i]t is well settled that the dismissal of a prior charge by the [General Counsel], even where the identical conduct is involved, does not constitute an adjudication on the merits, and no res judicata effect can be given these actions." *Kelly's Private Car Serv.*, 289 NLRB 30, 39 (1988), *enforced*, 919 F.2d 839 (2d Cir. 1990). *Accord B.A.F., Inc.*, 302 NLRB at 193 (the doctrine of res judicata is not applicable when a prior charge is dismissed before it is adjudicated on its merits). Therefore, the General Counsel's refusal to issue a compliant based on the earlier charge presents no barrier to the Board's finding here that the Company's acted unlawfully by implementing the healthcare insurance plan on March 1, 2009.

Contrary to the Company's contention (Br. 27, 31, 35, 50-53), the Sixth Circuit's decision in *Dayton Newspapers Inc. v. NLRB*, 402 F.3d 651, 668 (6th Cir. 2005), is not determinative. The Court in that case recognized the principle that when the General Counsel decides not to file a complaint, that decision does not bind the Board in a separate or related case. The Court, however, noted that the Board "in deciding the 'separate but related case' . . . cannot contradict the General Counsel's findings that some complained-of activity did not constitute an unfair labor practice" because otherwise the Board would be "acting in practice as a forum for considering the content of charges which the General Counsel, for reasons satisfactory to himself, has thought it proper to dismiss." *Id.* at 668 (quoting *Times Square Stores Corp.*, 79 NLRB 361, 365 (1948)). That did not occur here.

Here, the Board had no reason to consider the prior charge that the General Counsel had dismissed. Whatever the General Counsel's actions regarding the March 5 charge, the General Counsel, based on a separate charge filed on May 19 and amended on July 28, decided to issue an unfair labor practice complaint alleging that the Company had acted unlawfully when its healthcare insurance plan was put into effect on March 1. Therefore, the Board reasonably found (D&O 10) that to find a violation regarding the Company's March 1 conduct "cannot reasonably be seen as an improper usurpation of the General Counsel's

prosecutorial discretion” to dismiss the earlier charge, a charge that made no mention of the Company’s conduct on March 1.

Moreover, as the Board explained (D&O 11), “the General Counsel’s decision to affirm the dismissal of the prior charge[] filed by the Union does not encompass a conclusion that the [Company] implemented its healthcare plan along with other portions of its contract offer on December 22, 2008.” Thus, in dismissing the earlier charge, the General Counsel, as set forth on appeal, found that the Company’s implementation on December 22 was lawful because the parties were at impasse on that date. That determination did not involve any determination of when the healthcare plan was implemented. As the Board found (D&O 11), the General Counsel “did not specify which terms the [Company] implemented on that date, did not state that the [Company] implemented the entire contract proposal, and made no mention of the healthcare plan.” The General Counsel’s limited investigatory finding is significant, because, as the Board explained (D&O 11), at impasse an employer may implement all or part of its last contract offer. *See Lihli Fashions Corp.*, 317 NLRB 163, 165 (1995), *enforced in relevant part*, 80 F.3d 743 (2d Cir. 1996). Accordingly, as the Board further explained (D&O 11), “a conclusion that the implementation on December 22 was

lawful (even if correct) does not mean that the healthcare provisions of the last best offer were implemented on that date.”⁸

Moreover, the Board (D&O 11) properly found *Dayton Newspapers* inapplicable. There, the Court found that the “Board might” “have failed adequately to take into consideration some aspect of the General Counsel’s findings.” 402 F.3d at 668. The Court, contrary to the Board, further found that the employer was not unlawfully motivated in failing to reinstate, laying off, and failing to recall drivers; rather, the employer had lawfully eliminated the drivers’ jobs. *Id.* at 663-65. In finding no unlawful motivation, the Court considered the General Counsel’s findings that the employer’s initial lockout of the drivers was not unlawfully motivated, but instead motivated by a legitimate employer need. *Id.* at 665. Here, in rejecting the Company’s claim, the Board took into consideration the General Counsel’s finding that the parties were not impasse on December 22, 2008. The Board reasonably determined, however, that the General Counsel’s dismissal does not answer whether the Company’s subsequent March 1 conduct was unlawful.

⁸ This case involves partial implementation, not partial impasse. Therefore, the Company’s reliance on cases (Br. 47-48) to support the proposition that, in general, parties must reach impasse on an agreement as a whole before the employer can make a unilateral change is misplaced. *See Bottom Line Enters.*, 302 NLRB 373, 375 (1991), *RBE Elecs. of S.D., Inc.*, 320 NLRB 80, 81-82 (1993).

2. The Board reasonably found that the General Counsel acted appropriately in the amending of the charge

As shown above at p.12, the charge in the instant case was filed on May 19, 2009. Thereafter, on July 28, the charge was amended to include the allegation that the Company acted unlawfully when it put its healthcare insurance plan into effect on March 1 without bargaining to impasse. As the Board recognized (D&O 8 n.17), the Union filed the July 28 amendment to the May 19 charge based on the advice of the Board agent who investigated the charge. Contrary to the Company's contention (Br. 27), the Board agent's giving of such advice did not turn the agent into an "advocate" for the Union. Rather, the Board agent acted consistently with the Board's regular procedures. *See* Casehandling Manual Part 1, Unfair Labor Practices 2009.

First, the Board agent acted appropriately by identifying the potential violation and informing the Union that she had found evidence to support a possible amendment to the charge. Section 10052.6 of the Board's Casehandling Manual, "directs the Board agent "with appropriate supervision," to "develop a strategy for the investigation . . . [that] should be reviewed and revised on an ongoing basis in order to adjust to developments in the investigation." Second, the Board agent acted appropriately by notifying the Union of the General Counsel's view of the case and giving the Union the opportunity to amend the

charge. As the Board set forth in Section 10052.7 of the Casehandling Manual, the “charging parties . . . do not possess the knowledge or expertise to identify all possible issues,” and therefore the Board agent “should provide assistance in identifying issues,” and “candidly apprise the charging party of any potential issues and provide the charging party an opportunity to amend the charge in a timely fashion, if necessary, in order to pursue additional allegations.” Likewise, under Section 10062.5 of the Casehandling Manual, if “the investigation uncovers evidence of unfair labor practices not specified in a charge, Board agents . . . must determine . . . [if] the allegations of the charge are too narrow, not sufficiently specific or otherwise flawed” to support complaint allegations, alert the “charging party . . . of the potential deficiency in the existing charge,” and give it “the opportunity to file an amended charge.” That is exactly what the Board agent did here when she recognized and thereafter informed the Union of a potential deficiency in its May 19 charge.

The Board agent also acted consistently with Board case law that has rejected similar claims regarding an agent’s conduct. *See Peterson Constr. Corp.*, 128 NLRB 969, 971-73 (1960) (rejecting employer’s claim that the Board agent acted improperly when, after investigating an initial charge, he discovered conduct that could constitute additional violations and furnished the charging party with a charge form and directions on how to proceed). *See also Earthgrains Co.*, 351

NLRB 733, 739 (2007) (rejecting employer's claim that the General Counsel had improperly solicited charges).

Finally, rather than become an "advocate" for the Union, as the Company claims (Br. 27), the Board agent completed her administrative duties by notifying the Company both of the pending amended charge and the fact that the agent was responsible for recommending the amendment. As set forth in the Board agent's e-mail to the Company, she informed the Company of the amendment to assure that it was aware of the revised theory so that the Company would not face any potential deprivation of due process. (GCX 1(j) ex.F.)

In these circumstances, the Board (D&O 8 n.17) reasonably rejected the Company's claim (Br. 27) that the Board agent acted improperly, or in any way, became an advocate for the Union. Indeed, the Company has offered nothing but "mere speculation" that the Board agent did anything other than fulfill her duties to take proper measures to prosecute unfair labor practices revealed by the Board's investigation. *Earthgrains Co.*, 351 NLRB 733, 739 (2007).

Finally, the Company challenges the Board's remedy (Br. 60-61), which requires the Company to bargain with the Union and to reinstate its earlier healthcare insurance plan, by arguing that another case currently before the Board, which will likely address whether the Company also unlawfully withdrew

recognition from the Union, might ultimately affect the remedy in this case. The Company's argument must be rejected because it is based on complete speculation as to the outcome of that case pending before the Board. Moreover, in this case, the Board has given the Company the opportunity in later compliance proceedings to litigate "whether it would be impossible or unduly or unfairly burdensome to restore the health insurance in effect prior to March 1, 2009." (D&O 1 n.7.) Therefore, although "[t]he first and only opportunity for the Court to vacate a Board-imposed remedy is ordinarily in a petition for review of the Board order imposing the remedy," when, as here, "the Board reserves the issue for later consideration, that opportunity will necessarily be deferred until the Board resolves the issue in a subsequent order." *E.I. Du Pont de Nemours & Co. v. NLRB*, 489 F.3d 1310, 1317 (D.C. Cir. 2007) (citation and quotation omitted). Accordingly, the other case pending before the Board provides no basis for the Court to disturb the Board's remedy in this case.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

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July 2011

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMAU, INC.)
)
 Petitioner/Cross-Respondent) Nos. 10-1406
) 10-1409
)
 v.) Board Case No.
) 7-CA-52106
 NATIONAL LABOR RELATIONS BOARD)
)
 Respondent/Cross-Petitioner)
)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 11,026 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 27th day of July 2011

STATUTORY ADDENDUM

NATIONAL LABOR RELATIONS ACT

Also cited NLRA or the Act; 29 U.S.C. §§ 151-169

[Title 29, Chapter 7, Subchapter II, United States Code]

Sec. 7. [§ 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. [§ 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].

(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. [§ 160.] (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, 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 cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and 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. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall

apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(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.

BOARD'S CASEHANDLING MANUAL PART I, UNFAIR LABOR PRACTICES 2009

10052.6 Strategy for Investigation

Following the initial contacts with the parties, the Board agent, with appropriate supervision, should develop a strategy for the investigation, which normally would include:

- Identification of specific allegations and issues
- The theory of the case
- Areas of inquiry
- Areas of legal research
- A list of witnesses to contact
- A list of documents to obtain
- Approaches to reluctant witnesses
- Appropriate remedies, including consideration of 10(j) relief
- A schedule in which the above tasks will be completed

The strategy should be reviewed and revised on an ongoing basis in order to adjust to developments in the investigation.

10052.7 Identification of Issues

Although the charging party should be asked to specify the allegations of the charge and the facts in support of them, many individual charging parties and others do not possess the knowledge or expertise to identify all possible issues. While the Board agent must remain neutral and not be an advocate for either party, the agent should provide assistance in identifying issues. In this regard, the Board agent should candidly apprise the charging party of any potential issues and provide the charging party an opportunity to amend the charge in a timely fashion, if necessary, in order to pursue additional allegations.

10062.5 Allegations not Contained in Charge

Where the investigation uncovers evidence of unfair labor practices not specified in a charge, Board agents, with appropriate supervision, must determine whether the charge is sufficient to support complaint allegations

covering the apparent unfair labor practices found. For example, the charge should allege the type of conduct, such as:

- Interrogation
- Threats of discharge
- Threats of violence
- Mass picketing

If the allegations of the charge are too narrow, not sufficiently specific or otherwise flawed, the charging party or its representative should be apprised of the potential deficiency in the existing charge and given the opportunity to file an amended charge. The charging party should also be advised that failure to file the amended charge may affect the Regional Office determination of the case and that any complaint can cover only matters closely related to the allegations of the charge.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMAU, INC.)
)
 Petitioner/Cross-Respondent) Nos. 10-1406
) 10-1409
)
 v.) Board Case No.
) 7-CA-52106
 NATIONAL LABOR RELATIONS BOARD)
)
 Respondent/Cross-Petitioner)
)

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 27th day of July, 2011