

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR BOARD  
WASHINGTON, D.C.**

**NEW NGC, INC. d/b/a NATIONAL GYPSUM  
COMPANY**

**and**

**UNITED STEEL, PAPER AND FORESTRY,  
RUBBER, MANUFACTURING, ENERGY,  
ALLIED INDUSTRIAL AND SERVICE  
WORKERS INTERNATIONAL UNION, (USW)  
AFL-CIO, CLC**

**Case 25-CA-031825  
Case 25-CA-031898  
Case 25-CA-065321**

**And**

**UNITED STEELWORKERS LOCAL UNION  
NO. 7-0354, a/w UNITED STEEL, PAPER AND  
FORESTRY, RUBBER, MANUFACTURING,  
ENERGY, ALLIED INDUSTRIAL AND  
SERVICE WORKERS INTERNATIONAL  
UNION (USW), AFL-CIO, CLC,**

**RESPONDENT NATIONAL GYPSUM COMPANY'S BRIEF IN SUPPORT OF ITS  
LIMITED EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION**

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**I. STATEMENT OF THE CASE**

**A. Introduction and Issues**

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Respondent National Gypsum Company (hereinafter "National Gypsum" or the "Company") hereby submits its brief in support of its Limited Exceptions to the Decision of Administrative Law Judge Jeffrey D. Wedekind ("ALJ") dated September 7, 2012.<sup>1</sup>

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<sup>1</sup> References herein to the Administrative Law Judge's Decision shall be as follows: (ALJ Decision, p. \_\_.) References to the transcript of proceedings from the hearing in this matter shall be as follows: (Tr. \_\_). References to the exhibits presented and admitted during the hearing shall be as follows: General Counsel Exhibit (GC \_\_); Respondent Exhibit (R \_\_); and Union Exhibit (Un \_\_).

In the Consolidated Complaint and at the hearing before the ALJ, counsel for the General Counsel contended, among other things, that National Gypsum, at its facility in Shoals, Indiana, violated sections 8(a)(5) of the National Labor Relations Act (the "Act") by unilaterally refusing to pay the increased contribution amounts for health benefits coverage to the United Steelworkers Health and Welfare Fund (the "Fund") announced by the Fund after the parties' collective bargaining agreement expired, and by unilaterally implementing a requirement that employees carry two locks on their person as a part of the Company's "lockout-tagout" policy. (GC 1, ALJ Decision page 3, lines 15 to 21, page 10, lines 33 to 37). At the time of the hearing (and as of the filing of Respondent's Exceptions), the parties had yet to reach an agreement on the terms of a successor collective bargaining agreement.

The ALJ dismissed all of the General Counsel's allegations, but found merit with respect to these two unilateral change allegations. As a part of his Order addressing his findings, the ALJ ordered Respondent to take certain affirmative action relating to the unilateral changes, including a rescission of the "unlawful unilateral changes regarding the health insurance premiums and 'lockout/tagout' safety procedures," and to "restore and maintain the status quo until such time as it has complied with its collective bargaining obligations under the Act." (ALJ Decision, page 32, lines 25 to 28).

In addition to these specific instructions, however, the ALJ also formulated a "cease and desist" component of his Order that is either vague and requires clarification, or, alternatively, is unduly broad and not intended to effectuate the policies of the National Labor Relations Act (the "Act"), inasmuch as it requires the Company to bargain in good faith over all "unit employees' terms and conditions of employment" to "an impasse or agreement," without condition, and without regard to whether a subsequent collective bargaining agreement between the parties

permits a unilateral change of a specific term or condition of employment (e.g., by virtue of a waiver through a management-rights clause or other contract provision), or whether a unilateral change to a such term or condition is grounded in past practice and amounts to a continuation thereof. The ALJ's proposed Notice to Employees ("Notice") incorporates the same language in the first paragraph. Indeed, as written, the ALJ's cease and desist order (and corresponding language in the Notice) proscribes lawful conduct. It accordingly is too broad, particularly where the Order already effectuates the policies of the Act by requiring Respondent to rescind the unlawful unilateral changes and comply with its collective bargaining obligations under the Act.

For the reasons herein, and consistent with well-settled Board precedent, Respondent respectfully requests that Board modify the ALJ's cease and desist order (and corresponding language in the Notice) as too broad, by limiting it to the unilateral conduct found violative of the Act, and in a manner so as not to proscribe otherwise lawful conduct.

**B. Statement of Relevant Facts**

**1. The Alleged Unilateral Change Regarding Health Insurance Premium Contributions**

The Company has, at its facility in Shoals, offered healthcare (medical, dental) benefits to bargaining unit employees through the plan administered by the United Steelworkers Health & Welfare Fund ("USW Fund") since 2008. (Tr. 516-517, ALJ Decision p. 3, lines 34-37). The parties agreed to this USW plan in conjunction with negotiations for the agreement which expired January 31, 2011. (Tr. 517). Under the USW Fund's plan, employees make an election as to what coverage they want, and depending on the level of benefits elected, employees are required to contribute a portion of the overall premium amounts, as specified in the Agreement. (Tr. 517-518). The expired Agreement, in Article 15, contains a provision entitled "Insurance"

that sets forth the amount of the employee's premium contributions to their health insurance coverage. (GC 2, pp. 17-19).

The Agreement, however, is completely silent with respect to the Company's contribution obligations to the Fund. (*Id.* at p. 17). Indeed, the Company's obligation to contribute its portion of employees' health insurance coverage to the Fund is exclusively dictated by the Steelworkers Health & Welfare Fund Participation Agreement ("Participation Agreement") between the Union and the Company, as adopted by the Fund, which was in effect from April 1, 2008 through January 31, 2011. (R. 111). The Participation Agreement explicitly provides that it was being entered into "to implement the terms and conditions of their [the Company's and the Union's] collective bargaining agreement dated February 1, 2008...with respect to the provision of certain health and/or other welfare benefits to eligible employees and/or eligible retired employees." (*Id.*, p. 1). Section 4 of the Participation Agreement, entitled "Contributions," defines the specific dollar amount of the contribution obligations of the Company over the term of the Participation Agreement. (*Id.*, p. 3). By its own terms, the Company's obligation to make payments at the prescribed rates terminates with the expiration of the Participation Agreement, which, in Section 14 ("Term"), is defined as "the last day of January, 2011," the same day the parties' collective bargaining agreement was set to expire. (*Id.*, p. 3).

The Company paid the rates specified pursuant to the parties' Participation Agreement for the initial and subsequent terms from 2008 to 2010. (Tr. 521-523). Upon expiration of the parties' collective bargaining agreement, the Company continued to pay the Fund contributions based on the rates specified pursuant to the terms of the expired Participation Agreement, and not the higher rates announced by the Fund pursuant to a newly proposed Participation Agreement

which had yet to be adopted by the parties. (Tr. 528-529; R. 119). The Company notified the Fund that it would continue this status quo until the parties reached a new collective bargaining agreement and signed the new Participation Agreement. (*Id.*)

In an attempt to settle the Union's ensuing unfair labor practice charge and notwithstanding its disagreement with the Union and the Region's rationale for issuing a Complaint, the Company attempted to settle the Charge by paying the rates unilaterally announced by the Fund pursuant to a Participation Agreement that had yet to be signed by the parties (which in turn was intended to implement the terms of the parties' collective bargaining agreement which had yet to be signed) to ensure that employees and the Fund were made whole. (Tr. 532-534, R. 121).

The ALJ concluded that the Company's refusal to pay the increase in health insurance premiums (for the three month period from April 1 to June 30, 2011) violated Section 8(a)(5) of the Act. (ALJ Decision, p. 10, lines 27-29).

## **2. The Alleged Unilateral Change Regarding the Lockout/Tagout Policy**

At all relevant times, the Company has maintained a Lockout/Tagout Policy (the "Policy") applicable to all bargaining unit employees to ensure the safety and health of employees performing service or maintenance work on equipment, from the unexpected energization or, release of, stored energy in such equipment. (Tr. 62, 489). Indeed, the Policy has been in place since May 19, 1999. (*See* GC 19). Consistent with OSHA regulations, the Company's Policy specifically states that employees are required to "Lockout the 'energy isolating devices' by attaching the lock to the device so as to render it inoperable. *If more than one energy source is a concern, each must be locked out.*" (*See* GC 19, p. 4) (emphasis added).

Following a fatal accident at one of Respondent's facilities, Respondent reviewed the Shoals facility's Lockout/Tagout Policy, procedures and practices to ensure that all aspects of the lockout/tagout program were being carried out properly. (Tr. 490-491, GC 20). In conjunction with this review, the Company advised the Union that, consistent with the current Company practice, employees would be expected to carry two locks with them at all times, and that employees in those areas should keep additional assigned locks close by so that they would be able to access them readily in the event a particular lockout situation required the additional locks. (Tr. 498, 506-508; R. 109).

The ALJ concluded that the Company adopted and implemented two changes to the lockout/tagout policy in violation of Section 8(a)(5) of the Act, by: (1) requiring employees to carry at least two locks with them; and (2) requiring employees to keep additional locks within a reasonable distance of their work stations. (ALJ Decision, p. 13, lines 18-21). He concluded, however, that the latter change was not a material, substantial and significant change and dismissed that allegation.

### **3. The ALJ's Conclusions of Law and Remedy**

In his Conclusions of Law, the ALJ determined that by the above specific unilateral actions with respect to health insurance premiums and the lockout/tagout policy, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act. Other than these findings of unlawful unilateral changes, the ALJ found no other unfair labor practices. The ALJ ordered certain affirmative action to effectuate the policies of the Act, which included rescinding "any unilateral changes regarding health insurance premiums and 'lockout/tagout' safety procedures and restore and maintain the status quo ante until such time it has complied with its collective-bargaining obligations under the Act." (ALJ Decision, p. 32, lines 25-28).

The ALJ further ordered Respondent to “make all required payments to the union health and welfare fund that it failed to make from April 1 through June 30, 2011,” to “the extent it may not have already done so,” as well as to “make whole the unit employees for any loss of wages, benefits, or expenses resulting from the unlawful unilateral changes, in the manner set forth in the remedy section of this decision.” (ALJ Decision, p. 32, lines 30-34). The Order included a posting requirement and requirement to produce records upon request to permit the calculation of backpay due under its terms. (ALJ Decision, pp. 32-33, lines 36 to 15).

Unlike this affirmative action which narrowly and specifically addressed the two unilateral changes underlying the ALJ’s findings of unlawful conduct, the ALJ also included a very broad cease and desist order requiring Respondent to:

1. Cease and desist from
  - a. Making changes in the unit employees’ terms and conditions of employment without first bargaining in good faith with the United Steelworkers International Union and its Local 7-0354 to an impasse or agreement.

(ALJ Decision, p. 32, lines 14-18). The proposed Notice also contains the same language, which requires the Company to notify employees that:

WE WILL NOT make changes in your terms and conditions of employment without first bargaining in good faith with the United Steelworkers International Union and its Local 7-0354 to an impasse or agreement.

(ALJ Decision, Appendix). This cease and desist order and Notice language is not limited to the two unilateral changes at issue but applies to all unit employees’ terms and conditions of employment, contains no limits on the requirement of bargaining to impasse or agreement on such terms and conditions, and does not permit otherwise lawful unilateral changes by the Company. If intended as written, the order (and the corresponding language of the Notice) is too broad, punitive, and does not effectuate the policies of the Act. If unintended, the order and

Notice must nonetheless be modified to properly address the specific and limited underlying violations, and in a manner that permits lawful conduct.

## II. ARGUMENT

Section 10(c) of the Act empowers the Board, upon finding that an unfair labor practice has been committed, to correct the effects of the unfair labor practice by requiring the violating party “to cease and desist from such unfair labor practice, and to take such affirmative action including . . . , as will effectuate the policies of this Act. 29 § U.S.C. 160(c). The Board’s power to fashion remedies is broad and discretionary, and its orders will not be disturbed “unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216, 85 S.Ct. 398, 405 (1964). In developing remedies for specific situations, the Board must attempt to create “a restoration of the situation, as nearly as possible, to that which would have obtained” but for the unfair labor practices. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194, 61 S.Ct. 845, 852 (1941). To this end, the Board’s discretion to fashion remedies is not unfettered, but must be “calculated to effectuate a policy of the Act,” (*NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 349, 73 S.Ct. 287, 290 (1953)) and must not be punitive (*Local 60, United Brotherhood of Carpenters v. NLRB*, 365 U.S. 651, 655, 81 S.Ct. 875, 877 (1961)). The Board’s authority to remedy unfair labor practices also does not include “authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct.” *NLRB v. Express Publishing Co.*, 312 U.S. 426, 433 (1941). Rather, broad orders are reserved for violations that are so severe or numerous and varied as to demonstrate a general disregard for fundamental employee rights. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). In the matter presented, the breadth of the ALJ’s

cease and desist order does not effectuate any policy of the Act, and indeed is punitive inasmuch as it is not limited to proscribing the unilateral conduct forming the basis of the violations of the Act, and further prohibits *any* unilateral action by Respondent, notwithstanding that the Company may have the right, whether by Union waiver or past practice, to take such unilateral action.

It is undisputed that a principal policy of the Act is to stabilize industrial relations by fostering collective bargaining agreements that are binding on employers and unions alike. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 453-54, 77 S.Ct. 912, 916 (1957). To this end, unilateral action by the employer can impair the stability of the bargaining relationship. However, not all unilateral action is unlawful, and in certain circumstances, unilateral action by a party to a collective bargaining relationship is expressly permitted. Indeed, it is well-settled that bargaining over terms and conditions of employment is not required where the union has waived its right to do so by virtue of the parties' collective bargaining agreement. *See e.g., Omaha World-Herald*, 357 NLRB No. 156 (December 30, 2011) (finding that the employer did not violate Section 8(a)(5) by unilaterally implementing changes to benefit plans without giving the Union an opportunity to bargain, where the Union waived its right to bargain over those changes, based on the language of the collective bargaining agreement); *see Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). Bargaining similarly is not required where unilateral changes are consistent with an established past practice. *See e.g. Courier-Journal*, 342 NLRB 1093 (2004) (finding that the employer did not violate Section 8(a)(5) by unilaterally implementing increases to employee contributions for health insurance benefits, where the employer had made numerous unilateral changes in the health care plan in the past, such that the past practice had become an established term and condition of employment, and the changes were consistent with,

and in furtherance of, that practice); *United States Postal Service*, 350 NLRB 441 (2007) (finding that employer did not violate Section 8(a)(5) by promulgating a rule prohibiting union stewards from using stand up meetings to solicit grievances, where past practice established that such meetings were wholly controlled by management); *NLRB v. Katz*, 369 U.S. 736, 746, 82 S.Ct. 1107, 1114 (1962) (clarifying that an employer may make unilateral changes that are consistent with “longstanding practice” as such changes are a “mere continuation of the status quo.”).<sup>2</sup>

The ALJ’s cease and desist order as written (and the corresponding language in the proposed Notice), however, does not permit the Respondent to engage in any such lawful unilateral action. To the contrary, the order prohibits such conduct, inasmuch as it requires the Respondent to bargain “to an impasse or agreement” before making any changes in any unit employees’ terms and conditions of employment, and not just those at issue, i.e., the health insurance premiums and lockout/tagout policy. There is no reason presented (or articulated by either the ALJ or the General Counsel) in these proceedings for such a broad and punitive order, particularly where the record contains no evidence that the Company had engaged in the widespread misconduct justifying a broad and punitive remedy. Indeed, in the absence of such pattern or practice of unlawful conduct, the Board has routinely modified cease and desist orders by narrowing its scope to address only the underlying unlawful conduct. *See e.g. Famous Casting Corp.*, 301 NLRB 404, fn. 1 (1991) (finding merit to respondent’s exceptions that the judge’s cease and desist order was too broad, and should be modified, where there was no

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<sup>2</sup> In the context of on-going bargaining, the Board has recognized other instances in which an employer may unilaterally implement its offer short of impasse or agreement: delay or avoidance by the union in fulfilling its obligation to bargain and economic exigency that compels prompt action. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), *enf’d* 1994 U.S. App. LEXIS 917 (9<sup>th</sup> Cir. 1994), *citing M&M Contractors*, 262 NLRB 1472 (1982), *pet. den’d* 707 F.2d 516 (9<sup>th</sup> Cir. 1983), *Winn-Dixie*, 243 NLRB 972 (1979).

evidence that there was a pattern of conduct by respondent indicating a proclivity to violate the Act, and the respondent had not engaged in “such egregious or widespread misconduct as to demonstrate a general disregard for the employees’ fundamental statutory rights.); *see also Glendale Associates, Ltd.*, 335 NLRB 27, fn. 10 (2001) (finding merit to respondent’s exception that judge’s cease and desist order was overly broad, where order required employer to cease and desist from maintaining rules and guidelines prohibiting activities that are not protected under the Act, and modifying the recommended order to limit the remedy to the intrusion on Section 7 rights), *enf’d* 347 F.3d 1145 (9<sup>th</sup> Cir. 2003); *Omaha World-Herald*, 357 NLRB No. 156 (December 30, 2011) (modifying judge’s order requiring employer to cease and desist from violating the Act “in any other manner” to a more narrow “in any like or related manner,” where broad order was not warranted under the circumstances of the case); *Retail Clerks Union, Local 770*, 145 NLRB 307, 308 (1963) (modifying overly broad cease and desist order to correspond to the violations actually found to have been committed).

In the instant case, the ALJ’s cease and desist order (along with the corresponding language in the proposed Notice) should be modified to allow for lawful conduct (including lawful unilateral action), and prohibit the Company only from engaging in the unilateral conduct that formed the basis for finding violations of the Act, limited to such periods when the parties are engaged in negotiations for a collective bargaining agreement if the requirement of impasse or agreement is to be imposed. This is precisely what the Board did recently, in *E.I. DuPont Nemours*, 355 NLRB No. 176 (August 27, 2010). In *DuPont*, the Board concluded that the employer had violated Section 8(a)(5) by unilaterally changing the terms of an employee benefit plan at a time when the parties were negotiating for a collective-bargaining agreement and were not at impasse. In light of this conduct, the Board issued the following as part of its Order:

1. Cease and desist from

- (a) Making unilateral changes to the benefits of unit employees during periods when the parties are engaged in negotiations for a collective-bargaining agreement and have not reached impasse.

*Id.* at 4. The Board also ordered affirmative action by the respondent to rescind its change and restore the employees' benefits as they existed prior to the unilateral action. *Id.* The Board's Order in *DuPont* does not in any manner proscribe otherwise lawful unilateral changes, but instead is limited to the specific issue to which the unlawful unilateral change pertained, and requires bargaining to impasse *while the parties are engaged in negotiations* for a successor agreement. The remedy stands in stark contrast to the broad cease and desist order at issue, which limits any changes to any terms or conditions unless the parties bargain to impasse or agreement, regardless of whether the parties have concluded a successor agreement permitting unilateral action, or whether the Company simply seeks to continue a longstanding practice.

Similarly, in *Kingsbridge Heights Rehabilitation and Care Center*, 353 NLRB 631 (2008), *enf'd* 358 Fed. Appx. 267 (2d Cir. 2009), the Board adopted the first, very specific, section of the Judge's "cease and desist" order after the employer failed to make timely contributions to union benefits funds, which required the employer to:

1. Cease and desist from

- (a) Failing and refusing to make timely contributions to the Greater New York Benefit Fund, the Greater New York Pension Fund, Greater New York Education Fund, the Greater New York Job Security Fund, the Greater New York Child Care Fund, and the Greater New York Workers Participation Fund (collectively called the Funds), without notifying and bargaining with the 1199 Service Employees International Union, United Health Care Workers East (the Union).

*Id.* at 644. The Board, however, concluded that the remainder of the ALJ's cease and desist order *was still too broad* because subparagraph (b) of the order prohibited the employer from "In any other manner interfering with, restraining, or coercing employees in the rights guaranteed them by Section 7 of the Act." *Id.* at 631, fn. 1. The Board concluded that "a broad order is not

warranted under the circumstances of this case,” and *further modified* the order requiring the employer to cease and desist from violating the Act “in any like or related manner.” *Id.*

These types of narrow and limited cease and desist orders in cases of 8(a)(5) unlawful unilateral changes are the norm, rather than the exception. In *Union-Tribune Publishing Co.*, 353 NLRB 11 (2008), *vacated and remanded by* 2010 U.S. App. LEXIS 19647 (D.C. Cir. 2010) the Board concluded that the employer violated Section 8(a)(5) by unilaterally changing its drug and alcohol testing policy. In light of this conduct, the Board required the employer to:

1. Cease and desist from

(a) Unilaterally, without notice to or affording the Union an opportunity to bargain, changing its drug and alcohol testing policy for its packaging employees bargaining unit by compelling employees, whose annual hearing tests reveal the occurrence of an STS, to submit to drug and alcohol testing.

(b) Unilaterally, without notice to or affording the Union an opportunity to bargain, changing its drug and alcohol policy by compelling employees in its pressroom employees bargaining unit, who file workers’ compensation claims for cumulative trauma hearing injuries, to submit to drug and alcohol tests prior to examination by a company doctor.

*Id.* at 22-23. Here again, the cease and desist order was limited to address the employer’s specific unlawful unilateral conduct. The order also was accompanied by affirmative action requiring the employer “rescind the unlawful unilateral changes to the drug and alcohol testing policies applicable to employees in the units described above, and restore the policies that existed prior to the unlawful unilateral changes.” *Id.* at 12.

Based on this well-settled Board precedent, the ALJ’s cease and desist order, and the corresponding language of the Notice, cannot be said to effectuate the purposes of the Act, as it is too broad and unwarranted in light of the record evidence.

### III. CONCLUSION

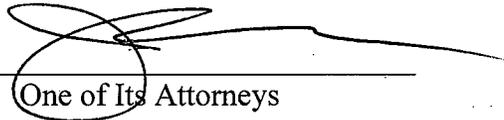
For the reasons cited above, Respondent National Gypsum Company respectfully requests that the Board review and reverse Administrative Law Judge Wedekind’s proposed

“cease and desist” order set forth in Paragraph 1.a. of the “Order,” and the corresponding language in the Notice to Employees set forth in the Appendix, and modify it in such manner as to conform to the violations found, and not prohibit Respondent from engaging in otherwise lawful conduct, by only requiring the Company to cease and desist from unilaterally modifying the procedures for paying health insurance contributions to the USW Health & Welfare Fund and from unilaterally changing its lockout/tagout policy by requiring employees to carry two locks on their person at all times, at a time when the parties are engaged in bargaining over a successor contract, until such time the parties are at impasse or the Company has otherwise satisfied its bargaining obligations under the Act.

Respectfully submitted,

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By: \_\_\_\_\_

  
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**CERTIFICATE OF SERVICE**

Jason C. Kim, an attorney for the Employer, hereby certifies that a true and correct copy of the foregoing Respondent National Gypsum Company's Brief in Support of Its Limited Exceptions to the Administrative Law Judge's Decision was served upon the following on this 5<sup>th</sup> day of November, 2012:

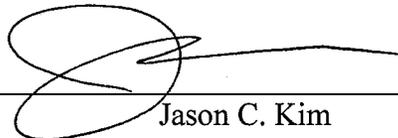
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